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SOUTHWESTERN REPORTER

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THE
SOUTHWESTERN REPORTER,
VOLUME 61,

CONTAINING ALL THE CURRENT DECISIONS OF THE

SUPREME COURTS OF MISSOURI, ARKANSAS, AND TENNESSEE, COURT
OF APPEALS OF KENTUCKY, SUPREME COURT, COURT OF CRIM-
INAL APPEALS, AND COURTS OF CIVIL APPEALS
OF TEXAS, AND COURT OF APPEALS
OF INDIAN TERRITORY.

PERMANENT EDITION.

MARCH 25—APRIL 29, 1901.

WITH TABLE OF WRITS OF ERROR DENIED BY THE SUPREME COURT OF TEXAS IN CASES IN THE
COURTS OF CIVIL APPEALS.

ALSO, TABLES OF SOUTHWESTERN CASES PUBLISHED IN VOLS. 102, KENTUCKY REPORTS; 157, MISSOURI
REPORTS; 105, TENNESSEE REPORTS; 23, TEXAS CIVIL APPEALS REPORTS.

ALSO. ADDITIONAL TABLES FOR VOLS. 102, KENTUCKY REPORTS; 157, MISSOURI REPORTS; 105, TENN-
ESSEE REPORTS; 23, TEXAS CIVIL APPEALS REPORTS.

A TABLE OF STATUTES CONSTRUED IS GIVEN
IN THE INDEX.

ST. PAUL:
WEST PUBLISHING CO.
1901.

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WRITS OF ERROR
WERE DENIED BY THE
SUPREME COURT OF TEXAS
IN THE FOLLOWING CASES IN THE
COURT OF CIVIL APPEALS
PRIOR TO APRIL 4, 1901.

[Cases in which writs of error have been denied, without the rendition of a written opinion, since the publication of the original opinions in previous volumes of this reporter.]

FIRST DISTRICT.

Focke v. Buchanan, 59 S. W. 820.
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SECOND DISTRICT.

Bruce v. First Nat. Bank, 60 S. W. 1006.
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THE
SOUTHWESTERN REPORTER.
VOLUME 61.

TODD et al. v. JACKSON et al.¹

(Court of Appeals of Kentucky. March 6, 1901.)

ACTION FOR NEW TRIAL—SUFFICIENCY OF PETITION.

A demurrer was properly sustained to a petition for a new trial of an equitable action, where nothing was complained of except errors which might have been taken advantage of upon appeal.

Appeal from circuit court, Fayette county. "Not to be officially reported."

Action by June Todd and others against H. J. Jackson and others for a new trial. Judgment for defendants, and plaintiffs appeal. **Affirmed.**

J. Alexander Childs, for appellants. Z. Gibbons, for appellees.

DU RELLE, J. The action below was a petition for a new trial, the judgment sought to be set aside being for the sale of two lots of land in Fayette county to enforce a lien adjudged in favor of appellee Crosthwait upon the western lot, and in favor of three other of the appellees upon both the western and eastern lots. The judgment provided that the western lot should be first sold, and, if that did not bring sufficient to pay the liens adjudged, the eastern lot should be sold; appellee Crosthwait's debt to be first paid out of the proceeds of the western lot, and each of the lots being adjudged indivisible. The principal ground set forth for the granting of a new trial is that the judgment was erroneous—First, in that it adjudged a lien upon both lots in favor of some of the appellees, when, at the time of the judgment, the lien upon the eastern lot had been satisfied; and, second, in that appellants had distinctly and expressly set up homestead exemption and contingent dower right in both lots, and especially in the eastern lot, and that the judgment denied their claim. The appeal is from a judgment sustaining a demurrer to the petition for a new trial. However erroneous the judgment complained of may have been,—and, in the absence of the

record, we must assume that it was correct,—nothing is complained of except matters which might have been taken advantage of upon appeal, and no ground is set up of which advantage can be taken in a petition for a new trial, under sections 340 to 344, inclusive, of the Civil Code. The judgment is therefore affirmed.

PENROD v. BRUCE¹

(Court of Appeals of Kentucky. March 6, 1901.)

BOUNDARY—TITLE TO BED OF STREAM.

The rule that, where a deed calls for the meanders of a stream as a line, the line extends to the thread of the stream, does not apply where the grantor has by deed of record previously conveyed the bed of the stream to another.

Appeal from circuit court, Logan county. "Not to be officially reported."

Action by William R. Bruce against J. J. Penrod to quiet title. Judgment for plaintiff, and defendant appeals. **Reversed.**

S. R. Crewdson and James H. Bowden, for appellant. E. B. Drake, for appellee.

WHITE, J. Appellee, Bruce, brought this action in equity, seeking to quiet his title to a certain boundary of land, of which he is alleged to be the owner and in the possession. The description is as follows: "Beginning at a stone upon Muddy river, south side, just above L. L. Bruce's ford; thence," etc., "* * * to 2 poplars and ash, corner to Henry L. Simmons (now Penrod); thence N., 13½ W., 184 po., to a box elder, corner to said Simmons (now Penrod), on the bank of the river; thence down the river, with its meanderings, to the beginning." Appellant by answer denied that appellee was the owner of the above-described land. Appellant then pleaded that he was informed that appellee claimed to own, and claimed that the same was within the above boundary, some six or seven acres, being the entire bed of the stream (Muddy river) between the point of beginning, stone, and the box elder. Ap-

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

pellant then alleged title in himself in the bed of the stream (that is, the whole of the stream and banks beyond the stone and the box elder, on the south bank), and asked that his title be quieted to same. The case was tried on this issue, as to the ownership of the stream; and upon proof, both by deposition and document, the court decreed that appellee was the owner to the middle thread of the stream; and hence this appeal.

The proof shows that the stream (Muddy river) at that point is some 60 to 80 feet wide from top of bank to bank, and so is not navigable. The stream is not fenced, and it would be quite impracticable, if not impossible, to build a fence along the stream, or to maintain a fence to low water at all times. The land in dispute is not actually inclosed by either party, and probably never was by any person. The proof further shows that in 1852 Thomas Page was the owner of the land of appellee, Bruce, and owned the stream; his line expressly calling for the north side or bank of the stream. Page's deed was dated in 1841. In April, 1852, Page conveyed to William Rogers the land now owned by appellee, together with other, also expressly including the stream; the calls of this deed to Rogers beginning at two sugar trees (the stone corner of appellee), and running several directions and distances "to a box elder, corner to Simmons, standing on the bank of the river [this also appellee's corner]; thence across the river N., $13\frac{1}{2}$ W., 5 poles, to the opposite bank of the river; thence down the several meanders of the river on the north side, opposite to the beginning; thence S., 19 E., 5 poles, to the beginning." In 1857 Rogers conveyed to William Gaston the land by this description: "Beginning at a sugar tree, upper corner of Slaughter Long's military survey, standing on the bank of the river, running with said Long's line * * * to a box elder, corner to said Simmons, standing on the bank of said river, with the various meanderings of said river to the beginning." In 1858 Rogers conveyed to S. J. Penrod, vendor of appellant, the bed of the river between the sugar-tree and box-elder corners. This description reads: "Beginning at two sugar trees, corner to Gaston & Ely; thence up the south bank of the river, with its various meanderings, to a box elder and hickory, corner to Gaston & Walker, standing on the bank of the river; thence across the river N., $13\frac{1}{2}$ W., 5 poles, to the opposite bank of the river; thence down the several meanderings of the river on the north side, opposite the beginning; thence S., 19 E., 5 poles, to the beginning,—containing six acres, more or less; it being the bed of the river." In 1869 Gaston conveyed to J. J. Bruce, father of appellee,—in this deed the river corners being the sugar trees on the bank of the river, and the box elder on the bank of the river, and with the various meanderings from the box elder to the sugar trees. In 1897 J. J. Bruce con-

veyed to appellee the 75 acres claimed by the boundary set out in his petition, and set out supra. In August, 1898, S. J. Penrod, who had purchased of Rogers, deeded to appellant the river bed, with the same description given in Rogers' deed, except that it also includes part of the river bed further down. It is shown by patents and deeds that prior to the deed of Rogers to Penrod in 1852 the river had, to its entire width and bed, belonged to the land on the south side of the river. So far as the deeds and patents show, the title never was in either side to the middle thread of the stream, but the stream entire has belonged to the land on one side or the other since it was public domain. We recognize the general rule of construction of calls in a deed or patent, where the meanders of a stream are designated as a line, to be that the line extends to the thread of the stream; but this rule of construction will not prevail where it is clear that the line is intended to be on the bank, and the whole bed of the stream is to belong to the land on one side. In this case it is clear that appellant owned the whole bed of the stream. His title back to a common source is complete to the bed of the stream. It is perfectly manifest that the whole bed of the stream belonged to Rogers when he owned the land on the southern bank, and it is equally clear that he separated the bed of the stream from the land, selling the land to the sugar trees, now stone and box elder along the south bank, and shortly afterwards sold the bed of the stream to the owner on the northern bank. Many years after the sale of the bed of the stream, appellee's father bought the land on the south of the stream to the stone and box-elder corners, and one call is for the box elder as Penrod's corner. The elder Bruce must have known of the deed from Rogers to Penrod, conveying the bed of the stream; but, if he did not, it was of record and passed title to Penrod. Appellee's land extends only to the stone and box-elder corners on the south bank, and along the meanders of the stream on the south bank. The judgment appealed from is erroneous and is reversed, and the cause remanded for judgment for appellant in accordance herewith.

ILLINOIS CENT. R. CO. v. SMITH.¹

(Court of Appeals of Kentucky. March 1, 1901.)

RAILROADS—CHANGE OF COURSE OF STREAM—MEASURE OF DAMAGES—OPINION EVIDENCE AS TO AMOUNT OF DAMAGES—ADMISSIBILITY OF EVIDENCE UNDER PLEADINGS.

1. The measure of damages for the injury to plaintiff's property from a change in the course of a stream in the construction of a railroad was the injury done to the soil, and the consequent diminution of the salable value of the land, the injury being a permanent one.

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

2. It was error to permit a witness to answer the question, "How much, in your opinion, was plaintiff's land damaged by this change in the stream?" the proper inquiry being as to the salable value of the land but for the injury, and then as to how much, if any, the salable value had been diminished by reason of the injury complained of.

3. Evidence as to the value of crops destroyed was inadmissible under the pleadings as framed.

Appeal from circuit court, Ohio county.

"To be officially reported."

Action by H. D. Smith against the Illinois Central Railroad Company to recover damages for injury to property. Judgment for plaintiff, and defendant appeals. Reversed.

H. P. Taylor and Pirtle & Trabue, for appellant. J. B. Vickers and S. P. Roby, for appellee.

O'REAR, J. Appellee recovered judgment on a verdict against appellant for damages to his land in the sum of \$450. The damages complained of were occasioned, it is alleged, by the building of a railroad by the Owensboro, Falls of Rough & Green River Railroad Company; the latter company, in the construction of its road adjacent to appellee's lands, it is charged, having diverted the course, and so changed the channel, of a stream known as "Middle Fork of Adam's Fork of Rough Creek" as to cause the current of the stream to strike plaintiff's lands at a different angle and with more accelerated force than when in its former and natural channel. The effect was to cause the stream to leave its channel in time of flooded waters, and "cut across" plaintiff's field of about 16 acres, washing away its soil, and rendering it "unfit for cultivation." Appellant for two years before this suit had owned and operated the road in question, and, after notice, had failed, it is alleged, to abate the continuing nuisance caused by the acts stated. It is sought to make appellant liable for the two years only since it acquired the road.

Numerous errors are complained of, but we think it necessary to notice only two, the others appearing immaterial, if they are errors at all. The trial court seemed to have had some difficulty in determining the measure of damages in this case. In the course of the trial, in ruling on the admissibility of testimony on this point, the court announced that the criterion of recovery was the diminished rental value of the land as occasioned by the acts complained of. Further along in the case the court admitted testimony showing not only the diminished rental value of the land, but the value of crops damaged in the two preceding years by this overflow; and, finally, as to the extent plaintiff's land was permanently damaged by the overflow,—that is, as to how much its selling value was decreased by reason of the loss of the soil occasioned by the overflows. From the facts shown in the record we think the injury complained of

was a permanent one, and therefore the measure of damages under the pleadings was the injury done to the soil, and consequent diminution of its salable value. On the trial, witnesses were introduced by plaintiff, who were asked the question, in substance, "How much, in your opinion, was plaintiff's land damaged by this change in the stream?" to which the witness would answer, "\$300," or such sum as he may have fixed as the damages. Opinions are not admissible as evidence in fixing damages, where the extent of damages may be shown by direct and positive proof. The word "opinion," as here used, is distinct from the faculty of judgment based on observation and experience and inspection of the premises in suit. The character of testimony discussed is open to the further objection that it constitutes the witness sole judge of the measure of damages in the case. For example, this case seemed to puzzle the lawyers engaged, and for a time to have not been fully satisfactory to the learned trial judge in determining what was the correct measure of recovery. A witness asked the mere question, "How much, in your opinion, was A. damaged by the overflowing of his lands?" at a certain time, left the witness to determine a measure of damage, and to apply it. In thus determining the measure of damages, the witness exercises the functions of the court, and, in applying it, the functions of the jury. Besides, neither the jury, nor the court, nor counsel interested could know what measure the witness adopted, and therefore would not know what just value to give his opinion, even had it been competent as testimony. In such a case we think the court should determine the criterion of recovery, and control the evidence of damage by it. If the criterion is the diminished rental value of the land, then the question to the witness is, "What was the rental value of the land but for the injury complained of?" and then, "How much, if any, had it been impaired by reason of the injury complained of?" If the criterion is the diminished salable value of the land, then the inquiry is, what was its salable value but for the injury, and how much, if any, has its salable value been diminished by reason of the injury complained of? The admission of the character of testimony above referred to was error. For the reasons indicated, the judgment is reversed, and cause remanded, with directions to set aside the judgment and verdict, and to grant appellant a new trial. Upon a return of the cause the court should allow or compel a reformation of the pleadings so as to fairly present the question of the alleged injury, designating so as it may be identified the particular tract of land alleged to have been damaged, and the character of the damage claimed to have been sustained. As the pleadings were framed on the other trial, evidence as to value of crops destroyed by the overflow was inadmissible.

BROWN v. COMMONWEALTH.¹

(Court of Appeals of Kentucky. Feb. 21, 1901.)

CRIMINAL LAW—INCREASE OF PENALTY UPON THIRD CONVICTION—INDICTMENT—RIGHT TO MANSLAUGHTER INSTRUCTION UNDER INDICTMENT FOR MURDER.

1. Under Ky. St. § 1130, providing that a person convicted the second time of felony shall be confined in the penitentiary not less than double the time of the first conviction, and, if convicted a third time of felony, shall be confined in the penitentiary for life, to authorize the infliction of the increased penalty it must appear from the indictment that the offense charged was committed subsequent to the former conviction or convictions; but it is not necessary to specifically allege that fact, it being sufficient that it appears from the dates given.

2. To authorize confinement in the penitentiary for life by reason of a third conviction of felony, it is not necessary that the penalty should have been increased upon the second conviction.

3. Under an indictment for murder accused is not entitled to an instruction as to manslaughter, where there is no evidence tending to reduce the crime from murder to manslaughter.

Appeal from circuit court, Bourbon county. "Not to be officially reported."

Burnam Brown was convicted of the offense of willfully and maliciously shooting another with intent to kill, and he appeals. Affirmed.

Nevill C. Fisher and Harmon Stitt, for appellant. Robt. J. Breckinridge, for appellee.

PAYNTER, C. J. The appellant, Brown, was indicted in the Bourbon circuit court for the crime of willfully and maliciously shooting Flora Bradley with intent to kill, etc. The shooting was charged to have been done on the 6th of December, 1900. It is also averred that on the 23d of March, 1893, he was convicted in the Bourbon circuit court of a felony, to wit, forcibly breaking and entering into a railroad depot with intent to steal property and things of value, the punishment for which was confinement in the penitentiary; that he was sentenced to two years' confinement in the penitentiary on the charge. It was further averred in the indictment that on the 30th day of November, 1895, he was convicted in the Bourbon circuit court under the name of Vernon Brown, and was again convicted of a felony, to wit, forcibly breaking and entering into a railroad depot with intent to steal property and things of value, the punishment for which was confinement in the penitentiary; that he was for that offense convicted, and sentenced to the penitentiary. The averments in the indictment, in addition to the charge of an offense for which he was put on trial, were with the view of increasing the penalty. They were based on section 1130, Ky. St., which reads as follows: "Every person convicted a second time of felony, the punishment of which is confinement in

the penitentiary, shall be confined in the penitentiary not less than double the time of the first conviction; and if convicted a third time of felony, he shall be confined in the penitentiary during his life. Judgment in such cases shall not be given for the increased penalty, unless the jury shall find, from the record and other competent evidence, the fact of former convictions for felony committed by the prisoner, in or out of this state." The appellant asked for a reversal—First, because it was not averred in the indictment that the shooting of Flora Bradley occurred after the offense for which he had been previously convicted; second, that the court erred in not giving an instruction on the question of shooting in sudden heat and passion; third, because the court did not tell the jury to find the defendant not guilty as to former convictions, because it was not shown that upon the second conviction he was confined in the penitentiary not less than double the time of the first conviction. The indictment stated the dates of the previous convictions, and also stated that the shooting took place on the 6th of December, 1900. This latter statement was equivalent to charging that the last offense was committed after the previous convictions. In *Brown v. Com.*, 100 Ky. 127, 37 S. W. 496. It was held that the increased penalties for the second and third convictions cannot be imposed for the offense committed prior to the former conviction or convictions. We are of the opinion that the averments of the indictment are sufficient under the rule announced in that case. The testimony in this case shows that the shooting was without provocation or the slightest excuse; that there had been no difficulty between the parties previous thereto. There was nothing said or done which in the remotest degree tended to arouse the passion of the defendant. If death had resulted, it would have been murder without a mitigating circumstance. In such cases this court has adjudged that the defendant is not entitled to an instruction upon self-defense. If death had resulted, the defendant, on the facts of this case, would not have been entitled to an instruction on self-defense. In order to reduce an offense of murder to manslaughter, something must transpire which would raise the question as to whether the killing was with malice aforethought, or in sudden heat and passion. When no facts are proven which tend to reduce the killing from murder to manslaughter, then the defendant is no more entitled to a manslaughter instruction than he would be to a self-defense instruction in a case where none should be given. This court has frequently announced the rule that in commonwealth cases the whole law of the case should be given, but that does not mean that instructions should be given when there are no facts proven upon which to base them. It means that all the law relative to the facts proven should be given. It is wholly imma-

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terial whether the defendant, on the second conviction, had his penalty increased by reason of his first conviction. The right of the commonwealth to have him confined in the penitentiary for life upon the third conviction is not based upon the question as to the amount of penalty inflicted in his former convictions, but upon the fact that he had been twice convicted of a felony. The lawmaking department of the government enacted the section of the statute under consideration for the purpose of confining for life in the penitentiary habitual criminals. It was supposed that, where a party was convicted three times of felonies, there could be no hope of reforming him; therefore he should be confined for life in the penitentiary. The defendant seems to be an habitual criminal, and he must suffer the penalty imposed by law, which is confinement in the penitentiary during his life. The judgment is affirmed.

POPE et al. v. BRASSFIELD et al.¹

(Court of Appeals of Kentucky. Feb. 27, 1901.)

ADVERSE POSSESSION—VENDOR AND PURCHASER—PURCHASE FROM PART OF SEVERAL JOINT OWNERS—CO-TENANTS—RUNNING OF STATUTE AGAINST MARRIED WOMEN AND INFANTS—IGNORANCE OF RIGHTS.

1. Where a title bond purporting by its terms to be the obligation of several joint owners of the tract of land referred to therein was not signed by all the owners named in the bond, the possession of the obligees, who claimed the entire tract of land, was adverse to the owners who did not sign the bond, and also to one of the signers who was a married woman, and therefore not bound.

2. As ignorance of one's rights does not prevent the running of the statute, the fact that the owners upon whom the bond was not binding erroneously supposed, as did the obligees, that their father, who signed the bond, had a life estate, did not prevent the statute from running against them.

3. The purchasers, having acquired an equitable title to the shares of the owners upon whom the bond was binding, became tenants in common with the other owners.

4. Though two of six tenants in common held the land adversely to the others, some of whom were under no disability, the statute did not run against such of the others as were under the disability of coverture, as the rule that, where a right of action accrues to parceners or joint tenants some of whom are under no disability, the statute runs against all, notwithstanding the disability of the others, has no application even if it exists under our present statutes, as the right of each of the joint owners was distinct, and each might have sued separately.

5. One of several vendors being an infant at the time she undertook to convey, the possession of the purchaser did not become adverse to her until she became of age, her obligation to convey not being broken until then, and as she was then, and has ever since continued to be, a married woman, the statute has never commenced to run against her.

Appeal from circuit court, Whitley county.
"To be officially reported."

Action by J. T. Pope and others against A. J. Brassfield and others to recover land. Judgment for defendants, and plaintiffs appeal. Reversed.

R. D. Hill, for appellants. C. W. Lester, for appellees.

HOBSON, J. Appellants filed their petition in equity in this case on January 14, 1892, in which they alleged that they were the only children and heirs at law of Eleanor Pope, deceased, and as such were the owners and entitled to the possession of the two tracts of land in controversy, containing together 208 acres; that appellees, without right or title, were in possession of the land, and had so held it for more than a month. They prayed judgment for the land and \$50 damages. Appellees, by their answer, denied that appellants owned the land, and alleged that Eleanor Pope left surviving her James M. Pope, her husband, who had a life estate in the land, the remainder being vested in appellants; that she died about the year 1855, and on June 7, 1872, James M. Pope, the surviving husband, and appellants sold the land to Nelson R. Tye and A. J. Brassfield for \$400, who took from appellants and James M. Pope a title bond, whereby they bound themselves to convey the land to Brassfield and Tye when the purchase money was paid; that the purchase money had been paid, and that no deed had been made, but that the vendees had been in possession of the land adversely to all the world since the sale, and limitation was pleaded in bar of a recovery of the land. The bond referred to which was filed with the answer is in these words: "Know all men by these presents that we, James M. Pope, husband of the late Eleanor Pope (formerly Eleanor Tye), and Henry S. Pope, Burgess Elliott and Martha E. Elliott (formerly Martha E. Pope), Hiram Foley and Nancy Ann Foley (formerly Nancy Ann Pope), Joshua T. Pope and Samantha, his wife, James A. Pope and Mary E. Pope,—the latter of whom is under twenty-one years of age, but her father James M. Pope becomes responsible for her performance of this obligation,—have sold, and do hereby sell and obligate ourselves to convey, or direct the commissioner to convey, unto Nelson R. Tye and A. J. Brassfield our entire interest in the home farm of Joshua Tye, deceased, for and in consideration of four hundred dollars; eighty-five dollars in hand paid, one hundred and fifteen dollars due and payable the tenth day of July, 1872, and two hundred dollars to be paid in good property, valued at cash prices, and due and payable the first day of November, 1872; and we obligate ourselves to make said conveyance when the purchase money is fully paid. Henry S. Pope, Burgess Elliott, and Martha E. Elliott being nonresidents, their father, Jas. M. Pope, obligates himself herein that they will convey, or authorize him to convey, in accordance with this bond.

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

Given under our hands this June 7, 1872. Jas. M. Pope. Hiram Foley. James A. Pope. Joshua T. Pope. Nancy Foley." Appellants, by their reply, denied the execution of the bond, and pleaded that some of them were at the time married women, and others infants, and alleged that they had received no part of the consideration. About a year and a half after this reply was filed, appellees filed an amended answer, based on some proof that had been taken in the case, in which they alleged that Eleanor Pope was the daughter of Joshua Tye; that she died in the year 1855; that her father died thereafter about the year 1860; that he owned the land, and it descended from him not to her, but to her children; that her surviving husband took no interest in it at her death; and that they had been in adverse possession of the land since June 7, 1872. The proof shows that Mrs. Pope died before her father, and that the land descended from him to the grandchildren. It also showed she left the following children, all of whom are appellants in this case: Henry S. Pope, born December 16, 1839; Joshua T., born April 13, 1843; Martha Elizabeth (now Elliott), born October 8, 1845; Nancy Ann (now Foley), born November 12, 1847; James A., born August 9, 1849, or according to his testimony, 1852; Mary Eleanor (now Bain), born June 26, 1855. It thus appears that all of the children were of age on June 7, 1872, except the last two, and from the recitals of the title bond signed by James A. Pope at that time, as well as the other evidence in the case, we think the preponderance of the testimony shows he was then of age. The infant Mary Eleanor was married to G. P. Bain on December 10, 1874. Mrs. Elliott and Mrs. Foley were both married women in 1872, and their coverture still continues. Henry S. Pope was a nonresident of the state and did not sign the bond. Joshua T. Pope and James A. Pope deny signing the bond, but we think the preponderance of the proof shows that they did sign it. The proof also shows that the land was paid for by Brassfield and Tye within a year after the sale, and there is some testimony that Joshua and James A. Pope got a part of the purchase money, although the evidence on this point is rather vague. The father, James M. Pope, died about two months before this suit was brought, and, if he had held a life estate in the land, the statute of limitation would not have run against the children in his lifetime. But, as his wife, Eleanor, died before her father, she had no title to the land, and her husband, as the survivor, took no interest. It would seem from the evidence, as well as the pleadings, that this fact was overlooked by both the parties. The title bond is binding on James A. Pope and Joshua T. Pope, and no recovery can be had by them of their interest in the land. But it is void as to Henry S. Pope, who did not sign it; as to Nancy Foley, who signed

it, but was then a married woman; as to Martha Elliott, who was also a married woman, and did not sign it; and as to Mary E. Pope, then an infant, now married, who also did not sign it. As to these four children the only defense is the statute of limitation, and the first question to be decided is, was the holding of appellees adverse to them under the circumstances?

In *Sprigg's Heirs v. Albin's Heirs*, 29 Ky. 162, it was held by this court that an occupant under a title bond did not hold adversely to his vendor, and that limitation would not run in his favor. The court said: "It is conceded that twenty years' continued possession of land being shown creates a legal presumption that the occupant has title. But this presumption is not of that absolute and conclusive character which will admit of no explanation. The law, from motives of sound policy, does in some instances create and sustain artificial presumptions which admit of no contradiction or explanation. Thus the rule that possession of goods remaining with the vendor after an absolute conveyance is per se fraudulent in respect to creditors, and cannot be avoided or contradicted by any proof as to honesty of intention on the part of the vendor. But we know of no artificial presumption which establishes a positive rule requiring courts and juries to regard the occupant of lands as possessed of an absolute title merely because he and those under whom he claims have continued in possession for twenty years. On the contrary, it is well settled by authority that the nature of the possession, whether it be adverse or friendly, may be shown by proof; and, if friendly, then the presumption of title resulting from the mere fact of continued possession is destroyed. No length of possession will invest a tenant or quasi tenant with the title of his landlord." This case was followed in *Beal v. Brooks' Ex'rs*, 30 Ky. 232; *Myers v. Buford*, Id. 250. The soundness of the rule was recognized in *Henderson v. Dupree*, 82 Ky. 678, but in that case the court also said: "A purchaser by title bond or executory contract, although a quasi tenant, or even a tenant, may, by disclaiming the relation, and by notoriously claiming to hold adversely to his contract, or by actual notice to the landlord or vendor to that effect, holds adversely in fact." In *Com. v. Gibson*, 85 Ky. 666, 4 S. W. 453, it was held that one who enters under parol purchase or gift, and holds the land by actual open possession, claiming it as his own for the statutory period, is protected by the statute. This case was followed in *Thomson v. Thomson*, 93 Ky. 435, 20 S. W. 373, and in *Creech v. Abner* (Ky.) 50 S. W. 58, this court said: "It is a well-settled rule of law that, as long as the vendee looks to his vendor for title, his possession is not adverse, and that he cannot avail himself of possession under such a contract to prove his title. A parol contract for the sale of land is not

enforceable, and the vendee acquires no title whatever to the land by virtue of such sale; but all the modern decisions of this court sustain the doctrine that a party may by parol purchase land, and enter upon the same, and he may then openly and notoriously hold, claim, and occupy the same adversely to all the world; and that such adverse holding and occupancy will ripen into a perfect title in fifteen years unless the statute is suspended or extended on account of the disabilities of the holder of the legal title. In other words, when the vendee has so held during the statutory period necessary to vest in him the independent title to real estate, his title will in like manner become perfect, although he first entered under a parol contract." The rule that a tenant or quasi tenant, who openly claims the land as his own, will, after a great number of years of such possession, be protected by the statute, has often been recognized by this court. See *Ogden v. Walker's Heirs*, 36 Ky. 420; *Chambers v. Pleak*, 36 Ky. 426; *Morton v. Lawson*, 40 Ky. 45; *Turner v. Davis' Adm'r*, 40 Ky. 151; *Farrow's Heirs v. Edmundson*, 43 Ky. 605. In accordance with this principle it is held that, though ordinarily the entry of one tenant in common and a holding by him will be for the benefit of all, one tenant may, by openly and notoriously holding and using the land as his own, oust his co-tenants and acquire a title to the property by prescription. *Gossom v. Donaldson*, 57 Ky. 230; *Greenhill v. Biggs*, 85 Ky. 155, 2 S. W. 774, and cases cited. So it is also held that, where one parcener or tenant in common conveys the joint property to a third person, the grantee, claiming the whole in severalty, holds adversely to the other joint owners. *Larman v. Huey's Heirs*, 52 Ky. 436. In this case appellees notoriously held and used the land as their own for more than 20 years before this suit was brought. Neither Henry S. Pope, Martha Elliott, nor Mary Bain signed the bond; and, while their names are set out in the bond as vendors, it imposed no obligation on them, and the holding of appellees, so far as they are concerned, must rest upon the same plane as a holding under a verbal contract. The same rule applies to Mrs. Foley, who, though she signed the bond, was then a married woman. The writing imposed no obligation upon her, and was utterly void as to her, she being without power to make such a contract. It is true, the bond shows on its face that these four children had an interest in the land. But it is in legal contemplation, on the whole, the bond of the signers, except Nancy Foley, by which they bound themselves that the land should be conveyed to the vendees. We are, therefore, of opinion that their possession of the land was

adverse, and that the statute ran in their favor against the other four children who had not signed or were not bound by the bond. The holding of appellees was not of a life estate, or merely under a life tenant; and, even if it be conceded that all the parties thought that the father, James M. Pope, had a life estate in the land, this would not stop the statute, for ignorance of one's rights does not prevent its running. *Commissioners v. McDowell*, 6 Ky. Law Rep. 520; *Perry v. Elgin* (Ky.) 28 S. W. 4. It follows, therefore, that appellant Henry S. Pope is barred by the statute, and that the judgment of the court below as to his interest and that of Joshua T. Pope and James A. Pope is correct.

It remains to determine whether the married women are also barred, notwithstanding their coverture. It is insisted for appellees that, where a right of action accrues to parceners or joint tenants, if some are under no disability the statute runs against all, notwithstanding the coverture or infancy of the others; and *Moore v. Calvert*, 69 Ky. 358, and the cases there cited, are relied on as sustaining this conclusion. Whether the doctrine of that case should be followed under our present statutes, taking them altogether, we need not determine, as it clearly does not apply to this case. Appellees had a title in equity to the shares of Joshua T. Pope and James A. Pope, and were, therefore, tenants in common in the property with the other four children. The right of each of these four children to one-sixth of the property was distinct. Each of them might have maintained an action separately in his own name against appellees and the other children for the protection of his rights. When this right of action accrued, the two married women, being under disability by the express terms of the statute, are not barred by it during their coverture. Ky. St. § 2506; *Riggs v. Dooley*, 46 Ky. 236. Though the infant Mary E. Pope, now Mrs. Bain, was not married when the bond was given and appellees entered upon the land, they entered under a contract that she would convey; and this obligation was not broken until she became of age. The possession of appellees was not, therefore, adverse to her until she was of age. Before she became of age she married, and when she did not convey after her majority, and the possession of appellees became adverse, she was a married woman, and the statute did not run against her. We are, therefore, of opinion that Mrs. Elliott, Mrs. Foley, and Mrs. Bain are entitled to their share of the land, and that the court below erred in not adjudging it to them. Judgment reversed, and cause remanded for a judgment and further proceedings not inconsistent with this opinion.

STANDARD OIL CO. v. EILER.¹**(Court of Appeals of Kentucky. March 1, 1901.)****PEREMPTORY INSTRUCTION—CONTRIBUTORY NEGLIGENCE IN USE OF MACHINERY.**

1. The proof of contributory negligence must be clear to authorize a peremptory instruction for defendant on that ground.

2. Plaintiff, who was 17 years of age and unskilled in the use of machinery, had just been assigned to the duty of putting corn in the hopper of a grinding machine which was run by steam. At the bottom of the machine the stuff that was ground came out at a metal spout about five inches long, and to this spout was attached, by a string, a longer spout, to conduct the material to a hole in the floor. The metal spout becoming choked, plaintiff took off the other spout, and ran his fingers into the metal spout to unchoke it, and the second time he did this the machine caught his hand and crushed it. The spout was subject to clogging, and the proper way to unclog it was by striking on it with something heavy. *Held* that, as one could not see how far the machinery was from the mouth of the spout, it was a question for the jury whether plaintiff, who had not been instructed how to unclog the spout, was guilty of contributory negligence.

3. It was the duty of the foreman, when leaving plaintiff in charge of the machine, to warn him of the danger, and to instruct him how to unclog it, especially as the foreman had a short time before had his finger injured by running his hand into the spout.

Appeal from circuit court, Jefferson county, law and equity division.

"To be officially reported."

Action by Andrew Eiler against the Standard Oil Company to recover damages for personal injuries. Judgment for plaintiff, and defendant appeals. Affirmed.

Edward P. Humphrey and Humphrey & Davie, for appellant. Thos. Lawson and Robt. W. Owens, for appellee.

HOBSON, J. Appellee sued appellant to recover damages for personal injuries received, as he alleged, by reason of the negligence of appellant. The facts of the case, as shown by the proof for appellee, are substantially as follows: Appellee began work for appellant in July, 1898. He was 17 years of age, and unskilled in the use of machinery. He was employed to do work as a laborer by appellant in rolling barrels and the like until the evening before he was hurt. That evening he was sent by his foreman to help Johnson shovel corn. The next morning he was sent back to help Johnson again, and carried the corn upstairs, and put it in the hopper of the grinding machine. This machine was run by steam. It consisted of two burrs, the upper one revolving and the lower stationary. By looking in the hopper from the top, when not filled with grain, the burrs might be seen. At the bottom of the machine, the stuff that was ground came out at a cast-iron spout about five inches long. Appellant had attached to this spout a galvanized iron spout to conduct

the material to a hole in the floor. The galvanized iron spout was tied to the other by a string. After they started the machine, Johnson went downstairs to fill the bags with the ground material as it came down, leaving appellee in charge of the machine. He instructed appellee that there were a few nails in the oats, which were mixed with the corn, and when a nail came through it would make a noise, and he should turn a crank, and let the nail go through. This was the only instruction given. When Johnson had been downstairs a few minutes, appellee came to him with his fingers crushed. The machine had choked up in the spout, and appellee, to unchoke it, took off the galvanized iron spout, and ran his fingers up in the metal spout to loosen the material in it. The second time he did this he put his fingers too far, and his hand was caught by the machine and crushed. The machinery could not be seen from the spout, and one could not tell how far it was from the mouth of the spout to the burr. The fact was that the burr revolved about two inches above the top of the spout, and there was a lug below this to throw the ground material out. The proof also shows that the machine was subject to choking in the spout, and that the proper way to unchoke it was to knock on the spout with something heavy, so as to jar it and unclog it. Johnson, who had been operating the machine, had a short time before run his finger up in the spout, and it had caught it and knocked off the nail. He says that he was just fooling when he did this, but he gave appellee no instruction as to how to unclog the machine, and did not tell him of the danger in unclogging the spout by putting his finger in it. The court below submitted the case to the jury under instructions which are not objected to, and seem to have been admirably clear and unobjectionable. The jury found a verdict for appellee. Substantially the only ground urged for reversal is that the court should have instructed the jury peremptorily to find for appellant. The learned counsel for appellant have referred us to a number of authorities in support of this conclusion, but they are all cases of patent danger. In this state the rule is that, if there is any evidence, it must be submitted to the jury, and the general rule is in this class of cases that it is only where the proof is clear that a peremptory instruction should be given. *Shear. & R. Neg.* § 218. In view of the fact that the danger in this case was not patent, and that the machine was subject to clogging, we do not see that on the facts the court erred in submitting the question of contributory negligence to the jury. Appellee being a mere green laborer, put alone in charge of the machine, uninstructed as to how to unclog it, and ignorant that the burrs ran so close to the spout, it was a question for the jury whether a boy, situated as he was, in the exercise of such care as was to be reasonably expected of him, might or might not unloose

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

the string and take off the galvanized iron attachment to relieve the choking, and whether or not, on finding the spout clogged up, he should, by the exercise of such care, have apprehended the danger of proceeding to unloose the obstruction in the spout with his finger. He was confronted with a difficulty which had not been explained to him, and what allowance should be made for his youth and inexperience a jury of 12 men were peculiarly fitted to determine. As has been well said: "Upon the facts proven in such cases, it is a matter of judgment and discretion—of sound inference—what is the deduction to be drawn from the undisputed facts. Certain facts we may suppose to be clearly established from which one sensible, impartial man would infer that proper care had not been used, and that negligence existed. Another man, equally sensible and equally impartial, would infer that proper care had been used, and that there was no negligence. It is this class of cases, and those akin to it, that the law commits to the decision of a jury. Twelve men of the average of the community, comprising men of education and men of little education, men of learning, and men whose learning consists only in what they have themselves seen and heard, the merchant, the mechanic, the farmer, the laborer; these sit together, consult, apply their separate experience of the affairs of life to the facts proven, and draw a unanimous conclusion. This average judgment, thus given, it is the great effort of the law to obtain. It is assumed that twelve men know more of the common affairs of life than does one man; that they can draw wiser and safer conclusions from admitted facts thus concurring than can a single judge." *Railroad Co. v. Stout*, 17 Wall. 657, 21 L. Ed. 745. We think the proof fairly shows that the machine was subject to clogging, and the jury may have inferred that Johnson got his finger injured, not unlike appellee, in seeking to discover or remove the cause of the trouble. Under such circumstances, it was incumbent on him, as the managing agent of appellant, when leaving a green boy in charge of the machine, to warn him of the danger, and instruct him how to unclog it. Judgment affirmed.

JOHN MATTHEWS APPARATUS CO. v.
RENZ.¹

(Court of Appeals of Kentucky. Feb. 19,
1901.)

PRINCIPAL AND AGENT—SALE BY DRUMMER—
REFUSAL OF PRINCIPAL TO COM-
PLETE CONTRACT.

In the absence of special authority to bind the principal, a drummer can merely solicit and transmit an order, and the contract of sale does not become completed until the order is accepted by his principal; and the fact that the drummer and the proposed buyer exchange memoranda of the proposed contract, signed by them, does not alter the rule.

Guffy, J., dissenting.

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

Appeal from circuit court, Jefferson county, common pleas division.

"Not to be officially reported."

Action by Frederick J. Renz, doing business as Renz & Henry, against the John Matthews Apparatus Company to recover damages for breach of contract. Judgment for plaintiff, and defendant appeals. Reversed.

Shackelford Miller and Barnett & Barnett, for appellant. Kohn, Baird & Spindle, for appellee.

O'REAR, J. Appellant's traveling salesman, Russell, took from appellee an order for a soda fountain, to be shipped by appellant in the future, at the price of \$1,200. Part of the purchase price was to be satisfied by two old soda fountains to be taken in exchange by appellant at \$900, and \$300 in cash on August 15, 1896. The order was given March 17, 1896. The order was as follows:

"March 17th, 1896.

"Order to John Matthews Apparatus Co., Manufacturers of Soda-Water Apparatus, Machinery, and Supplies, First Ave., 26 and 27th Streets, New York: Please furnish the following goods on the terms and conditions mentioned below. Deliver on or about at once to steamer Main Line Transportation Company, New York, marked, 'Renz and Henry, Louisville, Ky.' State if insurance or release required.

Pontiac 1816, new side jar.....	\$1,200
12-ft. champion couplings, slab as per diagram, divided by partition in the middle.	
Cr. 2 H. Cuscaden and extra fixtures	\$400
Collect and credit sale of app. as per on the accompanying contracts	475
Extra 25.....	25
	300

"Terms of payment, cash Aug. 15, '96. Settlement to be made by notes and your regular agreements, which I hereby agree to sign. There are no other conditions or agreements with your salesman, except those herein stated.

"Reference

Signature

"W. H. Russell,

"Address Salesman."

Within seven days after the giving of the order above, appellant, through its salesman, Russell, notified appellee that it declined the proposition and would not fill the order. Correspondence between appellant and appellee ensued for about a month longer, in which appellee sought to persuade appellant to accept the proposition, and in which appellant persistently and firmly declined. On May 7, 1896, appellee filed this suit for damages, asserting the foregoing as a binding contract between the parties, alleging its breach by appellant, and averring that appellee, Frederick J. Renz, who seems to have been conducting a drug business at Louisville under the firm name of Renz & Henry, had suffered damages to the extent of \$400 by the alleged

breach. The law and facts were submitted to the court without a jury, and, judgment having been rendered for appellee for \$200 damages, the case is brought here for review.

We consider that the main and only necessary question for us to determine is whether the transaction in question was a contract, or merely an offer or order which either party was at liberty to decline before final acceptance. The indisputable facts are that Russell, the travelling salesman of appellant, was a "drummer,"—a term that has come to have a fixed and proper place in our language as well as in our law. That this transaction was the usual taking of an order by the drummer, and transmitting it to his "house" for action,—approval or rejection. The custom of so doing business is of such long standing, so extensive, and so important in the commercial world, especially in the United States, that the courts will take notice of it. They have done so, and this court has. In *Grocery Co. v. Becket*, 57 S. W. 458, we recognized in this state what appears to be the general rule in most or all of the states, quoting it in this language: "In the absence of special authority to bind his principal, the drummer can merely solicit and transmit the order, and the contract of sale does not become completed until the order is accepted by his principal." Any other construction of these transactions would tend to so materially hamper and cripple this important means of conducting mercantile business as to well-nigh destroy its effectiveness, now so generally understood, employed, and recognized. The blank form used in the case at bar, executed in duplicate, one signed by the proposed buyer, which was forwarded by the drummer to his principal, the other signed by the salesman and delivered to the proposed buyer, were customary memoranda of what had occurred to evidence the contract, should the minds of the contracting parties finally meet. It was in no sense a closed transaction, and the correspondence between the parties shows conclusively that neither of them then regarded it as closed. Furthermore, we are unable to see from the evidence where appellee has sustained material damages in the transaction. Judgment reversed, and cause remanded for proceedings consistent herewith.

GUFFY, J., dissents.

DEAN et al. v. PHILLIPS et al.¹
(Court of Appeals of Kentucky. Feb. 27, 1901.)

CONTEST OF WILL—INSTRUCTIONS TO JURY—
MENTAL CAPACITY—UNDUE INFLUENCE—
WAIVER OF EXCEPTIONS TO DEPOSITIONS.

1. Upon a contest of the will of D. it was error to instruct the jury that they could not find the paper in contest to be the will of D.

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

unless they believed that it was signed or acknowledged by D. in the presence of the attesting witnesses, and that it was wholly composed, written, and signed by him without the aid, assistance, or intervention in any way of any other person.

2. The court properly instructed the jury that testator was of sound mind if "he had mind and memory sufficient to understand he was selecting the persons whom he wished to have his property, and to know his property, to take a rational survey of same, and to know the natural objects of his bounty and his duty to them, and to dispose of his property accordingly to a fixed purpose of his own."

3. It was proper to instruct the jury to find the paper in contest not to be the will of D. if they believed from the evidence that it was obtained by undue influence exercised on D., either by any of the beneficiaries named in the paper or by any other person, and that undue influence in law is "influence obtained by flattery, importunity, threats, superiority of will, mind, or character, or by what art soever that human thought, ingenuity, or cunning may employ which would give dominion over the will of the testator to such an extent as to destroy free agency, or constrain him to do against his will what he is unable to refuse"; and that such an influence the law condemns as undue "when exercised by any one immediately over the testamentary act, whether by direction or indirection, or obtained at any time or another."

4. The court, having told the jury what was testamentary capacity, properly refused to tell them what was not such capacity.

5. Exceptions to depositions going to their exclusion will be considered as waived unless disposed of before the commencement of the trial.

Appeal from circuit court, Marion county.
"Not to be officially reported."

Contest by George M. Phillips and others of the will of H. B. Dean. Judgment for contestants, and Frank Dean and others, the propounders, appeal. Reversed.

Stone & Stone and W. J. Lisle, for appellants. J. P. Thompson and S. A. Russell, for appellees.

O'REAR, J. H. B. Dean's will, written in 1890, was contested on appeal in the Marion circuit court, the jury rejecting it "because of undue influence," so they stated in their verdict. The court gave the jury a series of instructions, several of them practically repeating what had been previously given, and tending rather to confuse the jury than to enlighten them. The following instruction given is especially objectionable: "Unless the jury believe from the evidence that the paper in contest was signed or acknowledged by H. B. Dean in the presence of the attesting witnesses, and that said witnesses subscribed said paper at the request of said Dean, and in his presence, the jury will find said paper not to be the will of H. B. Dean; and, further, the jury is instructed to find said paper not to be the will of Harvey B. Dean unless they believe from all the evidence that said paper was wholly composed, written, and signed by said Dean, and without the aid, assistance, or intervention in any way of any other person or persons." Of the instructions tendered and given, the follow-

ing, we think, fairly present the law of this case: "(a) The court instructs the jury that if they believe, from the evidence before them, that the paper marked 'A. B.,' and purporting to be the will of H. B. Dean, was wholly written by himself, said Dean, and by him subscribed as his will, and he was then of sound mind, the jury should find said paper to be the will of said Dean. (b) The court instructs the jury that if they believe, from the evidence, that said paper marked 'A. B.' was subscribed by him, said Dean, as his will, in the presence of J. J. Cozatt and C. C. Reynlerson as witnesses, or his subscription to said paper as his will was acknowledged by him, said Dean, in the presence of said Cozatt and Reynlerson as witnesses, and they, as witnesses, subscribed the said paper with their names in the presence of said Dean, after said Dean had subscribed it in their presence, or acknowledged his subscription to it as his will in their presence, and that he, said Dean, was then of sound mind, the jury should find said paper to be the will of said Dean. (c) If the jury believe from the evidence that when he, said Dean, executed said will as defined in instructions 'a' and 'b,' if he did so execute it, he had mind and memory sufficient to understand he was selecting the persons whom he wished to have his property, and to know his property, to take a rational survey of same, and to know the natural objects of his bounty, and his duty to them, and to dispose of his property according to a fixed purpose of his own, he, said Dean, was then of sound mind." "(2) If the jury believe from the evidence that the paper in contest was obtained by undue influence exerted on Harvey B. Dean, either by any of the beneficiaries named in the paper or by any other person, then they will find that the paper in contest is not the last will of Harvey B. Dean. Undue influence in law is, 'influence obtained by flattery, importunity, threats, superiority of will, mind, or character, or by what art soever that human thought, ingenuity, or cunning may employ which would give dominion over the will of the testator to such an extent as to destroy free agency, or constrain him to do against his will what he is unable to refuse. Such an influence the law condemns as undue when exercised by any one immediately over the testamentary act, whether by direction or indirect, or obtained at any time or another.' " The court was asked to instruct the jury that testamentary capacity does not rise to that high degree of understanding and ability necessary to render a person capable of making a contract where the parties deal at arm's length, etc. The court having told the jury what was testamentary capacity, it was wholly useless to tell them what was not such capacity.

Objections were taken and exceptions filed to the depositions of Mariah Walston and J. J. Cozatt going to their exclusion. Unless

such exceptions are disposed of before the commencement of the trial, they should be considered as waived, and consequently overruled. The judgment is reversed, and cause remanded, with directions to grant a new trial not inconsistent herewith.

REED et al. v. CITY OF LOUISVILLE.¹

(Court of Appeals of Kentucky. Feb. 28, 1901.)

MUNICIPAL CORPORATIONS—VALIDITY OF ORDINANCE—FAILURE TO PUBLISH PROCEEDINGS—TAX BILL AS PRIMA FACIE EVIDENCE—PERSONAL JUDGMENT AGAINST MARRIED WOMAN FOR TAXES—CLERICAL MISPRISION—DISMISSAL OF ABANDONED APPEAL.

1. Ky. St. § 2773,—part of charter of cities of the first class,—requiring the proceedings of the two boards of the common council to be published in a newspaper, is directory merely, and the failure to publish the proceedings does not invalidate an ordinance.

2. Under Ky. St. § 2996,—part of charter of cities of the first class,—a tax bill authenticated by the assessor by his signature is prima facie proof that all steps have been taken to make it binding.

3. Under Ky. St. § 2998,—part of charter of cities of the first class,—providing that uncollected tax bills against any person "not under the disability of infancy, coverture or unsound mind," shall be deemed a debt from such person, it is error to render a personal judgment against a married woman for taxes.

4. A personal judgment against a married woman for taxes, prayed for in the petition, is not a mere clerical misprision.

5. Where appellant, having failed to file his transcript in time, abandoned an appeal granted by the lower court, and had a new appeal granted by the clerk of the court of appeals, the abandoned appeal will be dismissed, with damages, if the judgment was for money and was superseded, provided the motion therefor was made before the new appeal is submitted.

Appeal from circuit court, Jefferson county, chancery division.

"Not to be officially reported."

Action by the city of Louisville against Ella F. Reed and another to enforce a lien for taxes. Judgment for plaintiff, and defendants appeal. Modified.

W. W. Thum and H. M. Lane, for appellants. John Mason Brown, for appellee.

WHITE, J. This is an action to recover and enforce a lien for taxes for the year ending August 31, 1894, due the city from the appellant Ella F. Reed on certain real estate in the city. The original tax bill signed by the assessor was filed with the petition. The answer presents as a defense an allegation that there was no board of equalization, as provided by law; that the proceedings of the council that passed the ordinance were never published in any paper, as required by law. In a separate paragraph it was pleaded that for the year 1893 there was omitted from assessment property to the amount of \$20,000,000 in personality, subject to ad valorem taxation in the city, and that thereby

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

the taxes on appellant's property were increased. It was pleaded further that there had been no compilation of the ordinances of the city since the act of July 1, 1893. The court sustained a demurrer to that paragraph of the answer pleading the omission of the personalty. Issue was joined as to the other facts pleaded in the answer, and proof was taken, and upon trial the court adjudged appellants liable for the tax. The court thereupon rendered judgment for the tax, both personal against both appellants, and a lien against the property. From that judgment this appeal is prosecuted.

We are of opinion that the proof shows that there was a compilation of the ordinances, and it also shows that the proceedings of the council were not published. By section 2773, Ky. St.,—a part of the charter of appellee,—it is provided that the proceedings of the two boards of common council shall be published in a newspaper selected, etc. Section 2774 provides for the publication of the ordinances passed. It is not contended in this case that the ordinance was not passed, but only that the proceedings were not published. Section 2795 provides: "Except a resolution to adjourn, every proposed ordinance or joint resolution which has passed the general council shall be presented to the mayor, and if he approve it he shall sign it, and then it shall be obligatory; but if he disapprove it, he shall return it with his objections in writing to the board in which it originated, and said board shall then reconsider the same, and if two-thirds of the members elect concur in adopting it again, it shall be sent with the mayor's objections to the other board, where it shall also be reconsidered, and if again passed by the votes of two-thirds of its members, it shall be obligatory," etc. There is then an express provision of the statute that an ordinance shall then be obligatory, before or without publication or publication of the proceedings of the general council. The validity and obligation of the ordinance are not made to depend on the publication of the proceedings. We are therefore of opinion that section 2773 is directory as to the publication of the proceedings. It should be done always, as information to the general public, like the publication and distribution of the journals and acts of the general assembly; but, if omitted, it will not avoid the general tax ordinances passed by the general council. It is provided by section 2906 that the tax bill authenticated by the assessor by his signature shall be prima facie proof that all steps have been taken to make it a binding tax bill, etc. This appearing, the appellants have failed to present a defense to the action, and the judgment enforcing the lien is not error.

Section 2908 provides: "All tax-bills uncol-

lected in whole or in part, and which remain in the hands of the tax receiver on the first day of May succeeding the date on which they were listed with him for collection, against any person (not under the disability of infancy, coverture or unsound mind) owning property in his own right, together with interest," etc., " * * * shall be deemed a debt from such person to said city, arising as by contract, and may be enforced as such by all remedies given for the recovery of debt in any court of the commonwealth otherwise competent for that purpose," etc. Section 3005 provides, among other things: "The action herein authorized, and the judgment and subsequent proceedings therein (except as hereinafter excepted) shall be conducted in all respects like suits arising from contract." It follows from these two sections that there is no authority for a personal judgment against a person under the disability of coverture, and the personal judgment rendered is erroneous. This personal judgment cannot be held to be a misprision, as it was asked in the petition, and, it will be presumed, was granted at appellee's solicitation. This case is distinguished from the case of *Fonda v. City of Louisville* (Ky.) 49 S. W. 785, referred to by appellee. In that case the personal judgment against Meier, a mortgagee, was held to be a misprision, because no judgment was asked against him in the petition. Here a personal judgment was sought and obtained. For this reason alone, the judgment will be reversed.

Appellants present a motion in this case, entered October 3, 1899, to set aside an order dismissing, with damages, the appeal granted in the circuit court and superseded. This order of dismissal was entered April 12, 1899, and after objection thereto by appellants. The judgment appealed from was rendered February 12, 1898, and the record was not filed in this court till February 9, 1899, and then the appeal was granted by the clerk here. On March 10, 1899, appellee filed a copy of judgment and supersedeas, and the appeal granted below was dismissed. This dismissal was proper. The appeal granted below had been lost and abandoned, and, as appellee did not waive its right to dismissal in any way, it was entitled, when the motion was made, to a dismissal, with damages, on the judgment superseded. This right of dismissal with damages is given by the Code, and is always granted by the court unless there is a waiver by delay in waiting till submission of the case. This, we have held, may be done.

For the reasons indicated, the personal judgment rendered against both appellants is reversed, and cause remanded, with directions to set same aside and for proceedings consistent herewith. The judgment enforcing the lien is affirmed.

PRESIDENT, ETC., OF LOUISVILLE & T. TURNPIKE-ROAD CO. v. ANDERSON.¹

(Court of Appeals of Kentucky. Feb. 27, 1901.)

TURNPIKE ROADS—ERECTION OF TOLLGATE WITHIN PROHIBITED DISTANCE OF TOWN—INJUNCTION.

Where a turnpike-road company proposes, in violation of its charter, to erect a tollgate within one mile of a town, one who lives on the road within a mile of the town, and outside the proposed gate, is entitled to an injunction restraining the company from erecting the gate and from collecting tolls from her.

Appeal from circuit court, Spencer county. "To be officially reported."

Action by Annie M. Anderson against the president, directors, and company of the Louisville & Taylorsville Turnpike-Road Company to enjoin defendants from erecting a toll house and gate, and from collecting tolls from her. Judgment for plaintiff, and defendants appeal. Affirmed.

G. G. Gilbert and Pryor, O'Neal & Pryor, for appellants. P. J. Foree and J. W. Reason, for appellee.

PAYNTER, C. J. The appellant has a toll house and gate on its road near Taylorsville, where it has been for more than 40 years. It proposed to erect a toll house and gate within a less distance than one mile of that town. The appellee lived on its road, within a mile of Taylorsville; and, upon a claim that it was in violation of its charter rights to erect a toll house and gate within less than a mile of that town, and to do which would create a public nuisance, and also damage her specially, she enjoined it from erecting the toll house and gate. Upon the trial of the question the court adjudged that it did not have the right to erect the toll house and gate at the place mentioned, or to collect tolls from her. This court, in the case of Turnpike-Road Co. v. Boss, 44 S. W. 981, ruled that, under the charter of appellant, it had no right to erect a toll house and gate within one mile of a town on its road, although the legislature had, by amendment to the charter, endeavored to confer such a right upon it. Without going into the question as to the authority of the legislature, by an amendment to the charter, to have conferred the right upon appellant to erect a toll house and gate within the originally prohibited distance, and without expressing an opinion as to the correctness of the opinion of the court in the case referred to on that question, it is sufficient to say that no amendment to the charter is relied upon as conferring the right to erect the toll house and gate within a mile of Taylorsville. It appears that, under the original charter of appellant,—and it was so decided in the Boss Case,—it had no right to place a toll house and gate on the road within less than a mile of the towns along the

road. It was also decided in that case that a party living on the road, and within a mile of the town, was entitled to an injunction restraining the company from collecting of him tolls. So the question involved in this case was adjudicated in that case. Therefore it is unnecessary to extend this opinion for the purpose of giving further reasons for holding that appellant did not have the right to erect the toll house and gate as contemplated by it. The judgment is affirmed.

MORGAN v. WICKLIFFE.¹

(Court of Appeals of Kentucky. March 1, 1901.)²

STATUTE OF FRAUDS—PLEADING—CONTRACT NOT TO BE PERFORMED WITHIN A YEAR—USURY—SPECIAL ACT REGULATING PRACTICE—REPEAL BY CONSTITUTION.

1. A contract not alleged to be in writing must be held to be by parol.
2. A parol contract extending for five years the time of payment of a note was a contract not to be performed within a year, and therefore not binding.
3. The chancellor will purge a claim of usury shown by the proof, though not pleaded.
4. A local act, passed prior to the present constitution, regulating the practice in a court not of continuous session, ceased to be operative after the expiration of six years from the adoption of the constitution.

Appeal from circuit court, Daviess county. "To be officially reported."

Action by W. A. Wickliffe against Thomas A. Morgan to enforce a mortgage lien. Judgment for plaintiff, and defendant appeals. Reversed.

Geo. W. Jolly and T. A. Morgan, for appellant. Jep. C. Jonson, for appellee.

HOBSON, J. Appellee filed this suit against appellant to recover on a note executed by him for \$2,127.40, dated July 26, 1894, payable 12 months after date, with interest at 6 per cent. per annum from date, payable semiannually in advance, and secured by a mortgage on a tract of land. Appellee also sought the foreclosure of the mortgage. Appellant filed an answer in which he alleged that on October 31, 1896, it was agreed between him and appellant, in consideration of appellant agreeing to pay appellee, in gold coin of the United States, of the weight and fineness of such coins at that time, the interest on the note at the rate of 8 per cent. per annum, semiannually in advance, on the 1st day of May and the 1st day of November in each year, that appellee should extend the time for the payment of the principal of the debt until the 1st day of November, 1901. He also alleged that by a subsequent agreement made in January, 1897, the time for the payment of the semiannual installments of interest was

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

² Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

³ For opinion on petition for rehearing, see 61 S. W. 1017.

fixed for the 27th of January and July of each year, and that pursuant to this agreement he had paid to appellee the interest semiannually at 8 per cent. per annum in advance from November 1, 1896, up to and including January 27, 1898. Appellee demurred to the answer. The demurrer was overruled. He then replied, denying its allegations. Proof was taken, and on final hearing the court gave judgment on the note, and ordered a foreclosure of the mortgage.

The rule is well settled that a contract which is not alleged to be in writing must be held to be by parol. The answer in this case, therefore, set up only a verbal contract; and, as by its terms it was not to be performed within a year from the making of it, it was not enforceable. The evidence satisfies us, also, that the arrangement referred to in the answer was not a final one. No new note was given, as was clearly contemplated if the arrangement had been carried into effect. The court did not err in holding this defense not made out.

But the evidence of both parties shows beyond question that appellant borrowed of appellee \$2,000 at the date of the note, and paid him interest on the note at the rate of 9 per cent. per annum from that time until November, 1896, when the rate was reduced to 8 per cent. The proof shows that the 9 per cent. was payable annually in two payments,—6 per cent. due on July 26th, and 3 per cent. on January 26th. The note, as stated above, is drawn for \$2,127.40. The first credit indorsed on the note is in these words: "The first installment of interest due at date is paid." This interest was paid in the \$127.40 which was added to the \$2,000 and put in the face of the note. The next indorsement on the note is this: "The second installment of interest due at present date is paid. January 26, 1895." This amount was 3 per cent. on the face of the note, or \$63.82. The third indorsement on the note is: "Credit by \$127.64, July 30, 1895; being up to date." It will be observed that this amount is just 6 per cent. on the face of the note. The other credits on the note are of like character. In *Hart v. Hayden*, 79 Ky. 352, this court said: "The chancellor will always purge the claim of usury when the pleadings or proof show the transaction usurious. In other words, he will withhold a judgment for the usury, when disclosed by the record, and, if usury exist in this case, he will sell the land for the sum found due, deducting the usury; and this he will do although the debtor may refuse to make such a defense." In *Hill v. Cornwall & Bro.'s Assignee*, 95 Ky. 546, 26 S. W. 540, the court also said: "In fact, in any case where it is plain from the record that the party is seeking to recover usury, the chancellor should refuse to give judgment for the usury." Under this rule, which has been often upheld by this court,

it is unnecessary for us to determine how far the defense of usury was properly presented by the pleadings of appellant, or the motions made by him in the court below. The proof by both parties established the fact unquestionably. The court should have given judgment on the note for \$2,000, with interest from July 26, 1894, at 6 per cent., payable semiannually, subject to the following credits: January 26, 1895, \$63.82; July 30, 1895, \$127.64; February 7, 1896, \$63.82; November 23, 1896, \$127.64; January 27, 1897, \$45.99; February 22, 1897, \$46.23; August 16, 1897, \$85; January 27, 1899, \$300. We see no other error in the record.

In *Piper v. Gunther*, 95 Ky. 115, 23 S. W. 872, it was held that the local act regulating the practice in the Daviess circuit court was not repealed by any provision of the constitution which is in force of itself, or operative without legislation to enforce it. But the court said, speaking of the constitution: "It contemplates that the practice in circuit courts having stated sessions, as well as those having continuous sessions, shall be made uniform by general law, though the latter may differ from the former, after which it shall not be within the legislative competency to pass special or local acts regulating the practice, jurisdiction, etc., of the circuit courts." Section 1 of the schedule to the constitution reads: "The provisions of all laws which are inconsistent with this constitution shall cease upon its adoption, except that all laws which are inconsistent with such provisions as require legislation to enforce them shall remain in force until such legislation is had; but not longer than six years after the adoption of this constitution, unless sooner amended or repealed by the general assembly." The constitution was adopted on September 28, 1891. The six years above provided for therefore expired September 28, 1897. Section 59 of the constitution is in these words: "The general assembly shall not pass local or special acts concerning any of the following subjects, or for any of the following purposes, namely: (1) To regulate the jurisdiction or the practice, or the circuits of the courts of justice or the rights, powers, duties or compensation of the officers thereof; but the practice in circuit courts in continuous session may by a general law be made different from the practice of circuit courts held in terms. * * * The provision that the practice in circuit courts of continuous session may by general law be made different from the practice of circuit courts held in terms is, by implication, a restriction on the power of the legislature to make the practice different in the several circuit courts held in terms, for the one exception is necessarily an exclusion of others. Sections 125-136 provide for the circuit courts of the state held in terms. Section 137 provides for a county having a population of 150,000 or over; section 138, for a county having a

city of 20,000 inhabitants, and a population, including the city, of 40,000 or more, and concludes with these words: "And in such counties the general assembly shall by proper laws direct in what manner the court shall be held and the business therein conducted." From these provisions we think it manifest that, except in courts of continuous session, the practice throughout the state in the circuit courts was to be uniform, and that local acts in the several counties regulating the practice where the court was not of continuous session ceased to be operative after the expiration of the six years from the adoption of the constitution. The court below did not err, therefore, in refusing to follow the local act referred to. Judgment reversed, and cause remanded for a judgment and further proceedings consistent with this opinion.

BYBEE et al. v. SMITH.¹

(Court of Appeals of Kentucky. March 1, 1901.)

MUNICIPAL CORPORATIONS — QUORUM OF COUNCIL—REPEAL OF CHARTER BY CONSTITUTION—FAILURE TO PUBLISH ORDINANCE ANNEXING TERRITORY.

1. Under Ky. St. § 3616, part of charter of cities of the fifth class, providing that "the government of said cities shall be vested in a mayor and city council, to consist of six members," and Id. § 3634, providing that "a majority of the members shall constitute a quorum for the transaction of business," and that "the mayor shall preside at all meetings of the council, and may vote in case of a tie vote of the council," the mayor and three members of the council do not constitute a quorum.

2. Under Const. § 160, providing that existing charters of towns and cities shall continue in force until the general assembly shall provide by general law for the governing of towns and cities, except that officers in office shall hold until their successors are elected and qualified, the "trustees" of a town assigned to the fifth class became the "city council," under the general charter of cities of that class, at once upon its adoption, except that the chairman elected from the board, consisting of seven members, became the mayor, and therefore he and three of the members did not thereafter constitute a quorum, though they had done so under the old charter.

Appeal from circuit court, Barren county. "Not to be officially reported."

Action by J. N. Smith against F. G. Bybee and others to test the validity of a city ordinance. Judgment for plaintiff, and defendants appeal. Affirmed.

Basil Richardson and Herman Morris, for appellants. V. Baird, for appellee.

O'REAR, J. This action was brought under section 3630, Ky. St., to test the validity of an ordinance of the city of Glasgow attempting to annex additional territory to its corporate limits, under the provision of section 3611, Ky. St. On a former appeal, decided June 19, 1900 (57 S. W. 789), we held the action could be maintained, but that the

petition failed to state sufficient facts to support it, and reversed the judgment, with directions to allow appellee (plaintiff below) to amend his petition. On a return of the case to the circuit court, amendments to the petition were filed, and, demurrers thereto having been finally overruled, the defendants (the city of Glasgow and F. G. Bybee, police judge) declined to answer or plead further, and judgment was rendered granting the prohibition prayed for, and adjudging the ordinance void. The petition, as now amended, avers that the proposed ordinance was first presented at a meeting of the council on September 26, 1893, but that it was not "passed," and that no member of the council voted for it; that the council had, by ordinance previously adopted, fixed the first Monday in each month as the date of its regular meetings, and the office of the Times as the place of such meeting, but that this ordinance annexing the territory was attempted to be enacted at a meeting held on the 26th day of the month, and at the county court clerk's office, which was not the Times office. It further averred, as to the second ordinance, that at the session of the council at which it was attempted to be passed there were only three members and the mayor (who was ex officio chairman of the board); that there was not a quorum present at the meeting; that the ordinance was never published subsequent to the meeting; that the meeting was held October 27, 1893, at the county clerk's office, instead of at the place previously fixed by ordinance, to wit, the office of the Times newspaper. He further averred that it had adopted rules of procedure by which it provided that no ordinance should be passed at the meeting at which it was introduced, unless by a two-thirds vote of the board the rules were suspended, and that such suspension was not had, but the ordinance was attempted to be passed in violation of those rules. These facts are, of course, on demurrer admitted as true.

The city of Glasgow is a city of the fifth class, having been so assigned in the classification previous to July, 1896. The statute providing governments for cities of the fifth class became a law, and went into effect, on July 8, 1893. *City of Fulton v. Blythe* (Ky.) 30 S. W. 1018; *Bybee v. Smith* (Ky.) 57 S. W. 789. This statute provides (section 3616, Ky. St.) that "the government of said cities shall be vested in a mayor and city council, to consist of six members," and (section 3634) "a majority of the members shall constitute a quorum for the transaction of business. * * * The mayor shall preside at all meetings of the council, and may vote in case of a tie vote of the council." A quorum of the council of this city then was not less than four members and the mayor. *City of Somerset v. Smith* (Ky.) 49 S. W. 456. Prior to the adoption of the statute providing and regulating governments of cities of the fifth class, Glasgow was governed, as to its m

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

municipal affairs, by the provisions of its charter, theretofore granted by the legislature. It had a board of seven "trustees," one of whom, when elected by the other members, became chairman of the board, exercising the functions of the mayor provided for in the new law. It is argued for appellant that, under section 166 of the constitution, the new statute did not take effect till after the election of a new board of councilmen. Section 166 is as follows: "All acts of incorporation of cities and towns heretofore granted, and all amendments thereto, except as provided in section 167, shall continue in force under this constitution, and all city and police courts established in any city or town shall remain with their present powers and jurisdictions, until such time as the general assembly shall provide by general law for the governing of towns and cities, and the officers and courts thereof; but not longer than four years from and after the first day of January, 1891, within which time the general assembly shall provide by general laws for the government of towns and cities and the officers and courts thereof, as provided in this constitution." Section 167 merely provides that officers then in office should hold until their successors were elected and qualified.

The adoption of the general law governing cities and towns, in June and July, 1893, was in compliance with section 166, and immediately thereupon every provision of their several respective charters in conflict with the statute, providing for their government, was repealed. On the former appeal in this case we held: "The trustees of the old town became the 'city council' by the fiat of the charter, and were the legally constituted legislative body in and for the town, from and after July 3, 1893." Therefore, under section 3634, Ky. St., as construed and applied in *City of Somerset v. Smith*, supra, to constitute a quorum of the council, four of its members, besides the mayor, must have been present. Under the old charter, the chairman (ex officio mayor) was one of the "trustees," but he had, under the law then, only the same powers and privileges as under the new, so far as voting was concerned. The new statute merely changed his title, and defined his prerogatives. Being excluded from the privileges of a member, save in event of a tie vote in the council, the law requiring a quorum, to consist of at least four, was not fulfilled by the mere presence of the mayor and three members. Section 3638, Ky. St., provides: "* * * Every ordinance shall be signed by the mayor, attested by the clerk, and published at least once in a newspaper published in such city. * * * And shall be in force from and after such publication." It is admitted a newspaper was published in the city, but it is averred in the petition that the ordinance annexing the proposed additional territory was never published. It follows from the foregoing

that the ordinance annexing the territory in question was not adopted as required by law, and was void. It becomes unnecessary, in our opinion, to notice the other matters assigned as errors, or asserted by appellee as vitiating the ordinance in question. Judgment affirmed.

PORTER v. COMMONWEALTH.¹

(Court of Appeals of Kentucky. March 1, 1901.)

LARCENY — INDICTMENT — EVIDENCE — CONFESSION OF ACCOMPLICE IN PRESENCE OF ACCUSED — CONFESSION EXTORTED BY THREATS — CORROBORATION OF ACCOMPLICE.

1. An indictment for larceny alleged to have been committed by taking the personal property of a firm named as such is sufficient without naming specifically the members of the firm.

2. The confession of an alleged accomplice implicating the accused, made in his presence when both were in custody of an officer, was not admissible against accused, though he remained silent, and later in the day accepted from the alleged accomplice a part of the money they were charged with having stolen.

3. The confession of an accomplice extorted from him by threats was not admissible against accused.

4. Under Cr. Code Prac. § 241, providing that "a conviction cannot be had upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the commission of the crime," one accomplice cannot corroborate another so as to authorize a conviction upon the testimony of the two accomplices alone.

Appeal from circuit court, Jefferson county, criminal division.

"Not to be officially reported."

Thomas Porter was convicted of the offense of grand larceny, and he appeals. Reversed.

Nathan I. Kahn, for appellant. Robt. J. Breckinridge and Morrison Breckinridge, for the Commonwealth.

O'REAR, J. The appellant, Thomas Porter, was indicted in the Jefferson circuit court, tried, and convicted of the crime of grand larceny, the charge being laid in the indictment that he did with force of arms unlawfully and feloniously take and steal and carry away \$100 in lawful money of the United States, the personal property of the firm of Hausgin, Fulton & Co. The first objection raised on this appeal is as to sufficiency of the indictment, it being argued that the failure of the commonwealth to name specifically the members of the firm charged to be the owners of the money was a fatal defect. It seems that in some jurisdictions it has been held that such particularity of description is required, but in this state that rule does not prevail. In *Reed v. Com.*, 7 Bush, 642, an indictment which alleged the ownership of the property in "the Tennessee River Packet Company, D. W. Swan, Little Bros., and others" was held

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

good. Furthermore, section 128 of the Criminal Code of Practice is as follows: "If an offense involving the commission of, or an attempt to commit an injury to person or property, or the taking of property, be described in other respects with sufficient certainty to identify the act, an erroneous allegation as to person injured or attempted to be injured, as to owner of the property taken or injured or attempted to be injured, is not material." This indictment or charge is sufficient; particularly the description of the property stolen; it having been charged even more particularly than we have attempted to quote, and we hold that the indictment was sufficient as charging the crime indicated. On the trial three witnesses were permitted to testify, over the objection of appellant as to confession made in presence of appellant by one of his alleged accomplices, that several hours after the commission of the crime, and after appellant and two persons charged as having been his accomplices in the crime were handcuffed together, and in the presence of the officers in charge and the clerk of the owners of the money, one of the accomplices, in the presence and hearing of the appellant, confessed to the taking of part of the money charged in the indictment, and that later in the day he gave the appellant two dollars of it; that appellant was silent, and did not say anything. This supposed admission by appellant was the principal evidence against him on the trial. The court overruled the motion to exclude it from the jury, and they were permitted to consider it in rendering their verdict. This, we think, was error. The true rule on this subject may be stated from the text laid down in Robertson's Ky. Cr. Proc. § 968, as follows: "To be admissible, the statements must have been heard and understood by him. He must have been in a situation that he was at liberty to make a reply, and they must have been made by such person and under such circumstances as naturally to call for a reply, unless he intends to admit them. Thus, if the defendant is in custody or under any restraint or duress at the time the statement is made, or if the statement is made by a stranger, whom he is not called to notice, his silence, if he makes no answer, cannot be regarded as raising any inference against him." The text seems to be supported by abundant and most respectable authorities, including a full recognition of it by this court in the case of Jackson v. Com., 38 S. W. 426: "We are not satisfied that it was proper thus to limit this testimony. On the contrary, it would seem that those portions of Walling's statement which Jackson did not deny—or, in other words, remain silent about—were the portions which were incompetent, if any were. This is true because Jackson was not called on, or it was not incumbent on him to speak at all. He had the right to remain silent when charged with the crime, and

guilt is not to be imputed to him by reason of that silence." Further confessions were extorted from one of the accomplices by means of threats of the officers "to whale him to the bone," and by another officer who had said to him: "All we want is the money. Why don't you tell us where the money is, and we will turn you loose?" This confession was manifestly procured by the flattery of hope, or the torture of fear, and should have not been admitted in evidence. Laughlin v. Com. (Ky.) 37 S. W. 590.

The principal evidence tending to connect appellant with the commission of the crime is the confession or testimony of his two accomplices tending to implicate him. The instructions given by the trial court are not copied into the record, it being stated in the bill of exceptions that they were not objectionable. We are asked to reverse the case because the trial court refused to give a peremptory instruction at the close of the evidence for the commonwealth. While the evidence connecting the plaintiff with the commission of the crime, as we have said, is most meager, and by no means satisfactory to our minds as to his guilt, independent of the confession of his accomplices, yet there were some circumstances, though slight, that probably should be considered by the jury; and, inasmuch as the bill of exceptions is not a stenographic report, but is a summarized statement of the witnesses' testimony, we do not feel permitted to say that the case is one where such instruction should have been given. Of course, where two accomplices are produced as witnesses, they are not deemed to corroborate one another as to guilt of the accused, as a sufficient compliance with section 241, Cr. Code Prac., providing that: "A conviction cannot be had upon the testimony of an accomplice, unless corroborated by other evidence tending to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely show that the offense was merely committed and the circumstances thereof." Blackburn v. Com., 12 Bush, 181; Smith v. Com. (Ky.) 17 S. W. 182. For the reasons indicated, the judgment is reversed, and remanded for new trial not inconsistent herewith.

SIMMONS v. SAMUELS et al.¹

(Court of Appeals of Kentucky. March 5, 1901.)

APPEAL AND ERROR—SECOND APPEAL—LAW OF THE CASE.

A judgment locating a dividing line in exact accordance with a mandate of the court of appeals must be affirmed, though the court may now be of opinion that it deprives appellant of land to which he had the better title, as the opinion on the former appeal is the law of the case.

Appeal from circuit court, Bullitt county.
"Not to be officially reported."

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

Action by G. W. Simmons against Mary Lissie Samuels and others to locate the dividing line between adjoining tracts of land. Judgment for defendants, and plaintiff appeals. Affirmed.

Ben Chapense, for appellant. J. W. Croan, for appellees.

HOBSON, J. This is the second appeal of this case. For opinion on the former appeal, see *Samuels v. Simmons*, 44 S. W. 395. Appellant alleged in his petition that he owned a tract of land containing 75 acres, more or less, conveyed to him by George Gaither and wife by deed of date March 26, 1892; that appellee, subsequent to this purchase of his, bought of Gaither a tract of land adjoining his; that the dividing line between them ran east from a certain corner, and there was a dispute between them as to the location of the line. Appellee by her answer set up her title and the line claimed by her, and denied that the line claimed by appellant was the true line. It was admitted by both parties that the dividing line ran east and west. They differed as to the corner from which it should start. The land in controversy was therefore bounded by two parallel lines. On proof having been taken, the court below adjudged the line claimed by appellant to be the true line. Appellee prosecuted an appeal to this court, and obtained a reversal of this judgment on the former appeal above referred to. The cause was remanded, "with directions to fix the walnut and sassafras as plaintiff's beginning corner or starting point, which seems to be the north corner of the Crow forty-acre tract, and run from the said beginning corner east to Nelson Gaither's line, and adjudge the same to be the dividing line between appellant and appellee." On the return of the cause to the court below, he caused a line to be run, as directed in the mandate, east from the corner indicated to the Gaither line, and established that line as the dividing line between the parties. Appellant complains of this judgment for the reason that the line so established cuts off $1\frac{1}{11}$ acres of a 20-acre tract held by him under an older deed, which was expressly excepted out of appellee's deed when she bought from Gaither. He insists that this 20-acre tract was never in controversy, that his title to it was always admitted, and that therefore the establishment of a line cutting off a part of that tract to appellee is erroneous. But it will be observed that the court below has followed literally the mandate of this court, and that under the opinion delivered on the former appeal this line was settled as the dividing line between the parties, and nothing left for adjudication in the court below but the location of the line running east from the sassafras and walnut to the Gaither line. It is not contended that this line has not been properly located as directed by this court, and it cannot be so contended. The case, therefore, comes simply to this: that on the former appeal the court directed a line to be established which gives

appellee $1\frac{1}{11}$ acres of land that clearly appellant had the better title to. If this is true, appellant can have no relief, for the reason that the opinion rendered on the former appeal is the law of the case, and is binding on this court no less than on the court below. The record also shows that both the surveys made before the former appeal, and before this court when that appeal was determined, showed the line just as it is now located, and showed that it cut off the $1\frac{1}{11}$ acres now in contest. These maps also show that appellant, after cutting off the $1\frac{1}{11}$ acres, still has left more than 20 acres in his boundary,—the quantity that his deed calls for; and the corner at the sassafras and walnut being well established, and both parties agreeing that the dividing line ran due east and west, the court, on that appeal, no doubt, concluded that in running out the 20 acres it had been pushed over too far on appellee. The precise question in contest having been settled on the former appeal, and the court below having simply carried out the mandate of this court, the judgment complained of is affirmed.

CINCINNATI TIMES-STAR CO. v. FRANCE.¹

(Court of Appeals of Kentucky. March 5, 1901.)

FOREIGN CORPORATIONS — SERVICE OF PROCESS—VENUE OF ACTION FOR LIBEL—IMPROPER INTERRUPTION BY COURT OF ARGUMENT.

1. Where defendant, a foreign corporation, moved to quash the service of process on the ground that the person on whom the process was served was not its agent, it was error to require defendant to amend its affidavit so as to disclose an agent upon whom service of summons might be had, and upon its failure to do so to render judgment by default.

2. The venue of an action to recover damages for a libel published in a newspaper is in any county in which the newspaper was circulated, and summons may be served in a county other than that in which the action is brought.

3. A vender of newspapers, who buys his copies from the publisher for the purpose of reselling them, is not an agent of the publisher for the purpose of service of process.

4. In an action for libel the plaintiff's character is necessarily involved, and therefore it was error in such an action to interrupt counsel for defendant as he was commenting in his argument to the jury upon the probable effect of the libelous publication upon the character of a man of the calling of plaintiff, who was engaged in conducting lottery schemes, and thereupon to orally instruct the jury that they had nothing to do with anybody's character.

Appeal from circuit court, Kenton county. "Not to be officially reported."

Action by A. L. France against the Cincinnati Times-Star Company to recover damages for libel. Judgment for plaintiff, and defendant appeals. Reversed.

Harvey Myers and T. M. Hinkle, for appellant. B. F. Graziani and H. P. Whitaker, for appellee.

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

O'REAR, J. Appellant was sued in the Kenton circuit court for publishing an alleged libel against appellee. Service of summons was had upon one Carrie Mendenhall. The sheriff's return, as amended, reads: "The sheriff of Kenton county by leave of court amends his original return of service of process herein, and says that he served the process herein by delivering a true copy of the said summons to Carrie Mendenhall; she being the managing agent of the defendant, the Cincinnati Times-Star, in Kenton county, Kentucky, and said company having no president, vice president, no secretary or librarian, no cashier or treasurer or clerk, in Kenton county, upon whom process could be served." The petition alleges that appellant is an Ohio corporation, engaged in publishing a daily and weekly newspaper, and circulating the same in Kenton county, Ky., and elsewhere. Carrie Mendenhall and the manager of the appellant each filed affidavits denying that Carrie Mendenhall was at the time of the service, or had ever been, the managing agent, or agent at all, of the corporation, and alleging that she bought papers from it for resale, and that was her sole connection with it. The court, upon these affidavits, held, in an order entered April 1, 1898, "It is adjudged that the defendant is not before the court, and the plaintiff excepts," but subsequently entered this order, June 28, 1898: "The sheriff is given leave to amend his return herein. The defendant, the Cincinnati Times-Star Co., is required and ordered to amend affidavits filed on its behalf on January 8 and January 24, 1898, by stating upon whom process can be served in this state, on or before July 5, 1898." Defendant, failing to comply with the order above quoted, was compelled, under protest, and saving its objections and exceptions, to file answer, or suffer judgment by default. The matter published and complained of was as follows: "(1) People who know A. L. France will require more evidence than his affidavit to convince them that Geo. B. Cox ever received a dollar from any policy company, as France alleges. On his own statement, France stands a convicted perjurer; for in his affidavit he swears that Cox was given the money while he, France (meaning the plaintiff), was manager of the policy company in Covington. When the policy cases were tried before Judge Sage in the United States court, France (meaning the plaintiff) swore that he was not then, and never had been, connected in any capacity whatsoever with any lottery or policy company. Now he swears that he was manager of the company. (2) The fact is, France (meaning the plaintiff) was discharged from the policy company by his brother, W. C. France, and Morris Richmond was appointed to succeed him. The cause of the discharge was a difference of opinion about the pay roll, which A. L. France (meaning the plaintiff), the affidavit maker, could not or did not satisfactorily

explain to his brother. When the latter left for New York several weeks ago, he expressed the wish that A. L. France be sent to the penitentiary, if possible."

The court erred in requiring appellant to so amend its affidavits as to disclose an agent upon whom service of summons might be had in this state. *Bridge Co. v. White's Adm'r* (Ky.) 49 S. W. 36. But, before answer filed in this case, appellee caused summons to be served upon another person, in Campbell county, shown by the sheriff's return to be an agent of the appellant company. This fact appears to have been overlooked in the preparation of the case, though, of course, it will avail appellee notwithstanding, as conferring jurisdiction on the Kenton court. We held in *Press Co. v. Tennely*, 49 S. W. 15, that the venue of an action for libel was in the county in which the newspaper was circulated. Therefore a service of the summons in Campbell county upon an authorized agent of appellant gave the Kenton court complete jurisdiction to try the case of alleged libel, where the paper containing it was circulated by appellant in Kenton county.

We deem it scarcely necessary to say that a vender of newspapers, who buys his copies from the publisher for purposes of reselling them, is not thereby an agent of the publisher for purposes of sustaining service of process against the publisher.

The rulings of the court in admitting and rejecting evidence seem to us to be without fault, and the written instructions given fairly present to the jury the law applicable to the case. The jury returned a verdict upon which the court rendered judgment against the publisher.

In the course of argument by appellant's counsel, he was commenting to the jury upon the probable effect of the libelous publication upon the character of a man of the profession and habitual calling of appellee, shown by the evidence to have been engaged in conducting lottery schemes in this state and elsewhere during most of his life, when, upon objection by appellee's counsel, the court interrupted the course of argument, and orally instructed the jury that they had nothing to do with anybody's character; that character had nothing to do with the case. Appellant saved exceptions to the remarks of the court. We think this comment of the court a prejudicial error; for, as a matter of fact and law, appellee's character was legitimately and necessarily involved in the investigation on trial. It was the basis of the action. The law of libel is founded upon the theory that the character (or, perhaps, more accurately speaking, the reputation) of the libeled person is injured or damaged by the matter complained of; and it is partly and primarily to compensate him for this injury, actual or presumed, that the law allows this action. It necessarily follows, then, that the character (that is, the reputed

standing) of the plaintiff is always a foremost matter of consideration by the jury. Suppose, for example, it were falsely published of one notoriously a common gambler that he had been conducting and had set up such a game of chance in this state as our statutes denominate a felony. The matter would be a libel. It would be ridiculous to allow that he was entitled to recover of the libeler the same sum in damages as would one of irreproachable standing and habits, engaged in legitimate and commendable pursuits. Yet such would be the rule established if the jury were not permitted to consider the character, standing, avocation, conduct, and position of the person libeled. For the reasons given, the judgment is reversed and the cause remanded, with directions to set aside the verdict and award appellant a new trial, and for proceedings consistent herewith.

GLEASON v. BARNETT et al.¹

CITY OF LOUISVILLE v. GLEASON et al.

(Court of Appeals of Kentucky. March 5, 1901.)

MUNICIPAL CORPORATIONS—STREET ASSESSMENTS—PETITION OF PROPERTY OWNERS—SIGNING BY AGENT—SUFFICIENCY OF RESOLUTION WHERE ORDINANCE REQUIRED—PERMISSION TO LOT OWNERS TO IMPROVE STREET—ORIGINAL CONSTRUCTION.

1. Under the charter of the city of Louisville, providing that "the general council may in its discretion upon a petition of a majority of the property owners on the part of a public way proposed to be improved grant them permission to improve said public way under the supervision of the engineer," a petition signed by an agent for property owners, which was granted by the council, was sufficient to protect the property owners in the construction made thereunder, so as to exempt them from further taxation for that purpose.

2. Though the charter required an ordinance for the construction of the street, yet as the council, by resolution, accepted the proposition of the lot owners, and permitted them to incur the expense of the work under the belief that they would be free from further taxation for the purpose, the city cannot now charge the property owners with any part of the cost of reconstructing the street, upon the idea that the construction is an original one.

3. The resolution, if it had been passed with the formality required in the enactment of an ordinance, would have been binding as an ordinance.

Appeals from circuit court, Jefferson county, law and equity division.

"Not to be officially reported."

Action by J. R. Gleason against Andrew Barnett and others to enforce a lien for the cost of a street improvement. Judgment for plaintiff against the city of Louisville, and plaintiff and the city of Louisville separately appeal. Affirmed.

Lane & Harrison, for appellant Gleason. H. L. Stone, for appellant city of Louisville. T. L. Burnett, John Roberts, and Hardin H. Herr, for appellee Barnett.

O'REAR, J. Appellant J. R. Gleason, as contractor, under a contract made with the city of Louisville for the construction of a section of Highland avenue between Broadway and Everett, brought this suit against appellees, Andrew Barnett and others, upon the apportionment warrants issued against the respective abutting lot owners for the work done. The city of Louisville was also made a party defendant. The petition alleged that the work named was the original construction of the section of the street named, and was in accordance with an ordinance duly passed by each board of the general council of the city upon the recommendation of the board of public works, and duly published as required by law, and that appellant Gleason was awarded the contract as the result of competitive bidding required by law; all the facts relating to the passage of the ordinance and letting of the bid being set forth in detail and at length. A demurrer was sustained to this petition, and on appeal the judgment was reversed March 11, 1899 (50 S. W. 67); we having held in the opinion then delivered that the petition did state a cause of action against the defendants. An answer was filed, setting up various matters of defense; but they may be summarized in the statement that defendants alleged that in 1888 the street had been graded and macadamized, under the provisions of the city charter, at the cost of the abutting lot owners, and that the construction now being sued for was not original, but was a reconstruction of said work. It appears that in 1888 the locality in question was but sparsely settled, and at the instance of certain citizens residing on Everett avenue the question of macadamizing Highland avenue was agitated; Highland avenue then being a dirt road, in some parts of the winter being almost impassable by reason of mud. The charter of the city concerning original improvement or construction of streets at the expense of the abutting lot owners was substantially as now, however, expressly providing: "(1) Public ways, as used in this act, shall mean all public streets, alleys, sidewalks, roads, lanes, avenues, highways and thoroughfares, and shall be under the exclusive management and control of said city, with power to improve them by original construction and re-construction thereof, as may be prescribed by ordinance; improvements, as applied to public highways, shall mean all work and materials used upon them in the construction and re-construction thereof, and shall be made and done as may be prescribed either by ordinance or contract approved by the general council. (2) The general council may in its discretion upon a petition of a majority of the property owners on the part of a public way proposed to be improved grant them permission to improve said public way under the supervision of the engineer, and within such time as may be fixed by the general council."

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

It is claimed for appellees Barnett and others that, under the last clause of the above statute, the citizens in interest petitioned the general council in 1888 to allow them to construct the improvement on this section of Highland avenue at their own expense, and that they did so.

Following is the resolution of the council and the petition under which the construction of 1888 was done:

"Be it resolved by the general council of the city of Louisville: That property owners, and others interested therein, be and they are hereby authorized, at their own expense and free of cost to the city of Louisville, to cause the improvement of Highland avenue from the north line of New Broadway northeastward to the line of Everett avenue, in accordance with the specifications hereto attached and made part hereof, to be done and completed as herein provided, subject to the approval of the city engineer, such permission being granted because the street is not in condition for a more perfect and complete construction at the present time."

"To the Honorable Mayor and General Council: We, the undersigned citizens and property holders of the city of Louisville, owning property on the street mentioned, respectfully ask that the above resolution be passed. Pink Varble, Jr., for the Property Owners."

Then follow the specifications, as part of the above resolution.

The work is shown to have been done according to these specifications, under the direction and approval of the city engineer, and accepted by him, and paid for by the property owners. Under this contract of 1888 the surface of the street was required to be, and was, excavated along Highland avenue for a width of 16 feet, one-half on each side of its center, graded level and smooth, and covered with large broken stones or spalls from the quarries, so as to leave the crown 3 inches higher than outer edges, all smoothly and evenly spread throughout the length and width of the grade, and covered with gravel or fine spalls, so as to bring the surface of the street to the level of the sewer caps. It seems that this street at the point in question is 30 feet wide, from curb to curb, and that no curbing or guttering had been provided by the original improvements, as well as that the difference between the 16 feet of macadam and the 30 feet was left unconstructed. The lower court dismissed the petition as against the lot owners, holding the work done under the ordinance of 1894 to have been a reconstruction, and not original construction, and adjudged the cost thereof to be paid by the city of Louisville. The city prosecutes this appeal, urging that the work was at least partial, if not wholly, original construction, and that the cost of it, in so far as it was original construction, should be borne by the lot own-

ers. The contractor appeals, without complaint of the judgment, but that, in event of a reversal for the city, his rights might be protected by a reversal, consequently, of the judgment against him in favor of the lot owners.

The sole question for determination is, was the construction under the ordinance of 1894 original construction, or a reconstruction of the street? For, if it was the former, the lot owners were unquestionably liable; if the latter, the city only is liable. In solving this question, incidentally there are presented the following for adjudication: (1) Was the petition signed by Varble a sufficient authorization to protect the lot owners in the construction they made? (2) Was the granting of authority to the lot owners by the resolution of 1888 a sufficient compliance with the law requiring an "ordinance" to justify the construction?

It will be observed, there is nothing in the statute requiring the petition to the general council by the property holders to be in writing or to be signed by them. A personal petition, made by the citizens going in a body to the council chamber, would undoubtedly have been sufficient. Obviously, the purpose of the petition was to apprise the council of the desire or willingness of the property owners to be affected by the improvement, and of the fact of such willingness and readiness on their part to undertake the construction at their own expense. Even had a petition, in writing, signed by a certain number of citizens, been presented, extraneous inquiry would have been necessary, in order to establish to the satisfaction of the council (1) whether the signers were bona fide residents of the district affected; and (2) whether they constituted a majority. So here the council must satisfy itself that Mr. Varble was authorized by the citizens affected to represent them in the matter, as well as that those so represented constituted a majority of those involved in the proceeding. We perceive no satisfactory reason why the petition might not be presented by an authorized agent, whose signature alone would satisfy the statute, provided he had the authority to represent the principals in the act. *Harvey v. Lloyd*, 3 Pa. St. 331; *Skinner v. Avenue Co.*, 57 Ill. 151.

More difficulty is presented by the question whether the granting of authority for the improvement should not have been by ordinance instead of resolution. At first glance this difficulty may not be so apparent, but when it is considered that a resolution may be adopted by both bodies of the general council of Louisville at the same session, while an ordinance requires at least two weeks to intervene between its passage in one body and in the other, thus affording to the neighborhood affected an opportunity to protest and otherwise be heard as to their desires or objections, it will readily be understood that a valuable purpose was in v'

in requiring such proceedings to be by ordinance. But here the city has by its action allowed the citizens owning the lots in question to proceed in the expense involved in the original construction of the macadam street, under the supervision and approval of its engineer, and upon plans and specifications furnished by him, and ought not to be allowed to repudiate its action in the premises. Of course, if the resolutions had been passed in the manner and with the statutory formality required in the enactment of an ordinance, the mere fact that it was called a "resolution," and did not follow in strict semblance the usual form of an ordinance, would raise no question of its binding effect as an ordinance. *Bour. Law Dict. tit. "Ordinance"; Sower v. City of Philadelphia, 35 Pa. St. 231; San Francisco Gas Co. v. City of San Francisco, 6 Cal. 190. In Mackin v. Wilson (Ky.) 45 S. W. 663, a turnpike road had been taken into the city limits, and afterwards the adjacent property owners had, at their own expense, constructed sidewalks and dedicated them to the public, with the consent, or at least without the objection, of the city. We held such construction of the sidewalks to be an original construction, so as to deprive the city of the right to compel the construction of new or more substantial walks at the expense of the lot owners. This case presents a much stronger equity for the lot owners than that one. For here the city, by resolution, adopted the proposition of the lot owners to construct a macadam street according to specifications prepared by it, the work to be done under the supervision of its engineer, and permits the property owners to incur the expense incident to the work, under the evident belief that when they had discharged this obligation their property would be free from further taxation for the same purpose. It is clear that the city should be bound by this proceeding, and, so far as the carriage way of this portion of Highland avenue is concerned, must be held to have exhausted its right to compel its construction at the expense of the abutting property owners. Such having been the ruling of the learned judge below, the judgment is affirmed in each appeal.*

CRADDOCK v. LEE et al.¹

(Court of Appeals of Kentucky. March 1, 1901.)

PRINCIPAL AND SURETY—PAROL TESTIMONY TO SHOW SURETYSHIP—MORTGAGE EXECUTED BY SURETY—LIMITATION OF ACTIONS.

1. Where the obligors in a note "jointly and severally promise" to pay, any one of them may, for the purpose of pleading the statute of limitations applicable to sureties, show that he was merely a surety, without showing that the obligee had knowledge of that fact.

2. The fact that a surety has been discharged from liability by the lapse of the period of limitation specially applicable to sureties is not

a bar to the enforcement of a mortgage executed by the surety to secure the debt, and not merely his liability as surety, the mortgage not being barred until the debt itself is barred.

Appeal from circuit court, Hart county.
"Not to be officially reported."

Action by W. B. Craddock against S. J. J. Lee and others upon several promissory notes and to enforce a mortgage lien. Judgment for defendant S. J. J. Lee and against defendant Elizabeth B. Lee, and plaintiff appeals, defendant Elizabeth B. Lee prosecuting a cross appeal. Reversed on original appeal and affirmed on cross appeal.

H. L. James, for appellant. Watkins & Cardon, for appellees.

BURNAM, J. On the 1st day of November, 1888, James A. Lee and S. J. J. Lee borrowed from W. B. Craddock the sum of \$2,747.98, and executed and delivered to him in consideration therefor their four promissory notes for \$686.99 each. The first of these notes fell due one day after date, and the other three in three, six, and nine months, respectively, and were to bear interest at 6 per cent. from date. Each of these notes purported to be the joint obligation of James A. Lee and S. J. J. Lee. At the same time, for the purpose of securing the payment of each of said notes, the obligors, James A. Lee and S. J. J. Lee, with Elizabeth Lee, the wife of S. J. J. Lee, made, acknowledged, and delivered to W. B. Craddock their joint deed of mortgage of certain personal property and real estate. A part of the real estate conveyed by the mortgage stood in the name of James A. Lee, a part belonged to S. J. J. Lee, and a part was owned by Mrs. E. B. Lee, the wife of S. J. J. Lee. The mortgage recites: "That, in order to secure the payment of said sums, the parties of the first part do hereby sell and convey to the party of the second part the following described real and personal property. * * * The mortgage further recites: "That E. B. Lee expressly waives her right of dower and homestead exemptions in and to the lands of S. J. J. Lee therein conveyed;" and further stipulates "that, should the parties of the first part, James A. Lee and S. J. J. Lee, well and truly pay off said debts, and the cost of the mortgage, it was to be null; otherwise, to remain in full force and effect." James A. Lee having died, W. B. Craddock brought this suit against S. J. J. Lee, as administrator of James A. Lee, deceased, S. J. J. Lee, and Elizabeth B. Lee, on the 28th of March, 1898, in which he asked a personal judgment against S. J. J. Lee individually and as administrator of J. A. Lee for the notes which fell due in six and nine months from the date of their execution, with interest thereon, subject to certain credits; and for a foreclosure of the mortgage, and a sale of enough of the real estate to pay them.

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

The defendant S. J. J. Lee answered, admitting the execution and delivery of the notes sued on, but alleged that James A. Lee, deceased, was the principal in both notes, and that he signed them only as accommodation security for James A. Lee, and was never at any time bound thereon, except as security; and pleaded and relied upon the lapse of time and the statute of limitations in bar of plaintiff's right of recovery. He also admitted the execution and delivery of the mortgage made to secure them, and that he was the owner, jointly with his wife, Elizabeth B. Lee, of the tract of 105 acres of land conveyed by the mortgage; but alleged that he only executed and delivered the mortgage on the real estate to secure his liability as security, and not to pay the obligation of the principal, James A. Lee; and that, as he had been discharged of the personal liability by reason of the lapse of time and the statute of limitations, the mortgage made to secure his liability was also released. He further pleaded that he had no assets in his hands as administrator of his son James A. Lee, deceased, and resisted any judgment against him as administrator. The defendant Elizabeth B. Lee, by answer, said that she had not signed the obligation sued on, and was not in any way bound thereon, and that the 105 acres of land which she owned jointly with her husband were only bound by the mortgage to secure the liability of her husband, S. J. J. Lee, as surety of her son James A. Lee; and she alleged that more than seven years had elapsed since the cause of action accrued before the institution of the suit, and that her husband, S. J. J. Lee, was released by virtue of the statute of limitations, which she pleaded and relied on; and that the effect of his release was to discharge the mortgage lien on her land. Subsequently she filed an amended answer, in which she alleged that she never did agree or promise, before the execution of the mortgage, that her property should be included therein, or mortgaged to secure the payment of the debt of her son James A. Lee, evidenced by the notes sued on; that she only executed the mortgage for the purpose of waiving and releasing her inchoate right of dower and homestead in the land of her husband, S. J. J. Lee, to the plaintiff, Craddock, in so far as said S. J. J. Lee was personally bound as security on said debt, and not otherwise; and that to the extent the mortgage included her own land and the land conveyed to her and her husband jointly it was a fraud and mistake, and not her act and deed; and that she did not, at the time she executed the mortgage, know that it was embraced therein, and denied liability for the debt sued on. The issues being made up, and proof taken, it was adjudged by the trial court upon final submission that S. J. J. Lee was only bound as surety on the ob-

ligation sued on, and that he was released under his plea of the statute of limitations. It was also adjudged that plaintiff had no lien upon the real estate of S. J. J. Lee included in the mortgage, which consisted of 73 acres, described in the petition, and one-half of a tract of 105 acres held jointly with his wife, E. B. Lee; but subjected the interest of the wife to the payment of the debt sued on. From that judgment the plaintiff, Craddock, and the defendant Mrs. Lee both appeal.

It is first insisted for the appellant, Craddock, that, as the notes sued on purport to be the joint notes of James A. Lee and S. J. J. Lee, and there is nothing in either the notes or the mortgage which would indicate that S. J. J. Lee was only a security therein, he cannot show that he was a security without bringing the scienter home to the obligee. That this is the rule in some jurisdictions may be readily admitted, but a contrary rule has been established in this state by a long line of adjudications. In the early cases of *Lewis v. Harbin*, 5 B. Mon. 564, and *Emmons v. Overton*, 18 B. Mon. 647, it was expressly decided that between the obligors and the obligee, although the obligation read, "We jointly and severally promise," etc., any one of the obligors could show that he was only a security, so as to be protected in his rights as surety, without alleging and proving scienter on the part of the obligee; for the reason that such forms of expression in the obligation do not contradict the idea of his being merely a security, as it is a fact that he, whether as security or principal, is jointly and severally bound, and do not fix the legal status of the obligors. The rule in these cases has been followed in *Day v. Billingsly*, 66 Ky. 157; *Bank v. Gaines*, 87 Ky. 597, 9 S. W. 396; *Skinner v. Lynn*, 51 S. W. 167; *Youtsey v. Kutz* (decided at this term) 60 S. W. 857. We think the testimony conclusively establishes the fact that S. J. J. Lee was only an accommodation security for his son James A. Lee in the obligation sued on, and that, so far as his personal liability is concerned, he is discharged under the plea of the statute of limitations.

But the contention made by appellee S. J. J. Lee that the mortgage of his real estate was only intended to secure his personal liability as security on the debt sued on, and that, having been discharged of the personal liability by reason of the lapse of time and the statute of limitations, the mortgage is also released, presents a much more serious question. There is nothing in the mortgage itself which supports this contention; on the contrary, it recites that it was given to secure the payment of the debts sued for, and that it was to remain in full force and effect until they were fully paid and discharged. It is a rule in some states of the Union that, though a note secured by a mortgage may be barred, so that no action can be maintained thereon, yet the mortgage may be enforced against the

land by foreclosure. See *Booker v. Armstrong*, 96 Mo. 49, 4 S. W. 727; *Lewis v. Schwenn*, 8 West. Rep. 857; *Belknap v. Gleason*, 11 Conn. 160; *Thayer v. Mann*, 19 Pick. 535; *Elkins v. Edwards*, 8 Ga. 325. Generally, where this rule prevails, a different period of limitations as to liens is provided by statute; but in this state there is no statute of limitations as to liens, and, if there is nothing in the instrument creating them to show a contrary intent, they are only valid and enforceable so long as the debt they are given to secure is a valid and enforceable obligation. On the other hand, so long as the debt continues to be an enforceable obligation, the mortgage, which is an incident thereto, may also be enforced. The personal obligation assumed by appellee when he signed the notes for his son was wholly distinct and independent from the security given by the mortgage. The mortgage in itself carries no promise to pay the debt, and places upon its maker no personal liability to do so, but is only a conveyance of the property by way of pledge for the security of the debt, and is entirely independent of the personal liability assumed by the maker when he signed his name to the obligation. A personal obligation may be assumed without the execution of a mortgage, and a mortgage may be given, and is an enforceable obligation to secure the payment of the debt, without incurring a personal liability. Both may be securities for the same debt, but they do not necessarily bear any reciprocal relationship to each other. This distinction was clearly pointed out in the opinion delivered in *Hobson v. Hobson's Ex'r*, 71 Ky. 665. In that case a married woman had executed a mortgage upon her real estate to secure a debt of her husband, to which she was not a party, and, a suit having been instituted to enforce the lien seven years after the accrual of the cause of action upon the note, she pleaded that the mortgage stood only as a security for the payment of the debt, and was discharged after the lapse of seven years. The court held otherwise, and said that, viz.: "The terms 'surety' and 'security' are sometimes used as synonymous, and it may be admitted as true that a bond or obligation with surety is a security, for the latter term includes it, as well as the mortgages, pledges, or whatever else may be given, conveyed, or deposited to secure the payment of a debt or the performance of a contract. But it is manifest that the rights and obligations pertaining to the latter class of securities are essentially different from those which are acquired and incurred by the act of a party in becoming a surety of another in an ordinary bond or obligation. The description of security is clearly comprehended by the provisions of the statute referred to, both by the apt and appropriate language used and the connection of the section with the other sections of the same chapter relating to sureties and co-obligors. But

we cannot conclude that the legislature intended by the use of the word 'surety' that the limitation it provided should be so applied as to affect the rights of creditors holding mortgages or pledges made or created according to laws governing such securities, instead of personal security for their debts." In the case of *Johnson v. Nelson*, 15 Ky. Law Rep. 495, one W. H. Nelson delivered to T. H. Taylor his note for \$540, due one year thereafter. Simultaneously with the execution of this note, and in order to secure its payment, J. H. Nelson gave to him a mortgage on a tract of land owned by him, but did not personally sign the obligation. Suit was instituted on this note, asking a personal judgment against W. H. Nelson, and for the enforcement of the lien against the land of J. H. Nelson. J. H. Nelson answered that the lien on the land was only given as surety for the payment of the debt, and pleaded and relied on the statute of limitations in favor of sureties in bar of the relief sought. The superior court held that the mortgage was simply a conveyance of the property by way of pledge for the security of the debt, which was evidenced by the written contract, and not barred for 15 years; and that there was no bar to the enforcement of the mortgage lien until the debt was barred.

It is insisted for appellee that the rule announced in *Carlisle v. Chambers*, 4 Bush, 268, is conclusive of appellant's contention. In that case the court distinctly places its ruling upon the ground that *Carlisle* made the mortgage only to secure his personal liability as indorser if the assignee should fail to obtain payment from the obligors in the note after proceeding with due diligence; and, as he failed to do so, the indorser and the personal security given by the indorser were discharged. And this ruling seems to be in accordance with the general equitable doctrine governing such cases. It is clear from the evidence in this case that appellant, at the time he loaned the money for which the notes sued on were executed, really looked to the mortgage lien to secure their payment. Neither James A. Lee nor appellee had any considerable property outside of that included in the mortgage. We think, therefore, that the court erred in failing to enter a judgment for a sale of enough of the real estate of S. J. J. Lee which was embraced in the mortgage to secure the payment of the debt. Mrs. E. B. Lee has introduced no testimony which conduces to show that any mistake was made in the execution of the mortgage. By its terms she plainly conveys her interest in the 105-acre tract owned by her and her husband jointly, and also releases her homestead and inchoate right of dower in the landed estate of her husband. For the reasons indicated, the judgment is reversed on the original appeal, and affirmed on the cross appeal of Mrs. E. B. Lee, and remanded for proceedings consistent with this opinion.

MURPHEY v. CITIZENS' SAV. BANK OF OWENSBORO.¹

(Court of Appeals of Kentucky. March 5, 1901.)

BILLS AND NOTES—FAILURE TO PROTEST INLAND BILL—NOTICE OF NONPAYMENT—RENEWAL BY INDORSER OF BILL FROM WHICH HE HAD BEEN RELEASED.

1. While the indorser of an inland bill of exchange is entitled to notice of its nonpayment, no protest is required.

2. The indorser of an inland bill of exchange executed in renewal of a previous bill cannot escape liability on the ground that he had been released from liability on the previous bill by the failure to give him notice of its nonpayment, as he must have known that fact when he renewed the bill.

Appeal from circuit court, Daviess county.

"To be officially reported."

Action by the Citizens' Savings Bank of Owensboro against W. B. Rudd, agent, and John Murphey, on a bill of exchange. Judgment for plaintiff, and defendant John Murphey appeals. **Affirmed.**

Walker & Slack, for appellant. J. A. Dean, for appellee.

BURNAM, J. This action was instituted by appellee in the Daviess circuit court against W. B. Rudd, agent, as acceptor and drawer, and John Murphey, as indorser, of an inland bill of exchange for \$2,500, dated May 11, 1895, and due 30 days after date. The suit having been filed the 10th of January, 1896, the defendant Murphey filed an answer and several amended answers, in which he relied upon a number of separate and distinct defenses; all of which, however, seem to have been abandoned except one. He says that he was only the accommodation indorser of his co-defendant, Rudd; that the bill sued on was the final renewal of a bill for the same amount, dated on the 29th of September, 1892, payable four months after date, which was renewed from time to time until the bill in suit was finally executed, and that one of the renewals of the original bill was dated June 19, 1893, and due and payable on September 20, 1893; that at the maturity of this particular bill no demand for payment was made upon him, nor was it protested for nonpayment, and that he had not waived protest thereon; that he signed the renewal for this bill in ignorance of the fact that he had been released from liability thereon by such failure to protest; and that appellee subsequently failed to protest several renewals of the same bill; and that in ignorance of this fact, and believing that all legal steps necessary to hold him liable as indorser had been taken, he signed the subsequent renewals; and that at the date of these renewals the principal had become insolvent; and that he would not have indorsed the renewal bills if he had known of the failure of appellee to protest the preceding

bills, and his release by reason thereof; and that the bank officers knew that he was in ignorance of these facts, and fraudulently failed to communicate them to him, and accepted the bills with his indorsement with full knowledge of such facts; and that by reason of the failure of appellee to protest and take other legal steps necessary to hold him liable upon the maturity of the bill September 10, 1893, and several other renewals thereof, he had been released from all liability by reason of his indorsement, and there was no consideration for the execution of the obligation sued on. To support this contention appellant refers us to the case of *Ray v. Bank*, 3 B. Mon. 513, in which it was held that whenever there was a clear and palpable mistake of fact or law, or after money had been paid without consideration, it should be recovered back, and that the payment of a bill of exchange by an indorser, who had been legally exonerated therefrom, in ignorance of such exoneration, came within the rule; to the case of *Bank v. Leathers*, 10 B. Mon. 64, in which it was held that an indorser who had been released by laches of the holder of a bill of exchange was not bound by a subsequent verbal promise made in ignorance of his release; and to the case of *Russell v. Rice* (Ky.) 44 S. W. 110, in which it was held that a married woman, not being liable upon a note executed by her during coverture, was not bound by a renewal of the obligation after the entry of a judgment giving her the rights of a feme sole. In none of these cases was the liability of an indorser upon an inland bill of exchange executed in renewal of a previous bill, which had been discounted and accepted in payment of the preceding obligation, considered; and it seems to us that this liability rests upon an entirely different principle of law. It is a well-settled principle of law that the surrender of one negotiable instrument in consideration of receiving another in lieu of it is a sufficient consideration to support the new bill or note. In the early case of *Grey v. Bank*, 12 Ky. 378, the bank instituted a suit upon a piece of paper, which stood upon the footing of a bill of exchange. The defense pleaded that the note was executed without good or valuable consideration. A demurrer was sustained to the plea, and the court said, viz.: "The only question material to be noticed is whether the want of consideration for the execution of the note is admissible as a defense to the action or not. This question obviously depends upon the character of the note. If it is to be treated as a mere common-law instrument, the want of consideration is clearly a good defense; but, on the contrary, if it is to be considered as being placed upon the footing of a bill of exchange, then it is clear that the want of consideration cannot be alleged in bar of action. For although, in an action upon a bill of exchange by one party against another from whom he receives it (as

¹ Reported by Edward W. Hines, Esq., of the Frankfurt bar, and formerly state reporter.

the payee against the drawer or by the indorser against his immediate indorser), the want of consideration is a sufficient defense, yet it is well settled, as a general rule, that, where there exists any privity to the suit (as where the action is brought by the indorser against the drawer, or the payee against the indorser), the want of consideration is inadmissible as a defense." In the case of *Buckner v. Clark's Ex'r*, 69 Ky. 168, it was held that a surety is liable on a note given in the place of a previous note, on which he was surety, but on which he was released by the lapse of time. In that case the court said: "The question is not as to the consideration or benefit received by the security, for it is rare that he receives any; but what was the consideration as to the creditor, or did he part with anything valuable in fact or law, or what consideration did the principal debtor receive? Here the creditor merged his right of suit on the old note both with his principal and security, and also gave additional time during which his right of action against both was also suspended." While the drawer or indorser of a domestic or inland bill of exchange is entitled to notice of its nonpayment, no protest thereof is required by law. See *Whiting v. Walker*, 2 B. Mon. 262; *Bank v. Leathers*, 10 B. Mon. 65; *Bank v. Hays*, 96 Ky. 365, 29 S. W. 20. That appellant had notice of the nonpayment of the dishonored renewals, which he relies on to release him from liability on the obligation sued on, is abundantly shown by the fact that he indorsed the new bills which were executed to take them up. If he intended to raise any question of negligence on the part of appellee in not giving him notice of the default in their payment, the time to have done so was before he signed the new bills. He resided in the same town with the principal and with appellee, and by very slight care on his part he could have been fully informed of all of the facts upon which he now relies to escape liability. By the execution of the new bills, and their acceptance by the bank, his principal was granted protracted indulgence. It seems to us that this is an ordinary case of the borrowing and lending of money, and appellant cannot escape liability upon obligations voluntarily executed by him upon the ground that no protest or notice was given to him of previous default in the payment of the obligations executed in renewal of the original paper. Judgment affirmed.

FITE v. FITE.¹

(Court of Appeals of Kentucky. Feb. 28, 1901.)
BANKRUPTCY — DISCHARGE AS BAR TO ENFORCEMENT OF JUDGMENT FOR ALIMONY.

A discharge in bankruptcy is a bar to the enforcement of a judgment for alimony previously rendered against the bankrupt.

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

Appeal from circuit court, Bracken county.
"To be officially reported."

Action by Annie O. Fite against W. E. Fite for divorce and alimony. Judgment discharging rule against defendant to show cause why he should not be punished for contempt in failing to pay an installment of alimony previously adjudged against him, and plaintiff appeals. Affirmed.

Geo. Doniphan and A. E. Willson, for appellant. F. T. Fox, for appellee.

GUFFY, J. At the July term, 1898, of the Bracken circuit court, the appellant obtained a divorce from the appellee, and was given the care and custody of their two infant children. It is further adjudged that the defendant pay the cost of the suit, including an attorney's fee of \$50 for plaintiff's attorney. The following also appears in the said judgment: "It is ordered and adjudged that from this date the defendant pay to the plaintiff, as and for alimony, the sum of twenty-five dollars per month, payable on the 7th day of each month henceforth, which may be collected by execution, or by other process or orders of this court." At the March term, 1900, of the said circuit court, the appellant, then plaintiff, moved the court to redocket the aforesaid case of Annie O. Fite against William E. Fite; and plaintiff claimed that the defendant has failed to pay any installment of the alimony since the — day of —, 1899, and asked the court to enforce its order, and to issue a writ returnable forthwith against the defendant to show cause why he has so failed, and why he should not be punished for contempt. The plaintiff also moved the court to require the defendant to pay a monthly stipend for the support of the children awarded to her. The court proceeded to redocket the suit aforesaid, and issued the rule prayed for, returnable to the March term, 1900, of the said court. The response of the defendant showed that since February 10, 1900, he was adjudged a bankrupt by the district court of the United States for the district of Kentucky, and filed his discharge in bankruptcy, and prayed that an order be entered enjoining the plaintiff and George Doniphan from further proceeding to collect said sums of money, or from enforcing said judgment against the defendant. The discharge referred to is as follows: "It is therefore ordered by this court that William E. Fite be discharged from all debts and claims which are made provable by said acts against his estate, and which existed on the 24th day of November, A. D. 1898, on which day the petition for adjudication was filed by him, excepting such debts as are by law excepted from the operation of a discharge in bankruptcy. Witness: The Hon. Walter Evans, Judge of said District Court, and the seal thereof, this 15th day of June, A. D. 1900. Thomas Speed, Clerk." The reply of plaintiff traverses the fact or claim that the discharge relied on by defendant is

any bar to the collection of her claim. At the October term, 1900, of the said Bracken circuit court, the court, after reciting the matters and things in controversy, rendered the following judgment: "Upon proof heard and argument of counsel, the court finds, further, that the defendant is in arrears in the payment of the installments of alimony to October 7, 1900, in the sum of \$417.41, and of that sum \$117.41 was due at the time of the filing of the petition in bankruptcy by defendant, and \$300 has since accrued; also that from and after the 7th day of October, 1900, the alimony installments, at the rate of twenty-five dollars per month, are accruing and will accrue under the hereinafter set out judgment; that alimony accrued and to accrue under the aforesaid judgment is a provable claim in bankruptcy, and the discharge of the defendant in bankruptcy operated as a discharge of all moneys due, or to become due, as and for alimony. It is therefore ordered and adjudged that the plaintiff's motion herein be, and it is, overruled. The rules issued against the defendant are discharged. The response by the defendant, filed July 15, 1900, herein, is adjudged sufficient, and in accordance with the prayer of said response the plaintiff herein, Annie O. Fite, is perpetually enjoined and restrained from collecting, or attempting to collect, from the defendant the sums aforesaid, or any other sums accruing under said judgment." Plaintiff's motion to vacate or modify the foregoing judgment was overruled; hence this appeal.

The question presented for decision is whether appellee's discharge in bankruptcy is a bar to the prosecution or collection of the alimony theretofore adjudged to appellant. By section 1 of the bankruptcy act of July 1, 1898, it is said that "debt shall include any debt, demand, or claim provable in bankruptcy; discharge shall mean the release of a bankrupt from all of his debts which are provable in bankruptcy, except such as are excepted by this act." By section 63 of said act, the debts which may be proved are stated thus: "Debts of the bankrupt may be proved and allowed against his estate which are a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest. * * * By section 17 it is provided: "A discharge in bankruptcy shall release a bankrupt from all his provable debts, except such as are due as a tax levied by the United States, the state, county, district, or municipality in which he resides; judgments in actions for frauds, or obtaining property by false pretenses or false representations, or for willful and malicious injuries to the persons or property of an-

other; have not been duly scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy; or were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity." The district court of Kentucky, in *Re Houston*, 94 Fed. 119, had under consideration the precise question involved in the case at bar. It appears from the opinion in the case *supra* that the circuit court of Campbell county had committed to jail the petitioner for the reason that he had failed and refused to pay a judgment against him for alimony in weekly installments of five dollars each, notwithstanding his discharge in bankruptcy. The petitioner appealed to said district court to be released under a writ of habeas corpus. The district court, among other things, said: "Among these benefits was that of claiming a discharge from all liabilities of every character which, by the terms of the bankrupt law, were provable debts against his estate, with certain exceptions specified in the act." The court then refers to section 1 of said act, heretofore quoted, and then said: "Whether wisely or unwisely, congress did not in fact, in section 63, distinguish between judgments for alimony and other judgments, when including them in the list of provable debts; nor did it, in section 17, include judgments of that class among those not to be affected by a discharge in bankruptcy. The bankrupt court in this case had so decided on the motion for a stay of proceedings, and had directly passed upon the question in holding that a stay should be ordered. While, in making the order for a stay of proceedings, the court only looked at the question from a standpoint of the past-due installments of alimony, it is strongly inclined to the opinion that the peculiar form of judgment by which alimony is usually allowed may be properly classed among certain of the unliquidated demands of the bankrupt, to be liquidated and made certain in amount pursuant to section 63 of the act, and, if the state law gave it priority, such judgments could be allowed a preference of payment out of the assets. And it should not be overlooked that the court of appeals of Kentucky in the case of *Tyler v. Tyler*, 99 Ky., at page 34, 34 S. W. 899, in speaking of a judgment against the husband for alimony, said that it 'makes him an ordinary debtor to the wife for a fixed sum of money, that his estate is liable for in the same manner that it would be for a debt due upon any contract.' But whether the judgment be a fixed liability or a contingent one is immaterial in this case, because all these questions must be settled and disposed of in the bankruptcy court alone, and, while the judgment of the court thereon may be erroneous, it is not void, nor, so long as it

remains unreversed, is it to be disregarded by the state court. * * * It will be seen from the judgment of the Bracken circuit court that the court heard proof, which, however, is not certified to us; and it must be presumed that, so far as testimony affects the judgment, the same was amply sufficient to authorize the judgment rendered. It may be conceded that some state courts have reached a different conclusion. But it is also true that the law in some of the states in regard to alimony differs materially from the law of this state as declared in *Tyler v. Tyler*, supra. It may be in order to remark, further, that the honorable judge of the district court of Kentucky was a member of congress when the bankrupt law under consideration was enacted, and taking that, together with the well-known legal ability of the judge, into consideration, his opinion in respect to said law is entitled to very great consideration. This court has nothing to do with the question of sentiment that may be supposed to enter into the question under consideration, nor can the moral duty, if such there be, resting upon the appellee to pay the alimony in question, be considered in determining the law governing the case. This court must respect and obey the law as it exists. Judgment affirmed.

MEADOWS v. MOCQUOT.¹

(Court of Appeals of Kentucky. March 1, 1901.)

PARTNERSHIP—LABOR AS CAPITAL—CONTRIBUTION TO PAYMENT OF LOSSES.

A partner who furnishes labor as his part of the capital cannot be required to contribute to the payment of any part of the loss of the other partner's capital, which was money furnished on condition that it should be restored to him before there was any division of profits.

Appeal from circuit court, Fulton county.

"To be officially reported."

Action by W. W. Meadows against J. D. Mocquot to recover one-half of the loss in a partnership venture between them. Judgment for defendant, and plaintiff appeals. Affirmed.

Robertson & Thomas, for appellant. J. D. Mocquot, in pro. per.

BURNAM, J. This action was instituted by appellant to recover \$446.01, one-half of the loss in a partnership venture between them, from appellee. He says that in September, 1891, he and the defendant formed a partnership for the purpose of buying, ginning, and dealing in cotton; that by the terms of the partnership he was to furnish all of the money necessary to carry on the business, and the defendant was to furnish his labor; and they were to share equally

the profits, if any, and the losses, if any, arising from the business. The defendant, in his answer, admitted that in the fall of 1891 he formed a partnership with the plaintiff for the purpose of buying, ginning, and selling cotton, but alleges that by the terms of the agreement plaintiff was to furnish all of the money necessary to run the business, and pay the loss, if any, and expenses incident thereto; that he was to buy, gin, and ship the cotton, but was not to be liable for any loss or expense incurred in the business; that he devoted his time and attention to the business of the firm from the 1st of October, 1891, to the 1st of February, 1892, and that he received nothing for his services. The testimony of appellant conduces to support the averments of his petition. He testifies that he paid for the cotton purchased by the firm, kept its accounts, and collected all of the money, which was placed to his individual credit in the bank; that appellee bought the cotton, and attended to the details of having it ginned and shipped to the market; that the losses of the venture were \$892.02; that appellee expressly agreed to share his part thereof. Appellee, on the other hand, testifies that in September, 1891, he spoke to W. P. Felts, secretary of the Cotton Gin Company, for employment with the Cotton Gin Company, and that he told him that appellant, Meadows, wanted some one to run the gin for him; that he saw Meadows, and told him that he had no money, but that he would agree to go in with him, and run the gin for the season for half of the net profits; that he would buy, receive, gin, ship the cotton, and attend to the business generally; that Meadows was to keep the books, accounts, and furnish all of the money necessary in the operation of the business; that his understanding was that he was not to bear any of the loss, although nothing specially was said about loss; that he performed his part of the contract, and received nothing for his work; that appellant collected all of the money received from the sale of the cotton, and used it to reimburse himself for money advanced to the partnership and to pay the operating expenses of the business. The agreement between them was a verbal one, and no witnesses testify as to the terms of the agreement but the parties. Their statements conflict upon the crucial point of the case, and their intention can only be arrived at by considering their conduct in regard to the subject-matter of the contract. But we will first consider the law of the case. The universal test of partnership is community of profit and specific interest in the profits as profits, in contradistinction to a stipulated portion of the proceeds as a compensation for services. *Tanner v. Hughes* (Ky.) 50 S. W. 1099. If the agreement was that appellant should advance the money as his part of the capital, and appellee was to render services in buying and selling as his part of the capital,

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

nothing else appearing, in the event of a loss each would lose his own capital,—appellee his labor, and appellant his money; and the one would not be responsible to the other. The rule is thus stated by Mr. Rutherford in his Institutes, viz.: "In partnership, where work is contributed on one side and money on the other, the partner from whom the money comes may contribute only the use of the money, or the property of it. If he contributes the use of it, and still keeps his property in the principal, so that the joint stock is to be considered as made up of the labor of one partner and of the use of the other's money, it is plain that, supposing the principal to be safe, it belongs to him, and that, supposing it to be lost, he alone bears the loss. The other partner, who contributes work, since, as the case is put, he had no claim to the principal money, or any part of it, cannot be obliged to make good any part of the loss, or to bear any share of it. But if he contributes the property of his money, so that the joint stock, upon which each of them has a common claim, is made up of his principal money and of the other's labor, then the partner who labors has a claim upon the principal money itself; and consequently, whenever the partnership is dissolved, if the principal, or any part of it, is safe, he ought to share in it; and, if the principal is lost, he is a sufferer by losing such share." This principle was first applied in this state in the case of *Heran v. Hall*, 1 B. Mon. 159. *Heran* sued *Hall* for half the loss of capital advanced by the former for corn bought by the latter and shipped under a contract between them stipulating that *Heran* should furnish the money and *Hall* should buy and ship the corn, and that the profits of the venture should be equally divided between them. Chief Justice Robertson, who delivered the opinion of the court, said, viz.: "It is the general rule, applicable especially to such a single adventure as that in which the parties in this case were engaged, that when the capital of one party is money, and of the other party is labor, or other service, they are not partners, *inter se*, in the technical sense merely, because they had a mutual interest in the profits, and that, nothing else appearing, even considering them partners in the stock, he whose capital was labor would not be liable to him whose capital was money for contribution of any loss of capital in the adventure; for in such case each will have sustained a corresponding loss of capital, and neither would, therefore, be liable to the other for contribution." This rule was followed in *Rau v. Boyle*, 68 Ky. 253; *McCormick v. Stofer* (Ky.) 12 S. W. 151; *Fuqua v. Massie* (Ky.) 25 S. W. 875; and in a number of cases decided by the superior court. Both parties to this controversy admitted that it was one of the conditions of the partnership that, before any division of profits could be had, all of the money contributed

by appellant was to be restored to him,—in other words, that the firm was to have only the use of the money; and it seems to us that it necessarily follows, from the principle announced in the foregoing cases, under this state of facts, that appellant is not entitled to recover for the loss of any part of the money so contributed by him for the use of the firm. For the reasons indicated, the judgment is affirmed.

WHITE, J., not sitting.

PENTECOST v. MANHATTAN LIFE INS. CO.¹

(Court of Appeals of Kentucky. March 1, 1901.)

SECOND APPEAL—LAW OF THE CASE.

Where the court held upon appeal by defendant that the allegations of the answer presented a complete defense, and were not denied by the reply, a judgment rendered on the return of the case sustaining a demurrer to the reply and dismissing the petition must be affirmed on a second appeal, the former opinion being the law of the case.

Appeal from circuit court, Webster county. "Not to be officially reported."

Action by Francis C. Pentecost against the Manhattan Life Insurance Company on a policy of life insurance. Judgment for defendant, and plaintiff appeals. Affirmed.

Bourland & Rayborn and M. C. & G. D. Givens, for appellant. John W. Lockett, F. M. Baker, and J. H. Powell, for appellee.

BURNAM, J. This case was heard on a former appeal to this court, and the opinion then rendered is reported in 49 S. W. 425. A very full recital of the facts as they appear in the answer are set forth in that opinion, and they were held to constitute a complete defense, and not to have been denied by the reply. The court then said, viz.: "Appellant acted entirely consistently after the nonpayment of this note. It took no steps except to mark the note canceled, and to register the policy as lapsed. Its home office was in New York; and it lost no right by not returning the note to Pentecost, and demanding the surrender of the policy, under the facts of this case, within the limited time elapsing before his death. Pentecost had only paid for insurance on his life up to July 17th. He had no right to insurance after that date. His policy had lapsed under the express agreement made when the note was taken; and, the appellant having acted consistently, and waived none of its rights, no recovery can be had." Upon the return of the case to the circuit court, appellee filed a demurrer to the reply, which was sustained. Appellant did not amend or offer to amend, and the court then dismissed the petition, and this appeal is prosecuted from that judg-

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

ment. We have, on this appeal, the identical case which was decided on the former appeal. Every point suggested, and every argument now made, could have been made at that time; and under a rule of long standing in this court the law as announced in that opinion is the law of this case. For the reasons indicated, the judgment is affirmed.

CLARK v. KOERNER et al.¹

(Court of Appeals of Kentucky. March 5, 1901.)

MEASURE OF DAMAGES—BREACH OF CONTRACT TO FURNISH LUMBER.

1. In an action to recover damages for breach of a contract to furnish lumber for the construction of an elevator, it was proper to instruct the jury that, if defendant failed to perform his contract, and by reason of such failure plaintiffs were unable to procure other lumber, and were compelled to keep their workmen idle by reason of having no lumber to work on, or were delayed in the construction of the building, or put to additional expense by reason of the lumber not being delivered in proper order, they should find for plaintiffs an amount that would compensate them for the loss so sustained.

2. The court properly refused to instruct the jury that plaintiffs could not properly charge defendant with wages to their workmen while waiting for the lumber necessary to enable them to begin constructing the building, as plaintiffs might, if the workmen had been discharged, have been unable to get others to complete the building.

Appeal from circuit court, Henderson county.

"Not to be officially reported."

Action by H. W. Clark, Jr., against Bailey Koerner & Co. on an account. Judgment for defendants on a counterclaim, and plaintiff appeals. Affirmed.

S. B. & R. D. Vance, for appellant. Yeaman & Yeaman, for appellees.

HOBSON, J. Appellant sued appellees to recover \$836.51, the balance due on an account for lumber amounting to \$2,844.36, subject to a credit of \$2,507.25. Appellees denied that appellant had furnished \$72.43 of the account, admitting the balance of \$264.08. As a counterclaim to this they pleaded that appellant had, by a written contract with them, agreed to furnish them the itemized bill of lumber referred to for the construction of an elevator which they had contracted to build, and had agreed to begin the delivery of the lumber on August 27, 1898, and to complete it in 45 days from August 14, 1898; that he had also agreed that he would deliver the lumber in the order in which it was itemized on the bill; that he had failed to comply with his contract; that some of the lumber was not as thick as required by the con-

tract; that it was not delivered in the order specified in the bill, or within the time provided; that by reason of this they had been delayed in the construction and completion of the building, and put to additional cost, and otherwise damaged, their total loss amounting in all to \$850. The jury to whom the case was submitted returned a verdict in favor of appellees for \$145.30.

The main question necessary to be considered on the appeal relates to the measure of damages. The court instructed the jury that, if appellant failed to perform or carry out the agreement, and by reason of such failure appellees were unable to procure other lumber, and were compelled to keep their workmen idle by reason of having no material to work on, or were delayed in the construction of the building, or put to additional expense, by reason of the lumber not being delivered in proper order, as required by the contract, then they should find for the appellees an amount in damages that would compensate them for the loss so sustained. We see no objection to this instruction. It seems to follow the rule laid down in *U. S. v. Behan*, 110 U. S. 338, 4 Sup. Ct. 81, 28 L. Ed. 168, and *Railroad Co. v. Pottinger*, 10 Bush. 188. In 8 Am. & Eng. Enc. Law, 544, the rule is thus stated: "The fundamental principle of the law of damages is that the person injured in his person or his property rights shall receive compensation therefor. In applying the general rule as stated to the breach of contracts, it has been said that a party sustaining loss thereby is, so far as money can do it, to be placed in the same situation with respect to damages as if the contract had been performed." The failure of appellant to fill his contract having necessarily resulted in the items of loss referred to in the instruction of the court, proper compensation for the breach of the contract would not be made to appellees if these items of loss which were the natural result of the breach were not allowed. The instruction of the court was only a statement, in another form, of the measure of damages set out in instruction "A," asked by appellant, which authorized a recovery of "their necessary additional expenses in constructing the building for which said lumber was furnished." By instruction "B," appellant asked the court to tell the jury that appellees could not charge appellant with wages paid their workmen while waiting for the lumber necessary to enable them to begin constructing the building. This instruction was properly refused, for the reason that, under the evidence, if the workmen were discharged, appellees might have been unable to get others to complete the building, and they were required to use their best judgment and proper precautions to avoid unnecessary loss. Judgment affirmed.

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

BAILEY et ux. v. SOUTHERN RY. CO.¹

(Court of Appeals of Kentucky. March 5, 1901.)

CORPORATIONS—LIABILITY FOR DEBTS OF VENDOR.

Under Const. § 208, providing that "no corporation shall lease or alienate any franchise so as to relieve the franchise or property held thereunder from the liability of the lessor or grantor, lessee or grantee, contracted or incurred in the operation, use or enjoyment of such franchise, or any of its privileges," the purchaser of the tangible property of a railroad corporation is not charged with the contract duty of the vendor to maintain a fence on each side of its right of way through certain lands, the purchaser having no notice of the contract at the time of his purchase.

"To be officially reported."

Petition for rehearing. Denied.

For former report, see 60 S. W. 631.

PER CURIAM. Appellant complains that we did not notice in the opinion the provision of section 203 of the constitution. The section was considered, but deemed not to be applicable. The section is as follows: "No corporation shall lease or alienate any franchise so as to relieve the franchise or property held thereunder from the liability of the lessor or grantor, lessee or grantee, contracted or incurred in the operation, use or enjoyment of such franchise, or any of its privileges." The word "franchise," as here used, is the corporate existence, or charter privileges, as distinguished from the corporeal property of the corporation. The words, "or property held thereunder," have reference to such public duty, obligations, or servitude as may be imposed, by virtue of the "franchise," on the tangible property of the corporation. The construction asked for by appellant would deny the doctrines of estoppel, notice, and other similar defenses, erected upon considerations of public policy and common honesty, when urged in behalf of a corporation in such transactions as in this case. Such could not have been the intention of the framers of the constitution in the preparation of an instrument which they purposed should, and believed did, provide for "equal rights to all, exclusive privileges to none." Petition overruled.

BEAN et al. v. TAYLOR.¹

(Court of Appeals of Kentucky. March 5, 1901.)

EVIDENCE—DECLARATIONS OF AGENT—INSTRUCTIONS AS TO COUNTERCLAIM.

1. Where defendant pleaded as a counterclaim the damages which he had suffered by a breach of warranty of a machine for the price of which plaintiff sued, the court did not err in refusing to permit him to testify to conversations had with W. in relation to the machine

prior to the sale thereof, there being nothing to show that W. was the agent of plaintiff.

2. The court properly instructed the jury that if they found, from the evidence, that defendants were entitled to damages on their counterclaim in any sum less than the aggregate amount of the notes sued on, it should be credited thereon, and that, if such damage equaled the amount of the notes, they should find for the defendants, and, if greater than the sum of the notes, they should find for defendants the excess.

Appeal from circuit court, Warren county.

"Not to be officially reported."

Action by W. F. Taylor against J. M. Bean and others on two promissory notes. Judgment for plaintiff, and defendants appeal. Affirmed.

Guy H. Herdman, for appellants. W. E. Garth, for appellee.

BURNAM, J. Appellee in this action sought to recover a personal judgment against the appellants on two notes aggregating \$192.50, with interest thereon from maturity. Appellants, by way of answer and counterclaim, said that they were executed in consideration of a steam engine sold to them by appellee, which he warranted to be in good repair, and ready for immediate use, and of sufficient power to cut 4,000 feet of lumber per day; that these representations were untrue; that the engine did not have the guaranteed power, and was out of repair; and that they were compelled to expend \$75 to put it in order before it would operate at all; and that they had been damaged by appellee's breach of warranty in \$300, and made their answer a counterclaim for that amount. The pleadings being made up, a jury trial resulted in a verdict and judgment for the amount of the notes sued on. On this appeal appellants complain that the court erred in refusing to allow appellant Bean to testify to certain conversations had with one J. D. West in relation to the engine prior to the sale thereof. We think the court did not err in rejecting this testimony, as there was nothing in the record to show that West was the agent of appellee, or represented him.

Complaint is also made of the first instruction given to the jury. By that instruction the jury were told that if they found, from the evidence, that defendants were entitled to damages on their counterclaim in any sum less than the aggregate amount of the notes sued on, it should be credited thereon; that, if such damage equaled the amount of the two notes, they should find for the defendants; if greater than the sum of the two notes, they should find for the defendants the excess. This instruction, in connection with the other six which were given to the jury, fully, fairly, and aptly defined the law upon all the issues raised by the pleadings and proof. Judgment affirmed.

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

BANK OF KENTUCKY v. WINN et al.¹

(Court of Appeals of Kentucky. Feb. 27, 1901.)

TRUSTS—SALE OF STOCKS BY TRUSTEE FOR REINVESTMENT IN REAL ESTATE—PARTIES TO ACTION—REFUSAL OF CORPORATION TO MAKE TRANSFER TO PURCHASER.

1. Under Ky. St. §§ 4706, 4707, empowering persons holding stocks in a fiduciary capacity to sell them, and reinvest the proceeds in real estate, and providing that a corporation in which such stock is held shall not be liable for transferring the stock on its books upon the order of such fiduciary, bank stock held by a trustee having been sold by him pursuant to a judgment authorizing him to make the sale and reinvest the proceeds in real estate, the bank in which the stock was held cannot refuse to transfer the stock on its books on the ground that it may become liable to contingent remainder-men, who were not parties to the action in which the judgment was rendered, as they were neither necessary nor proper parties to the action.

2. The bank may be required by rule to make the transfer, though it was not a party to the action in which the judgment was rendered, and in which the rule was issued, and though its place of business is in a county other than that in which the action is pending.

Appeal from circuit court, Kenton county.
"To be officially reported."

Action by J. N. Winn, trustee, and H. C. Whitehead and wife, asking for a judgment authorizing the trustee to sell and transfer certain shares of bank stock. Judgment compelling the Bank of Kentucky, in which the stock was held, to transfer it to the purchaser at a sale made pursuant to judgment of the court, and the Bank of Kentucky appeals. Affirmed.

A. G. Barrett and O'Hara & Rouse, for appellant. J. F. Winn, for appellee.

BURNAM, J. Charles Eginton died a resident of Kenton county, and his last will and testament was duly probated and admitted to record by the county court thereof on the 30th day of October, 1890. He devised to his granddaughter, Sarah L. Eginton, certain real estate and bank stock owned by him at his death, and appointed Joshua N. Winn, her maternal grandfather, trustee thereof, giving him power to collect interest, rents, dividends, and profits, and to have the care, custody, and management thereof for the exclusive benefit and use of his granddaughter during her minority, and longer should she desire. The will further provides that the granddaughter, under certain restrictions, may dispose of this property by will, but that, in event she fails to do so during her life, and dies leaving a child or children, it should belong to them, but that if, at the time of her death, she left no child or children, and has made no disposition thereof by will, then all that remains of the principal and accumulations of the aforesaid estate should be distributed to other designated persons. After the death of her grand-

father, Miss Eginton married H. C. Whitehead; and in February, 1890, J. N. Winn, the trustee named in the will, Mrs. Whitehead, the beneficiary, and her husband, H. C. Whitehead, filed an ex parte petition in the Kenton circuit court, in which they ask for a judgment of the court authorizing the trustee to sell and transfer certain shares of bank stock, which were devised to him as trustee, and held by him in trust for Mrs. Whitehead under the provisions of the will of her grandfather Eginton, and to invest the proceeds thereof, with certain other funds in the hands of the trustee, in a tract of 500 $\frac{1}{2}$ acres of land located in Bourbon county, at the price of \$47.75 per acre, it being alleged that the tract of land which they desired to buy adjoined another tract owned by her, which contained about 700 acres of land; that the investment would be a safe and judicious one, and for the best interest of the cestui que trust. It having been made to appear to the chancellor that the change in the investment should be made, the court entered a judgment directing a sale of the 70 shares of bank stock held by appellee in the Bank of Kentucky, which is located in Louisville, and an investment of the proceeds thereof in the Bourbon county land. Appellee, under the judgment, sold the bank stock, but appellant, the Bank of Kentucky, refused to transfer it upon the books of the bank to the purchaser. Thereupon appellee filed his affidavit setting forth this fact, and a rule was awarded him against appellant to show cause why it had refused to transfer on the books of the bank the 70 shares of stock standing in the name of J. N. Winn as trustee. Thereupon appellant entered its appearance, and objected to the jurisdiction of the court, and by way of response said that the petitioner Winn held the stock as trustee for Mrs. Winn only during her life, and denied that he had the right to sell or dispose of it; and that the judgment of the chancellor authorizing the sale was not binding upon the contingent beneficiaries, and would not protect the bank against claims that they might thereafter assert against them. Appellant's response was held insufficient, and an order was entered directing it to make the transfer of the 70 shares of stock upon the order of J. N. Winn, trustee, and from this order of the court this appeal is prosecuted.

We think appellant's apprehension or fear that it might become liable to the persons named as contingent remainder-men by the will is groundless. Section 4706, Ky. St., provides: "That it shall be lawful for persons or corporations holding funds in a fiduciary capacity for loan or investment, to invest the same in real estate. * * *" Section 4707 provides: "That all persons holding stocks, bonds or other securities, in a fiduciary capacity for loan or investment, shall have power to sell and transfer same whenever in the judgment of such fiduciary

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

such a sale will benefit the trust estate, and re-invest the proceeds as authorized in section four thousand seven hundred and six of this chapter. * * * A purchaser in good faith from such a fiduciary shall not be bound to look to the application of the proceeds of the sale, nor shall a corporation in which such stock held by a fiduciary is sold as herein authorized be liable for transferring such stock upon its books upon the order of such fiduciary." The provisions of the statute were enacted for the express purpose of facilitating the transfer of trust funds held in a fiduciary capacity from one investment to another, and to exempt corporations from all liability for transferring shares of its stock so held upon the books of the company, when required to do so by the fiduciary or other proper authority. The only limitation upon this power of transfer and change in the investment is provided by section 4708 of the statute, which says that "these provisions shall not be construed to permit a sale, investment or loan in conflict with the provisions of the will, deed or other instrument creating the trust, under which the funds or property may be held." There is no provision of the will of Charles Egington which either expressly or by necessary implication forbids a change in the investment of the property devised to his granddaughter. On the contrary, the testator reposed great confidence in the judgment of the trustee, and in his solicitude for the best interest of the cestui que trust, who was also his granddaughter, and conferred upon him as trustee unusual powers over the trust property. Besides, the provisions of the statutes under which this transfer was directed did not materially change the law as it had always existed. In the well-considered opinion delivered by Judge Pryor in the case of *Bank v. Jefferson*, 88 Ky. 651, 11 S. W. 767, it was held that trustees charged with the management of trustee funds for the support and maintenance of the beneficiaries not only had the right, but it was their duty, to make such investments of the funds as would be made by prudent business men with a view to secure to themselves and families a safe income, and that they might change the investments from time to time as they deemed the best interest of the beneficiaries required. In this case no question of the wisdom of the proposed investment is even suggested, and we entertain no doubt of the power of the chancellor to have authorized the change of the investment.

The second complaint is that the bank was not before the court until after the judgment was entered, and that upon this account the judgment is void, and not binding upon it. It is also contended that under the ruling of this court in the case of *Bank v. Boswell's Adm'r*, 93 Ky. 92, 19 S. W. 174, the Kenton circuit court had no jurisdiction to compel appellant, whose place of business was lo-

cated in Louisville, to enter its appearance to a rule issued from the Kenton circuit court. All that was decided in the *Jefferson Case*, supra, was that under section 428, Civ. Code Prac., a Louisville bank in which the decedent held stock was not necessarily a party to an action in equity for the settlement of his estate, not being either a representative, legatee, distributee, or creditor; and could not be brought before the court in such a proceeding by the service of process in another county for the purpose of litigating differences with reference to the settlement of the estate. No relief was sought in this action against appellant, and it had no beneficial interest in the stock directed to be transferred. All that has been required of it is that it shall not obstruct the trustee in the performance of his duty to the cestui que trust. In our opinion, neither appellant nor the persons suggested as having a possible interest in remainder were proper parties to this proceeding. The judgment of the court fully protects the interests of all parties who have or may have any possible interest in the property required to be transferred. Judgment affirmed.

RITTENHOUSE v. CLARK et al.¹

(Court of Appeals of Kentucky. Feb. 27, 1901.)

DEFECT OF PARTIES—WAIVER OF OBJECTION—DEEDS—DESTRUCTION BY GRANTEE AND CONVEYANCE BY GRANTOR TO ANOTHER.

1. A defect of parties is waived unless the objection is made by a special demurrer or other pleading.

2. A married woman cannot divest herself and her children of title to land by merely destroying the deed to them, and consenting to the making of a deed by the grantor to another; nor is she estopped thereby to claim her interest in the land, the grantee in the new deed being a party to the arrangement, and having knowledge of all the facts as to the title.

Appeal from circuit court, Floyd county.

"To be officially reported."

Action by Morgan Clark and Rebecca A. Clark against J. S. Rittenhouse to recover land. Judgment for plaintiffs, and defendant appeals. Affirmed.

Walter S. Harkins, for appellant. Jas. Go-ble, for appellees.

PAYNTER, C. J. It appears from the record that previous to December 20, 1894, the appellee Morgan Clark and his wife, Rebecca A. Clark, either owned, or had an interest in, a certain tract of land, which they exchanged with John W. Porter for a tract of land known in this record as the "Long Branch Land." Porter made a deed to them, by the terms of which Rebecca A. Clark was vested with a life estate in it, with a certain character of remainder to her children, with the right in Morgan Clark to control it during his lifetime. This deed was not recorded.

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

On December 20, 1894, the appellant, Rittenhouse, and John W. Porter and others met the Clarks, and they sold the land to Rittenhouse for twenty-two hundred and some odd dollars. For reasons which will hereafter appear, Clark and wife did not make a deed to Rittenhouse, but the deed which Porter had made them was destroyed with the knowledge of Rittenhouse, Porter, and the Clarks, and at the instance of Rittenhouse and Porter; whereupon Porter then made Rittenhouse a deed for the land. Rittenhouse gave Porter a check for \$175, and his notes for \$2,050, payable to the order of Porter, who thereupon indorsed and delivered the check and notes to Morgan Clark. On December 27, 1894, in payment of the notes which Rittenhouse had executed, and which had been assigned and delivered to Clark, he conveyed to Clark and wife, and to those who took the remainder interest in the Long Branch land, certain houses and lots, and some land at Mt. Carbon, in Johnson county. After occupying the property for a time, Clark and wife became dissatisfied, and instituted this action to recover the Long Branch land. It being claimed that old man Clark and wife were ignorant, neither being able to read nor write; that old man Clark was eighty odd years old, and did not have mental capacity to enter into the transaction; that they were overreached therein. It is further claimed that Mrs. Clark and her infant children owned the land, and she could not divest herself and children of title to the property by consenting that her deed should be destroyed. On behalf of Rittenhouse, it is claimed that the trade was in good faith; that old man Clark was capable of transacting business, and that he did not overreach them in the transaction; and, further, that as the Clarks were present, and consented that Porter should make the deed, they are now estopped to question his right to do so. On the trial of the case, the court set aside the contract, adjudged the Long Branch Land to the appellees, and restored the property which the Clarks had obtained from Rittenhouse to him.

We will first dispose of a preliminary question that arises in the case, which is, did the court err in rendering the judgment which it did, because the infant children of Mrs. Clark and Porter were not parties to the proceeding? It would be unprofitable to discuss the question as to whether the infant children and Porter should have been made parties to the action. This court has repeatedly decided that where a party fails to demur specially to a proceeding because certain persons are not made parties to the action, or fails to raise the question by pleading, it is too late to raise the question here.

The doctrine of estoppel, which the appellant invokes to aid him in defeating a recovery in this action, seems to us to have no place in it. It is true that the rule is well recognized in

Story's Equity Jurisprudence, in many cases by this court and by the supreme court of the United States, and we believe by all courts, that when a person having title to an estate which is offered for sale, and, and knowing his title, stands by and encourages the sale, and does not forbid it, and thereby another person is induced to purchase the same under the supposition that the title is good, the party thus standing by and being silent is bound by the sale. When one is silent when he ought to have in good faith spoken, he shall not be heard to speak when he ought to be silent. If Porter had claimed to be the owner of the property in question, and was proposing to sell it to Rittenhouse, and Clark and wife encouraged him to buy and pay for it, then they might have been estopped thereafter to assert claim to it. Rittenhouse was not negotiating with Porter for the purchase of the property, but was buying it from the Clarks, and Porter was simply aiding the contracting parties, to the end that the Clarks be divested and Rittenhouse invested with the title to it. The evidence shows that Rittenhouse knew all about the deed which Porter had made to the Clarks and its terms, and was instrumental in having it destroyed; hence he traded with his eyes open as to the real condition of the title to the property.

A married woman may do an act which estops her from thereafter claiming her own property, but this is not one of the cases wherein she has deprived herself of that right. Mrs. Clark did not represent at the time of the sale to Rittenhouse that she had no title or interest in the property, nor did she represent that her children had none. On the other hand, the facts proven show that all the parties to the transaction recognized that she did have a life estate in it, and remainder in her infant children. The question here is, did she divest herself of title to the property by consenting that the deed which Porter had made her should be destroyed? She once having acquired title to the property, the destruction of the deed could not deprive her of it. When the owner of real estate executes and delivers a deed of conveyance to another, which is accepted, the title vests in the grantee. At least, in the case of a married woman, it will take a reconveyance to reinvest the grantor with title,—a destruction of the deed will not do so. 1 Devl. Deeds, § 300, reads as follows: "When a deed has been properly executed and delivered, it operates as a transfer of title. Its redelivery to the grantor or its cancellation cannot operate as a retransfer of the title so conveyed. Where it has once become effective, it cannot be defeated by any act occurring afterwards, unless it be by force of some condition contained in the deed itself. The redelivery of a deed is not only ineffectual to retransfer the title, but also to revive a debt for the

extinguishment of which the deed was given. "The decided weight of authority is that the surrender of a deed, though not registered, will not operate to revest the grantor with the title." The fact that both grantor and grantee suppose that a deed will not take effect until recorded, and might be revoked at any time before that is accomplished, does not alter its legal character as a conveyance where it has been delivered to the grantee. Nor will a contemporaneous parol agreement between parties who have reciprocally executed and delivered deeds, that they shall not be probated for registry until one of the parties shall perfect the title to the land conveyed by him, prevent the vesting of the titles in accordance with the terms of the deeds." In such a case it is immaterial that the parties did or did not understand whether this would be the legal result of their acts. The title remains in the grantee when it has once become vested in him, notwithstanding the destruction of the deed or its return to the grantor, and although the latter has, through the direction of the grantee, again executed a deed to another." To the same effect is Tied. Real Prop. § 812.

We apply the rule announced by the authorities cited to the facts of this case, in so far as to hold that a married woman could not divest herself and her children of the title to real estate by simply destroying their deed, and consenting that their grantee shall make a deed to another. There is no proof in this record tending to show that the Clarks attempted to resell the property to Porter, or that they had any contract with him by which he was to buy it. As we have said, the facts of this case do not show that Mrs. Clark was estopped to assert her right to the Long Branch land by being present and consenting that Porter might make Rittenhouse a deed therefor. Not being guilty of any act working estoppel on her rights, the only way that Rittenhouse could claim the land as against her would be by showing that she had executed and delivered to him a deed of conveyance in the manner provided by the statute. There is no claim that she and her husband executed and delivered a deed to Rittenhouse for the property; hence she continued to hold the property according to the terms of the deed which Porter had made her, and she was entitled to maintain this action. We might add here that we think, on the facts as proven in this case, if she had conveyed the property to Rittenhouse in the manner pointed out by the statute, the court would have been justified in setting the sale aside. As it is not necessary to do so, we forbear to give the reasons for the latter conclusion. The appellant certainly cannot complain that the court restored to him the property which he had conveyed the Clarks. The judgment is affirmed.

WHALEY et al. v. COMMONWEALTH.
RATLIFF, Sheriff, v. SAME. SAME v.
NICHOLAS COUNTY (two cases).¹

(Court of Appeals of Kentucky. Feb. 27, 1901.)

RECOVERY OF TAXES ILLEGALLY COLLECTED—ACTION BY ONE TAXPAYER FOR ALL—PARTIAL INVALIDITY OF TAX—SEPARATION OF LEGAL FROM ILLEGAL PART—LIABILITY OF SURETIES FOR TAXES ILLEGALLY COLLECTED BY SHERIFF—LIABILITY OF SHERIFF FOR TAXES ILLEGALLY COLLECTED BY DEPUTY—INTEREST—APPROPRIATION OF TAXES TO PURPOSE FOR WHICH NOT LEVIED—RIGHT OF APPEAL.

1. Under Civ. Code Prac. § 25, providing that "if the question involve a common or general interest of many persons, or if the parties be numerous and it is impracticable to bring all of them before the court within a reasonable time, one or more may sue or defend for the benefit of all," one of a number of taxpayers from whom money has been illegally collected as taxes may sue for all, to recover of the collecting officer the money thus illegally collected.

2. In such an action it was proper to direct the master commissioner to ascertain the names of all persons in the county who had paid any part of the illegal tax, and to report the part each one had paid, as the basis of a final decree, and, to authorize this course, it was not necessary that the tax books should be filed as a part of the record; the commissioner having access to them as public records, and the law requiring them to remain in the sheriff's office.

3. Where a county was prohibited by the constitution from levying a tax rate of more than 50 cents in one year, a levy of 25 cents, when 34 cents had been previously levied, was void only as to the excess of 9 cents; the illegal part being separable.

4. Under Const. § 180, providing that "no tax levied for one purpose shall ever be devoted to another purpose," where a surplus remains after the purpose for which a particular levy was made has been accomplished it may be appropriated by the county for general purposes.

5. The sureties in a sheriff's official bond are liable for the county levy collected by him, where no county levy bond has been executed, and the fact that such a bond has been executed is matter of defense.

6. The sureties in a sheriff's bond are not liable for the void part of a county levy collected by the sheriff, and neither the sheriff nor his sureties are liable for the void part of such a levy collected by the sheriff's deputy and not paid over to the sheriff.

7. The sheriff was not chargeable with interest on the void part of the levy collected by him, until there had been a settlement, and the amount due by him had been properly ascertained.

8. Under Const. § 157, providing that no county shall be authorized to become indebted to an amount exceeding in any year the income and revenue provided for such year, "without the assent of two-thirds of the voters thereof voting at an election to be held for that purpose," a vote by two-thirds of the voters of a county in favor of free turnpikes was a vote in favor of incurring the necessary indebtedness for that purpose, and authorized the county to incur an indebtedness in excess of the revenue provided for the year in purchasing the turnpikes in the county.

9. In a contest between a county and taxpayers as to which is entitled to money alleged to have been illegally collected by the sheriff, the sheriff has such an interest as entitles him to appeal from a judgment against him in favor

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

of the taxpayers for that part of the tax held by the court to be illegal, and from a judgment against him in favor of the county for the remainder of the tax collected.

Guffy, Du Relle, and White, JJ., dissenting from certain parts of the opinion.

Appeal from circuit court, Nicholas county.
"To be officially reported."

Action by Aris Wiggins, on behalf of himself and all other taxpayers of Nicholas county, against S. A. Ratliff, sheriff, to recover money alleged to have been illegally collected by him as taxes, consolidated with an action by the same plaintiff on the bond of S. A. Ratliff as sheriff, and also with an action by Nicholas county on the same bond, and also with a motion by the county against S. A. Ratliff for a settlement of his accounts as sheriff. Judgment in favor of taxpayers against the sheriff and his sureties for a part of the tax alleged to have been illegally collected, and the sheriff and his sureties appeal; the sheriff also prosecuting an appeal from a judgment in favor of Nicholas county for the balance found in his hands of that part of the tax held to be valid, and Aris Wiggins prosecuting a cross appeal on behalf of the taxpayers because the whole of the tax in question was not adjudged void. Reversed in part, and affirmed in part.

C. W. Wood and Emmett M. Dickson, for appellants Ratliff and others. Winfield Buckler and J. H. Minogue, for the Commonwealth. Kennedy & Williamson and John F. Morgan, for appellee Nicholas county.

O'REAR, J. Under provisions of the statute permitting counties to acquire turnpike and gravel roads within their limits either by donation, purchase, or condemnation, the fiscal court of Nicholas county on June 25, 1897, contracted with the Maysville & Lexington Turnpike-Road Company, purchasing the latter's road within that county at the agreed price of \$23,000. At the previous November election the question had been duly submitted to the voters of the county whether they were in favor of free turnpike and gravel roads, resulting in a vote of 1,665 for to 483 against the proposition, which was duly canvassed and certified. Other roads had been acquired by the county since the vote named, either by gift or purchase, aggregating about 150 miles. Prior to June, 1897, the fiscal court had levied a tax rate of 34 cents on the \$100 for county purposes for that year, but no part of it for turnpikes or for their repair. On June 25, 1897, the fiscal court made an additional levy of 25 cents on the \$100 for turnpike purposes. At the same time it contracted with the Carlisle & Sharpsburg Turnpike-Road Company to acquire its road at the price of \$15,000. It is claimed, however, that the court had, by the purchase of the Maysville & Lexington road, exhausted the limit of indebtedness which it could incur for that year, under section 157 of the constitution, and therefore the attempted contract with the Sharpsburg road was void.

The order laying the 25-cent levy above named undertook to apply or apportion it among the roads of the county. Of this application, \$2,500 was attempted to be set apart to the Carlisle & Sharpsburg Turnpike-Road Company in part payment of the consideration for its road. The sheriff, appellant S. A. Ratliff, undertook the collection of these taxes, and it is shown that he did collect them,—both levies. There was an issue as to the amount collected, but the appellant is not questioning the finding of the lower court in fixing the amount of the balance not before accounted for by him, which was \$7,605.20. Appellee Aris Wiggins filed an action in the Nicholas circuit court in April, 1898, in the name of the commonwealth of Kentucky for the use of the said Aris Wiggins and all other taxpayers of Nicholas county, and by said Aris Wiggins on behalf of himself and all taxpayers of Nicholas county, in which he set out the foregoing facts, substantially, adding that he was a citizen of Nicholas county, and owned the legal and equitable title to more than \$10,000 worth of real and personal property therein, which had been assessed and was assessable for taxation therein, and that the sheriff, Ratliff, had proceeded to collect and had collected from the 3,000 taxpayers of Nicholas county the above-named tax (the said 25-cent levy), amounting, it was alleged, to some \$10,000; that the sheriff had collected it, and the taxpayers had paid it, under a mutual mistake of law and fact, each believing the levy was valid and that they and their property were liable to pay it; that the sheriff had asserted the whole tax as a lien against their property, and would have distrained it but for their payment. He brought the suit in equity on behalf of himself and the other 3,000 taxpayers of Nicholas county to recover the whole of the tax represented by the 25-cent levy, contending it was void. While this action was pending, appellant was ruled by the Nicholas county court to settle for the county levy collected by him for the year 1897, and appointed a commissioner to make the settlement, who reported, charging the sheriff with the taxes on the total assessed valuation of the county, less exoneration and delinquents, at the rate of 59 cents on the \$100. From this settlement the sheriff appealed to the circuit court, and the proceeding was consolidated with the suit of Wiggins, above named. The circuit court adjudged the excess above 50 cents levied by the fiscal court of Nicholas county to be in violation of section 157 of the constitution, limiting the maximum tax rate for any one year to 50 cents, and corrected the settlement to that extent, and in some other minor particulars, remanding it to the fiscal court. That body adopted the judgment of the circuit court, and demanded of the sheriff the payment of the balance thus fixed, which he declined to pay; and the fiscal court ordered suit instituted upon his bond, which was done, and that suit also consolidated with the Wiggins suit. When the court adjudged the 9 cents excess

void, Wiggins, on behalf of himself and all other taxpayers of Nicholas county, instituted an action in the Nicholas circuit court against appellant Ratliff, sheriff, and appellants H. Whaley, W. B. Ratliff, and Waller Sharp, as sureties on his official bond, to recover of them the tax illegally collected and withheld by the sheriff. This last-named suit was heard and adjudged, resulting in a judgment in favor of the plaintiffs, and the sheriff and his sureties have prosecuted this appeal. The sheriff has also prosecuted appeals from the judgment declaring only the 9 cents of the 25-cent levy void, and from the judgments of the circuit court requiring him to pay to Nicholas county the balance found in his hands of the 16 cents that was held to be valid. His sureties have appealed from the judgments making them liable for any part of the tax collected. Wiggins prays a cross appeal because the whole of the 25-cent levy was not adjudged void. Their cases have been ordered heard together, and are so determined.

Numerous questions of practice and matters of law are urged, many of them not sufficiently material, in our opinion, to warrant reversal if we should concur that they were indeed errors. Those questions of a more serious nature we will state and dispose of in their order: (1) The right of Wiggins to maintain this action. (2) Whether the lower court adopted a correct method in directing its master commissioner to ascertain the names of all persons who had paid taxes for the year 1897, and the amounts so paid by them, respectively, and that $\frac{9}{100}$ of the sum so paid by each of them should be reported as the basis of a final distribution. (3) Was the 25-cent levy void in toto, or only the 9 cents in excess of the 50-cent limit. (4) Was the sheriff and the sureties on his official bond liable for these taxes so collected by him? (5) Was the money collected by the sheriff in excess of the constitutional limitation a liability embraced by the terms of his bond, for which his sureties were liable? (6) Was the sheriff or his sureties liable for such excess collected by a deputy of the sheriff, and not paid to the principal by the deputy? In addition to the above, appellee Wiggins raised these questions on his cross appeal: (7) He claims interest should have been allowed on the judgment in favor of the taxpayers from May, 1898, when the sheriff's answer was due, and when appellee contends he should have tendered the money into court. (8) That the \$2,500 appropriated to the Carlisle & Sharpsburg Turnpike Road Company was void, and the collection of any part of the 25-cent levy, even within the 50-cent limit, was void. (9) That the sheriff, being but a bailee, could not in any event prosecute this appeal, because no substantial right of his is determined or affected. The court has merely adjudged which of two contending claimants is entitled to the fund which he holds for the rightful claimant.

1. In *Blair v. Turnpike Co.*, 67 Ky. 157, this

court held that a sheriff holds the money collected by illegal taxation on a void subscription to turnpikes as a trust fund for the benefit of taxpayers who contribute that fund. Section 25 of the Civil Code of Practice provides: "If the question involve a common or general interest of many persons, or if the parties be numerous and it is impracticable to bring all of them before the court within a reasonable time, one or more may sue or defend for the benefit of all." Before the adoption of the Code in Kentucky a similar practice was indulged as a part of equity jurisprudence, and in line with like practice in other jurisdictions where the common law prevailed. To prevent a multiplicity of suits where one might settle the question at issue and grant complete relief to all interested, courts of equity have long entertained a suit at the instance of one or more of the class affected, suing for all. At one time it was thought, and to some extent it was held, that the rule above noted did not embrace actions by a taxpayer to restrain the collection of or to recover illegal taxes imposed. The reason urged was that there was not a common title, or such identity of interests as so connected the interest of one with all the others as to bring them within the rule; it being argued that each taxpayer's cause of action was complete in itself, and could be maintained or defended without reference to the presence of other taxpayers, and that frequently, and indeed generally, separate defenses would be required to the claim of each, and in event of a judgment in their favor separate recoveries must be adjudged them. The modern tendency has been, though, to extend the rule, codified in the language of section 25, supra, so as to include the class of cases to which this one belongs. From the authorities, and from the weight of the best reasoning defining the principle governing this practice, we find that, where the individual taxpayer may maintain an action at law to recover back the illegal tax which he has paid, all the reasons for exercising the jurisdiction to prevent a multiplicity of suits apply. Although each taxpayer has a remedy by action at law, it is manifestly inadequate and imperfect, and often nominal. By means of the equitable jurisdiction the whole controversy and the rights of each individual taxpayer can be fully determined in one judicial proceeding by one judicial decree. Such questions involve, we may say, public or community rights; and a practical, speedy, expedient, and, as far as may be possible, inexpensive, method should be provided for their settlement. This we think was fairly within the contemplated meaning of section 25, supra. These conclusions, we think, are fully sustained by *Pom. Eq. Jur.* § 270; *Cooley, Tax'n*, p. 769; *Road Co. v. Thomas (Ky.)* 3 S. W. 907; and *Com. v. Tilton (Ky.)* 54 S. W. 11.

2. It follows from the foregoing that the

circuit court proceeded properly in having its master commissioner ascertain the names of all persons in the county who had paid any part of the tax in question, and to report what part decided to have been illegally assessed and collected each one paid, as the basis of a final decree in the action. The tax books in the possession of the sheriff being public records (section 4138, Ky. St.), it was proper that the commissioner should have recourse to them, as the most accessible and best evidence of the amounts assessed to and paid by each person. The objection that these books were not filed in this record is not well taken, because by law they are required to remain among the records of the sheriff's office. If any item of the commissioner's report is questioned, the sheriff was competent as a witness to testify concerning the books, and certainly could not have been misled or injured by his having their custody, instead of the commissioner.

3. It is argued for the taxpayers that as the constitution prohibits the levy of any tax rate in one year, in a county of which Nicholas is of a class, of more than 50 cents on the \$100, the levy of 25 cents, when 34 cents had been previously levied, was void; that it being one sum, and not separable, the whole of that levy was void. The general rule on this subject is, if the illegal tax or an illegal item embraced in the levy be separable from the remainder, that which is above the legal limit will be void, while that within will be upheld. Many eminent authorities may be cited to support this doctrine. In this state, in *Levi v. City of Louisville*, 97 Ky. 894, 30 S. W. 973, 28 L. R. A. 480, this principle was recognized in the following statement: "The legal part of this levy can be separated from the illegal, and the omission to assess certain personal estate in the proper mode will not render the entire ordinance inoperative. 1 *Desty, Tax'n*, 468." Nicholas county having adopted the free-turnpike system, its fiscal court was authorized to levy as much as 25 cents on the \$100 for road and bridge purposes each year, provided the total levy for the year did not exceed 50 cents on the \$100. That court was the sole judge of the necessity of the levy, and of the manner in which it should be applied upon its roads. If it went beyond the constitutional restriction, only that part that is without the court's power is contrary to the law. In *Mix v. People*, 72 Ill. 242, this principle is tersely discussed, the court saying in part: "It is also insisted that even if the levy was made, it being in excess of the per cent. allowed by the constitution, the entire levy is void. The eighth section of article 9 provides that the 'county authorities shall never assess taxes the aggregate of which shall exceed 75 cents per \$100 valuation, except for the payment of indebtedness existing at the adoption of this constitution, unless authorized by a vote of the people of the county.' This provision ren-

ders all this tax void which is in excess of the constitutional limit; but the books abound in cases which hold that, in the exercise of a power, any excessive action beyond the power will not vitiate acts within the power, where the acts well performed can be separated from those that are not authorized. Here there can be no question that 75 cents on the \$100 valuation was fully warranted, and that sum can be readily separated from the illegal and unauthorized sum levied in excess of that amount. It requires but a simple calculation to make the separation with precision. In such cases this court has uniformly held that the tax levied within the limit of the power will be sustained when it can be separated from the portion that is illegal. *O'Kane v. Treat*, 25 Ill. 557; *Briscoe v. Allison*, 43 Ill. 291; *State v. Allan*, Id. 456; *Allen v. Railroad Co.*, 44 Ill. 85; *People v. Nichols*, 49 Ill. 517. "It has been so repeatedly held that an illegal levy of tax does not vitiate or affect the portion legally levied, when the two can be separated, that the question must be regarded as settled, and we must decline its further discussion. The court below did not, therefore, err in separating the legal portion of the levy for county purposes from the illegal, and in rendering judgment for the portion authorized by law." This court, in *Davless Co. Ct. v. Howard*, 13 Bush, 101, held that bonds issued in excess of authority conferred by law were void to the extent of the excess only. That view, upon appeal to the United States supreme court, was affirmed. *Davless Co. v. Dickinson*, 117 U. S. 657-665, 6 Sup. Ct. 897, 29 L. Ed. 1026. We are of the opinion that the tax levy of June 25, 1897, was valid to the extent of 16 cents, and void as to the remaining 9 cents; that it was separable, because, only $\frac{9}{100}$ of the total levy for that year being void, it was a matter of simple calculation to determine and eliminate the illegal part. This process is criticised because it is said a part of the 16 cents was appropriated to the payment of \$2,500 to the Carlisle & Sharpsburg road, which it is alleged was void. Even if the appropriation to the Carlisle & Sharpsburg road was void, but a small fraction of the 50-cent levy would be involved in it; and, as the fiscal court had the right to use the valid part of this 25-cent levy in payment of its road expenses, this surplus might be so appropriated. In *Field v. Stroube*, 44 S. W. 363, we held that, where a surplus remains after the object to be obtained by a particular levy had been accomplished, such surplus might be appropriated by the county, even for general purposes, and that such appropriation was not prohibited by section 180 of the constitution. Such a construction is necessary, because it is impossible to fix accurately a tax rate to meet exactly a liability. Exonerations, delinquencies, or miscalculation, decrease or increase of valuation by supervisors or board of equalization, and other un-

foreseen circumstances, will, in every probability, produce either a surplus or deficit of tax; and, if a surplus, to hold that it could never be used for any purpose, except that for which it was specifically levied, would tend to, in time, lay up a public fund entirely unavailable for any public purpose. A construction leading to such an absurd result will be repudiated as not having been within the contemplation of the framers of the constitution.

4. The pleadings show that these actions were based upon the sheriff's official bond, required of him by section 4133, Ky. St. It is not stated that the sheriff executed the county-levy bond provided for in section 1884 of the statutes. The sureties in the official bond might have pleaded the fact of such execution, if it had been a fact, when the actions would have been upon the last-named bond. *Lyons v. Breckinridge Co. Ct. (Ky.)* 42 S. W. 748. But if the county-levy bond was not executed the actions might be upon the official bond. We so held in *Howard v. Com.*, 49 S. W. 406, followed in *Pulaski Co. v. Watson*, 50 S. W. 861, and *Catron v. Com.*, 52 S. W. 829.

5. It follows from what has been said that the sureties upon the official bond of the sheriff were liable to Nicholas county for the 16 cents of the 25-cent levy made June 25, 1897. But, in our opinion, they were not liable to any one for the excess. Their liability is measured by the terms of their bond alone. They engage that their principal shall perform every act which the law required of him as such official to perform, and that, if he fails to do that which he is required by law to do in the discharge of his official duties, they will answer for such default. *Hawkins v. Com.*, 17 Ky. 146, was an action upon a sheriff's bond, alleging as a breach of its covenants his failure to make or pay over to the plaintiff certain funds represented by the attachments in the sheriff's hands for distraint. It appeared that the writs of attachment were void. Said the court: "If, therefore, each of the attachments is void, it follows that neither of the assignments of breaches shows any breach of the condition of the sheriff's official bond. Though received by the deputy, if void the attachments conferred no authority upon the deputy; and, of course, the plaintiff in the attachments can have no cause of complaint against the sheriff for the failure of the deputy to levy and return the attachments. Nor is the sheriff liable if, as alleged, the deputy received from the person against whom the attachments issued the amount thereof, and failed to pay the same to the plaintiff in the attachments; for, having received the money under void process, the deputy must be considered as holding it for the use of the plaintiff, in whose favor the process issued, not in his official capacity, but as a private individual; and it is to him, and not to the

principal sheriff, the plaintiff must have recourse for indemnity." *Hammond v. Crawford*, 72 Ky. 76, was an action upon the bond of a county school commissioner for money drawn from the treasury, by virtue of his office, for the school districts of his county, and not paid over. The money appears to have been drawn by the commissioner without the certificate required of him by law. Said the court: "The certificate of the superintendent is required as a precautionary measure to protect the treasury from imposition. But the sureties of a commissioner are not responsible for money drawn from the treasury by him, unless it is drawn according to law; and, in an action against them as sureties, the petition should contain a statement of every fact necessary to show that the auditor had the authority to draw his warrant on the treasurer for the amount drawn by the commissioner." *Griffith v. Com.*, 73 Ky. 281, was an action on a sheriff's bond, alleging as a breach his failure to pay to the plaintiff certain fee bills listed with the sheriff by the plaintiff for collection, and which he had collected, but failed to pay over on demand. The statute made it the duty of the sheriff to receive and collect certain fee bills, which were by law distrainable. The record failing to show that the fee bills in question could have been legally distrained for the sureties were held not liable, the court using this expression: "The sheriff would be individually liable on his covenant to collect and account for the fee bills which he acknowledged he had received, but his sureties are not. They can only be made liable for money collected on writs and process which the law makes it his duty to take and collect." In *Greenwell v. Com.*, 78 Ky. 320, the railroad tax provided by law to be levied in certain districts of Nelson county for the year 1878 had been omitted from the tax levy as fixed by the county court order. The sheriff proceeded to collect and did collect it. Failing to pay it over, action was instituted against his sureties on his bond. In denying recovery of the sureties, this court said: "It is true, that appellants voluntarily executed the bond as the sureties of the sheriff, and by so doing made themselves liable for any of his official defalcations; but here they are proceeded against, not on account of the failure of the sheriff to do what the law required of him, but for failure to do what the law did not require or exact of him and his sureties. * * * Before these sureties can be made liable for this tax, it must appear that the sheriff has failed to discharge some duty imposed on him by law with reference to its collection." *Dawson v. Lee*, 83 Ky. 55, is to the effect that, where the sheriff collects an unconstitutional tax, no such liability attaches therefor to his sureties, that if they pay it off, in supposed discharge of their liability on his bond, they could be

subrogated to the rights of the state. The court held his bond not to cover such supposed liability to the state. In *Osenton's Adm'r v. Burnett*, 41 S. W. 270, this court again and lately said: "The liability of the obligors in an official bond is measured by its terms. * * * If the [tax] collector collected more than was sufficient for that purpose, or might have done so with a reasonable effort, he may be liable to the county; but not so with his sureties." No act which is prohibited by the constitution can ever become a duty. Every act, whether of the legislature, of the judiciary, or of the executive branch of government, in violation of the terms of that instrument, is void ab initio. It is the duty of an officer charged with the execution of an act to know whether it is within the constitution, and, if he have doubts, to refrain from doing it, says Judge Cooley in his *Constitutional Limitations* (page 88). The fiscal court being prohibited from levying the nine cents in question, its action was void; and, of necessity, so was every other act thereafter of whomsoever attempting to enforce it. Consequently it was not the duty of the sheriff to collect it, and therefore it is not covered by the undertakings of his sureties in his bond.

6. Upon the authority of *Hawkins v. Com.*, 17 Ky. 146, cited above, as well as because of the conclusions above set out, neither the sheriff nor his sureties were liable for that part of the unconstitutional tax collected by the deputy, Sparks, and not paid over to the sheriff. That is a personal and individual liability of Sparks to the taxpayers.

7. Until the settlement was completed, and the amount due by the sheriff was properly ascertained, interest should not have been charged; and the circuit court properly fixed the date in accordance with this view.

8. The question now recurs, was the contract made by Nicholas county with the Carlisle & Sharpsburg road, herein before adverted to, beyond the constitutional limit of indebtedness allowed to be contracted by the county? It will be remembered that Nicholas county had bought other roads, costing some \$23,000, and this one of \$15,000, making \$38,000 for that year. The taxable property of Nicholas county was \$3,938,544, and about 3,100 tithes for the year 1897. Section 157 of the constitution provides as follows: "* * * No county, city, town, taxing district, or other municipality shall be authorized or permitted to become indebted in any manner, or for any purpose, to an amount exceeding, in any year, the income and revenue provided for such year, without the assent of two-thirds of the voters thereof, voting at an election to be held for that purpose; and any indebtedness contracted in violation of this section shall be void." Another clause of the section fixes the maximum rate of taxes to be levied by the county under the conditions admittedly existing in Nicholas

county at 50 cents on the \$100. It will thus be seen that the revenues and income of the county for that year were not and could not have been sufficient to meet that indebtedness. The record discloses that the proposition had been regularly and legally submitted at the November election in 1896 whether the county should avail itself of the provisions of the free-turnpike statute; that is, whether the county would adopt the system of free turnpikes in the county, instead of the toll system then in vogue. The record also discloses that there were something over 150 miles of turnpike roads in the county, most or all of them held and operated by private ownership. It necessarily followed that to adopt the free-turnpike system meant to buy or condemn many or all of these roads, and to do either involved the county's assuming the corresponding financial liability represented by their fair value. A vote, therefore, in favor of the proposition necessarily was a vote in favor of incurring the necessary indebtedness to enable the county to carry into effect the voter's will and mandate. And when 1,665 of the voters voting at the election called and held for that purpose voted in favor of the proposition, as against the 483 who opposed it, the requisite two-thirds majority had fairly and sufficiently expressed themselves in favor of incurring the indebtedness. If the proposition submitted to the voter and printed on his ballot had been, "Are you in favor of free turnpikes, and of incurring for the county such debt as may be legally necessary to pay for the turnpikes now owned and operated in the county by private owners?" and if the majority voting in the affirmative had been as shown by this record, no one would have questioned that the result was a fulfillment of the constitutional requirement. The question submitted, "Are you in favor of free turnpikes and gravel roads?" involved fairly and fully the question of necessary indebtedness to pay for them. No other means were possibly available, save the creation of a present indebtedness to be met by future taxation. The court must indulge the presumption that the voters of Nicholas county both knew and intended the construction herein given the proposition. To deny it is to question in the first place their common understanding, as not knowing the necessary and legal results of their action; and in the next place it would be to question their honesty or fair purpose to pay for the roads they were voting to acquire, and which by their votes they were authorizing and directing their fiscal representatives to acquire for their use and in their name. The views, apparently in conflict with this opinion, expressed in *Road Co. v. Wiggins* (Ky.) 47 S. W. 434, seem to have been in response to argument, and, because not necessarily involved in the record then under consideration, merely dicta, and not binding on this court.

9. The sheriff had such interest in the result of these litigations as to entitle him to appeal from the judgments against him.

It follows that the judgments in favor of Nicholas county are each affirmed. The judgment in favor of the commonwealth of Kentucky, for use of Aris Wiggins and other tax payers, against S. A. Ratliff, is reversed in so far as it adjudges against Ratliff any part of the illegal tax collected by his deputy, Sparks, and not paid over to Ratliff, and affirmed in all other respects. The judgment in the case of Wiggins, for the use of the taxpayers, against Whaley and others, the sheriff's sureties, is reversed. The judgment on the cross appeal of Wiggins for himself and others is affirmed. In so far as these causes are reversed, they are remanded for proceedings consistent herewith.

GUFFY and DU RELLE, JJ., dissent from that part of the opinion holding the incurring of the obligation for the Carlisle & Sharpsburg road a legal liability against the county. GUFFY, DU RELLE, and WHITE, JJ., dissent from the views of the opinion holding the sureties not liable for that part of the tax collected by the sheriff and his deputy, held herein to have been in violation of the constitution.

MORRIS' ADM'R v. LOUISVILLE & N. R. CO.¹

(Court of Appeals of Kentucky. Feb. 27, 1901.)

PEREMPTORY INSTRUCTION — RAILROADS — EJECTION OF TRESPASSER FROM TRAIN — FAILURE OF EVIDENCE TO SHOW EJECTION.

1. The giving of a peremptory instruction for defendant, where there is no evidence tending to show a right of recovery on the part of plaintiff, does not deprive plaintiff of his constitutional right of a trial by jury.

2. Where the facts are undisputed, and there is no room for honest difference of opinion as to their effect, or the reasonable inference to be drawn therefrom, it is proper to give a peremptory instruction.

3. Two men entered a freight car at B. for the purpose of stealing a ride to a distant station. After passing one station, the train stopped at a place at which it was not accustomed to stop, and several hours thereafter the two men were found at that place, near the track, unconscious from injuries which seemed to have been inflicted by some blunt or heavy instrument. It was the duty of the servants in charge of the train to eject trespassers on discovering their presence. In an action against the railroad company to recover damages for the death of one of the men, held, that a peremptory instruction for defendant was proper, as the jury could not infer that the men were ejected from the train, and that unnecessary force was used in ejecting them.

Appeal from circuit court, Warren county.
"Not to be officially reported."

Action by the administrator of Cooper Morris against the Louisville & Nashville Railroad Company to recover damages for the death of plaintiff's intestate. Judgment for defendant, and plaintiff appeals. Affirmed.

Rodes & Rodes, Proctor & Herdman, and Sims & Covington, for appellant. J. A. Mitchell, H. W. Bruce, E. W. Hines, and W. D. Hines, for appellee.

PAYNTER, C. J. This action was instituted by the appellant against the appellee, its agents and employes who were in charge of freight train No. 113 on its road. It is averred, in substance, that train No. 113 was a through freight running from Bowling Green, Ky., to Paris, Tenn.; that it started south on its trip at 12:30 o'clock a. m. on April 11, 1897; that the decedent, Cooper Morris, and also Mason Thomas, were riding thereon in a stock car; that the rules of the company required its employes to eject them from the train when found thereon; that, acting under such rules, they ejected plaintiff's intestate, Cooper Morris, from the train between Bowling Green, Ky., and Clarksville, Tenn., near the town of Rockfield, Ky.; that in ejecting him from the train they did, with gross negligence, wound and injure him in such a way that he died therefrom two days thereafter; that the plaintiff cannot tell, and has no means of knowing, the exact place at which the intestate was so wounded and injured; that the injuries were inflicted by the agents and servants of the appellee somewhere between Bowling Green, Ky., and Paris, Tenn., near Rockfield, Ky., or were inflicted at the place where their bodies were found; that the injuries were caused by the joint and concurring gross negligence of the employes and servants acting for and under the rules of the appellee; that all the defendants were present, aiding and abetting, consenting and approving the wrong and injury inflicted upon the intestate. The administrator of the estate of Cooper Morris, deceased, asked damages on account of his death, which resulted from the alleged injuries. The jury found for the appellee under a peremptory instruction. It is to review the action of the court in giving that instruction that this appeal is prosecuted.

The evidence offered by the plaintiff conduces to show that freight train No. 113 is a through freight running from Bowling Green, Ky., to Paris, Tenn.; that it left Bowling Green at 12:30 o'clock a. m. on April 11, 1897; that about the time it left the intestate and one Mason Thomas boarded it, one of whom had entered a rack or cattle car, and the other was going into it through an opening in its end; that they entered the car without the knowledge of those in charge of the train; that they had started to Clarksville, Tenn.; that they were not again seen by any of the witnesses for the plaintiff until, some hours afterwards, they were found on the side of the railroad near Mrs. Taylor's house, a short distance from Rockfield station; that both of them were unconscious; that they never regained consciousness, and died two or three days afterwards at Bowling Green, where they had been carried,

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

that they had cuts and bruises on their heads, their skulls being fractured,—all of which seemed to have been inflicted by some blunt or heavy instrument; that it was not usual for train No. 113 to stop at Rockfield. There is testimony offered conducing to show that on the night in question, about the time train No. 113 would reach Rockfield, a freight train going south stopped near Rockfield, near where Morris' and Thomas' bodies were found; that no other freight train went south that night except No. 113. The testimony also conduces to prove that each of the injured men had a small amount of money when they left home that night, and when found they still had it,—the latter fact being of value only for the purpose of tending to show that the injuries were not inflicted by a person or persons with a design of robbery. The facts which we are giving are the principal facts proven by the plaintiff.

On the conclusion of plaintiff's testimony the court refused to instruct the jury to find for the defendant, and required it to introduce its testimony, after hearing which, however, the court peremptorily instructed the jury to find for it. In considering the question as to whether a peremptory instruction should have been given to the jury, we will alone determine the matter from the testimony offered by plaintiff. It is insisted on behalf of appellant that the testimony offered was sufficient to authorize the court to let the case go to the jury. While the law guaranties a trial by jury in a case like this, yet this court, and all other courts in the American Union, so far as we are aware, give peremptory instructions in cases where it is proper for them to be given. In cases where peremptory instructions should be given, it cannot be said that in giving them a party is deprived of his constitutional right to a trial by jury. In a case like this he has his trial by jury, but it is the duty of the court to direct the jury as to the law which should govern its deliberation upon the facts submitted to it. Wherever there is any doubt as to the facts, it is the province of the jury to determine the question; or where there may reasonably be a difference of opinion as to the inferences and conclusions to be drawn from the facts, it is likewise a question for the jury. The plaintiff endeavored to show by his testimony that the intestate was not probably injured by being struck by one of the trains on appellee's road, but he failed to show that any of the officers, agents, or servants in charge of the train even knew that the deceased and Thomas had entered the rack or cattle car. Not a single witness testified that either of the appellee's employes on the train did or attempted to eject the deceased from the train. Neither is there any testimony which shows that the deceased had any words with any of its servants or employes, much less a conflict with them. There is no evidence,

as we say, tending to show that they were ejected from the train, and therefore there could be none which tended to show that more force was used in accomplishing the ejection than was necessary. The plaintiff endeavored to show that it was not only the right of those in charge of the train to eject the deceased, but it was their duty to do so. The mere fact that this right and duty existed does not argue that the deceased was discovered, and the duty performed; and certainly no inference would follow that in the performance of such duty the agents and servants of appellee were guilty of a wrong and negligence resulting in the injury and death of the deceased. No one can read the testimony in this case, and say that either or any one of the officers or agents in charge of the train inflicted the injury. The mere fact that they were proven to be on the train does not show that they were forcibly ejected from it, and thereby injured. Assuming that the testimony shows that the train stopped at Rockfield on the night in question, still it is not legitimate to draw the inference from that fact that the men were forcibly and negligently ejected from the train. They might have been put off at that place, and still the men in charge of the train be perfectly innocent of the charge that they had inflicted the injuries upon them. They could have left the train at Memphis Junction, reached the point where their bodies were found, and there received their injuries from some one not connected with the train. They could have been put off the train at Rockfield, and have been injured after the train had departed from that place. The testimony of plaintiff does not develop a single fact which would justify a jury or court to infer that those in charge of the train had any motive to inflict the injuries which the intestate sustained. The fact that it was their duty to put him off if his presence had been discovered on the train, does not create a presumption that he was put off, and at the place where found, or that he was injured in an effort to put him off. The rule of this court is that, notwithstanding the court overrules a motion for a peremptory instruction at the conclusion of plaintiff's testimony, still, after hearing the testimony of the defendant, it may give such an instruction, the testimony of the defendant failing to strengthen that offered by plaintiff. All those in charge of the train testify that they did stop at Memphis Junction, a station about four miles from Bowling Green; that while there two persons were discovered on the train, and at the command of the conductor they left it; and one or two of the witnesses testify that the two men who left it remained standing at the station as the train pulled out. This station is from four to six miles north of Rockfield. All the employes in charge of the train testify that they did not eject Morris and Thomas, never had any conflict with

them, and never inflicted any injuries upon them in any way whatever. A peremptory instruction for a defendant ought not to be given unless, after admitting every fact proven by plaintiff's evidence to be true, as well as all reasonable inferences that can be drawn therefrom, the plaintiff has failed to establish his case. *Fugate v. City of Somerset (Ky.)* 29 S. W. 970. A motion for peremptory instructions admits the facts given in evidence and every reasonable deduction to be drawn therefrom. Where the facts are undisputed, and the court can say there is no room for honest difference of opinion as to the effect of the facts, or reasonable inference to be drawn therefrom, then the court should give a peremptory instruction. *Dolfinger v. Fishback*, 12 Bush, 474. Suppose the court had submitted to the jury the inquiries: Who struck the fatal blow? Who was present when it was struck? The jury would have been forced to say it did not know. If the testimony would force the jury to make that response, then it necessarily follows that no reasonable inference could be drawn from the facts proven that the appellee's employes inflicted the injuries upon the intestate, much less that the injuries were inflicted in the performance of their duties, and that they were the result of more force than was necessary to discharge their duties. In determining the propriety of a peremptory instruction, the court is necessarily bound to do so from the facts of each particular case, and therefore it cannot always have a precedent to follow. However, we have reached the conclusion in this case that the court properly gave a peremptory instruction, and, as in some degree supporting this conclusion, we cite the cases of *Railroad Co. v. Humphrey's Adm'r (Ky.)* 45 S. W. 503; *Gas Co. v. Kaufman (Ky.)* 48 S. W. 434; *Railroad Co. v. Wathen (Ky.)* 49 S. W. 185. The judgment is affirmed.

THOMAS' ADM'R v. LOUISVILLE & N. R. CO. (two cases).¹

(Court of Appeals of Kentucky. Feb. 27, 1901.)
NEW TRIAL—NEWLY-DISCOVERED EVIDENCE.

The court properly refused a new trial asked upon the ground of newly-discovered evidence which was merely cumulative.

Appeal from circuit court, Warren county.
"Not to be officially reported."

Action by the administrator of Mason Thomas against the Louisville & Nashville Railroad Company to recover damages for the death of plaintiff's intestate. Judgment for defendant, and plaintiff appeals. Affirmed.

Action by the administrator of Mason Thomas against the Louisville & Nashville Railroad Company for a new trial. Judgment for defendant, and plaintiff appeals. Affirmed.

Proctor & Herdman, Rodes & Rodes, and Sims & Covington, for appellant. Edward W. Hines, J. A. Mitchell, H. W. Bruce, and W. D. Hines, for appellee.

PAYNTER, C. J. The plaintiff's intestate, Mason Thomas, received his injuries at the same time and under the same circumstances that Cooper Morris received his, from the effects of which he died. The facts proven on the trial by plaintiff were substantially those proven on the trial of the case of *Morris' Adm'r v. Louisville Railroad Co.*, 61 S. W. 41, in which the court this day delivered an opinion. The lower court gave a peremptory instruction in this case as in the *Morris Case*. Having reached the conclusion in that case that the court properly gave that instruction, it is unnecessary here to again discuss the facts, as the same conclusion must necessarily be reached. After a verdict had been returned for the defendant on a peremptory instruction, the plaintiff instituted an action asking a new trial upon the grounds of newly-discovered evidence, being the testimony of one Sanders. This testimony was on the subject as to whether freight train No. 113 stopped at Rockfield on the night the parties received their injuries. It was merely cumulative. His testimony was heard for the plaintiff in the *Morris Case*. We are of the opinion that the court properly sustained a demurrer to the petition in which a new trial was sought. Both judgments are affirmed.

MAYFIELD WOOLEN MILLS et al. v. CITY OF MAYFIELD et al.¹

(Court of Appeals of Kentucky. March 6, 1901.)

MUNICIPAL CORPORATIONS—CONSTITUTIONAL LIMITATION OF TAX RATE AND INDEBTEDNESS—CONCLUSIVENESS OF COUNCIL'S DECISION AS TO NECESSITY OF TAX.

1. A contract by a city with a water company for the payment of water rent, which was entered into prior to the adoption of the constitution, created an "indebtedness," within the meaning of Const. § 157, providing that the tax rate of cities having less than 10,000 inhabitants shall not exceed, for other than school purposes, 75 cents on the \$100, "unless it should be necessary to enable such city * * * to pay the interest on, and provide a sinking fund for the extinction of, indebtedness contracted before the adoption of this constitution."

2. The authority given the city to levy a tax to pay interest on, and provide a sinking fund for the extinction of, an indebtedness, authorizes the levy of a tax to pay installments of such indebtedness which, by the terms of the contract creating it, fall due from year to year.

3. The courts cannot inquire as to the necessity of a tax levy made by a municipal council within the limits prescribed by the constitution.

4. A tax levy, within the constitutional limit for the payment of current expenses, is not rendered void by reason of the fact that the intention is to pay it to parties with whom the city has a void contract for lighting the city.

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

Appeal from circuit court, Graves county.
"To be officially reported."

Action by the Mayfield Woolen Mills and others against the city of Mayfield and its tax collector to enjoin the collection of a tax. Judgment for defendants, and plaintiffs appeal. Affirmed.

Robertson & Thomas and Crossland & Webb, for appellants. D. G. Park and W. K. Wall, for appellees.

DU RELLE, J. Appellants, taxpayers of the city of Mayfield, brought suit against the city and its tax collector, seeking to enjoin the collection of 25 cents of the tax rate of \$1 on the \$100 worth of taxable property, levied for the year 1900. By the averments of the petition, it appears that Mayfield is a city of the fourth class; that in all the years since it became a city of the fourth class, until the year 1900, it levied a tax of only 75 cents on the \$100; that the city had not created more indebtedness for the year 1900 than existed for any of the preceding years; and that the rate of taxation complained of was not for school purposes, nor necessary to enable the city to pay interest on indebtedness previously contracted, nor to provide a sinking fund for the extinguishment of indebtedness contracted before the adoption of the constitution. For the year 1900 the levy ordinance fixed the rate of taxation at \$1 on each \$100 worth of property, the ordinance providing that "seventy-five per cent. of such tax is levied for the purpose of paying the current expenses of the city of Mayfield for the year 1900, other than the water rent, and twenty-five per cent. of such tax is levied for the purpose of paying the Graves County Water & Light Company for rent of water for the year 1900, said debt for water having been contracted for, and being an existing indebtedness against said city, at and prior to the adoption of the present constitution of Kentucky." It was averred that the ordinance, to the extent of 25 per cent. of the taxes levied by it, was void, under section 157 of the constitution. A demurrer having been sustained to the petition, an amended petition was filed, averring that at the adoption of the present constitution, and continuously since that time, Mayfield has been a city of more than 3,000, and less than 8,000, inhabitants; that it was made a fourth-class city by the act of the general assembly approved September 30, 1892, and that the act for the government of cities of the fourth class became a law June 28, 1893; that under subsection 2, § 3490, Ky. St., being part of the act for the government of cities of the fourth class, the city has power to levy an ad valorem tax of 75 cents only on the \$100 worth of property, and in addition not exceeding 50 cents on the \$100 worth of property for the maintenance of schools, and not exceeding 50 cents to meet the prin-

cipal and interest of any bonded debt thereafter authorized, such bonded debt referred to being the bonded debt authorized to be incurred by a vote of the people; that the indebtedness sought to be met by the taxes complained of was not created by a vote of the people, nor were such taxes for school purposes, or for the erection or improvement of any public school building or buildings, nor levied under the provisions of any law existing prior to the adoption of the present constitution, nor was such "indebtedness contracted under any law providing for any levying or collecting any taxes" by the city. It was further alleged that the boundary of the city has not been changed; that there are no more streets to be kept in repair, and no more necessity for an increase of the current expenses, than had existed continuously since the adoption of the constitution, and that all the current expenses of the city, and the indebtedness for which the tax complained of was levied, had been paid in prior years with the levy of only 75 cents on the \$100 worth of property; and that the assessed valuation of the property in the city had continuously increased during that period, and that the increased rate of 25 cents was not necessary to enable the city to pay that indebtedness. It was further alleged that, without any vote of the people, the city had increased its annual indebtedness in the sum of \$8,581, the averments showing that this increase of annual indebtedness was an increase of expenses caused by increasing the number of policemen, the number of street lights, for brick streets, etc., and that the city had no right to contract such increased indebtedness, or any indebtedness which, added to the existing one, would necessitate the 25 per cent. increase of the tax rate. In an additional paragraph it was alleged that in 1893 the city entered into a contract with the Graves County Water & Light Company, in which it agreed to pay the company the sum of \$1,660 per year for 10 years thereafter to furnish electric lights for the city, and that by that contract it became indebted to the Graves County Water & Light Company in the sum of \$16,600; that only two years of its contract with that company for water hydrants had then expired, and it was liable on that contract for 23 years, at \$3,840 per year, or a total sum of \$88,320; that the assessed value of the taxable property of the city for the year preceding the year the additional contract for lights was made was \$1,200,000, and that the existing indebtedness for water hydrants exceeded 5 per cent. of the assessed value of the taxable property of the city, and therefore the contract for the electric lights was in violation of section 158 of the constitution; that 16 cents of each dollar of the tax levied was levied for the purpose of paying what was due on the contract for said lights for the year 1900, and that the levy was void to that extent. A

demurrer to the petition as amended was sustained, and, the plaintiff declining to plead further, the petition was dismissed.

A number of questions are made as to misjoinder of plaintiffs, departure in the amended petition, and upon motions to strike out parts of the pleadings; but, in the view we have taken of the law of the case, it is not necessary to determine any of these.

By section 157 of the constitution, which is relied on in the original petition, it is provided that the tax rate of cities having less than 10,000 inhabitants shall not exceed, for other than school purposes, 75 cents on the \$100, "unless it should be necessary to enable such city * * * to pay the interest on, and provide a sinking fund for the extinction of, indebtedness contracted before the adoption of this constitution." The contention, therefore, upon the original petition, is that, admitting the contract for water hydrants to be an indebtedness existing at the time the constitution was adopted, nevertheless, because a tax rate of 75 cents had, for a number of years after the adoption of the constitution, been sufficient, not only to pay the current expenses of the city, but also to provide for the current installment due under that contract, such current expenses should never be increased so as to require a tax levy in addition to the 75-cent rate to meet such liability existing at the time of the adoption of the constitution, or, at least, that such expenses should not be so increased unless there existed a necessity for the increase, and that the courts must determine the existence of the necessity.

It is nowhere averred that the contract with the water company for water rent had not been entered into prior to the adoption of the present constitution, though some of the averments of the amended petition seem framed with the intention of approaching such an averment, and the existence of the facts relied upon to make the tax illegal should appear clearly by the averments. Indeed, appellants' brief seems to concede the existence of this contract, and it is practically conceded by the recital in the amended petition averring the length of time it had to run when the additional contract for lights was entered into. That the contract thus existing at the date of the adoption of the constitution was an indebtedness, within the meaning of section 157, seems to be settled beyond all question by the case of *Beard v. City of Hopkinsville*, 95 Ky. 239, 24 S. W. 872, 23 L. R. A. 402. It follows, therefore, that unless the courts can inquire into the necessity of a tax levy made by the municipal legislature within the limits prescribed by the constitution, this objection cannot be sustained. It seems to be well settled that such inquiry cannot be made. "The tax in question was authorized by the city charter, and in such case whether its imposition be necessary is a matter for the

determination of the taxing power." *Anderson v. City of Mayfield*, 93 Ky. 234, 19 S. W. 598.

The 25-cent levy is also objected to upon the ground that the provision of section 157, above quoted, provides only for the levy of a tax to pay the interest on, or to provide a sinking fund for the extinction of, such pre-existing indebtedness, and does not authorize a levy to pay the debt directly. Subsection 28, § 3490, Ky. St., was adopted by virtue of section 157. It provides that nothing in the act "shall be construed to prevent any city having an indebtedness contracted under laws existing at the date of the adoption of the present constitution of Kentucky from levying and collecting such taxes for the payment of such indebtedness, and the interest thereon, as are provided for in such laws, in addition to the tax herein authorized to be levied and collected." This indebtedness was not only contracted in accordance with laws in existence at the date of the constitution, of which we take judicial notice, but was itself contracted before the adoption of that instrument. That contract could not be affected or invalidated by the adoption of the constitution. See *Freeman's note to Beard v. City of Hopkinsville* (Ky.) 44 Am. St. Rep. 241 (s. c. 24 S. W. 872, 23 L. R. A. 402).

Nor are we able to see the force of the contention that the express exception authorizing the city to levy a tax to pay interest on, and provide a sinking fund for the extinction of, an indebtedness does not include in its terms authority to levy such a tax to pay installments of such indebtedness, which, by the terms of the contract creating it, fall due from year to year. In construing section 158 of the constitution, this court, through Judge Hazelrigg, in *Holzhauser v. City of Newport*, 94 Ky. 405, 22 S. W. 754, said: "But in express terms the limitation of ten per centum may be exceeded when the proposed indebtedness 'has been authorized under laws in force prior to the adoption of this constitution.' There is no limit indicated to this excess. From the very nature of the case, there could be none. At least the actual condition of the cities and towns, with respect to the sums they owed, could not be affected by the constitution. These debts, however large, and by whatsoever extent they might in fact exceed the conservative limit imposed under the constitution, could not be legislated out of existence."

When we come to consider the amendment, we find the basis of the contention to a large extent changed. Waiving the question of departure, we find it contended that because the aggregate amount of the annual payments to be made under the water contract during the whole period of the contract will be \$88,320, and the indebtedness provided for by the contract for lights would

amount to \$16,600, the tax levy of 16 cents for rent of lights provided for by the levy ordinance set out in full in the petition is invalid, under section 158 of the constitution, because the aggregate indebtedness, under both the contracts referred to, is more than 5 per cent. of the total of taxable property in the year 1892, which was the year before the second contract alleged was entered into. We must read these averments of the amended petition in connection with the provisions of the ordinance set out in the original petition, for the averments themselves show that they are made with reference to those provisions. The ordinance does not show that the levy of 16 cents is to pay a pre-existing indebtedness; but, on the contrary, that it is to pay a part of the current running expenses of the city for that year, and to that extent limits and controls the averments of the amended petition. Whether the 16-cent levy is in fact to be paid in compliance with such a contract as the one alleged in the amendment becomes immaterial, for the same pleading admits that this very levy is to pay a part of the current expenses for that year. Being for current expenses, and within the constitutional limitation for that purpose, it makes no difference whether it is intended to pay it to the parties with whom the city has a void contract or not. The only question is whether it is a necessary or proper current expense, and that question is to be settled by the municipal council, which alone has the jurisdiction to decide it. We are not deciding that in proper proceeding the contract complained of may not be declared void or its execution enjoined. But if in such proceeding such judicial action were already taken, it would still be necessary to run the city; the city government would still live for that purpose, and would still have power to make a levy of 16 cents on the \$100 to provide for city lights. *Nicholasville Water Co. v. Board of Councilmen* (Ky.) 36 S. W. 549. Whether the contract is void or not is not now the question. The question here is solely as to the powers of the municipality to levy a tax for current expenses within its constitutional limitation. "In all legal proceedings, after proper evidence is given of municipal action, it is always to be assumed that the municipality, whether represented by its people or by its official board, has acted wisely and well upon all matters of policy and of discretion which have been submitted to it, and that the conclusion was warranted by the facts and circumstances which were the basis of its action. The courts have no power to review their action so long as they are found to have kept within the limits of their authority. The legislature, which gives and recalls, at pleasure, the power to tax, may do so, but not the courts." *Cooley, Tax'n* (2d Ed.) 342. For the reasons given, the judgment is affirmed.

COLSON v. COMMONWEALTH.¹

(Court of Appeals of Kentucky. March 6, 1901.)

FORGERY—CHARACTER OF WRITING FORGED.

Neither under the common law, nor under Ky. St. § 1188, providing for the punishment of any person who shall forge "any writing whatever, whereby fraudulently to obtain the possession of or deprive another of any money or property, or cause him to be injured in his estate or lawful rights," or who "shall utter and publish such instrument knowing it to be forged," can a man be punished for publishing a writing to which the name of a woman has been forged, purporting to be an invitation to him to come to her house at night for a private conversation.

Guffy, J., dissenting.

Appeal from circuit court, Knox county.

"To be officially reported."

John Colson was convicted of uttering and publishing a forged instrument, and he appeals. Reversed.

B. B. Golden, for appellant. Robt. J. Breckinridge and C. J. Whittemore, for appellee.

WHITE, J. Appellant was indicted, tried, and convicted of the crime of uttering and publishing a forged instrument. His punishment was fixed at six years in the penitentiary, and he appeals. There was a demurrer to the indictment, which was overruled, and the sufficiency of the indictment is seriously questioned here. The instrument that was charged to have been forged and uttered and published by appellant is a letter purporting to have been written by Ellen Goodin, inviting the appellant to her house for a private conversation. It reads: "Barbourville, Ky., July 27, 1900. Mr. John Colson, Sir, I want you to come here some time when they is nobody hear. I have got something to tell you. It is about what you saw at Mother's. An dont fail to come. You can come some nite when they hant nobody hear. Elen Goodin." In our opinion, it is clear that such writing is not the subject of indictable forgery. Indeed, the attorney general, in his brief, confesses the insufficiency of the indictment. "To constitute an indictable forgery," says Mr. Bishop (section 533, 2 Cr. Law), "it is not alone sufficient that there be a writing, and that the writing be false. It must also be such as, if true, would be of some legal efficacy, real or apparent, since otherwise it has no legal tendency to defraud." In section 523 forgery is defined to be "the false making or materially altering, with intent to defraud, of any writing which, if genuine, might apparently be of legal efficacy or the foundation of a legal liability." Mr. Blackstone defines forgery to be "the fraudulent making or alteration of a writing to the prejudice of another man's right." 4 Bl. Comm. 247. "Forgery

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

is the false making or alteration, with fraudulent intent, of any writing, by which the party committing the act may wrongfully obtain something of value to the prejudice of another's rights because of the apparent legal efficacy of the writing and its capacity to deceive." 13 Am. & Eng. Enc. Law (2d Ed.) p. 1082. The statute upon which this indictment is supposed to rest reads: "If any person shall forge or counterfeit any writing whatever, whereby fraudulently to obtain the possession of or deprive another of any money or property, or cause him to be injured in his estate or lawful rights, or if he shall utter and publish such instrument knowing it to be forged and counterfeited, he shall be confined," etc. Section 1188, Ky. St. Just preceding this section there are set out various instruments declared to be the subject of forgery, and then this section (1188) follows. This section cannot mean that the forging or counterfeiting of any writing is an indictable forgery. The writing forged or counterfeited must be apparently such as will deprive a person of property or estate of a legal right. The words "legal right," as used in the statutes, evidently mean a right that may be enforced in a civil action. The writing charged in the indictment to have been uttered with knowledge that it was a forgery does not come within the class of writings that either under the common law or the statute are subjects of an indictable forgery. On its face there is no appearance of legal efficacy, nor of anything to injure any person in his estate or property or lawful rights. The judgment is reversed, and the case remanded, with directions to sustain the demurrer to the indictment.

GUFFY, J., dissenting.

ELIZABETHTOWN, L. & B. S. R. CO. v. CATLETTSBURG WATER CO.¹

(Court of Appeals of Kentucky. Feb. 27, 1901.)

EMINENT DOMAIN—APPEAL TO CIRCUIT COURT—AMENDMENT OF PETITION—ACCEPTANCE OF AMOUNT AWARDED IN COUNTY COURT—ESTOPPEL TO CLAIM MORE ON APPEAL—DAMAGES TO REMAINDER OF PROPERTY—CROSS APPEAL—LIMITATION—ESTOPPEL TO DENY RIGHT TO CONDEMN.

1. Upon appeal to the circuit court by the plaintiff in a condemnation proceeding, the court did not abuse its discretion in refusing to permit plaintiff to file an amended petition seeking to condemn a smaller part of defendant's lot than that described in the original petition, as the amendment came so late that it might have materially affected the issue to be tried, and necessitated a delay of the trial.

2. Defendant, by accepting under an agreed order the amount awarded in the county court, and executing a bond for its return so far as it might be in excess of the sum adjudged on appeal to the circuit court, was not estopped in the circuit court to claim more than that amount, as the statute required the case to be

tried anew in the circuit court; but as he permitted plaintiff to take possession of the land condemned, and proceed with the building of its bridge at a large cost, he was estopped in the circuit court to question the right of plaintiff to condemn the property.

3. Evidence as to the damages to the remainder of defendant's property from the construction and operation of the railroad, and from the obstruction of the ingress and egress from the property, was admissible, as such damages form a part of the compensation guaranteed by the constitution.

4. The limitation of two years applicable to original appeals does not apply to a cross appeal, which, under Civ. Code Prac. § 755, may be obtained any time before trial.

Appeal from circuit court, Boyd county.

"To be officially reported."

Proceeding by the Elizabethtown, Lexington & Big Sandy Railroad Company against the Catlettsburg Water Company to condemn land. Judgment fixing value of land taken, and plaintiff appeals, defendant prosecuting a cross appeal. Affirmed.

Wadsworth & Cochran and F. T. D. Wallace, for appellant. W. H. Holt, John F. Hager, and Thos. R. Brown, for appellee.

HOBSON, J. Appellee owns a lot 60 by 120 feet on the bank of the Big Sandy river, upon which is its plant for furnishing the city of Catlettsburg with water. On July 23, 1894, appellant filed its petition in the Boyd county court to condemn a triangular piece off of the southwest corner of appellee's lot, 55 feet by 25 feet, containing 687½ square feet. Commissioners were appointed, who on August 10th returned a report assessing the value of the land taken at \$1,283, and the damages to the remainder of the tract at \$3,521, making a total for the whole of \$4,804. Both parties filed exceptions to the report of the commissioners, and a trial was had in the county court before a jury, who returned a verdict fixing the value of the land taken at \$500, and the damages to the remainder at \$4,500, making a total of \$5,000. Appellant prosecuted an appeal from the county court to the circuit court, and the case was there again tried before a jury at the December term, 1895. This jury returned a verdict fixing the value of the land taken at \$1,000, and the damages to the remainder of the tract at \$6,636, making a total of \$7,636. Judgment was entered in the circuit court pursuant to the verdict on January 2, 1896. Both parties excepted and prayed an appeal, but neither took an appeal until December 28, 1897, when the appellant sued out an appeal in this court. On January 5th following, appellee sued out a cross appeal.

In the judgment of the county court, after that part of it granting an appeal to the circuit court, and reciting that appellant had paid into court the amount of the judgment, and that the clerk was directed to hold it subject to the orders of the court, the following agreed stipulation was entered: "By consent of parties hereto the clerk of this

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

court is directed to allow the defendant, the Catlettsburg Water Company, to withdraw the sum of \$5,000 deposited with him, upon said Catlettsburg Water Company executing bond, with good surety, to be approved by the judge of this court, conditioned to hold same subject to the order of the court herein, and to the order of any court to which these proceedings may be carried by appeal, and if, upon a final determination of this proceeding upon appeal, the damages of the defendant should be adjudged to be less than said sum of \$5,000, then it will refund to plaintiff the difference between said sum and the amount so adjudged." Appellee executed bond pursuant to this order, and withdrew the money. The bond, after reciting the order made in the county court, reads as follows: "Now, we, the Catlettsburg Water Company, as principal, and W. A. Patton, William Seymour Edwards, and Thos. R. Brown, sureties, do hereby covenant to and with said Elizabethtown, Lexington and Big Sandy Railroad Company that the said Catlettsburg Water Company, now electing to withdraw said sum of five thousand dollars, as allowed to do by said judgment, will hold same subject to the order of the court in this action, and to the order of any court to which this proceeding may be carried by appeal, and if, upon a final determination of this proceeding upon appeal, the damages of the defendant, Catlettsburg Water Company, should be adjudged to be a less sum than said five thousand dollars so deposited, then and in that event the said Catlettsburg Water Company, together with the said sureties, whose names are signed hereto, will refund and pay to the plaintiff, the Elizabethtown, Lexington and Big Sandy Railroad Company, the difference between said sum of five thousand dollars and the final sum so adjudged on appeal, if any."

In the circuit court, on October 16, 1893, appellant offered to file an amended petition in which it sought to condemn a smaller triangle off of appellee's lot than that described in the original petition. The court refused to allow this amendment to be filed, and appellant earnestly complains of the action of the court in rejecting it. The case had been pending some time, the court has a large discretion as to allowing amendments, and we are not prepared to say that the court abused a sound discretion in refusing an amendment so late in the progress of the cause that might materially affect the issue to be tried, and necessitate a delay of the trial. And, from the whole record, we are by no means satisfied that appellant was materially prejudiced by this ruling.

Appellant also insisted on the trial in the circuit court that appellee, having accepted the \$5,000 under the agreed order above quoted, and executed the bond for its return so far as it might be in excess of the final sum adjudged it, was estopped in the circuit

court to claim anything more than the \$5,000. The statute required the case to be tried anew in the circuit court. This entitled appellee to a verdict at the hands of the jury in the circuit court without regard to the amount adjudged it in the county court. Its accepting the money under the agreed order and bond above referred to was not a waiver of this right. Such were clearly not the contemplation of the parties at the time, according to the evidence, and nothing short of an express waiver of an absolute right of this character could be sustained.

Appellant also insists earnestly that the court erred in permitting evidence to go to the jury as to the damages to the remainder of appellee's property from the construction and operation of the railroad, and from obstruction of the ingress to the property, and the egress from it. This is the most important question in the case, as the court by its instruction allowed the jury to consider these matters in estimating the damages, and the verdict of the jury is plainly based on them in a large measure. While the authorities on the subject are not uniform, the weight of authority and the better reason seem to sustain the ruling of the court below. The law abhors a multiplicity of actions. Our Civil Code of Practice is very liberal in its provisions as to the joinder of causes of action. The just compensation which our constitution guarantees to appellee for the taking of its property must fairly include all those injuries to the remainder of its property growing out of the construction and operation of the road on the strip taken. Section 242 provides: "Municipal and other corporations and individuals invested with the privilege of taking private property for public use shall make just compensation for property taken, injured or destroyed by them; which compensation shall be paid before such taking or paid or secured at the election of such corporation or individual before such injury or destruction." This subject was fully considered in *Eaton v. Railroad Co.*, 51 N. H. 504, 12 Am. Rep. 147; *Trowbridge v. Inhabitants of Town of Brookline*, 144 Mass. 139, 10 N. E. 796, and *Railroad Co. v. Miller*, 132 U. S. 75, 10 Sup. Ct. 34, 33 L. Ed. 267; and the principles announced sustain *Rand. Em. Dom.* § 136: "Where a corporation condemns a part of a tract, it is compelled usually to compensate for pretty much all the effects of construction and operation which can be fairly said to lessen the value of the remainder." All the elements of damage admitted in this case legitimately and naturally result from the construction and operation of the railroad on the location in contest, and it would be practically impossible to separate the damages, and say which might have ensued if no part of appellee's lot had been taken, and the right of way had been located just beyond its borders. It was not contemplated by either the constitution or statute under which the proceedings were had that the in-

jury should be cut in two, and part of it recovered in the proceedings to condemn the property, and part in a separate action.

These are the only errors relied on by the appellant, and we are therefore of opinion, on the original appeal, that there is no error in the judgment complained of. On the cross appeal it is insisted that appellant is without authority to condemn property under the statute, as it has leased its road to another company for 250 years; that the land taken is not necessary for its purposes; and that, being already dedicated to public use, it cannot be condemned, where to do so will destroy the public use to which it is already dedicated.

The cross appeal was not taken within two years after judgment was rendered, and it is insisted for appellant that it cannot, therefore, be considered. Counsel rely on *Brown v. Vancleave*, 86 Ky. 381, 6 S. W. 25, and *Chamberlain v. Berry's Ex'r* (Ky.) 56 S. W. 659, as sustaining this conclusion. In *Brown v. Vancleave* it was held that the judgment from which the cross appeal was taken was not the same as that from which the original appeal was taken, and therefore that the cross appeal did not lie. In that case it was also held that, as the cross appeal was not taken within two years after the judgment it sought to reverse was entered, it could not be sustained as an original appeal, and it was therefore dismissed. In *Chamberlain v. Berry's Ex'r* the chancellor's judgment was affirmed on the original and cross appeals on the facts, and no ruling was made on the motion to dismiss the cross appeal. The question before us is therefore not determined by either of these cases. Section 755 of the Code of Practice provides: "The appellee may obtain a cross-appeal at any time before trial by an entry on the record of the court of appeals." A cross appeal cannot be obtained until the original appeal is taken, and, by the express words of the statute, may be taken thereafter "at any time before the trial." Section 745 limits the time of appeals to two years after the right of appeal first accrues, but this section applies to original appeals. It cannot apply to a cross appeal, for that cannot be taken before the original appeal is had. The clear purpose of the statute was to give this court entire control of the merits of the case where an appeal was taken and the appellee sued out a cross appeal. The motion to dismiss the cross appeal is therefore overruled.

It is also insisted for appellant that appellee is estopped to raise the questions above stated by reason of its accepting the \$5,000 under the agreed order, and allowing appellant to go on and take possession of the strip condemned, and proceed with the building of its bridge, at a cost of something like \$400,000. The proof shows that no writ of possession was issued from the county court, but that, after the agreed order was made, appellee itself removed its building from this part of the lot, and suffered appellant to take possession of it, and, without objection, proceed to the building

of its bridge at great cost. The transaction does not seem capable of any other construction than that appellee agreed to take the money and let appellant take the property, and that the sole question to be tried on the appeal in the circuit court was the amount appellee was entitled to. Appellee not only did not appeal from the judgment of the county court, but it suffered appellant, without any process, and plainly by its agreement, to take possession of the property for the purpose of building its bridge upon it. It cannot, therefore, raise any questions as to the right of appellant to condemn the property. The judgment complained of is therefore affirmed on the original and the cross appeals.

JOLLY v. COMMONWEALTH.¹

(Court of Appeals of Kentucky. Feb. 27, 1901.)

HOMICIDE—INSANITY AS DEFENSE—INSTRUCTIONS TO JURY—SUFFICIENCY OF EVIDENCE TO AUTHORIZE MANSLAUGHTER INSTRUCTION—DEFINITION OF MALICE.

1. It was error to instruct the jury that, in order to acquit accused of murder on the ground of insanity, they must believe that at the time of the shooting he "was laboring under such a defect of reason as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know it was wrong," as the court should have further told the jury that they must acquit on that ground if they believed "that as the result of mental unsoundness he had not then sufficient will power to govern his actions by reason of some insane impulse which he could not resist or control."

2. Instead of instructing the jury that if they "entertain a reasonable doubt as to any facts necessary to constitute defendant's guilt they must acquit him," it will be better, on another trial, to instruct them, in the language of Cr. Code Prac. § 238, that, "if there be a reasonable doubt of the defendant being proven to be guilty, he is entitled to an acquittal."

3. Upon a trial for murder, defendant was not entitled to an instruction as to manslaughter, where there was no provocation, and nothing to reduce the crime from murder to manslaughter.

4. Where the death penalty has been imposed, the court cannot say, on appeal, that the substantial rights of accused were not prejudiced by instructions omitting a material ground of defense.

5. Upon a trial for murder, the court should instruct the jury that the words "with malice," in their legal sense, denote a wrongful act done intentionally, without just cause, and that by the term "aforethought" is meant a pre-determination to do the act, however sudden or recently formed in the mind before the act is done.

Paynter, O. J., dissenting.

Appeal from circuit court, Campbell county. "To be officially reported."

John W. Jolly was convicted of the offense of murder, and he appeals. Reversed.

S. C. Bailey, for appellant. R. J. Breckinridge, for the Commonwealth.

HOBSON, J. Appellant was indicted for the murder of Emma Klekamp. The jury to

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

whom the case was submitted found him guilty as charged, and fixed his punishment at death. Judgment was entered upon this verdict. The only grounds of reversal necessary to be noticed relate to the instructions to the jury given and refused by the court on the trial. To understand these properly, we must briefly state the facts shown by the evidence.

The proof showed that appellant, Jolly, was the brother-in-law of the deceased, Emma Klekamp. In July, 1900, Jolly and wife were living at Hamilton, Ohio, keeping house. His mother-in-law, Mrs. Klekamp, and her oldest daughter, Minnie, paid them a visit. Mrs. Jolly came home with Miss Minnie to Newport, where her father lived, bringing with her most of the personal property in the house. Jolly followed them to Newport, and made several unsuccessful attempts to see his wife. He finally secured an interview with her at the office of his attorney, O. W. Root, in which she declined to return to him; the deceased, Emma Klekamp, being present. He was impressed with the idea that his father-in-law and family were keeping his wife from him, and continued his efforts for further interviews, with a view to her return to him, and was greatly disturbed. He stayed at the house of his sister. She testified as follows: "He came to our house on Wednesday morning. I was washing. He says, 'Sister, I am all left alone;' and he said, 'I am going to hunt my wife; I am going to hunt my wife; I am going to hunt her;' and I didn't see him any more until twelve o'clock. I never had him still a moment. He never ate, and he never slept. He done nothing but run and storm. He was off and on, and up and back again. I said to him, 'John, please be still; after a while, perhaps, this will change.' He would answer, 'I can't do it; I can't do it. I love my wife.' Q. Did you see him the day he shot Emma Klekamp? A. He never got up; he was up all night. Q. Where was he that night? A. He never went to bed, and when I came downstairs I put him in the sitting room, and he looked so wild that I never said anything to Mr. Hewitson. And I kept all this from my husband, to try to give him a home, and see if he wouldn't be better. In the night he would go out the side screen door, and go right round again, and leave the door open, and every night our house was left open. I would come down the stairs, and tell him he ought not to unlock the doors. 'I didn't do it, sister,' yet I know he did do it. He was the only one that did do it." Several days before the homicide he had asked his attorney, E. H. Kilpatrick, to write to his wife, and try to get an answer in her handwriting. This was after a number of other letters had been written. Kilpatrick testified as follows: "I noticed that Jolly, he would come into my office some days twenty-five times a day, and at night he would come in there and bother me until

bedtime, and talk foolishly; and every time he had some new hobby, and I noticed that Jolly was, in my opinion, an unsound man. The day before the tragedy I wrote up to Mrs. Jolly to please call at the office. If I could see my handwriting, I could identify it; and I got a little bit of a piece of paper about that size, and I read it to Jolly: 'I will not come; I don't want you to bother me.' That was about fifteen minutes after eleven when it came. Mr. Jolly left my office without saying one word. He was an insane man, if ever I seen one. He left without saying one word. He went out, and in about three-quarters of an hour some one said to me: 'Do you know your client has done an awful thing? He has killed his sister-in-law and his wife, and he is now being taken down to jail in a patrol wagon.' Q. How long was it, you say, before Jolly killed his sister-in-law that you saw him the last time? A. About a quarter after eleven I got that note, and in three-quarters of an hour this terrible thing had been committed. Q. Was he then in a condition to distinguish between right and wrong? A. The man was diseased, and of unsound mind, and I am satisfied the man couldn't distinguish the consequences of his act." After leaving the lawyer's office at 11:15, Jolly next appeared at the Klekamp residence at 11:40. When first seen, he was standing in the kitchen, with a revolver in his hand, holding it up over his head. He asked Emma Klekamp for his wife. She said that his wife was not in. He said he was going to shoot his wife. He then reached for the pantry door. Emma gave Minnie Klekamp, who was sitting in the next room, a sign to call for help. She ran out and cried murder. Jolly opened the pantry door. His wife was in the pantry. He got her out, and drove her in the dining room. Then she got in the pantry again, and he got her out, and as he did so she fell. As she was getting up, he fired on her, shooting her in the back. She crawled out of the kitchen on her hands and knees. He then seized Emma Klekamp, and drew her face down beside him, and, putting the pistol close to her face, shot her through the brain, killing her instantly. Just then help came in, and he was disarmed and taken away. There was other testimony introduced on behalf of appellant, corroborating the statements of his sister and attorney above quoted. There was also testimony by the commonwealth showing that he was not of unsound mind. Mr. Root, who was introduced on his behalf, said he was a mental degenerate.

On this evidence, the court below instructed the jury as follows: "(1) If the jury believe from all the evidence beyond a reasonable doubt that in killing Emma Klekamp, in this county and state, and on the 7th day of August, 1900, the defendant, John W. Jolly, willfully, wrongfully, feloniously, and with malice aforethought, express or implied, shot her with a pistol loaded with a

lead bullet or other hard substance, from which shooting said Emma Klekamp then and there died, they will find him guilty of willful murder, and in their discretion fix his punishment at death or confinement in the penitentiary for and during his natural life; otherwise, they will acquit him. (2) If, however, the jury believe from all the evidence that the defendant, John W. Jolly, on the 7th day of August, 1900, in this county and state, in killing said Emma Klekamp, shot her with a pistol loaded with a lead bullet or other hard substance, from which shooting said Emma Klekamp did then and there die, but also believe that at the time of said shooting said John W. Jolly was laboring under such a defect of reason not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know it was wrong, they will acquit him on the ground of insanity, and so state in their verdict. (3) If the jury entertain a reasonable doubt as to any facts necessary to constitute defendant's guilt, they must acquit him."

The only defense relied upon for appellant was insanity. It will be observed that the second instruction, which defines the degree of insanity rendering appellant irresponsible criminally for his act, sets it out as such a defect of reason as to disable him from knowing the nature and quality of the act, or, if he did know it, from knowing that it was wrong. The absence of self-control by reason of unsoundness of mind is entirely omitted. Many insane persons have remarkable intelligence, and are yet truly of unsound mind and wholly irresponsible. In *Graham v. Com.*, 55 Ky. 592, the jury were instructed that "the true test of responsibility is whether the accused had sufficient reason to know right from wrong, and whether or not he had a sufficient power of control to govern his action." In *Smith v. Com.*, 62 Ky. 224, the subject was discussed at length, and this instruction was approved as expressing the true rule. It is true that this case, in so far as it lays down the rule applicable to insanity from voluntary intoxication, was overruled in *Shannahan v. Com.*, 71 Ky. 463, but it has not been otherwise criticized. On the contrary, it is referred to with approval in *Kriel v. Com.*, 68 Ky. 362, where the instruction above quoted was also given. It was also given and approved in *Brown v. Com.*, 77 Ky. 398. These cases are in accord with the great weight of modern authority, and were recently followed in *Abbott v. Com.* (Ky.) 55 S. W. 196. In lieu of instruction No. 2 above quoted, the court should have instructed the jury as in instructions "a" and "b" given in that opinion.

The first instruction given by the court is objectionable in its phraseology, and it will be better, on another trial, to give in lieu of it instruction No. 1 asked by the commonwealth, substituting the words, "before the finding of the indictment herein," for the

words, "on the 7th day of August, 1900," in that instruction.

The third instruction may not have misled the jury; for, taking all the instructions together, they perhaps understood that the facts necessary to constitute appellant's guilt were those set out in the preceding instructions. But, as this court has often said, in instructing on reasonable doubt it is best simply to follow the language of the Code: "If there be a reasonable doubt of the defendant being proven to be guilty, he is entitled to an acquittal." Section 238.

The court properly refused to instruct the jury on the law of involuntary manslaughter. There was absolutely no provocation, and nothing to reduce the crime to manslaughter. It is earnestly argued for the commonwealth that, in view of the facts of the case, the judgment should be affirmed on the ground that the substantial rights of the appellant were not prejudiced. But in a case where the death penalty has been imposed we do not feel at liberty to say that the substantial rights of the appellant were not prejudiced where the only defense on which he relied was unduly curtailed by the instructions given the jury, and a material ground of defense entirely left out. To hold otherwise would be for this court to determine his guilt or innocence, and deny him a trial on the merits of his case before a jury of his peers, as provided by the constitution.

In addition to the instructions we have indicated, the court should, on another trial, instruct the jury that the words "with malice," in their legal sense, denote a wrongful act done intentionally, without just cause, and that by the term "aforethought" is meant a predetermination to do the act, however sudden, or recently formed in the mind, before the act is done. It has been held error to instruct the jury that malice may be implied from certain facts; but it is proper to define the technical terms used in the charge, for without this the jury may be misled by them. There was no error in overruling the demurrer to the indictment, or in the admission or rejection of evidence. Judgment reversed, and cause remanded for a new trial, and for further proceedings consistent with this opinion.

PAYNTER, C. J., dissents.

WILLIAMS v. GOBBLE et al.

(Supreme Court of Tennessee. Feb. 9, 1901.)

NEGLIGENCE — EVIDENCE — ADMISSIBILITY — MASTER AND SERVANT — INJURY TO THIRD PERSON — INSTRUCTIONS.

1. Plaintiff's minor son, who was employed by his father, whose wheat was being threshed, as water carrier, was injured by stepping on a defective platform over a horse power operated by defendants in connection with their threshing machine. *Held*, that the admission of plaintiff's evidence showing the condition of the platform the day before the accident, and

that defendants' attention was called to it, was not error.

2. Defendants operated a horse-power thresh-er, and furnished the necessary machinery, horses, and driver to thresh plaintiff's wheat. Plaintiff's minor son, who was employed by his father as water carrier, was injured while complying with the driver's directions. *Held*, in the absence of evidence that the driver had any authority or superintendence over any of plaintiff's employes, that it was error to charge that the defendants were liable for his acts.

Appeal from circuit court, Lawrence county; Sam Holding, Judge.

Action by Joel Williams against W. A. Gobble and others. From a judgment for plaintiff, defendants appeal. Reversed.

R. B. Williams and J. B. Wagstaff, for appellants. W. R. King and J. B. Garnett, for appellee.

WILKES, J. This is an action for damages brought by a father for injuries to his minor son. There was a judgment in the court below for \$1,000 for the plaintiff, and defendants have appealed.

It appears that the defendants were operating a horse-power wheat-threshing machine in Lawrence county, and Joel Williams, a lad of about 13 years of age, was engaged in bringing water to the hands who were attending the thresher. The boy, in passing between the levers to which the horses were attached, in order to give water to the driver, who stood upon a platform erected over the center of the machinery, was caught and badly crippled by the levers or other apparatus forming a part of the motive power of the thresher. There are three counts in the declaration,—one that there was a defect in the platform on which the driver stood, and when the boy stepped upon it his foot slipped through a hole in the floor, and was caught by the revolving machinery and injured. The other two counts appear to be based upon the theory that the water carrier was directed by the driver to bring the water to him on the platform while the machinery was in motion, and that this order was attended with danger, and this would make the master responsible. The theory of plaintiff is that he is entitled to recover, first, because of the dangerous order given by the driver, especially to one of tender years, and in view of the dangerous character of the machinery. The defendants contend that they are in no wise responsible for the injury done; that there was no hole in the platform; that they are not responsible for the order of the driver, because, in the first place, no such order was given, and, in the second place, if given, it was the request of the driver, for which the defendants were not responsible. In the additional assignment filed it is stated that there is no proof of the nature and value of the boy's earning capacity, and that the verdict, in any event, is excessive, and there is no evidence to sustain it. It appears from the record

that the defendants furnished the machinery and the driver and horses, but that the hands necessary to handle the wheat and wait upon the machinery were furnished by the parties whose wheat was being threshed. There is a conflict in the evidence as to whether there was a hole in the platform. The plaintiff and his son testify that there was, and several witnesses testify that there was such a hole the day before, and that defendants' attention was called to it. It is also stated that the platform was exhibited to the jury, and there was a hole in it, and the dimensions are given. The testimony as to the condition of the platform on the day before was objected to on the ground that it should have related to the exact time of the accident. One of the defendants testifies that this hole had been closed two or three days before the accident. He admits that some one called his attention to it, but does not remember who. Williams, the father, states that he called defendants' attention to it the day before. We think there was no error in the admission of this testimony, and that there is sufficient proof under the rule to warrant the jury in believing that the platform was defective, if this were all. The exceptions to the testimony are general, and not specific, that the platform was defective. There is also proof of the boy's age, proof of medical expenses incurred, and proof of the nature and extent of the injury sustained, and of the earning capacity of the boy. The injury resulted in the amputation of the left leg about four inches above the knee. It is true, there is evidence tending to show that the platform was not defective; that the boy needlessly stepped upon it, and of his own motion, and not at the direction of the driver; but the questions of fact were fairly submitted to the jury, and it found for the plaintiff.

Upon the feature of the case presented by the second and third counts of the declaration there is more difficulty. That it was not a place of safety to which the boy went fully appears from the record. To pass between the levers among the horses and into the net work of machinery with the moving levers revolving around and over the braces, stays, cogwheels, etc., was an obviously dangerous experiment, and one the danger of which the jury may have been justified in believing that the plaintiff, on account of his age and want of experience, was not sufficiently informed of. The court, in effect, charged that the boy was not a fellow servant with the driver if the former was employed and furnished by the owner of the wheat, but that, if he was injured while complying with the directions of the driver, and while exercising due care himself, then the defendants would be liable; and this would be the case whether the platform was or was not defective, and upon the idea that the service required of the boy was dangerous, and inviting or ordering him into the place of dan-

ger was negligence. We think there is error in this charge in this: We are of opinion that the driver and water carrier were not fellow servants, since they were employed by different masters, and in this respect the charge was correct. But it does not follow that the owners and operators of the machinery are liable for the acts of the driver. In order that the result should follow, it must appear that the driver had some sort of delegated authority or superintendence over the other laborers at the thresher,—at least over the water carrier,—and that in directing him he stood in the place of or acted for the defendants, either by express or implied authority. In the present case it affirmatively appears that the driver was employed simply to drive the horses and keep the motive power in motion. He had no authority from defendants over the other employes; no right to direct them; none to control them. It also appears that one, at least, of the owners of the thresher, was present, and it does not appear that the boy went into the place of danger at his request, or even with his knowledge. It further appears that the owners of the machinery went about over the country with their thresher, threshing out wheat for the farmers. The defendants furnished the machinery, horses, and driver, while the owners of the wheat furnished such labor as was necessary to handle the wheat, and, among others, this boy was employed or engaged to carry water. But it does not appear that the driver had any authority or superintendence over any other employes working about this thresher. It does not appear that he had any right to order or request any particular service of any other employe; and, if he did so, he was not, in so doing, standing in the place and doing the work of the master, as he had no such authority. The circuit judge was in error, therefore, in charging, as he did, that, if the driver and water carrier were not fellow servants, then the defendants would be liable for the acts of the driver; but he should have coupled it with the further condition that the driver must have been shown to have some authority or superintendence over the other employes, delegated to him by the defendants, and that the act he did was in the scope of his authority. It is alone upon this ground that the liability of the master would attach for the act of the servant. It is not necessary to pass upon the other features of the case argued before the court, for the instruction given by the trial judge was calculated and altogether sufficient to warrant the jury in fixing liability upon the defendants whether the driver had any authority or superintendence over the other hands or not, and whether the platform was or was not defective. For this error the judgment of the court below is reversed, and cause remanded for a new trial. Appellee will pay the cost of appeal.

FERGUSON v. PHOENIX COTTON MILLS.

(Supreme Court of Tennessee. Jan. 12, 1901.)

MASTER AND SERVANT — INJURIES — OBVIOUS DEFECTS — SERVANT'S KNOWLEDGE — INSTRUCTIONS—OVEREXERTION — EVIDENCE—ASSIGNMENT OF ERROR.

1. Plaintiff was employed in defendant's cotton mill to wheel wet cotton in a four-wheeled truck from one vat to another. While pushing the truck from behind, in seeking to avoid some boxes piled in the passageway, one of the fore wheels of the truck ran into a hole in the floor, necessary for drainage purposes. In attempting to lift the wheel out of the hole, plaintiff sustained a rupture, by overexertion. Plaintiff, who possessed ordinary intelligence, had only been employed in the mill five days, and did not know of the existence of the hole. *Held*, that the hole in the floor, if dangerous, was patent and obvious, and hence it was not error for the court to refuse to charge that the defendant should have cautioned the plaintiff as to the danger arising from the same.

2. Where plaintiff, who had been employed in the mill only five days, sustained a rupture in attempting to lift a truck wheel out of a drainage hole in the floor of defendant's cotton mill, it was not incumbent on defendant to prove the plaintiff's knowledge of the hole, as the same, being plain, obvious, and necessary, was one of the risks assumed by the plaintiff; and hence an instruction that defendant must prove the plaintiff's knowledge of the existence of the defect was properly refused.

3. In an action for injuries received by overexertion in attempting to lift a truck wheel out of a drainage hole in the floor of defendant's cotton mill, an instruction that, if the plaintiff could have seen or known of the existence of the hole by the exercise of ordinary care and prudence, the defendant would not be liable, was proper.

4. Plaintiff was not entitled to recover for injuries received by straining and overexerting himself in attempting to lift a truck wheel out of a drainage hole in the floor of defendant's cotton mill, since he is the judge of his own lifting capacity, and the risk is on him not to overtax it.

5. Where plaintiff was injured by straining and overexerting himself in attempting to lift a truck wheel out of a drainage hole in the floor of defendant's cotton mill, and there was no assignment that the evidence did not support the verdict, a contention that plaintiff, in his stooping posture, while pushing the truck, because of pulleys overhead, and because of the poor light of the place, could not protect himself properly against the hole, will not be considered.

Appeal from circuit court, Davidson county; John W. Childress, Judge.

Action by J. C. Ferguson against the Phoenix Cotton Mills. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

E. S. Ashcraft, for appellant. Stith M. Cain, for appellee.

WILKES, J. This is an action for damages for personal injuries. The plaintiff was employed as a laborer in the defendant mills. It was one of his duties to remove wet cotton, packed in a large box placed on a four-wheeled truck, from one kettle or vat to another; the distance being some 50 feet. He alleges that, through defective construction of the floor, and the presence of a hole

in it, he was injured by one of the wheels of the truck falling into the hole. The plaintiff, with another, tried to lift the truck out of the hole; and his contention is that he was ruptured, either by the strain of lifting, or by coming in contact with the bed of the box by pushing it, on the truck, when it fell into the hole,—he being behind it. The plaintiff had been at work in the mill for only five days. He had been given no notice or warning concerning the hole by any one connected with the factory, and had never lifted one of the boxes, and did not know its weight. The hole was not in the direct line the trucks were usually moved, but to one side, caused by warp boxes standing in the direct line, as was frequently the case while the mill was in operation. At the point where the trucks were rolled around the warp boxes, there were pulleys and belts overhead, which would require some care to be used by a person passing under them. The holes in the floor were necessary for drainage. There was a verdict for the defendant, and the plaintiff has appealed and assigned errors.

The first four errors are that the court failed to charge certain specific requests. These requests are not set out in the bill of exceptions. It appears that they were intended to be set out, and a blank space appears in the transcript for them, but they are not inserted or copied. They are, however, inserted in the motion for a new trial, and the requests present virtually the same features of objection as are made to the charge itself. The first assignment is, specifically, that the plaintiff was not cautioned as to the danger of this hole in the floor. The second is that it was not stated to the jury that the burden of the proof was on the defendant to show that plaintiff had knowledge of the hole. The third is that it was error not to charge that the duty of inspection was greater in the case of the master than of the (plaintiff) servant. The fourth is that, if the defect was patent, still, if the plaintiff was inexperienced, it was the duty of the defendant to instruct and warn him. The sixth assignment, complaining of error in the charges given, embraces the same feature of the duty to instruct an inexperienced employé. The seventh assignment complains that it was error to say that, if the hole could have been seen or known of by the plaintiff by the exercise of ordinary care and prudence on his part, then there would be no liability. The eighth is as to the charge of the court that the plaintiff must use ordinary diligence and be reasonably vigilant. These assignments may all be grouped and treated together. There is no allegation that plaintiff did not have ordinary intelligence. We think, from this record, that, if there was any defect that was dangerous,—which is very doubtful,—it was patent and obvious. The rule is that if the danger is obvious, and the servant has sufficient discretion to see and avoid it, the mas-

ter cannot be held for any injury to the servant, although he did not warn him of the danger. *Wood, Mast. & S. § 349; Brown v. Railway Co.*, 101 Tenn. 255, 47 S. W. 415. It was not incumbent on the defendant to prove that the plaintiff had knowledge of a defect which was plain and obvious; nor was it incumbent upon the defendant to prove the condition, when it was obvious. It does not require experience to see a hole in the floor, and, as these were necessary for the drainage of the floor, it was one of the risks that plaintiff assumed, and was so simple and obvious that experience was not an element to be considered in determining the question of liability; nor was it such as was incumbent on the defendant to instruct about. *Bigelow, Torts*, pp. 331, 332; *Brown v. Railroad Co.*, 101 Tenn. 255, 47 S. W. 415. So, also, the rule is well settled that, if an accident and injury might have been prevented by the use of reasonable diligence, there is no ground of liability. *Wood, Mast. & S. § 328*. If the wheel of the truck had gone into the hole, and it was the duty of the employé to lift it out, then he cannot hold the master liable for overexerting and straining himself. He is the best judge of his own lifting capacity, and the risk is upon him not to overtax it. If it was not his duty to lift the truck out, and he did it without an order from his employer, the latter would not be liable. *Hale, Torts*, p. 516. *Knox v. Coal Co.*, 90 Tenn. 547, 18 S. W. 255.

There is no assignment that there is no evidence to support the verdict. Such an assignment would not hold good, as there is grave doubt whether the plaintiff was injured by the accident, or whether his trouble was not caused by other things, or constitutional. In argument it was stated that the light at the place of the accident was not good, and that the plaintiff, in his stooping posture under the pulleys overhead, could not protect himself properly against the hole; but these are exceptions which would properly be raised under an assignment of no evidence to support the verdict. Besides, we do not think they are supported by the record. There is no error in the judgment of the court below, and it is affirmed, with costs.

MADDEN v. MASON et al.

(Supreme Court of Tennessee. Dec. 22, 1900.)

APPEAL—REVIEW—FINDINGS OF FACT BY COURT OF CHANCERY APPEALS—DEEDS—EXECUTION BY MARRIED WOMAN—PRIVY EXAMINATION—DEFECTIVE CERTIFICATE—CORRECTION—BURDEN OF PROOF.

1. Findings by the court of chancery appeals that a wife was not of unsound mind at the time of signing a deed, and that she was coerced by her husband, are findings of fact, which are rendered conclusive, and placed beyond the jurisdiction of the supreme court, by the express terms of Shannon's Code, § 6322.

2. Code, § 2032 (Mill. & V. Code, § 2396; Shannon's Code, § 3759), declares that omissions

in the certificate of privy examination of a married woman, taken on the execution of a deed by her, may be corrected on the application of either party, the officer taking the examination "making oath in open court to the truth of such correction." *Held*, that the quoted clause was mandatory, and that the burden of showing compliance with it was on the party seeking the benefit of the correction, and that a finding that a notary appeared before the county judge, and identified himself by oath as the person who previously took a wife's acknowledgment, and thereupon made the necessary corrections, did not show a compliance with the statute, as it did not show that the oath was made "in open court," nor that he swore to the "truth of the correction."

Appeal from chancery court, Franklin county; T. M. McConnell, Judge.

Bill by Ed Madden, next friend of Eliza Madden, against Ed Mason and others. A decree in favor of complainant was reversed by the court of chancery appeals, and complainant appeals. Reversed.

T. J. Alexander and Turney & Turney, for appellant. Geo. E. Banks, and Lynch & Lynch, for appellees.

CALDWELL, J. Ed Madden, as next friend of his widowed mother, Eliza Madden, filed this bill on the 28th of December, 1897, to set aside a deed in fee simple, whereby his father, and her husband, Mike Madden, on the 1st day of September, 1888, undertook to convey a certain house and lot belonging to her, in the town of Cowan, to defendant Edward Mason, for the recited consideration of \$1,300, paid and to be paid to the conveyor. Though not appearing in the body of the deed, her name was attached at its end, and a certificate of acknowledgment by her was indorsed upon the deed on the 14th of September, 1888, two weeks after the execution and acknowledgment by her husband. Among the alleged grounds on which the relief just stated was sought are the following: First, that Eliza Madden was at the time the deed was made of unsound mind; secondly, that she was coerced by her husband to sign her name to his conveyance; and, thirdly, that her acknowledgment was not legally taken and certified. Edward Mason and his co-defendants, to whom he had conveyed the property, filed answers denying all hurtful allegations against their title. The chancellor granted the relief prayed for, but the court of chancery appeals reversed his decree, and dismissed the bill. The complainant has appealed to this court, and here assigned errors.

The first assignment is that the court of chancery appeals erroneously found that Mrs. Madden was not of unsound mind at the time the deed was made. The finding here assailed, being one of fact only, is rendered conclusive, and placed beyond the jurisdiction of this court, by the express terms of the statute. Shannon's Code, § 6322.

The second assignment is that the findings of that tribunal that Mrs. Madden was coerced by her husband to sign and acknowl-

edge the deed is erroneous. The answer just made to the first assignment is equally applicable to this one.

The third assignment challenges as erroneous that court's finding that Mrs. Madden's acknowledgment of the deed was properly taken. This objection raises a question of mixed fact and law. The statement of the conclusion of the court of chancery appeals as to what was actually done by her and the certifying officer in respect of her acknowledgment of the deed is a finding of fact, and hence binding in this court; but the statement of the conclusion of the legal effect of what they did in the matter is a finding of law, reviewable here. Shannon's Code, § 6322. The deed in question, as it appears in the record, is accompanied by two certificates of the notary public before whom the acknowledgment of Mrs. Madden is found to have been made; one of them having been written on the same paper at the foot of the deed September 14, 1888, and the other having been written on a printed blank, and attached to the deed May 21, 1896, some months after the filing of the bill. The former of these certificates is conceded void for the lack of essential statutory recitals which need not be mentioned, but the latter one contains every required recital, and hence, in point of form, it is without ground for adverse criticism. Both certificates were based upon the same acknowledgment; the latter one being made on the day it was attached, for the purpose of connecting the fatal defects in the former one, and thereby avoiding the bill's impeachment of the deed on this particular ground. The statute (Shannon's Code, § 3759), which expressly authorizes a clerk to correct his certificate of acknowledgment by a married woman so as to conform to the actual facts of the acknowledgment (Garth v. Fort, 15 Lea, 683), by implication confers the same power on a notary public (Brinkley v. Tomeny, 9 Baxt. 275; Grotenkemper v. Carver, 4 Lea, 379); and the correction, when properly made under the statute, takes effect as between the parties as of the date of the original acknowledgment (Id., 9 Lea, 280). The statute is in these words: "If a clerk omit any words in the certificate of privy examination by him taken of a married woman touching the execution of any deed or other instrument by her executed, he may at any time, on application of either of the parties interested, correct such error, mistake or omission, *making oath in open court to the truth of such correction.*" Code, § 2082; Mill. & V. Code, § 2896; Shannon's Code, § 3759. For the purpose of emphasis we have italicized the last clause, which is mandatory, and embraces three indispensable elements: (1) "Oath"; (2) "in open court"; (3) "to the truth of such correction." The burden of showing compliance with this requirement is upon those who seek the benefit of the corrected certificate. The finding of the court of chancery appeals is that "on May 21.

1898, said Beresford appeared before the judge of the county court of Davidson county, and in his capacity as a notary public for Franklin county, Tenn., made oath that he was the same G. H. Beresford who took the acknowledgment of Mrs. Madden to the deed executed by Mike Madden at Cowan, Tenn., to Ed Mason, September 14, 1888, and made the corrections necessary to make said acknowledgment and privy examination conform to the requirements of the statute." Condensed and analyzed this finding is only that (1) the notary public appeared before the county judge, (2) and by oath identified himself as the person who took Mrs. Madden's acknowledgment 10 years before, (3) and thereupon made such corrections as were necessary to give the certificate proper form. There is no finding that the notary's oath was made "in open court," nor that he swore "to the truth of the correction"; and yet the statute imperatively required that both should be done to authorize the corrected certificate, and the burden was upon the defendants to show that both were done to entitle them to the benefit of the certificate. The finding that the notary appeared before the county judge, and made oath to his own identity, is in no sense a finding that he made "oath in open court to the truth of the correction" embodied in his second certificate; hence that certificate is not supported by the finding actually made by the court of chancery appeals, and, being without other support, it is wholly without jurisdiction in fact, and, consequently, without efficacy in law.

It may well be remarked in conclusion that, although the statute does not so require (*Grotenkemper v. Carver*, 4 Lea, 379), it would be more orderly to enter the oath of the correcting officer, or some note thereof, on the minutes of the court. It would certainly facilitate all investigations like the present one if that course were pursued, or if a certification of the proceeding were made to accompany the corrected certificate when attached to the deed and spread upon the register's book. Indeed, it would serve the desirable purpose of perpetuating the real facts, and be of but little expense to do both. These, however, are but precautionary suggestions. For the reasons stated, the decree of the court of chancery appeals is reversed, and that of the chancellor affirmed.

TOWNSEND v. NASHVILLE, C. & ST. L. RY.

(Supreme Court of Tennessee. Dec. 15, 1900.)
RAILROADS—PASSENGERS—INJURY—ALIGHTING—NEGLIGENCE—PLEADING—SUFFICIENCY.

A declaration alleged that plaintiff was standing on the platform of one of defendant's trains, when it went into the depot sheds, having been unable to secure a seat; that the whistle was blown and the station announced, and the train slowed up for passengers to alight, so that, when it came to the usual place of

stopping, plaintiff, thinking it had stopped, and being impliedly invited to alight by the conduct of the trainmen, stepped off, and as he did so the cars lurched forward, throwing him down. Held, that a demurrer to the declaration was properly sustained, because of the absence of a definite averment that the train had stopped as a matter of fact.

Appeal from circuit court, White county; W. T. Smith, Judge.

Action for injuries by W. M. Townsend against the Nashville, Chattanooga & St. Louis Railway. From an order sustaining a demurrer to the declaration, plaintiff appeals. Affirmed.

Snodgrass & Fancher and Story & Kirby, for appellant. Jarvis, Hill & Jarvis (Claude Waller and J. B. De Bew, of counsel), for appellee.

WILKES, J. This is an action against a common carrier for personal injuries sustained by the plaintiff while attempting to alight from a train. There was a demurrer to the declaration, which was sustained, and the suit was dismissed, and plaintiff has appealed to this court, and assigned as error the sustaining of the demurrer.

So much of the declaration as is material is that the train was coming into the depot sheds at Nashville. Plaintiff was standing upon the platform, having been unable to secure or hold a seat for some distance before reaching Nashville, as the coach was crowded. The railroad employes in charge of the train blew the whistle, rang the bell, and announced the station as they approached the depot. The train slowed up for passengers to alight, and when it came to the usual place of stopping it had come to a stop, or so near to a stop that plaintiff thought it had stopped, and it appeared to have stopped, and, by the conduct of defendant's conductor and employes in charge of the train, plaintiff was impliedly invited to alight from the train. At the moment the plaintiff stepped off the step on which he had been forced to stand, and was in the act of alighting from the train, the engineer negligently and wrongfully caused the cars to lurch forward by a violent jerk, which threw him off his feet on the floor of the shed, breaking both bones of his wrist or forearm. We are of opinion this declaration fails to state a cause of action. The blowing of the whistle, ringing of the bell, and calling out the name of the station is not an implied or express invitation to alight at once, but is merely a warning to be ready to alight when the car comes to a stop. The principle governing the case is stated in *Railroad Co. v. Massengill*, 15 Lea, 328. A passenger who steps from a moving train does so at his peril, and, to absolve him from all contributory negligence, he must wait until the train has in fact stopped. He cannot recover upon his belief that it had stopped, or had come so near to a stop as to induce him to believe it had stopped. His mistake, though innocently made, is not a matter upon which liability of the road can be predi-

cated. If he was not misled by the acts of the railroad employes or by their specific directions to alight, he must see that the train has in fact stopped, and, if he do not, he takes the risk of injury upon himself if he attempts to alight. The pivotal question in this case is not whether the plaintiff was excusable in being on the steps of the platform because he could not or was not furnished a seat, but did he exercise proper care in alighting, and had the train in fact stopped when he attempted to get off? We do not think the case of *Railroad Co. v. Arnol* (Ill. Sup.) 33 N. E. 204, 19 L. R. A. 316, is in point. There the passenger was injured while in the coach, after she had left her seat for the purpose of alighting. Here the cause of the injury was in attempting to alight from the step thinking the train had stopped, when in fact it had not. We think the fact that plaintiff was not provided with a seat for some distance before he reached the city of Nashville can have but little, if any, weight upon the crucial question in this case. For all that appears from the declaration, he may have been provided a seat when he entered the cars, and may have given it up to others, and then been forced to ride on the platform or steps. But the determining question in the case is whether, being in this exposed and dangerous situation, he exercised proper care and caution in alighting, and whether, as a matter of fact, the train had stopped. Liability of the road cannot be predicated upon his mistaken belief that the train had stopped, and, in the absence of a definite and specific averment that it had as a matter of fact stopped, no cause of action is stated. We are of opinion, therefore, that there is no error in the judgment of the court below, and it is affirmed, with costs.

SWAN v. LOUISVILLE & N. R. CO. et al.
(Supreme Court of Tennessee. Jan. 12, 1901.)

CARRIERS — RAILROADS — BILLS OF LADING —
CONSIGNMENT — REMOVAL — DEMURRAGE —
LIEN — REASONABLY ENFORCEABLE.

1. Plaintiff received three cars of stone over defendant's road. Due notice of its arrival was given plaintiff, together with the amount of the freight charges thereon, but plaintiff did not pay the same until 10 days after the arrival of the cars, when defendant refused to deliver the stone until demurrage charges had been paid. Plaintiff had a stone yard to which a side track had been constructed by a company other than defendant, though cars could be transferred from defendant's track to this side track. The bill of lading under which the stone was shipped provided that the delivering carrier might make a reasonable charge every day for the detention of any car and for use of the track after the car had been held 24 hours for unloading, and might add such charges to all other charges hereunder, and hold such property subject to lien therefor, and that the consignee should pay all charges before a delivery of the property. *Held*, in conversion for the value of the stone, that the defendant was entitled to the payment of the demurrage, under the bill of lading, before a delivery of the property, and hence it was not necessary for

the defendant to place the cars on plaintiff's side track before making a demand therefor, as such would constitute a delivery of the property.

2. A stipulation in a bill of lading that the carrier may make a reasonable charge for a failure of the consignee to unload his property from the carrier's cars within 24 hours after its arrival is a reasonable provision, and hence it was not error for the trial court to charge that the parties were bound thereby.

Appeal from circuit court, Davidson county; John W. Childress, Judge.

Action by Peter Swan against the Louisville & Nashville Railroad Company and others. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

Washington & Allen, for appellant. Smith & Madden, for appellees.

WILKES, J. This is an action for the value of some stone, and the freight paid on the same, upon the theory that the stone was shipped to plaintiff over the defendant road, but was converted by the road, and plaintiff deprived of the same. The suit was brought before a justice of the peace. The defense was, in effect, the same as under a plea of general issue. Upon trial before the court and jury, there was verdict and judgment for defendants, and plaintiff has appealed to this court, and assigned errors.

The facts, so far as necessary to be stated, are that three cars of stone were shipped to the plaintiff, P. Swan, from the Bedford, Ind., quarries. Mr. Swan was notified of the arrival of the cars of stone, and that, upon payment of the freight, the cars would be placed on the track leading to his yard, where he had a derrick and other machinery for unloading. This track was constructed jointly by Swan and the Nashville & Chattanooga Railroad Company, and the Louisville & Nashville Railroad Company had no interest in it or control of it. The plaintiff, Swan, was further notified that charges for car service would begin to run after two days, unless the freight was paid. Several other notices to the same effect were given him on successive days, but he failed to pay the freight until about ten days after the arrival of the first car, and seven days after the arrival of the last. He then sent a check to the company to pay the freight, but did not pay, and refused to pay, any car-service charges. He was informed that there was a demurrage,—a car-service charge of \$21 upon the cars,—and that this must be paid before the cars would be placed upon his track for unloading. He refused to pay anything on this account, and this suit is to recover for the value of the stone as upon a conversion. The Louisville & Nashville Railroad Company moved the stone out of their yards after suit was brought, and unloaded it on its right of way, in East Nashville, where it still remains, about two miles distant from the yards of the plaintiff.

Without passing specifically upon the errors assigned, it is only necessary to say that the real question presented in the case, and raised by the assignments, is, did the railroad have the right to demand the prepayment of the freight before placing these cars of stone upon the plaintiff's yard track, and did it have the right to demand demurrage for failure to pay the freight; and, after the freight had been paid, did it have the right to retain the cars of stone in its possession and under its control unless and until the demurrage which had at that time attached was paid? The bill of lading under which this stone was shipped contained several clauses bearing upon the matter in controversy. Paragraph 5 is in these words: "Property not removed by the persons or party entitled to receive it, within 24 hours after its arrival at destination, may be kept in the car depot or place of delivery of the carrier at the sole risk of the owner of such property, or may, at the option of the carrier, be removed or otherwise stored at the owner's risk and cost, and they are subject to lien for freight and all other charges. The delivering carrier may make a reasonable charge every day for the detention of any car, and for the use of the track after the car has been held 24 hours for unloading, and may add such charges to all other charges hereunder, and hold said property subject to lien therefor." Paragraph 10 reads as follows: "The owner or consignee shall pay the freight at the rate hereon stated, and all other charges accruing on said property, before delivery, and according to the weights as ascertained by any carrier herein." The contention of plaintiff is that the road has no right to make any demurrage charge, and that, in any event, its right to do so will not accrue until the cars are placed upon plaintiff's track, at the customary place of unloading, which was the inclosed premises of the plaintiff, and reached by the tracks of the Nashville & Chattanooga Railroad, and not by those of the defendant. It appears that at this time the credit of the plaintiff was not considered good by the defendant, and for this reason the stone would not have been delivered upon his premises, where it might be unloaded by the plaintiff. The proof shows that the defendant company was ready to deliver the cars as plaintiff desired, provided its charges for freight and demurrage were paid. The cars were placed near by the premises of plaintiff, but on those of defendant, but were ready and conveniently placed to be delivered when the charges should be paid.

The court charged that, when the company received this stone for transportation, it did so upon the terms and stipulations of the bill of lading; that it was incumbent upon it to transfer it to its yards in Nashville, at a place convenient for delivery to the plaintiff, at the point he desired to receive it, and that it was not incumbent upon

defendant to place it on plaintiff's side track and on his premises until all proper charges were paid; that due notice of arrival should be given; and that the rights of the parties would be governed by the terms of the bill of lading. This charge is objected to, and special requests were made, the ground or basis of all of which is that it was incumbent on the defendant road to place the cars upon the side track running into plaintiff's yard at the usual place of delivery and unloading, and until it did so it could claim neither freight nor demurrage. This is practically all that is involved in the case.

We are of opinion the circuit judge was correct, and that the assignments of error are not well made. The defendant company could not be required to part with the possession and control of the property until its legitimate charges were paid, and to have placed it on the plaintiff's premises, where he could unload it as he saw proper and when he pleased, was virtually to part with possession, and to surrender its lien for freight and other charges. The lien existed for demurrage in the case by the express terms of the bill of lading. It was held in the case of *Railroad Co. v. Hunt*, 15 Lea, 261, that, in the absence of contract, a railroad could not claim a lien for demurrage charges, so that the *Hunt Case* is not applicable, and the only question that could arise is whether such a stipulation in a contract is a reasonable one, such as the courts will enforce. A mere statement of the proposition carries with it an answer. If a road cannot make a reasonable charge for detention of its cars by consignee, it is evident that such consignees may delay unloading until virtually the entire rolling stock of the road may be tied up, and its tracks obstructed by loaded cars, awaiting the pleasure or convenience of consignees. We can see no reason why carriers should not be entitled to reasonable compensation for the unreasonable delay and detention of their cars by consignees (4 Elliott, R. R. § 1567; *Miller v. Railroad Co.* [Ga.] 15 S. E. 316, 18 L. R. A. 323); nor to a lien for such charges, when such lien is agreed to, and stipulated for, in the bill of lading. There is no complaint that the amount of charges is unreasonable. We see no error in the judgment of the court below, and it is affirmed, with costs.

FLEMING v. LOUISVILLE & N. R. CO.
(Supreme Court of Tennessee. Feb. 9, 1901.)

RAILROADS—INJURY TO LICENSEES.

Where railroad cars are being moved over premises which the public is allowed and accustomed to frequent at any and all times, it is the company's duty to use reasonable care to see that its tracks are clear before moving trains thereon, and a mere failure to observe persons on the tracks will not relieve the company from liability for their injuries.

Appeal from circuit court, Maury county; Sam Holding, Judge.

Action by R. G. Fleming against the Louisville & Nashville Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Geo. T. Hughes, for appellant. James A. Smisir, for appellee.

WILKES, J. This is an action for damages for personal injuries. There was a trial before a jury in the court below, and a verdict and judgment for \$900, and the defendant railroad company has appealed, and assigned errors. The facts, so far as necessary to be stated, are that Fleming was at the depot in Columbia, Tenn., on some business for his employers, who were expecting some shipments by the morning express train. He went upon the tracks of the company to talk to the watchman in the employ of the company, whose duty it was to look after the safety of passengers and other persons at the depot and on the grounds of the company. The watchman was sitting on the steps of a caboose, which was standing on the tracks with several other cars attached, but to which there was no engine attached. Plaintiff was told that the train was late, and he engaged with the watchman in a conversation, and afterwards with another person who came up. In the meantime the watchman had stepped to the telegraph office, only a few feet away, to learn when the train would arrive. The entire space between the tracks—and there were several at this place—was level, and the public generally, as well as passengers, were in the habit of going upon it when it was not being used for passing trains, and especially when awaiting the coming of trains. It was more or less crowded all the time by persons standing upon or passing over it. While standing near the caboose, and partially on the track behind it, an engine, which had been engaged in switching, pushed some cars down the track on which the caboose was standing, and they ran against the caboose and standing cars, and they were jammed back, and struck the plaintiff, knocking him down, and rendering him for awhile unconscious. He suffered greatly with his head from the concussion, and for some month or two was wholly disabled from work, and at the time of the trial was still suffering very much from the injury.

It appears that these cars which came down the track and jammed these standing upon it were cut loose from the switch engine, and shunted down the track about 100 yards, and, the track being a down grade, they continued to roll down it of their own momentum, until they struck the standing cars. One brakeman was upon them, and had set one of the brakes, and started to the other, when the accident occurred, but he did not see the plaintiff, and his situa-

tion was such that he could not see him. The cars came down the track quite rapidly, and struck the standing cars with force, and pushed them some distance from the track.

There are several objections made to the charge as given, and several to the failure to give several other instructions as requested. The court laid down the rule of law, applicable to the company's duty to a licensee, that it was incumbent on it to keep the walkways, platforms, and standing places reasonably safe for the use of such persons, and proceeded to say that, if a party be a trespasser, it would not prevent him from recovering from the company for injuries negligently inflicted by the railroad company, and which might be averted by using ordinary care and caution by the railroad, but this was true only in cases where the negligence of defendant was the direct and proximate cause of the injury. The insistence of the counsel for the company is that it is not required to anticipate the presence of a trespasser, nor to guard against injury to him, unless his presence is known to the company, and it then failed to use proper care. While, as a general proposition, this may be correct, still it is not applicable in a case where cars are being moved over tracks and yards, and in localities which the public is accustomed to frequent, and where the road may reasonably expect that persons may be in the way of moving trains or cars at any time.

The mere fact that the company was ignorant of the presence of the party, whether licensee or trespasser, would not absolve the company from liability; but the controlling question is whether the company was negligent or not, and that question would depend largely upon the circumstances, the locality, the manner in which the particular place was used, and whether much or little frequented by third persons. If, for instance, the company should be pushing its cars along or over crowded streets and passways, it must keep a more vigilant lookout than if it were merely switching at a country station where persons were not accustomed to frequent. A different rule from this would place a premium upon the inattention and failure of the company to see persons who are exposed to danger. While the company, as against a licensee as well as trespassers, is entitled to the use of its tracks when it desires to use them, still when they are not continuously in use, and persons are allowed to go upon them between trains, it would be incumbent upon the road to see that its tracks were clear before moving its trains over them. It appears that the place where this accident occurred had been used as a passing or standing place for a number of years, and was really necessary to be so used for the accommodation of passengers and persons having business at the depot. It does not,

therefore, present the case of a person needlessly and heedlessly placing himself in front or rear of a car likely to be moved; and injured because the railroad had no actual knowledge of his presence.

The court, as bearing on this feature of the case, charged that, if plaintiff's negligence was the direct and proximate cause of the injury, he could not recover. The court gave full instructions as to the care required of plaintiff, and the caution he must use to look and listen. We think that the objections to the charge as given and the requests as made are faulty, in that the proper distinction is not made that is raised by the facts of the case, to wit, that the cars were being moved over premises which were frequented by the public at any and all times, and there was a duty resting upon the company to keep a close watch out for persons on or near the track, and this duty made it incumbent on the company to use all reasonable care and diligence to see that its tracks were clear, and a mere failure to see persons on the track would not be sufficient. We think the charge as given was fair and full, and properly presented the case to the jury, and, there being no errors assigned except as to the charge, the judgment of the court below is affirmed, with costs.

STATE v. ROBINSON.

(Supreme Court of Tennessee. Dec. 22, 1900.)

CRIMINAL LAW—CONCEALED WEAPONS—EVIDENCE—VERDICT—CHARGE—BILL OF EXCEPTIONS—EXCESSIVE SENTENCE.

1. Where, on a trial for unlawfully carrying a pistol, the defense was based on the testimony of one witness that the pistol was delivered to defendant by an officer to assist in quelling a threatened disturbance, and after the disturbance the officer directed him to retain the pistol until he got to the hotel where they were stopping, and the sheriff and his deputies knew of no such disturbance, and arrested defendant while he was eating in a restaurant, and not on his way to the hotel, a verdict of guilty was justified.

2. Where defendant was convicted of unlawfully carrying a pistol, and the bill of exceptions recites that the court charged fully and satisfactorily on the law on the subject of carrying concealed weapons, and, among other things not excepted to, charged that in determining the facts the jury "must give the defendant the benefit of a reasonable doubt as before explained," it did not appear that the judge did not charge properly on reasonable doubt, since the part of the charge included in the bill of exceptions shows that the subject was covered by other parts of the charge, not so included, and such part must be presumed to have been correct.

3. Defendant was convicted of unlawfully carrying a pistol. He was arrested by the sheriff while eating in a restaurant. A constable testified that he called on defendant to assist in quieting a threatened disturbance, and delivered the pistol to him for that purpose, and afterwards requested him to keep it till he got to the hotel where they were stopping. Neither the sheriff nor his deputies knew of any such disturbance. Defendant was sentenced to a fine of \$50 and six months' im-

prisonment. *Held* the punishment was excessive, and the imprisonment should be remitted.

Appeal from criminal court, Dekalb county; M. D. Smallman, Judge.

Havre Robinson was convicted of unlawfully carrying a pistol, fined \$50, and sentenced to six months' imprisonment, and he appeals. Modified.

T. W. Wade, for appellant. The Attorney General, for the State.

WILKES, J. It appears that upon a public occasion the sheriff of the county saw that the defendant had a pistol upon his person, and took it from him, and arrested him. Defendant relied upon the testimony of one witness in his defense. This witness—Charles Frazier—stated that he was a constable in one of the country districts of Dekalb county; that he was in Smithville on the first day of the term of the court, and saw that a breach of the peace was about to take place, and that four men were about to engage in a difficulty, and he thought he needed assistance to preserve the peace, and summoned the defendant to aid him, and, if necessary, to arrest the parties; and for that purpose he gave him the pistol which the sheriff afterwards took from him. After the parties separated, he handed the pistol back to him, but he told him to keep it, and carry it to the room at the hotel which both were occupying when he came in that night. The parties who had threatened the difficulty were still in town, though they had separated, and defendant kept the pistol under the officer's directions. There was considerable drinking in town that day. The sheriff testified that he and his deputies were in town that day, and heard of no such threatened breach of the peace, and were not called upon or notified of it, and that when he took the pistol from defendant, and arrested him, he was in a restaurant, eating oysters, and not on his way to the hotel. This is the substance of all the evidence there was in the case. The court charged the jury very fully, and said to them that, if they believed defendant was carrying the pistol in good faith, and in order to assist, under the sanction and direction of an officer, in preserving the peace when a breach of it was imminent, that would excuse him; but if he carried it for any other purpose, and merely used this as an excuse or pretense, it would not. The names of the parties who were threatening a breach of the peace were not stated, and the testimony as to the threatened breach of peace is very indefinite and meager. The jury had the two theories before them under a fair charge, and believed the state's theory, or, at least, did not give full credit to the theory of the defense; and we do not feel authorized to disturb their finding. It is said that the court did not properly charge on the feature of a reasonable doubt. What the judge said in the last clause of his charge was this: "How the facts are is a matter

for the jury to determine from the evidence; and in determining the facts, as before stated, you must give the defendant the benefit of a reasonable doubt, as before explained to you." The bill of exceptions, in setting out the charge, begins as follows: "The court charged the jury fully and satisfactorily upon the law on the subject of carrying concealed weapons, and, among other things not excepted to, charged as follows," etc. Then follows a portion of the charge, and the last clause in the portion copied contains the reference to reasonable doubt which we have copied heretofore. It is evident from that clause that the court had already explained reasonable doubt, as he closed the charge, "You must give the defendant the benefit of a reasonable doubt, as before explained to you." We must assume, therefore, that the charge upon that as well as all other features involved in the offense was correct, and satisfactory, and counsel did not think it necessary to set it out, except some specific portions as to which no complaint is made. We think there is no error in the record, and the judgment of the court below is affirmed, except that the sentence of six months' confinement is remitted, as being excessive under the facts.

• MOORE v. TILMAN.

(Supreme Court of Tennessee. Feb. 9, 1901.)
EQUITY—DISMISSAL OF COMPLAINT—ANSWER
AS CROSS BILL—LACK OF BOND, PROCESS,
AND ANSWER—WAIVER—PROOF OF MATTERS
ALLEGED IN ANSWER.

Where an answer was filed as a cross bill, and no bond for costs was executed, nor process issued under the prayer in such answer, nor answer filed thereto, but proofs were taken on matters set up in such answer alone, the taking of such proof was not a waiver of irregularities, so that the answer could be treated as a cross bill, and such answer unanswered could not be made the basis of affirmative relief; hence the complainant had a right to dismiss his bill at his own costs before trial.

Wilkes, J., dissenting.

Appeal from chancery court. Maury county; Z. W. Ewing, Special Chancellor.

Action by James T. Moore against M. E. Tilman. From a judgment of the court of chancery appeals reversing a judgment in favor of defendant, he appeals. Affirmed.

J. C. Voorhies and W. J. Webster, for appellant. H. P. Figuers and L. P. Padgett, for appellee.

WILKES, J. The original bill in this cause was filed to enforce a vendor's lien upon land for unpaid purchase money. There was an answer to the bill, in which the defendant set up that a fraud had been perpetrated upon her, in that, while one tract of land was pointed out to her as the land sold, in fact another, and very inferior, tract was conveyed; and this fact was not discovered until after a cash payment had been made, which was fully as much as the tract

conveyed was worth. The answer, after setting out the fraud in detail, prayed, in substance, that she be held not liable for the notes, and that she have an account, and recover what she was injured by the fraud. She asked that the answer be taken as a cross bill; that process issue, and complainant be required to answer it, but not under oath; and that she have judgment for whatever might be shown to be justly due her on the basis of the answer and cross bill. No bond for costs was executed, no process issued under the prayer of the cross bill, and it was not answered. Proof was taken, however, mostly on the part of complainant, the defendant giving her testimony only, and producing no other witness. When the cause was regularly reached for trial upon the docket, complainant announced that he was not ready for trial, and asked for a continuance. This was refused, when complainant offered to take a nonsuit, to which defendant objected, and the cause was heard as is stated in the decree on the bill, answer, cross bill, or answer filed as a cross bill, exhibits, and proof, and a decree was rendered for defendant that she was owing complainant nothing on the sale of the land, and was entitled to a cancellation of her notes, and to retain the land deeded to her; and costs were divided equally. Complainant appealed, and the court of chancery appeals reversed the decree of the chancellor, and dismissed the bill, at costs of complainant, and taxed the costs of appeal to the defendant. The defendant has appealed to this court, and the question which this court is asked to pass upon is whether it was error in the chancellor to refuse complainant the right to dismiss his bill and take a nonsuit, as he proposed to do.

The general rule of practice is that a complainant may dismiss his bill, as a matter of course, at any time before decree is rendered, upon payment of costs. *Gillespie v. McEwen*, 1 Tenn. Cas. 400; *Stone v. Huggins*, Id. 564. The general rule is, however, subject to many exceptions. A dismissal cannot be had after a decree has been entered adjudicating rights; or when a decree has ordered an account upon principles laid down; or when an issue has been made up, and tried by a jury; or when a cross bill has been filed, or an answer as a cross bill, seeking affirmative relief, and it has been answered, and issue made (*Partee v. Goldberg*, 101 Tenn. 664, 49 S. W. 758); or when a creditor seeks to set aside a trust deed and sale under it as fraudulent, and also attacks the validity of a tax title under which the purchaser at the sale under the trust deed also claims title, he cannot, on the hearing, dismiss his bill, so as to throw the burden of proving its validity on defendant (*Allen v. Hotel Co.*, 95 Tenn. 480, 32 S. W. 962). We are of opinion, from these authorities, that, if this were a cross bill proper, or an answer as cross bill, which had itself been

answered, the decree of the court below refusing to allow the dismissal would be based upon authority as well as reason. But the question is made that this answer should not be given the effect of a cross bill, or an answer as a cross bill. In *Harrell v. Harrell*, 4 Cold. 377, it was held broadly that the court could take no notice of a paper filed as a cross bill if no bond was filed. In *Curd v. Davis*, 1 Helsk. 574, it was said that an answer prayed to be taken as a cross bill might be treated by the chancellor as an answer only; and in the case of *Keele v. Cunningham*, 2 Helsk. 288, it was said that, when no bond was given, and no process issued, the answer could not be entertained as a cross bill. But in *Hall v. Fowlkes*, 9 Helsk. 745, it was held that an answer filed as a cross bill might be entertained as such, even though no bond should be given, and no process issued, if the complainant should file an answer to the cross bill; the court saying that the filing of an answer without objection for want of cost bond or process was a waiver of these matters. In commenting on the cases in 4 Cold. and 2 Helsk., to which we have referred, the court, in 9 Helsk. 753, said: "In neither case does it appear that there was any appearance to the answer as a cross bill by filing an answer thereto or otherwise." From this language it appears that the court in the 9 Helsk. case was of opinion that the irregularities in the cross bill or answer as a cross bill could be waived not only by an answer, but otherwise; but it is not stated in what other way the waiver may be made. In the present case there was no answer filed, but the parties took proof upon the matters set up in the answer alone; none of it pertaining to the matters set up in the bill. The majority of the court is of opinion that this could not be considered a waiver of irregularities, so that the defendant's answer could be treated as a cross bill; that, until the cross bill was answered, or taken for confessed, it could not be made the basis of any affirmative relief. While the evidence introduced was, therefore, competent upon the issues made by the original bill and answer thereto, treated as an answer, it could not be considered as converting the answer into a cross bill. This being so, the complainant had a right to dismiss his bill at his own costs at any time before trial, and that would take with it the answer of the defendant; and the decree of the court of chancery appeals is affirmed.

I do not concur in this view, but think that, when the complainant took proof upon the matters set up in the cross bill without objecting to it, he recognized it as regular, and waived the irregularities, and the case must be treated as if the answer to the cross bill had been filed, and the matters set up in it had been put in issue. In that event, it is true, the complainant might still dismiss his original bill, but the defendant, under his answer as a cross bill, had the right, nevertheless, to proceed

under his cross bill to obtain such affirmative relief as he was entitled to under its allegations and the proof.

UNION CENT. LIFE INS. CO. v. FOX.
(Supreme Court of Tennessee. Feb. 2, 1901.)
LIFE INSURANCE—CONTRACT—CONSTRUCTION
—ESTOPPEL—WAIVER—CHARGE—REQUESTS.

1. The application which was the basis of a policy in terms warranted that the statements made therein were full and correct as facts. The conditions on the second page mentioned certain acts and omissions, subsequent to the issuance of the policy, which would avoid it, and limited the time for bringing an action thereon, and stated that, "except as hereinbefore provided, this policy shall be incontestable for any cause except misstatement of age." Defendant filed several pleas alleging fraud in procuring the policy, and that assured falsely answered questions in his application as to the sanity of his father, himself, and his sister, and as to his previous illness. The court charged that, under the policy, the defendant was estopped from relying on such damages, and had waived them. *Held*, that the words, "except as hereinbefore provided," relate only to the conditions on the second page in which they occur, and do not refer to the face of the policy and application, and that by the terms of the contract the policy could not be contested on the grounds set up in the pleas; hence the charge was proper.

2. Where a life insurance policy provided that, if the insured should die by self-destruction, whether sane or insane, within three years, the policy should be void, and the assured died within that time, it is not error to refuse to charge that, if deceased "was desperately ill with scurvy, and weary of life, and deliberately undertook to starve himself to death, and the scurvy and starvation jointly caused his death, there can be no recovery," where the court has granted other requests, covering all the facts and points involved in the request refused.

Appeal from circuit court, Rutherford county; W. C. Houston, Judge.

Action by Susie E. Fox against the Union Central Life Insurance Company. From a judgment for plaintiff, defendant appeals. Affirmed.

J. E. Richardson, for appellant. Palmer & Ridley, for appellee.

WILKES, J. This is an action upon a life insurance policy. It is brought by Mrs. Susie E. Fox, the widow of the assured and the beneficiary named in the policy. It was issued September 10, 1898, and the insured died December 12, 1898, or about two months after the issuance of the policy. The cause was tried before a jury in the court below, and there was judgment for \$2,078.35, the amount of the policy, and the company has appealed, and has assigned errors. Passing over the details of the pleadings, the principal question presented to this court is whether, under the terms and stipulations of the policy, fraud perpetrated by the insured in procuring the policy is available as a defense to a recovery upon it. Upon this feature the court charged the jury as follows: "It [the company] further files several pleas, alleging fraud in procuring the policy, and

alleging that the assured, John E. Fox, falsely answered questions propounded to him in his application for insurance, to wit, as to the sanity or insanity of his father, himself, and his sister, and as to his previous illness, as set out in its pleas. You are instructed that, if you find the policy introduced in evidence to be the contract of insurance, then the defendant should be estopped from relying upon such defenses, and would be held to have waived them." It is insisted this instruction was erroneous, and it presents the question now to be considered. In the face of the policy, the following provisions appear, to wit: "In consideration of the statements made in the application for this policy, which application is hereby made a part of this contract," etc. Again: "This policy is issued and accepted subject to the benefits, provisions, and conditions on the second page hereof, which are made a part of this contract." Turning to the application, we find the following provisions, which are pertinent and proper to be considered: (1) "It is hereby agreed and warranted that, should the company issue a policy upon this application, its interest shall not be affected by verbal statements made to its agents or others, or by the knowledge of such agents, but it shall be affected only by the statements herein made, including those made to the medical examiner, which are hereby warranted to be full and correct as facts, and they shall constitute the basis of any policy which may be issued hereon." (2) In the statement to the medical examiner it is said: "I hereby further declare that I have read and understand all the above questions put to me by the medical examiner, and the answers thereto, and that the same are true, and that I am the same person described as above, and I hereby warrant that there is not and there has not been any concealment of facts regarding my past and present state of health and habits of life or my personal history." The conditions referred to as being on the second page of the policy are as follows: "Conditions: First. The failure to pay, if living, any of the first three annual premiums, or the failure to pay any notes, or interest upon notes, given to the company for any premium, on or before the days upon which they become due, shall avoid and nullify this policy without action on the part of the company or notice to the insured or beneficiary, and all payments made upon this policy shall be deemed earned as premiums during its currency. Any and all notes, with their conditions, which may be given for premiums or loans upon the security of this policy, are hereby made a part of this contract of insurance. Second. No suit to recover under this policy shall be brought after one year from the death of the insured. Third. If the insured should, without the written consent of the company, at any time, enter the military or naval service, the militia excepted, or become employed in a liquor saloon, or if the insured should die by self-destruction, whether sane or insane, within three years

from the date hereof, this policy shall be null and void, and, in case of said avoidance, the reserve value only, according to the Actuaries' Table of Mortality, with four per cent. interest, shall be paid on the surrender of this policy. Except as hereinbefore provided, this policy shall be incontestable for any cause except misstatement of age. In case the age of insured shall have been misstated, the amount payable hereunder shall be such proportion of the sum insured as the premium paid bears to the required premium at the correct age of the insured."

The real controversy arises out of the true meaning and proper construction of the phrase, "except as hereinbefore provided." It is said by the company that the phrase applies to and embraces everything contained in the face and on the back of the policy coming before this excepting clause; in other words, it embraces not only the conditions set forth on the second page, but also the warranties and representations made in the application and on the face of the policy on its first page. The different results reached by these different constructions are apparent at a glance. If the phrase is limited to the conditions set out on the second page, then the policy is contestable only for a breach of those conditions, while, under the other construction, it would be contestable for any fraudulent misstatement by assured in the application and medical examination.

It is further stated that, if the clause should be so construed as to make the policy incontestable for fraud in obtaining it, then the contract itself would be void, because contrary to public morals and a sound public policy. The question involved in this controversy was before the supreme court of Iowa in the case of *Welch v. Insurance Co.*, 78 N. W. 853. In that case the policy involved was the same as in the present case, issued by the same company. That court held that the phrase, "except as hereinbefore provided," applied not only to the conditions indorsed on the second page of the policy, but also the application and the statements contained in it, and that to hold the policy incontestable for fraud would be to deny any effect to the warranty and agreement of the applicant, while to hold otherwise gives full effect to all parts of the contract. That court says, if the policy may never be contested for fraud in its procurement, why include the warranty and agreement in it? That court also intimates that a provision in a policy that it should not be contestable for fraud would be void and render the contract itself invalid. The court also draws a distinction between policies which are by their terms to become at once incontestable and those to become incontestable only after a certain length of time, and intimates that the latter cases may be sustained, and that fraud will not defeat such policies after the time limited, because the company has reserved to itself the delay which it deems necessary to detect and discover the fraud, and, if it has not been discovered and defended

against in that time, it may not be afterwards set up. In this latter class falls the case of *Clement v. Insurance Co.*, 101 Tenn. 22, 46 S. W. 561. See the same case, reported in 42 L. R. A. 247. It is conceded that this case is correctly decided, but it is said that the present case, as well as the case from Iowa, is to be distinguished from it by the fact that in the *Clement Case* a period of one year was reserved by the company in which it might make such investigations as it deemed proper, and, if dissatisfied, might cancel the policy, while here no time is reserved. It will be noted that this is a concession that fraud will not prove a defense after the expiration of one year, so that this concession, as well as the holding in the *Clement Case*, go to the extent that fraud in procuring the policy does not render it void, but only voidable within the time stipulated. If the time may be limited to one year within which the defense of fraud may be made available, it is difficult to see why it may not be limited to six months or one month, or such other time less than this as the company may deem it important to stipulate. If fraud may be waived at all, certainly the parties may stipulate the grounds upon which the waiver may be made, and, if a company can stipulate that its policies shall be incontestable, it may fix the conditions upon which incontestability shall rest, and may fix a time limit upon the right to contest.

We think that a consideration of the manner in which insurance is effected and policies are written will remove much of the difficulty in determining the proper decision of this case. When a party applies for a policy he is required to make an application, and in it to reveal and state everything that the company deems material to the risk. A large number of questions are put to him to elicit the facts. These questions are framed by the company, and he is obligated by the terms of his application to commit no fraud and make no material mistake in answering them. Not only so, but the company, by its own medical examiner, subjects the applicant to a physical personal examination, and to a course of questions calculated to bring out and make plain his physical history and condition. With this statement of the applicant and report of its own examiner before it, the company has the privilege of making such investigation as it may deem proper. It is under no obligation to come to a conclusion in any definite or specified time. If it desires a week, it may take it; if a month or a year, it may suspend its acceptance until that time expires. We can see no difference, in principle, between the present case and the *Clement Case*. In that case, the company stipulated for 12 months' time after it issued its policy; in the present case, it took the time it deemed necessary before accepting the policy. It may therefore well be held to have waived the effects of fraud, since it had such time to discover it as it saw proper. We can therefore see no good

reason why these parties may not have entered into such contract if they saw proper so to do. *Joyce, Ins.* § 8782. We are not passing upon the wisdom of such a provision, but upon the rights and liabilities of the parties, if it has been made.

But the question remains, did the company intend to cut itself off from the defense of fraud in obtaining the policy? In the *Clement Case* the incontestable clause read as follows: "After the policy shall have been in force one full year, if it shall become a claim by death the company will not contest its payment, provided the conditions of the policy as to payment of premiums have been observed. This is a broad provision, and leaves the policy contestable alone upon the ground of nonpayment of premiums." Now, in the present case, it is evident that the company intended to stipulate that it would not contest the policy upon any ground except misstatement of age and "except as hereinbefore provided." We cannot construe this exception as leaving the company an option to contest the policy for any matter contained in the application and medical examination, but only for such matters as are stated in the conditions indorsed upon it. These conditions are, in brief: (1) Failure to pay premiums as agreed upon; (2) bringing suit within one year after the death of the insured; (3) the entrance by insured into military or naval service, engaging in saloon business, death by self-destruction within three years; and (4) misstatement of age. To hold that all the statements made in the application are to be excluded from the clause of incontestability would be to deny any scope or effect to that clause. These statements of the application and examination contain all the grounds of contest of which the policy is susceptible, so far as its terms are concerned. If they are all excepted, and contest may be made upon any or all of them, then the noncontestable clause has no operation whatever. Of course, the clause does not embrace a matter which is outside of the terms and conditions of the policy, such as nondelivery, forgery, false impersonation, etc., as these matters would go to the question of title, and not mere fraudulent or false misstatement in the policy itself. The true meaning is that no defense will be interposed by reason of the terms and form of the policy, except those embraced under the head of "Conditions," including the express provision as to misstatement of age. To illustrate: The company might defend under the policy on the ground that plaintiff was not dead; that the policy had never been delivered,—because such defenses do not amount to the contest of the terms, provisions, conditions, and stipulations of the policy. We are of opinion that the causes set out in the "Conditions" and the misstatement as to age are the only grounds upon which the company, under the terms of this policy, has the right

to contest liability, and it has waived the right to make any contest on any other ground covered by the terms and provisions of the policy. We can come to no other conclusion, and give any effect to this clause in reference to noncontestability, nor to give effect to the different provisions of the policy.

It is assigned as error that the court refused to charge, upon defendant's request, that, "if John Fox was desperately ill from scurvy, and became weary of life, and deliberately undertook to starve himself to death, and the scurvy and starvation jointly caused his death, there can be no recovery in this case." The defendant had already made two requests bearing upon this feature of the case, both of which were given, and are as follows: "If John Fox refused to take nourishment, and the proximate cause of his death was starvation, and he refused to take nourishment in order to bring about that result, there can be no recovery by plaintiff in this case. That would be so although John Fox may have been so sick from scurvy that it would have ultimately caused his death. If John Fox was fatally ill with scurvy, and his death was hastened by such starvation, there can be no recovery by plaintiff." Again: "If John Fox was desperately ill with scurvy, and became weary of life, and deliberately starved himself to death, there can be no recovery by plaintiff in this case. If the lack of nourishment was the proximate cause of his death, this would be so, even though he was so afflicted with scurvy that it would have ultimately resulted in his death." This, we think, is ample on this feature of the case, and embraces the request refused. We can see no error in the proceedings and judgment of the court below, and it is affirmed, with costs.

STATE v. ROBINSON.

(Supreme Court of Tennessee. Jan. 5, 1901.)

HOMICIDE—TRIAL—JURY—OPINIONS—EFFECT—COMPETENCY—OFFICER IN CHARGE—ASSISTANT—APPOINTING—DISTRICT ATTORNEY—IMPROPER STATEMENTS—EFFECT—WITHDRAWING—EVIDENCE—SUFFICIENCY.

1. Where, in a prosecution for murder, two of the jurors on their voir dire stated that they had formed and expressed an opinion as to the guilt of defendant, which it would require proof to remove, based on information believed to be true, though they did not know that those from whom the information was obtained knew or professed to know the circumstances of the case, but they could try the case according to the law and evidence, and give defendant a fair and impartial trial, it was not error to accept such jurors as competent.

2. Where, after the jury had retired, a person obtruded himself on them in the nighttime, and they asked the officer in charge to apply for another to assist him, it was not error for the judge to go to the hotel where the jury were quartered, and swear in another person to assist the officer in charge of the jury, in the absence of defendant, and without his knowledge or consent, or that of his attorney.

61 S.W.—5

3. Where, on defendant's offering to read a deposition in evidence, the district attorney stated orally in the presence of the jury that the witness had been sent to the penitentiary for stealing mules; that he did not have the record to prove it, but had a witness to do so, whom he would examine if there was no objection,—but on objection he withdrew his statement, which the judge had stated in open court was improper, the conduct of the district attorney, though improper, is not reversible error.

4. Where an indictment for murder had been pending for some time, and had been twice tried, and no special effort was made to get absent witnesses whose testimony was merely cumulative, and there was unnecessary delay in applying to have them attached, it was not error to refuse a continuance.

5. Defendant and his father, while driving, met deceased and two others, driving calves with a great deal of noise, which frightened defendant's team, and he was thrown from the buggy. Defendant and his father claimed that, as he got up, deceased rode up, swearing at him, and as defendant started towards his buggy deceased stepped in front of him, and they quarreled and deceased knocked him down, and that, as deceased made a motion as though to draw a knife or pistol, he, not knowing that deceased was unarmed, shot him four times. The persons with deceased, both friends of his, and who had committed numerous crimes, testified that defendant went down the road towards deceased, and, seizing the bridle of his horse, told deceased that he ran over his brother, but could not run over him. Deceased denied running over his brother, and defendant called him a liar, to which he replied that he was not armed, and wanted no trouble. Defendant kept his hand under his coat, and, after more words, again called deceased a liar, whereupon deceased struck him, and defendant drew his pistol, firing four times. *Held* to sustain a conviction of murder in the second degree.

Appeal from circuit court, White county; W. T. Smith, Judge.

George Robinson was convicted of murder in the second degree, and appeals. Affirmed.

L. D. Smith, B. G. Adcock, and Smith & Hudson, for appellant. Snodgrass & Fancher, Jarvis & Hill, and the Attorney General, for the State.

WILKES, J. Defendant is convicted of murder in the second degree, and sentenced to 15 years in the state prison, and has appealed. The killing of Erb Wilhite by defendant is admitted, and the contention on the merits is that it was done in self-defense, or, if this may not be sustained under the proof, that there was not such malice as would make the killing murder in the second degree, but that it was done in a sudden heat of passion provoked by a blow from the deceased. The state insists, however, that there was an old grudge between the parties, arising out of a former difficulty with a brother of the defendant, and that the killing was malicious and unjustifiable. The defendant has been ably defended, and his cause has been elaborately presented by learned counsel; and several assignments of error are made, in addition to an oral argument on the facts and merits of the case.

It is objected that Howard Smith and J.

R. Robins, two of the jurors who tried the defendant, were incompetent to act as such. These gentlemen on their voir dire stated that they had formed and expressed an opinion as to the merits of the case and the guilt of the defendant; that this opinion was based upon information which they relied upon and believed to be true; that they had read the newspaper accounts of the killing, but that they did not know that those from whom they obtained their information knew or professed to know the circumstances of the case; that they had a fixed opinion, based upon this information, which they regarded as true and reliable, and one which it would require proof to remove; that they could, however, try the case according to the law and evidence, and give the defendant a fair and impartial trial. The parties were held by the court to be competent, were accepted by the state, but challenged by the defense, and were placed on the jury over the protest of the defendant. The defendant exhausted all his challenges in making up the jury, and was forced to accept a juror over his peremptory challenge. This is assigned as error. We are of opinion that under the ruling of this court in *Woods v. State*, 99 Tenn. 182, 41 S. W. 811, there was no error in accepting these parties as competent jurors. They could not say that the accounts which they had heard and read were given by persons who knew or professed to know the facts, and they stated that they could render a verdict impartially upon the evidence, notwithstanding these preconceived opinions, which were formed, as we think, from rumor, and not from any account by any one purporting or assuming to know or state the facts. We think the statements they had read and heard of the facts must be treated as rumor, and do not disqualify the persons from acting as jurors.

It is next assigned as error that after the jury had retired to consider of the verdict, and while the court was not in session, and in the nighttime, and in the absence of the defendant, and without his knowledge or consent, or that of his attorney, the trial judge appointed one W. D. Passons to assist the officer in charge of the jury. He was sworn, and, in connection with the other officer, waited upon the jury. The bill of exceptions does not state the reason why this additional officer was selected and sworn. It appears, however, from an affidavit made on the motion for a new trial by the officer in charge originally, that one William Robinson had obtruded his presence on the jury on two or more occasions; and, while it does not appear that he held any improper communication with the jury, yet some of the jurors thought his conduct was improper, and asked the officer in charge to apply for another to assist him. The judge was telephoned to about the matter, and went to the hotel where the jury was quartered, and selected Passons, and swore him in to assist

the regular officer. Some three or four of the jury were sick, and seemed to be alarmed at what was being given them to eat at the hotel. We think there is no reversible error in this action of the trial judge. He was on the ground, and saw and knew all the circumstances, and must have been convinced that it was necessary, under the circumstances, to have an additional officer to handle the jury. There is no valid exception or objection made to the party selected to aid the regular officer, and it is not stated that he had any intercourse with the jury, but he was merely assisting to wait upon them. An emergency having arisen in the nighttime for this additional officer, it was not reversible error in the trial judge to make this provision without attempting to convene court and have the jury, defendant, and attorneys present when he made the appointment.

It is next objected that there was improper conduct on the part of the attorney for the state. The defendant offered to read the deposition of one Noa, when the district attorney stated orally in open court, in the presence of the jury, that the witness had been rendered infamous and had been sent to the penitentiary for stealing mules; that he did not have the record to establish the fact, but that he had a witness who would prove it,—and proposed to introduce and examine him if there was no objection; adding that he knew that it would be incompetent unless there was no objection, and asked counsel for defendant if he would object. The defendant's counsel objected, and thereupon the district attorney withdrew his exception to the deposition, and it was read. The trial judge stated in open court that the proposition of the district attorney was improper. This statement and proposition of the district attorney was improper, and should not have been made. While the record is meager as to what the court stated, it does appear that the trial judge said that it was improper; and the district attorney, upon objection, withdrew the statement and proposition, and the deposition was read without further exception. This was all that could be done to rectify the error, and we do not think it of such importance as to be reversible. Other objections were made to statements by the district attorney, but we do not consider them of reversible importance.

We are also of opinion that no sufficient ground for continuance was laid. The case had been pending for some time, and had been twice tried. No special effort appears to have been made to get absent witnesses, and there was unnecessary delay in applying to have them attached. The evidence of the absent witnesses appears to be merely cumulative. There are other assignments, which we do not deem material.

Coming to the merits of the case, the defendant's version is: That he and his father

were returning to their home from Sparta, driving a wild team of horses in a two-horse buggy. That they met the deceased and witness Burgess driving some calves in an opposite direction, and they were "hollering" quite loudly,—more so than was necessary to drive the cattle, but as if they were drunk. They met in a lane, and, as the cattle came running along, they frightened the horses, and caused them to turn the buggy out of the road, on the side and upon a bank, and threw him out. Defendant's father drove the buggy up the road about eight steps from where it turned over, and left the defendant standing at that place, where the deceased and Burgess came up and began cursing him. That he said to deceased that he wanted no fuss, and deceased called him a damned liar, when he replied that he could not take that from him. That he then started to get in his buggy, when deceased stepped between him and the buggy and called him a damned liar again, and he replied that he was another, and deceased then struck at him, but he warded off the blow to a considerable extent, so that he only hit his hat, but he immediately struck him again, in the eyes, and knocked him down backward. That he caught on his hands. That deceased threw his hand into his pocket in front, and defendant then pulled his pistol and shot, firing at him four times. He thought deceased was trying to draw a knife or pistol, and he shot because he was afraid of being killed. That he begged him, when the quarrel first commenced, to get on his horse and go on, and said that he wanted no difficulty and had nothing against him. That deceased and Burgess came back to where defendant was. That after the shooting he got into the buggy with his father and went on home, about 2½ miles, and stayed there until arrested. That his father told the deceased when they were coming down the road, driving the calves, to hold up; that he was scaring the horses,—and that he replied that the road was free to let them run. Defendant and his father had some whisky in the buggy, and he had taken two or three drinks, but they were not drunk. That he was occasionally in the habit of carrying a pistol, but did not wear it all the time. That deceased never told him during the difficulty that he had no pistol. The defendant stated that he had shot at another person three times on a previous occasion, but that Williams, the other party, had shot at him, and that he had a fight up at a sawmill, but denied other difficulties about which he was questioned. That the next day after the shooting he went hunting in the mountains, and stayed several days, and was arrested while going home, just before day. That he got money, and made arrangements to leave the country. That he was arrested about three months after the killing, and had been dodging the officers. And that during the difficulty he had his hand on his hip,—an attitude usual to him. The testimony of the

father is substantially the same as that of defendant. It appears that Combs Burgess and Will Jett were the only two other eye-witnesses of the immediate difficulty. Both Jett and Burgess were with deceased when they met defendant and his father. Burgess' version is: That, as they passed the buggy, defendant's father said something. That he helped to turn the horses and buggy back into the road, and while he was doing so defendant went down the road towards Wilhite, and took hold of the bridle of his horse and said, "You run over Charley, but you can't run over me." Wilhite replied that he did not run over Charley, and defendant called him a liar. Wilhite replied that he did not want any fuss. That defendant had his hand on his pistol. Wilhite got off his horse, and threw the reins over a bush at the side of the road, and told defendant not to do anything to him; and defendant told him to get on his horse and go on home, or he would blow his head off. That defendant had his hand under his coat, but whether in his hip pocket or not he could not tell. A few words passed, and defendant called Wilhite a liar and a son of a —, and Wilhite thereupon struck him in the face and knocked him back, and defendant drew his pistol and fired four times. On cross-examination this witness confessed to many misdemeanors and crimes that he had committed, such as stealing watermelons and whisky, and causing disturbances at church, and stopping the mail, and that he had paid to get out of a great many scrapes,—so many that he could not remember them; that he seduced his two cousins, and that he never stole anything he did not need; that he was a chum of the deceased, and related by marriage; that Wilhite was between the defendant and his buggy when he was shot; and that the defendant was not doing anything to deceased when he struck him, except calling him a liar and a son of a —. In his re-examination the witness attempted, with poor success, to explain his many escapades. He also stated that the deceased struck at defendant twice, but, he thinks, hit him only once, and staggered him back, but did not knock him down. Will Jett, the other witness, was a negro, and testified to substantially the same state of facts as Burgess. He corroborates him in the statement that after defendant got out of the buggy he went on down the road to where deceased was, and that he took hold of his bridle reins and told deceased he could not run over him like he did over Charley; that deceased denied running over Charley, and got down off his horse, and defendant called him a damned liar, and told him to get on his horse and go home, or he would blow his head off; that defendant had his hand under his coat all the time while talking to deceased; that deceased told him he was not armed, and wanted no fuss; that when Wilhite struck defendant he fired, but Wilhite did not fall; that the first thing Wilhite said in the trouble was that

had nothing against defendant, and had nothing to fight him with; that after the trouble he went away from the county, at Wilhite's request, and on his money; that Wilhite was between the defendant and his buggy when the shooting occurred, and was doing nothing but talking and swearing. The physician testified: That Wilhite was shot in the right side, about two inches below the right nipple. The ball ranged downward, and went through the right lung, making a large wound, which caused the death. That Wilhite was not under the influence of whisky when he was shot. The character of the main witnesses is severely attacked, and it must be confessed that they do not well stand the test,—especially Burgess; but it seems that the jury believed them, and there is no very great difference between their statements and defendant's, except in the feature that they say the deceased told defendant he was not armed, and that the defendant advanced upon the deceased by going down the road to him.

It is earnestly insisted the facts do not make out a case of murder in the second degree, but, at best, only manslaughter done in a heat of passion. There is evidence tending to show something of a grudge by defendant against deceased on account of his former treatment of his brother Charley, but it is insisted that the real cause of the killing was the hot blood aroused at the moment by the blow which the deceased gave the defendant while intercepting him from his buggy. The defendant denies that he made any reference to the former difficulty with Charley, but we think the weight of the evidence is that he did refer to it. There are other features in the case, but we do not think they are of sufficient importance to pass on them specially. We think the weight of the evidence is that the defendant advanced upon the deceased in a threatening manner after he was thrown from the buggy, and cursed and abused him, and that he shot the deceased when he was in an upright position, and not on his knees; that deceased was unarmed, and the defendant referred to the previous difficulty between deceased and his brother, showing an old grudge; and, under these facts, he is guilty, as found by the jury, and the judgment is affirmed, with costs.

NASHVILLE, M. & S. TURNPIKE CO. v. DAVIDSON COUNTY.

(Supreme Court of Tennessee. Jan. 19, 1901.)

CONSTITUTIONAL LAW—CHARTER—CONTRACT —TURNPIKE—EXCLUSIVE PRIVILEGE— EMINENT DOMAIN—INJUNCTION.

1. The charter of a turnpike company (Act Jan. 4, 1830) provided, by section 7, that it should not be lawful to open or establish any other road so near as to injure or prejudice its interest, and by section 8 that the rights, privileges, and immunities granted should pass to and vest in its successors. Complainant's charter (Acts 1831, c. 46) provided that it should

succeed to and have all the rights, privileges, and immunities of the former company. *Held*, that the legislature could grant such rights, privileges, and immunities to complainant, and when accepted the charter became a contract between the state and complainant, which was inviolable, under Const. U. S. art. 1, § 10, providing that no state shall pass any law impairing the obligation of a contract.

2. The charter of complainant turnpike company (Act Jan. 4, 1830, and Acts 1831, c. 46) provided that it should not be lawful to open or establish any other road so near as to injure or prejudice its interests. *Held*, that such provision is not indefinite or uncertain, since the question whether the new road is so near the turnpike as to injure or prejudice it is merely one of proof, and pecuniary injury can be definitely shown.

3. Complainant's charter (Act Jan. 4, 1830, and Acts 1831, c. 46) provided that it should not be lawful to open or establish any other road so near as to injure or prejudice its interests. The county was about to open a new road, extending from another turnpike to complainant's, at a point beyond its principal tollgate, which would greatly impair its revenue. *Held*, that the exclusive privilege granted by the charter, though an inviolable contract with the state, must yield to the public use, on just compensation, and hence the opening of such new road should be restrained only until just compensation has been paid to complainant for the injury which it will suffer by the opening of the new road.

Appeal from chancery court, Davidson county; H. H. Cook, Chancellor.

Action by the Nashville, Murfreesboro & Shelbyville Turnpike Company against the county of Davidson. From a judgment of the court of chancery appeals affirming a decree of the chancellor dismissing complainant's bill, it appeals. *Reversed*.

John J. Vertrees and Parks & Harwood, for appellant. J. A. Cartwright, for appellee.

WILKES, J. This is a bill by the turnpike company to enjoin the county of Davidson from opening and building a public road near Nashville, to be called "Arlington Avenue." The road as projected is about one-half a mile long, and extends from a point on the company's pike just beyond its first tollgate, in an oblique or diagonal direction, to the Stone River or Chicken pike, near the southeast corner of Mt. Olivet Cemetery. The road simply extends from the one pike to the other, and not beyond either, in either direction. The theory of the bill and ground of complaint is that the proposed road will be used and will operate as a shun pike, whereby payment of tolls will be avoided at its first and most valuable and important tollgate; but if not, technically speaking, a shun pike, still the turnpike company has a right to prevent the opening of the road, because it violates a provision of its charter, and injures or destroys an exclusive right which the charter of the turnpike company confers upon it. The chancellor held against the complainant company, and denied it any relief and dismissed its bill, and the company appealed. The court of chancery appeals reached the same result as the chan-

cellor, but upon different grounds, and the complainant has appealed to this court and assigned errors.

The case, as it comes to this court, depends upon the validity of the charter provision, and its proper construction and interpretation. The court of chancery appeals report as facts that the proposed road if opened, would be a great public convenience, and that it was not designed or intended as a shun pike, for the purpose of depriving complainant company of its tolls, but from a sincere purpose to subserve the public convenience, but that it will materially injure the plaintiff, inasmuch as it will be used by a large number of people as a way of getting into the city of Nashville and leaving it without having to pay toll at gate No. 1 upon complainant's road, and this damage is estimated at from \$500 to \$1,500 per annum. It is not insisted that, outside and independent of the charter provision referred to, the complainant could prevent the building of this road, so that we pass at once to the consideration of this feature of the case, inasmuch as complainant now bases its right to the relief prayed for upon the provision in the charter. Upon this point, see the case of Hyde's Ferry Turnpike Co. v. Davidson Co., 91 Tenn. 291, 18 S. W. 626; Clarksville & R. Turnpike Co. v. Montgomery Co., 100 Tenn. 417, 45 S. W. 345.

The complainant company was chartered in 1831 under chapter 46 of the Acts of that year, and was organized and has been operated under that charter ever since. That act gives to the company all the rights, privileges, and immunities which had previously been conferred by the act of January 4, 1830, upon a turnpike to be built from Nashville to Murfreesboro, and it is in this latter charter that the provision in question is found at sections 7 and 8. Section 7 is as follows: "That it shall not be lawful to open or establish any other road so near as to injure or prejudice the interest of the said Nashville and Murfreesboro T. P. Co." Section 8 provides that the rights, privileges, and immunities granted to the original members or stockholders of the company should pass to and vest in their successors. This is all that is necessary to set out of the charter; and conceding, as found by the court of chancery appeals, that the present company is entitled to all the rights, privileges, and immunities of the original company, the question recurs, is the complainant company, by virtue of these charter provisions, entitled to enjoin the opening and use of this road as projected? It is not necessary to give any technical definition of the terms, "rights, privileges, and immunities," as used in the charter. It is sufficient to say that under these terms are embraced such things as are valuable to the company in the exercise of the franchises conferred upon it. There can be no serious doubt but that the legislature could grant to the complainant company such a right, privilege, or

immunity as is contained in this act. Railroad Co. v. Hicks, 9 Baxt. 442; In re Binghamton Bridge, 3 Wall. 51, 77, 18 L. Ed. 137; Humphrey v. Pegues, 16 Wall. 244, 21 L. Ed. 326. Nor can there be any serious doubt but that, upon the acceptance of a charter with such provisions, it became a contract between the state and the complainant company, which, under section 10, art. 1, of the federal constitution, would become inviolable. As to what will be the ultimate effect or result of this holding, we will consider further on. We are now considering the question of the validity and proper construction of the provision. The court of chancery appeals was of opinion that it was not sufficiently definite to found a right in complainant to the relief asked in this case; and that court cites and relies in its holding upon principles announced in the following, among other, cases: State v. Clarksville & R. Turnpike Co., 2 Sneed, 90; Talmadge v. Transportation Co., 3 Head, 338; Gas Co. v. Williamson, 9 Helsk. 326; Clarksville & R. Turnpike Co. v. Montgomery Co., 100 Tenn. 417-421, 45 S. W. 345. In the first of these cases it is said, "Nothing passes against the state or public by implication." In the case last cited it is said, "Nothing is taken or conceded to a corporation but what is given in unmistakable terms or by an implication equally clear." And, again, the contract, to be effective, must be clearly expressed in the charter. Page 421, 100 Tenn. and page 346, 45 S. W. To the same effect, see, also, Railroad Co. v. Dennis, 116 U. S. 665, 6 Sup. Ct. 625, 29 L. Ed. 770; Slidell v. Grandjean, 111 U. S. 412, 4 Sup. Ct. 475, 28 L. Ed. 321. The correctness of this holding we are not disposed to question, but readily approve.

The court of chancery appeals was of opinion that the charter provision was indefinite, in that it did not define the territorial limits or distance within which the road should not be constructed; and, bearing upon this feature of the case, the court of chancery appeals cite the cases of Enfield Toll-Bridge Co. v. Hartford & N. H. R. Co., 17 Conn. 40, 42 Am. Dec. 716; Proprietors of Piscataqua Bridge v. New Hampshire Bridge, 7 N. H. 35; Bridge Properties v. Hoboken Co., 1 Wall. 116, 17 L. Ed. 571; In re Binghamton Bridge, 3 Wall. 51, 18 L. Ed. 137,—as illustrating their position and ruling, and as indicating the proper mode and degree of definiteness requisite to create an exclusive right or franchise. The substance of the position taken by the court is that, if the provision were that no other road parallel or practically parallel to the complainant's line could be opened within any given distance,—as, for instance, a mile, or five miles, or any other designated distance, it would be valid and definite. We are unable to agree with the court of chancery appeals in their view of this matter. We cannot see that the fixing of exact distances or territorial limits is an any more definite provision than the one

Incorporated in this charter. It is quite possible that the opening of a new road parallel to complainant's road, and within one mile or five miles of it, would not in any way injure complainant's road; and yet this is the test applied by that court. It is certainly better that upon the question of opening a public road the test should be the necessity and convenience of the road, on the one hand, and the injury to the existing road, upon the other. The public is certainly entitled to all the roads necessary for its use, and the complainant should not complain, no matter how near they were constructed to its road, if they did not injure it. It is true that in the cases cited by the court of chancery appeals the question is made to turn upon the matter of distance or territorial limit, but this was because of the provisions of the charters which were under consideration, and which prescribe territorial limits. It does not necessarily follow that charters which do not fix such limits or zones are indefinite. In either case the question is one of proof in the one case, as to distance; in the other, as to injury. The latter may not be as readily ascertained as the former, and by the same means of survey, but injury is susceptible of proof equally as is distance. Now, in the present case the court of chancery appeals has found that the new or proposed road is one of public convenience, but not one of public necessity, and that it will materially injure the complainant's road. The vague and indeterminate conditions which the court of chancery appeals imputes to the terms of the charter do not relate to it, but, if they exist at all, pertain to the proof that must be made. Proof must be made in either case, and it may and probably would be harder to make in the one case than in the other. We have constant questions arising in the courts of "reasonable notice," "reasonable skill," "reasonable care," and "reasonable compensation"; and, while definite limits are not fixed in any of these cases, it does not follow that they are indefinite, since they are ascertainable by proper inquiry and judicial investigation. The charter provision is virtually as if it read, "No other road should be opened or established so near this road as to materially reduce its revenues, within the judgment of a court of competent jurisdiction;" and the act could not be classed as vague and indefinite under such a provision. In the one case it must be shown that the road complained of is within a certain geographical distance or territorial zone; in the other, that it is a material injury to the established road. In the one case the test is a physical, in the other a financial, one.

We are of opinion that the court of chancery appeals are in error in their view of the case, and that complainant is entitled to relief, and the question now to be considered is the character and extent of the relief that should be granted. Before passing to this, however, we refer to the contention

made for the county that the charter had reference to a parallel road, or one virtually parallel, to the existing road, and therefore a competitor with it. But this contention is not supported by the language or reason of the act. The critical question is not whether the new road is parallel, or has the same trend or direction as the established road, for there might be such a road without injury to the established road; but the question is, does the new road, as constructed or projected, injure or prejudice the interest of the old road? If it does, it is within the inhibition of the charter, no matter what its direction may be. As a matter of fact, however, the new road, when used in connection with the Chicken or Stone River pike, does make a line substantially parallel with the old road. In the case of *Red River Bridge Co. v. Mayor, etc., of Clarksville*, 1 Sneed, 176, it was held that a grant by charter from the legislature of an exclusive right to build a toll bridge within certain limits, although a contract, is such an exclusive right as must yield to the public use, upon just compensation being paid therefor, without violating said contract or impairing its obligation, in the sense of the constitution. This doctrine is recognized and approved in *Clarksville & R. Turnpike Co. v. Montgomery Co.*, 100 Tenn. 425, 45 S. W. 345, citing 6 Am. & Eng. Enc. Law, 545, 546; *Dyer v. Bridge Co.*, 27 Am. Dec. 655. To the same effect are *Enfield Toll-Bridge Co. v. Hartford & N. H. R. Co.*, 17 Conn. 40, 42 Am. Dec. 716; *Proprietors of Piscataqua Bridge v. New Hampshire Bridge*, 7 N. H. 35; *State v. Noyes*, 47 Mo. 189; *Mason v. Bridge Co.*, 17 W. Va. 396. We are of opinion, therefore, that there is error in the decree of the court of chancery appeals, as herein indicated, and the decree of that court is reversed and modified. The cause is remanded to the chancery court of Davidson county for a reference and ascertainment of the compensation that should be paid to the complainant for opening this road, and when the amount is ascertained and paid the county shall be entitled to open and operate the road, and until that time the injunction will remain in force. The costs of the cause up to the present time will be paid by the county.

MARK TWAIN LUMBER CO. v. LIEBERMAN et al.

(Supreme Court of Tennessee. Dec. 15, 1900.)
APPEARANCE—SPECIAL APPEARANCE—WAIVER OF OBJECTIONS—PLEA IN ABATEMENT—STATUTES—SERVICE ON AGENT—RESIDENT AGENT.

1. It was not error to set aside a decree pro confesso and permit a plea in abatement to be filed to the jurisdiction on the ground that the appearance on such motion was a submission to the jurisdiction.

2. Shannon's Code, § 4542, declares that when a company, corporation, or individual has an agency in any county other than that in which the principal resides, service of process may be made on an agent employed therein in all

actions in such county growing out of the business or connected with the principal. *Held*, that the statute only authorizes suit against such nonresident where the agent is a resident in the county, and hence service of process in the county where suit was brought on an agent who operated in several counties, traveling from place to place, and stopping wherever convenient, sometimes for three or four days at a time in the county where service was made, gave the court no jurisdiction.

Appeal from chancery court, Fentress county; T. J. Fisher, Chancellor.

Suit by the Mark Twain Lumber Company against Lieberman, Loveman & O'Brien and others. From a decree of the court of chancery appeals affirming a decree of the chancery court in favor of defendants, plaintiff appeals. Affirmed.

Smith, Smith & Lansden, for appellant. Conatser & Case, for appellees.

WILKES, J. This is a bill filed by a domestic corporation in Fentress county against the defendants, who are residents of Davidson county, to recover \$3,658.84, alleged to be due from the defendants for lumber sold to them in Fentress county. Subpoena to answer was served upon A. F. Brasswell, who, it is alleged, was the agent of the firm in Fentress county. Brasswell, as an individual, was also made a defendant to the bill. Process was executed returnable to the April term of the court, but, there having been no term of the court held in April, a pro confesso was taken against the defendants at the May rules. On the 23d of May the individual members of the firm made affidavit for the purpose of having the pro confesso set aside, and in it stated that they had prepared to defend the suit, and that they file with the affidavit a sworn answer to the bill; and it was asked that the pro confesso be set aside, and they be allowed to file their answer, but no answer as a matter of fact was filed. The chancellor set aside the pro confesso, and in his order setting it aside stated that the defendants asked leave to defend by filing a plea in abatement tendered with the motion, but that, if the court should be of opinion that the plea in abatement could not be considered, then they ask leave to file the answer presented therewith, and be allowed to defend thereunder. The order allowed the pro confesso to be set aside, and granted leave to the defendants to make such defense as they might deem proper. They thereupon filed a plea in abatement, properly sworn to, in which they stated, in substance, that they were a partnership doing business in Nashville, Davidson county, Tenn., and were residents of that county when the bill was filed, and that complainant was a resident of Fentress county; that they had, when the bill was filed, no office or agency or resident agent in Fentress county, where it was filed; that process had never been served upon them; and they asked that the

suit be abated. There was a motion to strike out the plea because: (1) Defendants had permitted a pro confesso to be taken, and thereby submitted to the jurisdiction of the court. (2) They had entered their appearance to make the motion, and thereby submitted to the jurisdiction; that the plea was insufficient in form and substance, in that it did not allege that the firm had no agent in Fentress county, nor any office in that county, when service of process was made. The defendants were allowed to amend their plea so as to allege that they had no office in Fentress county, and the motion to strike out was overruled, and the complainant was required to join issue on the plea, to which he excepted. Evidence of the defendant Brasswell was heard, and upon it the chancellor sustained the plea in abatement, and dismissed the bill; to which complainant excepted, and it thereupon prayed an appeal, which was granted. The court of chancery appeals was of opinion that the chancellor committed no error in setting aside the pro confesso, and permitting the plea in abatement to be filed to the jurisdiction; that the entry of appearance was simply for the purpose of contesting the jurisdiction, and not for a trial on its merits, and was not a submission to the jurisdiction; and in this, we think, that court was correct. That court was also of the opinion that the court below acquired no jurisdiction of the defendants Lieberman, Loveman & O'Brien by service of subpoena upon defendant Brasswell; that the true meaning of our statute (Shannon's Code, § 4542) is that suit may be brought in any county where a corporation, company, or individual has an office, agency, or place of business located in the county, and does not mean a mere traveling agent, but one resident in the county,—citing *Railroad Co. v. Walker*, 9 Lea, 481. The testimony of Brasswell was, in substance, that he was defendants' agent to buy logs; that he made purchases without consulting with them, and drew drafts on them, signing the same as agent; that he had paid out for them in Fentress county about \$80,000 for logs; that he received his mail and had his washing done in Picket county, Tenn.; that he operated in Fentress, Picket, Overton, and Clay counties in Tennessee, and bought some logs in Clinton and Wayne counties, Kentucky; that he traveled from place to place, stopping wherever convenient, carrying his books, branding iron, and draft book with him; that he brands the timber; and that he advanced money to the complainants to a specified sum on the contract on which this suit is based; that he was frequently in Fentress county, and had stayed three or four days at a time in its county town, but that most of the time he was on the several rivers that run through his territory; that complainant's residence as a corporation was in Fentress county, while the defendants' as a firm or partnership was in Davidson county. This court, in constr-

ing the statute to which we have referred (Shannon's Code, § 4542), has held that the agency intended by the statute means some office, agency, or place of business located in the county, and does not mean a mere traveling agent, but an agent resident in the county. *Railroad Co. v. Walker*, 9 Lea, 481. We think that case analogous to the present, and, following its holding, we are of opinion that Brasswell was not such agent as is contemplated by the section, and the service upon him was not sufficient to give jurisdiction of the firm of Lieberman, Loveman & O'Brien. It follows that the decree of the court of chancery appeals is affirmed.

LITTERER et al. v. TIMMONS.

(Supreme Court of Tennessee. Jan. 5, 1901.)
APPEAL AND ERROR—RECORD—ASSIGNMENT
OF ERROR—VERDICT—EVIDENCE
—REVERSAL.

1. Where, on appeal from a judgment for rent for a store occupied by one selling merchandise on commission for defendant, and not authorized to contract any debt against him, there was nothing in the record, except in the motion for a new trial, which showed that the ground of the judgment was that defendant was estopped from denying his liability because of his failure to notify plaintiff that he would not be liable when he first learned that his agent was occupying plaintiff's store, an assignment that the court erred in holding that defendant was estopped will not be considered.

2. Where, in action to recover rent for a store occupied by one selling merchandise on commission, plaintiff's evidence made out a clear case of liability, a judgment in his favor will not be disturbed on appeal.

Appeal from circuit court, Davidson county; J. W. Bonner, Judge.

Action by C. A. Litterer & Co. against W. H. Timmons. From a judgment in favor of plaintiffs, defendant appeals. Affirmed.

E. S. Scruggs, for appellant. Douglas Wike, for appellees.

WILKES, J. This case was commenced before a justice of the peace of Davidson county in 1898 to recover rent for a storehouse in Thompson Station from August 1, 1895, to January 1, 1897. This storehouse was occupied by one Critz, who, as the defendant testifies, was to sell merchandise for him on commission, but who was not authorized to contract any debt against the defendant. Judgment was given for \$85 by the justice, and defendant appealed to the circuit court of Davidson county. The cause was there heard without a jury, and the judgment of the justice affirmed. Defendant has appealed to this court, and assigns as error:

1. That the court erred in holding that the defendant was estopped from denying his liability on plaintiff's debt because of his failure to notify plaintiff that he would not be liable for same when he first learned that his agent was occupying plaintiff's house.

There is no request made of the trial judge to reduce his findings of fact and law to writing, and there is nothing in the record, except in the motion for a new trial, which shows that estoppel was the ground for the trial judge's judgment. This assignment, therefore, is not well made.

2. There is no evidence to sustain the judgment of the court below. The only real question of fact in the case is whether the defendant rented the storehouse, or made himself liable to the plaintiff for it, to be occupied by his agent. The evidence of the plaintiff makes out a clear case of liability; and, this being so, under the rule of this court that, when there is any evidence to support the finding, the judgment of the lower court will not be disturbed. The judgment must be affirmed, with costs.

STATE v. FLEMING.

(Supreme Court of Tennessee. Jan. 8, 1901.)

USURY—STATUTORY PROVISION—APPEAL—
USURY LESS THAN \$10—PUNISHMENT.

1. The act of 1835 (Shannon's Code, §§ 6732, 6733) provides that no person shall receive by way of compensation for the use of money more than 6 per cent. per annum, and that the punishment of the offense shall be a fine in no case less than \$10, nor more than the usury received. The interest law of 1869 declares that a conventional rate of interest may be charged by a written consent of the parties, and that in the absence of such written agreement the interest and usury laws then in force shall remain as before. *Held*, that the act of 1835 was not repealed by the act of 1869, which only takes exceptional cases out of the former act.

2. Under Shannon's Code, §§ 6732, 6733, providing that no person shall charge more than 6 per cent. per annum, and that the punishment of the offense shall be a fine in no case less than \$10, nor more than the amount of the usury received, receiving usury in a sum less than \$10 is subject to a fine of \$10.

Appeal from criminal court, Davidson county; J. M. Anderson, Judge.

E. M. Fleming was convicted of receiving usury, and he appeals. Affirmed.

John T. Lellyett, for appellant. G. W. Pickle, Atty. Gen., and W. E. Hudson, Asst. Atty. Gen., for the State.

WILKES, J. This is an indictment for receiving usury. The charge is that defendant did exact and receive from one Eliza Benson, colored, as compensation for the use of money, a usurious rate of interest, to wit, 390 per cent. per annum on \$5, or \$1.60 for the use of \$5 for the period of one month. The cause was tried in the court below without a jury, and the learned judge found the defendant guilty, and that \$1.60 was charged under disguise for the use of money, as charged. Very many exceptions are made, and many errors are assigned to the action of the court below, with great particularity of detail.

Our statutes in regard to usury are thus set out in Shannon's Code:

"Sec. 6732. No person shall receive by way of compensation for the use of money more than at the rate of six dollars for the use of one hundred dollars for one year.

"Sec. 6733. The punishment of this offense shall be a fine in no case less than ten dollars, nor more than the amount of the usury received, to be ascertained by the jury," etc.

These statutes had their origin in the Acts of 1835-36, c. 50. They are brought forward into our Code of 1858 as sections 4821 and 4822, and in the compilation of Milliken & Vertrees as sections 5622 and 5623.

The first insistence is that these acts were repealed by the act of 1869-70 called the "Conventional Interest Law," and when this latter act was repealed by the Acts of 1877, c. 21, p. 35, the former laws were not re-established or re-enacted. We are of opinion this contention is not correct, and that the act of 1835 (Code 1858, §§ 4821, 4822) was not repealed by the act of 1869-70. That act does not purport to repeal any former act, but only to amend. It only provides, in substance, in the first section, for a conventional rate of interest by written agreement of parties, and by the second section that the interest and usury laws then in force should remain as theretofore, in the absence of such written agreement; and by the third section a penalty and punishment are provided for a violation of the first section. The two acts are not in conflict, but the act of 1869-70 only provides for an exceptional case, to be taken out of, and not to be treated as within, the provisions of the act of 1835 and Code 1858, §§ 4821, 4822.

The second contention is that under the wording and language of section 6733, Shannon's Code, it was never intended by the general assembly to punish the taking of usury when the amount taken is less than \$10. In other words, the statute says that the fine in no case shall be more than the usury received, and in no case less than \$10, so that if the usury received was less than \$10 no fine can be assessed; and the argument is that for such a small offense the legislature did not think proper to affix a penalty. It appears that the section, from the peculiar collocation of words, is susceptible of this construction. But when we look to the original act of 1835, from which it was compiled, the meaning and proper construction appear at a glance. It reads as follows: "Shall be fined a sum not more than the whole usurious interest, so taken and received, which amount shall be ascertained by the jury, trying the case: provided, no fine shall be less than \$10.00." We are of opinion, therefore, that the act was intended to apply to all cases of receiving usury, no matter what the amount taken might be; and the provision is that the minimum punishment shall be \$10 in any case, but the maximum shall in no case exceed the usury taken, when the usury ex-

ceeds \$10. Using the same words of the statute, but in a different collocation, the section would read: "The punishment of this offense shall be a fine not more than the amount of the usury received, to be ascertained by the jury, but in any case not less than ten dollars." This, we think, is the proper meaning of the statute; and, thus read, the taking of usury in an amount less than \$10 subjects the taker to a fine of that amount. Taking usury to an amount greater than \$10 subjects the taker to a fine not more than the usury received.

Some exceptions are made that the evidence does not sustain the finding of the trial judge, but we think they are not well made, and that the offense is made out, and we affirm the judgment, with costs.

WALLER et al. v. MARTIN et al.

(Supreme Court of Tennessee. Feb. 2, 1901.)

WILLS—CONSTRUCTION—LIFE ESTATE—POWER OF DISPOSITION—ESTATE BY CURTESY—DESCENT—HEIRS.

1. Where a will bequeathed certain property to a woman for her natural life, remainder to her legal heirs, and provided that such property should be under the control of the devisee, free from her husband's debts, but that, should any of them desire to sell their lands, they might do so, provided they would reinvest the money in other lands and take the deed to her and her legal heirs, with the same provisions contained in the will, the power of disposition given did not vest a fee in the devisee, since it was not unlimited, but was restricted to a sale for reinvestment on the same terms under which the original property was held; and hence the devisee's husband could take no estate by the curtesy, as her estate terminated with her life.

2. Where a will bequeathed certain property to a woman for life, remainder to her legal heirs, the rule that, where a party would take by descent the same estate that a devise purported to give him, he would take the land by descent, and not by devise, did not apply, since such heirs did not take the same estate under the will as they would take by descent, and hence the estate did not vest in the woman and her heirs, so as to convert her life estate into a fee.

3. Where a will bequeathed property to a woman for life, remainder "to her legal heirs," and authorized the sale of the property for reinvestment in other lands if the deeds therefor were taken in the name of such woman "and her legal heirs, with the same provisions contained in the will," the words "legal heirs" were equivalent to "children or their descendants," and the estate did not vest in her and her heirs, so as to convert the life estate into a fee.

Appeal from chancery court, Wilson county; J. S. Gribble, Chancellor.

Suit by Llewellyn Waller and others against T. A. Martin and others. From a decree in favor of complainants, defendants appeal. Affirmed.

Cantrell & McMillan, for appellant Martin. McClain & McClain, for appellees Mrs. Omohundro's children.

WILKES, J. The question in this case is to determine the rights of R. J. Omohundro

to a homestead in certain real estate in controversy. The contest arises between the heirs at law of his wife, Mary E. Omohundro, and a creditor of the husband, who had levied upon the interests of the husband in the land and sold it, upon the theory that he had a life estate in it as tenant by the curtesy. The present proceeding is by the heirs of Mrs. Omohundro to enjoin further proceedings to set apart such homestead, upon the theory that upon the death of Mrs. Omohundro the property descended to them, and that Mrs. Omohundro had but a life estate in the premises, and her surviving husband could not have, therefore, any estate as tenant by the curtesy in them. The chancellor held that the husband had no estate by curtesy in the land, and the court of chancery appeals affirmed this holding, and enjoined the proceedings to set aside homestead, vacated the sale, and declared and adjudged the children of Mrs. Omohundro to be the owners of the land in fee simple, and removed the clouds created by the condemnation and sale proceedings from the title. The creditor has appealed to this court.

If Mrs. Omohundro had only a life estate in the land, with remainder to her children, her entire interest in the land would cease with her death, and there would be nothing in which the husband could have an estate by curtesy. *Beecher v. Hicks*, 7 Lea, 207, 214; *Alexander v. Miller*, 7 Heisk. 81; 2 Kent, Comm. 134; *Bigley v. Watson*, 98 Tenn. 353, 358, 39 S. W. 525, 38 L. R. A. 679; *Stovall v. Austin*, 16 Lea, 700, 706. The title of Mrs. Omohundro was derived under the will of her father, which contained this clause: "I give and bequeath to my daughter Mary E. Omohundro my farm near the grade in the 23rd civil district of Wilson county, Tennessee [describing it], to have and to hold during her natural life, and at her death to go to her legal heirs. Now, I intend, and hereby will and direct, that all the lands I give to my daughter shall be under her control, and free from the debts of her husband; but, should any of them at any time desire to sell their lands, they may do so, provided they reinvest the proceeds in other lands, taking a deed to her and her legal heirs, with the same provisions contained in this will; and I hereby appoint my son Joshua C. Logue, trustee, to see that this part of my will is strictly complied with." It is insisted that such a power of disposition is given to Mrs. Omohundro by this will as must vest in her an absolute estate in the land. We think this position is not well taken, since the power of disposition is restricted to a sale for reinvestment on precisely the same terms under which the original property is held. It is not an unlimited power of disposition, and the case is not brought within the rule laid down in *Bradley v. Carnes*, 94 Tenn. 27, 27 S. W. 1007. A

general discussion of the subject of limited and unlimited estates in the first taker is there had, and need not be here repeated. The case of *Young v. Insurance Co.*, 101 Tenn. 311, 314, 47 S. W. 428, was where there was a devise to a mother for life, with power to sell for reinvestment; and it was held that the power did not convert the estate into a fee, or cut off the remainder interest. So in the present case there is no power in the life tenant to defeat the remainder; for a sale could only be made for reinvestment, and a trustee is appointed to see that this shall be done in a particular mode.

It is said, however, that the terms used in the conveyance vest a fee-simple estate in Mrs. Omohundro; in other words, that the phrase "to go to her legal heirs" means that the property shall descend to the persons who under the law will answer the description of heirs, and, if her "children" are the "heirs," they will take under the laws of descent, and not as purchasers under the will, and, this being so, under our statute the estate vesting in a party and her heirs would at once be converted into an estate in fee simple in the first taker. In this connection the rule is invoked that, where a party would take by descent the same estate that a devise purports to give him, then the law presumes that he takes by descent, and not by devise. 4 Kent, Comm. § 506. Unquestionably, in the absence of any statutory provision, if an ancestor devise to his heir just the estate, in quality and quantity, which he would take by descent, the latter will be considered as holding by descent, and not by devise. 3 Washb. Real Prop. side pages 414, 699. But Mrs. Omohundro did not take, under her father's will, the quantity and quality of estate she would have taken by descent, but she took a life estate only. Under the statutes of descent her children would have taken nothing from the grandfather, but under the will they take an estate in remainder. In the connection in which it is used in this will the expression "legal heirs" is equivalent to "children or their descendants." The term "legal heirs" is frequently held, from its connection, to mean "children." See the question discussed in *Alexander v. Wallace*, 8 Lea, 572; *Ingram v. Smith*, 1 Head, 426; *Gosling v. Caldwell*, 1 Lea, 454; *Boyd v. Robinson*, 93 Tenn. 34, 23 S. W. 72; and a large number of cases there cited. We are of opinion, therefore, that Mrs. Omohundro took only an estate for life in the lands in controversy, and her children took the remainder interest as purchasers, and not by descent, and the surviving husband had no estate by curtesy in the lands. The decree of the court of chancery appeals is therefore affirmed.

STATE v. CONNECTICUT MUT. LIFE INS. CO.

(Supreme Court of Tennessee. Jan. 19, 1901.)

INSURANCE—PRIVILEGE TAX—DOING BUSINESS IN STATE—RECEIVING PREMIUMS BY MAIL—LIABILITY TO TAX—POSTAL AUTHORITIES—AGENTS OF POLICY HOLDER—WITHDRAWAL FROM STATE—EFFECT.

1. Acts 1897, c. 2, § 5, provides that foreign insurance companies doing business in this state shall pay a privilege tax of 2½ per cent. on their gross premium receipts. A foreign insurance company, which had solicited and written insurance in the state, withdrew its agents in 1894, and ceased to issue policies. *Held*, that receiving renewal premiums on the policies already in force, by mail, directly from the policy holders under provisions in the policies that the premiums were payable in New York, was not doing business in the state, within the meaning of the act.

2. Where policy holders sent their renewal premiums by mail or express direct to the company in New York, in accordance with provisions in the policies that the premiums were payable in New York, the postal and express authorities were agents of the policy holders, and not of the company.

On Rehearing.

1. Acts 1897, c. 2, and Acts 1899, c. 432, provide that foreign life insurance companies which cease to transact new business in the state shall continue to pay the taxes therein provided on the business in force until the same shall terminate. *Held*, that where a foreign insurance company ceased issuing policies in the state in 1894, and withdrew its agents, but continued to collect its renewal premiums on the policies then in force by mail, it was not liable for the tax, since it had withdrawn from the state before the passage of the acts.

2. Acts 1895, c. 160, § 2, provides that it shall be unlawful for any company to make any contract of insurance on the lives of persons in the state, or for any insurance agent to solicit such insurance, except as authorized in the act. *Held*, that the statute did not apply to a foreign insurance company which had ceased issuing policies in the state in 1894, but continued to collect its renewal premiums on policies then in force by mail.

Appeal from chancery court, Davidson county; Henry H. Cook, Chancellor.

Action by the state of Tennessee against the Connecticut Mutual Life Insurance Company. From a decree in favor of defendant, plaintiff appeals. Affirmed, and rehearing denied.

Robt. Vaughn and G. W. Pickle, Atty. Gen., for the State. John J. Vertrees and Francis Fentress, for appellee.

WILKES, J. Prior to July, 1894, the Connecticut Mutual Life Insurance Company prosecuted its business of life insurance in the state of Tennessee through resident agents and local and general agencies. At that date it withdrew from the state, so far as soliciting or attempting to do any new business was concerned, leaving, however, quite a large number of policies in force. From July, 1894, to July, 1899, it received from policy holders residing in Tennessee premiums aggregating \$137,384.47. Of this sum \$124,526.96 was collected on policies originally solicited and taken in the state,

and \$2,867.50 on policies taken out originally in other states, and whose holders had subsequently moved to the state. For many years the state has exacted of foreign insurance companies a privilege tax of "2½ per cent of gross premium receipts, payable semiannually, January and July." Acts 1898, c. 80, § 6; Acts 1895, c. 160, § 19; Acts 1897, c. 2, § 5. The tax, without interest, due on this volume of business, is \$3,368.17 on policies taken originally in Tennessee and \$71.43 on policies taken originally elsewhere. The defendant's contention is that it withdrew from the state and its jurisdiction in July, 1894, that it has not since been "doing business" in the state, and that it is, therefore, not liable to this tax. What the defendant company did in 1894 was to recall its agents and agencies from the state, and cease to solicit and write new policies. It kept alive its existing policies by receiving premiums thereon as before, except that the money was sent by mail or otherwise to defendant's agents or agencies outside the state, and not paid to the company in the state. The chancellor was of opinion that the company was not liable for the tax, and so decreed, and the state has appealed, and assigned as error this holding of the chancellor.

The defendant company is a foreign corporation, not engaged in interstate commerce, and it is conceded that the legislature has power to prescribe the terms on which it may be permitted to do business in Tennessee. *Ohio Life Ins. & Trust Co. v. Merchants' Ins. & Trust Co.*, 11 Humph. 25; *Dugger v. Insurance Co.*, 95 Tenn. 245, 32 S. W. 5, 28 L. R. A. 796; *Young v. Iron Co.*, 85 Tenn. 196, 2 S. W. 202. The only question at issue is whether the company, under the facts in the case, after its withdrawal from the state in 1894, leaving a portion of its policies in force, was thereafter doing business in Tennessee by receiving by its officers in another state, through the mails and express, the accruing premiums on such policies. It is insisted by the state that to allow an insurance company thus to continue its business by receiving the premiums would be an easy evasion of the law. It must be observed that the tax as laid is not a gross sum for doing business, but a tax upon the gross premiums received by the company. These policies were all upon the usual plan; that is to say, the assured paid the first premium, and received the policy. Such payment kept the policy in force for a year. It was the right and privilege of the policy holder to renew the policy for another year by paying another premium. Such premium is known as a "renewal premium." It is optional with the assured to pay it, but obligatory upon the company to receive it. The company cannot compel the assured to pay a renewal premium, but he can compel the company to receive it, or, what is equivalent, keep the policy alive by tendering

it. When the company withdrew from Tennessee (July 1, 1894) there were 369 policy holders in the state (34 of whom had been insured while citizens of other states) holding policies which provided, in terms, that all premiums should be paid at the company's home office in Connecticut, unless, for the policy holder's convenience, it should, from time to time, be otherwise arranged. Many of these policies are still in force, but 104 have either matured or lapsed. None of the premiums were, after withdrawal in 1894, received by the company in Tennessee, but were sent to it by mail or express to Kentucky, or the home office in Connecticut. The act of the general assembly pertaining to foreign corporations refers, by its terms, to their admission, their retirement, and their exclusion. Section 9 of the act which provides for the exclusion of such corporations from the state prescribes the manner in which it shall be done, and says upon the doing of these acts the agents of the company are required to discontinue the issuing of any new policies or the collection of any premiums. It is argued, therefore, that the act, by its terms, defines the "doing of business" to be the issuance of policies and collection of premiums in Tennessee; and it is also contended that neither of these things has been done since the withdrawal of the company. We think it clear that a foreign insurance company, which issues to a citizen of Tennessee a policy, is not doing business in Tennessee if it receives the application in a foreign state, and without solicitation in Tennessee, and if it, in addition, executes and delivers the policy and receives the premiums in such foreign state. In such case there cannot be said to be any "doing of business" in Tennessee by the foreign corporation that would subject it to tax. A tax in such cases would be invalid, and such legislation would be unconstitutional and void. *Allgeyer v. Louisiana*, 165 U. S. 578, 17 Sup. Ct. 427, 41 L. Ed. 832; *Association v. Bedford* (C. C.) 88 Fed. 7.

It is insisted on behalf of the state that the present case is controlled by that of *Insurance Co. v. Spratley*, 99 Tenn. 322, 42 S. W. 145. In substance, that case is this: Prior to 1894, the company, while doing business as a foreign insurance company in Tennessee, insured the life of B. R. Spratley, a citizen of Tennessee, upon an application made in Tennessee, and by a policy delivered in Tennessee. The company afterwards, on July 1, 1894, withdrew from the state. Mr. Spratley died in 1896. Proofs of his death were filed, and claim made by his widow, also a citizen of Tennessee. Thereupon, in May, 1896, the company sent an agent named Chaffee into Tennessee "to investigate his claim, and the conditions under which the death occurred." He was also authorized to and did make a proposition of compromise while there. 99 Tenn. 324, 332, 42 S. W. 145.

Under sections 4543-4546 of Shannon's Code it was held that the company had transactions in Tennessee with regard to the policies before and at the time of their delivery, and was doing business with reference to them, through Chaffee, in Tennessee, when process was served on him; and therefore the process and service were sufficient to bring the company before the court. 99 Tenn. 332, 42 S. W. 145. It will be observed: (a) That the company had done business and had this transaction in Tennessee; (b) that Chaffee, as agent, had come into Tennessee in a representative capacity as agent; (c) that he had come with respect to the original Tennessee transaction; and, (d) that undeniably an agent of the company was in Tennessee, and in a representative capacity, and consequently the sole question was whether, under such circumstances, process could be served on the agent so as to bind the company. It was held, under the peculiar statute, that it could. The case was carried to the supreme court of the United States, and is reported in 172 U. S. 602, 19 Sup. Ct. 308, 43 L. Ed. 569. The judgment of the supreme court of Tennessee was affirmed. The federal question in the case was whether the court below had jurisdiction to render a judgment on the service of process on Chaffee. If it had not, the company had been denied "due process of law." 172 U. S. 609, 19 Sup. Ct. 311, 43 L. Ed. 571. The court held that by continuing the old policies in force, and collecting the premiums in another state, and sending a regular general agent into the state to investigate and with authority to settle, the company was "doing business within the state as far as is necessary," within the meaning of the statute (Shannon's Code, §§ 4543-4546). The provisions of the statute (Shannon's Code, §§ 4543-4546) are special, and somewhat peculiar. By the first section it is provided that "any corporation claiming existence under the law of another state found doing business in this state shall be subject to suit here to the same extent that corporations of this state are by the laws thereof liable to the same, so far as relates to any transaction had in whole, or in part, within this state, or any cause of action arising here, but not otherwise." Section 2 of the act defines what is meant by the term "found doing business" in this state in these words: "Any corporation having any transactions concerning any property situated in the state through any agency whatever acting for it within this state shall be held to be doing business within the meaning of section 1." Section 3 provides that "process may be served upon any agent of said corporation found within the county when the suit is brought, no matter what character of agent such person may be, and in the absence of such agent it shall be sufficient to serve the process upon any person if found within the county when the suit is brought, who represented the corporation at the time

the transaction out of which the suit arising took place." This court, speaking of the applicability of the act to the facts of that case, said: "Not only had the complainant transactions in this state with regard to the policies before and at the time of their delivery, but, through its agents, was found doing business in respect to them at the time of the institution of this suit; and it cannot be otherwise than that this agent would be reasonably certain to inform his principal of the fact." It was further said in regard to the facts of that case: "Certainly the corporation cannot be heard to complain, whatever others might do, because the agent upon whom service was made in this case was at the time within the state as the representative of the complainant, examining for it into the condition under which Spratley's death occurred, and finally, upon the authority of his employer, submitting a proposition of compromise of the claim now in controversy." In that case it is evident this court gave weight to the fact that an agent of the company was within the state negotiating with regard to the settlement of the policy, and this, under the provisions of that act, was "doing business" in such sense as to justify and warrant service of process. It is true, this court said: "From July, 1894, down to the time the suit in the circuit court was brought, complainant company was doing a limited business in Tennessee. It had a large number of policies in this state, from which it collected its premiums at stated intervals." And the supreme court of the United States said: "Its outstanding policies were not affected by its withdrawal from the state, and it continued to collect the premiums upon them, and to pay the losses arising thereunder, and it was doing so at the time of the service of process upon its agent." *Insurance Co. v. Spratley*, 172 U. S. 611, 19 Sup. Ct. 308, 43 L. Ed. 569. Whether these premiums were paid in Tennessee or beyond its borders does not appear by express statement, but it may fairly be inferred from the statement in the opinions that it was treated as if the payments had been made in the foreign state. It is evident, however, that both courts laid great stress upon the fact that the corporation had an agent in Tennessee adjusting the claim, and with authority to settle the same; and this, under the provisions of the act, was sufficient to authorize service upon him, and for holding that the corporation was "doing business" in the state. However this may be, the question now before the court is upon a different state of facts, and under a different statute. The inquiry is not whether a regular agent doing something in the state for the company in connection with the receipt of premiums causes it to be "doing business" in the state, so as to be sued under the service of process act of 1887, but whether the mere receipt in another state of renewal premiums from persons residing in Tennessee, who re-

mit by mail or otherwise—that, and nothing more—is "doing business" in Tennessee, within the meaning of the laws regulating and taxing the business of life insurance in Tennessee.

It was said in *Association v. Bedford* (C. C.) 88 Fed. 7, 17, in regard to this service of process provision of our Code, that it is a special statutory definition for a particular purpose, and cannot be perverted to the purposes of an interpretation of another act, where only a similar phraseology is used for an entirely different purpose. This was said by the circuit court of the United States for the Western district of Tennessee in a case wherein a transaction with a citizen of Tennessee in the state of New York, involving lands in Tennessee, mortgaged to the foreign corporation, was held not to be "doing business" in Tennessee. In *Norton v. Trust Co.*, 46 S. W. 544, it was held by the court of chancery appeals and the supreme court of Tennessee that a foreign corporation which had no agent or place of business in Tennessee, and had loaned money in another state, on application sent to it through the mail by citizens of Tennessee, and had taken a mortgage, at its home office, on lands in Tennessee, to secure the loan, did not "transact business" within the meaning of the act requiring foreign companies to register their charters. We think the *Spratley* Case is not conclusive of the real point at issue in the present controversy. The term or phrase "doing business" does not have, and cannot have, a uniform and unvarying meaning, but is governed largely by the connection, in view of the object of the statute, and these statutes are governed largely by the objects intended to be effected by them. We may admit that the receipt of premiums is doing business; but, when such collection is made in a foreign state, it does not amount to doing business in Tennessee, but in such foreign state. When the premium is paid and the renewal made and completed in a foreign state, we are unable to see how any business is done in Tennessee. Neither the policy is renewed or continued, nor is the money paid in Tennessee, but both are in the foreign state. There is nothing done in Tennessee, no new business done or solicited; no agent there and no agency, no contract made, no money paid, no receipt for renewal given, and no business done of any character. The postal and express authorities are not the agents of the company, but of the insured, as the company's policies stipulate that the premiums shall be paid at the home or foreign office. It is said that this view will operate hard upon domestic companies and such foreign companies as continue to issue policies and do an active business in the state. In other words, that a company may come into the state, and write a large number of risks, then withdraw, and collect its premiums in another state, and thus escape taxation while it receives the protection of the laws of the state. It is

true, such condition of affairs might arise, but we cannot decide the question before us upon any consideration of expediency or public policy, but upon a proper construction and application of the law as we find it. We are of opinion that this company, under the facts, is not liable for the tax, and the decree of the chancellor is affirmed, and the bill of the state is dismissed, at its costs.

On Rehearing.

(Feb. 9, 1901.)

A very earnest petition to rehear is filed by the state in this case, and the court is asked to reconsider and reverse its original holding. The petition, taken alone, presents nothing new; but a very elaborate brief is presented by the attorney general, setting out very fully what it is feared will result from the holding, and going very elaborately into an argument of the questions passed on in the original hearing. Among other things, it is said that foreign insurance companies will take advantage of this decision, and avoid altogether the payment of taxes, and thus deprive the state of a very large and increasing source of revenue. Of course, every company which comes within the operation of the decision will be affected by it, but it will only apply to such as bring themselves strictly within its provisions, and it cannot be used as a pretext by companies not in like conditions to evade the payment of any legitimate tax imposed. It is said by the attorney general that the construction placed upon the act will permit foreign insurance companies to solicit, issue, and deliver policies, and to adjust losses through local agents or agencies in the state, without payment of any taxes, provided they arrange to have the premiums sent by mail or express direct to the home office or other agency outside of the state. The opinion of this court does not admit of such construction, but, on the contrary, repels it, and holds that if the companies solicit, issue, and deliver policies, or do any other thing, through local agents in this state, whether such agents are the express companies or the postal authorities or agents exclusively of the company, they would not fall within either the letter or spirit of the decision. We think that under the facts of this case neither the express companies nor the postal authorities can be considered as the agents of the insurance company, but they are, when used, the agents of the insured to transmit the premiums to the company's offices beyond the state. Until the money reaches the home or foreign office of the company, and is received by it, it is not the money of the company, nor is the insured entitled to the renewal. If the money is lost en route, it is not the loss of the company, but of the insured. Premiums are not authorized expressly or by implication to be

paid through the mail or express company, but only at the home or foreign office, and the renewal receipts are then delivered. It is true, Acts 1897, c. 2, and Acts 1899, c. 432, provide, in substance, that life corporations of other states, and foreign companies ceasing to transact new business in the state, shall continue to pay the taxes herein provided on business in force, and until same be terminated. We have no doubt but that a foreign company which enters the state after the passage of such an act, or which, being in the state prior to its passage, remains in the state, and doing business in it, after the acts take effect, are subject to the provisions of the acts, even if they afterwards withdraw; but these acts do not apply in the present case, because the defendant company withdrew from the state in 1894, and was not doing business in the state when the acts took effect in 1897 and 1899. Nor was it made a condition upon which the company originally entered the state that it should continue to pay, after its withdrawal, upon business then in force. This decision does not in any way question the right of the legislature to impose such tax requirements upon foreign corporations as it may see proper as a condition for their entering the state, nor such as may be legitimate for their continuing to do business in the state, but it only applies to companies which withdraw from the state at a time when there is no act in force taxing them for receiving premiums beyond the state, and which have not expressly or impliedly consented to such taxes. The insurance act of 1895 (Acts 1895, c. 160, § 2) has no application to this case, but only applies to the making or entering into contracts of insurance. The crucial question in this case is whether the company, under the facts stated, is "doing business" in the state. Unquestionably, the legislature may have made it a condition precedent to entering the state that the company shall continue to pay taxes upon its receipts after its withdrawal, and it no doubt can make it a like condition for its future withdrawal; but it had not done so when this company withdrew from the state, but the attempt in this case is to impose the tax after the company has withdrawn from the jurisdiction of the state. The attorney general has formulated quite a number of hypothetical cases, none of which are not covered by the terms of the present decision, and which are covered by this opinion. The decision is limited, as are all others, to the facts of the case, and is determinative only of the questions strictly at issue in the case. Whether other companies occupy exactly the same status as the present company, we are not advised, and we express no opinion as to those who do not occupy the same status. We think there is no error in the opinion originally rendered in the case, and the petition to rehear is dismissed.

HOME INS. CO. v. WEBB.

(Supreme Court of Tennessee. Dec. 22, 1900.)
**PROCESS—RETURN—CONTRADICTING RETURN
 —EXECUTION—MOTION TO QUASH.**

1. A return of service indorsed on the process by the officer may not be contradicted by parol on a petition to supersede execution.

2. An objection that the record on appeal was not filed, nor the errors assigned within the proper time, made after the case was called and heard, is too late.

Appeal from circuit court, Dekalb county; M. D. Smallman, Judge.

Suit by the Home Insurance Company against B. M. Webb. Judgment for plaintiff. Petition by defendant to quash execution against him on the ground that he had not been served with process. From a judgment sustaining the petition in part, plaintiff appeals. Reversed.

B. M. Webb, for appellant. Wade & Robinson, P. M. Estes, and Morean P. Estes, for appellee.

WILKES, J. This is a petition to supersede and quash an execution upon the ground that the petitioner, Webb, was never served with process, and the judgment of the justice of the peace of Davidson county was therefore void for want of jurisdiction. There was a motion to dismiss, which was sustained so far as petitioner sought to obtain a new trial, but overruled so far as the petitioner sought to supersede the execution issued in Dekalb county on an execution certified from Davidson county. The trial judge heard the case upon the evidence, and granted the relief prayed for, and plaintiff has appealed and assigned errors.

We think there is error in the action of the court below in declining to dismiss the petition outright. In the case of *Wilson v. Moss*, 7 Heisk. 418, it appeared that the petitioner had a good defense upon the merits, and that the judgment against him was unjust; but the allegation in the petition that the petitioner was never served with process was contradicted by the return of the officer indorsed on the warrant, and it was held that no allegations could avail against such return, citing *McBee v. State*, Meigs, 122; *Ridgeway v. Bank*, 11 Humph. 525; *Gardner v. Barger*, 4 Heisk. 671. This did not deprive the petitioner of his remedy in chancery, nor by action against the officer making the false return. In the present case there was a return of service indorsed on the warrant by the officer, and it could not be contradicted by parol upon a petition to supersede the execution.

It is objected that the record in this case was not filed until the 10th of December, and hence the case does not stand for trial at the present term of the court, and, again, that the errors were not assigned within the time prescribed by the rule. The original appears to have been filed December

2d, and the assignment of errors on the 11th of December. A supplemental and amended transcript appears to have been filed at the latter date, and we will presume it was done either upon a suggestion of diminution or by consent. No objection was made to either the transcript or assignments until after the case was called and heard, and we think the objections are not well taken, and come too late. The judgment of the court below is reversed, and the suit dismissed, at petitioner's costs.

GOAD v. STATE.

(Supreme Court of Tennessee. Dec. 22, 1900.)
**PERJURY — JUROR'S COMPETENCY — CONVIC-
 TION OF INFAMOUS CRIME—OBJECTION
 AFTER VERDICT—EVIDENCE.**

1. Where a juror in a prosecution for perjury had been convicted of robbing the mail, and had been sent therefor to a reform school, such facts were not sufficient ground for reversing a conviction of perjury, in the absence of a showing that a conviction for robbing the mail carried with it a sentence of infamy.

2. Where the objection to a juror, in a prosecution for perjury, that he had been convicted of an infamous crime, was made after verdict, it was without avail, since it was an objection proper defectum.

3. In a prosecution for perjury, ignorance of the conviction of a juror of an infamous crime would not excuse the omission to object to such juror on that ground before verdict.

4. It was agreed between G.'s attorney and H. & W., in a suit to recover a debt secured by a lien on one-half of a mill, that the whole mill should stand good for whatever recovery was had, instead of the half interest attached, but H. & W. did not purchase the mill, nor agree to satisfy the judgment of recovery. G. continued to litigate his liability on the debt after such agreement. The whole mill was sold to satisfy the judgment. In a suit in which the matter was material to the issue, G. swore that he had sold the mill to H. & W. to pay such judgment, and that they were to satisfy the same, and that he understood it was satisfied by them. In a prosecution for perjury for such false swearing, G. explained that he had reference to the agreement made with H. & W. that the whole mill was to stand for the recovery and satisfy the same, as it was worth twice the amount of the debt. *Held*, that the evidence was not sufficient to warrant a conviction of perjury.

Appeal from circuit court, Macon county; William T. Smith, Judge.

J. W. Goad was convicted of perjury, and he appeals. Reversed.

I. L. Roark and T. E. Faust, for appellant.

WILKES, J. Defendant is convicted of perjury, and sentenced to the penitentiary for three years, and has appealed.

It is said in his behalf that a new trial should have been granted because one of the jurors who tried the case was incompetent. It appears from the sworn statement of Elijah Snider, the objectionable juror, that he was convicted in the federal court at Nashville of robbing the mail while he was a mail carrier. No record of his conviction nor of the sentence upon it was produced. The

affidavit states that he was sent to a reformatory school in New York for the offense, being at the time about 17 years of age, and that it had been 7 years since he was discharged. This is not sufficient ground for reversal. It does not appear that this conviction for robbing the mails carries with it under the federal statute a sentence of infamy, nor that one was pronounced by the court. The fact of the conviction is not shown by the record of the federal court, nor is the character and extent of the sentence. It does not appear that Snider was sentenced to the penitentiary; on the contrary, it appears he was sent to a reformatory school. The objection was not made until after verdict. It is an objection "propter defectum," and must have been made before the verdict, and ignorance of the fact does not excuse the omission. *McClure v. State*, 1 Yerg. 206; *Cartwright v. State*, 12 Lea, 620; *Draper v. State*, 4 Baxt. 246; *Gillespie v. State*, 8 Yerg. 507; *Hamilton v. State*, 101 Tenn. 418, 47 S. W. 695; *Givens v. State*, 103 Tenn. 666, 55 S. W. 1107.

It is said that the evidence in the case does not warrant the conviction, because the matter sworn to was not material to the issues involved in the suit in which the affidavit was made, and because the swearing was not corruptly or knowingly false, but was simply a mistake of law upon the defendant's part. It appears that one Lyle had sold the defendant a half interest in a saw-mill; that he gave his notes for the same, and a lien was retained on the half interest to secure the notes. Lyle filed a bill to obtain judgment on these notes, and to subject the half interest in the mill, and did recover judgment for \$482.66; but the decree ordered the entire mill in question to be sold to satisfy the judgment. This seems to have been done by agreement. The mill was sold, but when, and for how much, does not appear. An execution issued for the balance not paid from its proceeds, and was levied on a one-fifth interest of defendant, Goad, in another tract of land. It was sold, and deed made to Lyle. Thereupon Lyle, Wood, and Sullivan filed a bill to partition this land, and to set aside as fraudulent a deed made by Goad to his wife of his interest in it, and an amended bill was filed to stay waste. In this case a deposition was given by Goad, in which he stated that before the mill was sold by the court he had sold and transferred it to Harlan & Wooten to pay the judgment of the supreme court, and they were to satisfy the same, and that he understood it was satisfied by them. Wooten testified that pending the litigation in regard to the mill, and as a condition for a continuance, an agreement was entered by himself and Harlan, as attorneys for Lyle, and Mr. Roark, an attorney representing the defendant, that the whole of the mill should stand good for whatever recovery Lyle might get in said cause, instead of merely the one-half inter-

est which had been attached originally; but that he did not purchase the mill, nor agree to satisfy Lyle's judgment, and that he made no other agreement except as stated. Harlan proved substantially the same thing. As a matter of fact, the whole mill was sold to satisfy the judgment. Defendant's explanation is that he had reference in his deposition to the agreement made with Wooten & Harlan that the whole mill was to stand for the recovery, and satisfy the same, as it was worth twice the amount of the debt; and that he told them, after the case was decided in the supreme court, that he had agreed the mill was to go that way, and to take it. It appears that Goad, after this agreement, continued to litigate his liability upon the original debt, upon which the judgment was rendered, and, when asked to explain why he did this, said he did not understand the inquiry. We do not think this makes out a case of willful and corrupt false swearing. The defendant probably understood that by letting the whole mill stand for whatever might be recovered, instead of the half interest that was attached, he had, in effect, satisfied or provided for the debt. His continuing to litigate the justice of the original claim seems to be inconsistent with this view, but we think he did this under the belief that the demand was an unjust one, and that, if it was defeated, the mill would not be taken from him under the agreement that it was to stand for whatever recovery was had. It appears that the partition suit failed because the complainants failed to introduce the judgment execution and report of sale of Goad's interest in the land, and it is evident that, in the absence of such proof, complainants did not show any interest in or title to the land. The decree of the court must have been the same even if the defendant had not sworn in the case, and in that sense it was immaterial; but we do not base our holding on this feature. We think there is not that clear evidence of knowledge of the falsity of the statement necessary to make out a case of perjury, but that it is simply a case of misunderstanding as to what the agreement really was, or what its effect would be, and defendant characterized the matter as a satisfaction when in fact it was only a mode by which satisfaction would be made. The judgment of the court below will be reversed, and cause remanded for a new trial. State will pay costs.

MUSE v. STATE.

(Supreme Court of Tennessee. Dec. 22, 1900.)

APPEAL—RECORD—CONVICTION—FAILURE TO ENTER PLEA—BILL OF EXCEPTIONS—TIME FOR EXCEP.

1. Under Shannon's Code, § 7217, declaring that no conviction shall be reversed because the clerk of the trial court omitted to file or enter defendant's plea of record, a conviction will not be reversed because the record did not show a

plea of not guilty to have been entered, the fact that such a plea was entered being inferable, it appearing that a jury were sworn to try the issues joined.

2. Under Acts 1899, c. 275, declaring that the trial court may allow parties desiring to appeal not more than 30 days in which to prepare a bill of exceptions, in order for the bill to become a part of the record on appeal it must affirmatively appear that it was filed within the time allowed.

Appeal from circuit court, Coffee county; Dan Williams, Special Judge.

One Muse was convicted of an assault with intent to commit voluntary manslaughter, and he appeals, Affirmed.

W. V. Whitson and B. P. Bashaw, for appellant. Geo. W. Sutton, Atty. Gen., and Atty. Gen. Pickle, for the State.

BEARD, J. This is a conviction of an assault with intent to commit voluntary manslaughter, with punishment fixed at 11 months' imprisonment in the county jail, and the payment of a fine of \$500. It is assigned for error that the record fails to show a plea of not guilty. This is true, but it does show that the jury were sworn to try the issues joined, the necessary inference from which is that this plea was interposed. In this respect, the case differs from *Lynch v. State*, 99 Tenn. 124, 41 S. W. 348, which is relied on by plaintiff in error. There the entry on the minutes failed to show a plea or anything from which its existence could be implied. For this reason that case was reversed. Here, however, it being clearly impliable that such plea was filed, the statute forbids a reversal because the clerk of the court omitted to file or enter it of record. Shannon's Code, § 7217.

The assignment of error, however, most earnestly pressed upon the court, is that the evidence does not warrant conviction. But, in the condition of the record, we cannot consider this assignment. The trial judge, in overruling the motion for a new trial, allowed plaintiff in error 30 days within which to make and file his bill of exceptions. There is in the transcript a paper so entitled, but there is nothing to indicate that it was ever filed. In *Bettis v. State*, 103 Tenn. 339, 52 S. W. 1071, a bill of exceptions was filed four days after the time allowed for its preparation. In the opinion it was suggested that there might be a doubt whether chapter 275 of the Acts of 1899, allowing parties desiring to appeal to this court 30 days in which to prepare a bill of exceptions, was intended to apply to criminal causes. But, conceding that it did, it was held that the bill of exceptions in that case came too late. Since then we have had occasion to review the statute in question, and have announced in one or more of such cases that it does. Under this act, the bill of exceptions must not only be prepared, but filed, within the extended pe-

riod. To become a part of the record, it must affirmatively appear that it was delivered to the proper officer within the period of extension. *Jones v. Moore*, *infra*; *Tucker v. Same*, *Id.* It is not improper to say that we have carefully examined the papers sent up as a bill of exceptions, and, even if properly filed, would not be inclined to interfere with the judgment of the trial court. Affirmed.

JONES v. MOORE.

TUCKER v. SAME.

(Supreme Court of Tennessee. Dec. 22, 1900.)

BILL OF EXCEPTIONS—FILING—TIME—RECORD
—RECEIVER—ACTION—LEAVE OF
COURT—JUDGMENT.

1. Where the trial judge gave appellant 30 days from the date of overruling a motion for new trial to prepare a bill of exceptions, a bill of exceptions filed after such 30 days had elapsed is too late, and cannot be considered on appeal.

2. Under Acts 1899, c. 275, providing that a bill of exceptions must be filed within 30 days after the date of overruling a motion for new trial, a bill of exceptions found in the transcript on appeal, when the record does not show when it was filed, cannot be considered, since the record must show affirmatively that it was filed in time; the mere bodily presence of the paper in the transcript not being sufficient.

3. Where an action of replevin, against a receiver appointed by another court, is brought without the permission of the court appointing him, and the property taken from his possession, judgment of dismissal and for the value of the property taken should be awarded, since an action cannot be maintained against a receiver without such permission, and the property in his possession is in custodia legis, and cannot be interfered with by the process of another court.

Appeal from circuit court, Dekalb county; M. D. Smallman, Judge.

Actions by Brunette Jones against J. B. Moore, receiver, and by one Tucker against the same. From judgments for defendant, the plaintiffs appeal. Affirmed.

Webb & Cantrell, for appellants. Wade & Robinson, for appellee.

BEARD, J. These cases were heard together. They are actions of replevin. In each case the court below entered a judgment of dismissal and for the value of the property replevined, upon the ground that it was taken under the writ from the control and possession of a receiver, appointed by a court of competent jurisdiction, in a cause then pending, and that the action was instituted and the writ executed without the consent of that court. This action is made the basis of error assigned by the respective plaintiffs in error. These causes must be considered by us on the record entries alone; for while, in each transcript, we find what is entitled a bill of exceptions, yet in neither can the plaintiff in error avail himself of it as such. In each the trial judge gave 30 days from the date of overruling the motion for

new trial to prepare a bill of exceptions. In the case of *Tucker v. Moore*, the record shows that more than 30 days elapsed before the bill of exceptions was filed. This was too late. *Bettis v. State*, 103 Tenn. 339, 52 S. W. 1071. In the case of *Jones v. Moore*, the record fails to show when the paper purporting to be a bill of exceptions was filed. Under chapter 275 of the Acts of 1899, filing within 30 days is essential, and this is defined to be a delivery of the paper in question "into the actual custody of the clerk, to be kept by him among the files, subject to the inspection of the parties." Enc. Pl. & Prac. 923. And the record must affirmatively show that this was done. *Muse v. State* (present term) 61 S. W. 80. The mere bodily presence of the paper in the transcript, without more, is not sufficient. The result is that we are bound to assume that the trial judge was warranted in finding that the property involved was wrongfully taken out of the custody of a duly-appointed receiver without the permission of the court appointing him. Such a proceeding cannot be tolerated. It is well settled that property in the hands of a receiver is in custodia legis, and cannot be interfered with by process of another court. *Morrill v. Noyes*, 3 Am. Law Reg. (N. S.) 21, cited and approved in *Conley v. Deere*, 11 Lea, 274; 20 Am. & Eng. Enc. Law (1st Ed.) p. 141 et seq., and notes. Judgment in each case is affirmed.

LUCAS et al. v. MALONE et ux.

(Supreme Court of Tennessee. Dec. 15, 1900.)

APPEAL AND ERROR—BILL OF EXCEPTIONS—EVIDENCE—NECESSITY—TRUSTS—RESULTING—LIMITATIONS—DESCENT AND DISTRIBUTION—BROTHERS OF THE HALF BLOOD.

1. Where, in a suit to enforce a resulting trust in lands, the court of chancery appeals held that the evidence thereof was properly excluded as hearsay and incompetent, but it was not preserved by bill of exceptions, on appeal the supreme court will not consider the question.

2. Where complainants, claiming a resulting trust in land of a decedent, did not bring suit to establish it for more than 10 years after his death, their right thereto is barred by limitations.

3. Shannon's Code, § 4163, subsec. 3, provides that where land comes to an intestate by descent from a parent, and he dies without issue, if he have brothers and sisters of the paternal line of the half blood, and brothers and sisters of the maternal line, also of the half blood, the land shall be inherited by such brothers and sisters on the part of the parent from whom the estate came. A daughter inheriting land from her father, who owned it at his death, died, leaving the complainants, a half-brother and the son of a deceased half-brother of the maternal line, and a niece, daughter of deceased sister of the whole blood. *Held*, that the complainants inherited no interest in the land.

Appeal from chancery court, Smith county; T. J. Fisher, Chancellor.

Bill by J. G. Lucas and L. R. Lucas against William Malone and wife. From a decree of the court of chancery appeals af-

firming a decree dismissing the bill, plaintiffs appeal. Affirmed.

J. J. Ford, for appellants. Fite & Aust, for appellees.

WILKES, J. The bill in this case was filed in a double aspect: First, to set up a resulting trust in certain lands; and, second, to assert an interest in the same lands by inheritance from James H. Davis. The chancellor refused any relief, and dismissed the bill, and his decree was affirmed by the court of chancery appeals, and the cause is before us on appeal by the complainants.

As to the resulting trust feature of the case the court of chancery appeals reports that considerable testimony was introduced, but that it was all hearsay, and incompetent. It was objected to as incompetent, and excluded by the chancellor, but was not preserved by bill of exceptions, and it is not before us, so that as to this the complainants fail to establish their contention. In addition it appears that James H. Davis died more than 10 years before the present bill was filed, and their right to set up a resulting trust is barred by the statute of limitations. *Henderson v. Tipton*, 88 Tenn. 256, 14 S. W. 380; *Love v. Welch*, 88 Tenn. 259, 14 S. W. 380.

As to a claim of an interest in the land by inheritance it appears that many years ago James H. Davis intermarried with Jane Lucas, who was then a widow, having two children by her first marriage,—L. R. Lucas, one of the complainants in this cause, and John Lucas, who has since died, leaving the complainant J. G. Lucas his only heir. James H. Davis and Jane Lucas had two children by their marriage, to wit, Mexico Davis, who has since died, leaving no issue, and Nettie, who has also died, leaving the defendant Mamie Malone as her only child and heir at law. James H. Davis died in 1888. The land in controversy belonged to him at the time of his death, and was assigned to his widow as dower; the remainder of his lands having been sold to pay his debts. The widow died some two years before the bill in this case was filed. Mexico Davis also died after her father, leaving Mamie Malone as her only heir. The contention made is that complainants, who are the children and grandchildren of Jane Lucas by her first marriage, inherit this land equally with Mamie Malone, a grandchild under the second marriage. The land was the property of the father, James H. Davis, and the complainants have failed to set up any resulting trust in it arising out of the investment in it of their mother's funds. In such case the statute applicable is that embodied in Shannon's Compilation as section 4163, subsec. 3, as follows: "Where the land came to the intestate by gift, devise or descent from a parent and he die without issue, if he have brothers and

sisters of the paternal line of the half blood, and brothers and sisters of the maternal line also of the half blood then the land shall be inherited by such brothers and sisters on the part of the parent from whom the estate came in the same manner as by brothers and sisters of the whole blood until the line of such parent is exhausted of the half blood to the exclusion of the other line." See, also, *Deadrick v. Armour*, 10 Humph. 588. The result is that complainants, under the law, inherited no interest in the land, and have failed to prove any resulting trust in their favor. They are entitled to no relief, and the decree of the court of chancery appeals is affirmed.

HIGHTOWER v. WRAY.

(Supreme Court of Tennessee. Jan. 26, 1901.)

MORTGAGES—TRUST DEEDS—CONSTRUCTION—DEBTS—DESCRIPTION—DISCREPANCY.

1. Defendant had reduced the principal of a note to \$1,500 when he made a trust deed of his property to pay off his debts. This deed stated that defendant owed the plaintiff "about \$1,500, which I wish paid in full"; and in the schedule this debt was listed at \$1,500. At the time the trust deed was executed the total amount of principal and interest due on defendant's note was about \$4,000. *Held*, that the deed intended the payment of only \$1,500, and not the payment of the debt in full.

2. A trust deed divided the grantor's debts into five classes, and designated plaintiff's credit as \$1,500, and as of the fourth class, with instructions that it should be paid in full. The deed further directed a ratable payment of the creditors in the fifth class, and any other just debts. Plaintiff's claim amounted to \$4,000. *Held*, that plaintiff, after receiving \$1,500 as a preferred claim under the fourth class, was entitled to receive a pro rata payment of the balance.

Appeal from chancery court, Davidson county; H. H. Cook, Chancellor.

Bill by L. C. Hightower against W. A. Wray. From a decree in favor of defendant, complainant appeals. Modified and affirmed.

Percy D. Madden, for appellant. Morton B. Howell and Nolen & Siemmons, for appellee.

WILKES, J. The question involved in this case is the proper construction of a deed of trust made by W. A. Wray. It contains a provision in substance as follows: "I owe L. C. Hightower about \$1,500, which I wish paid in full." It turned out that he owed Hightower but one debt, and that was a note, and amounted, principal and interest, to about \$4,000. The bill is filed in a double aspect, claiming payment of the entire debt of \$4,000 upon (1) a construction of the terms of the instrument; (2) on the intention of the maker in executing the deed, which is sought to be shown by parol. Both contentions were found against the complainant; the court of chancery appeals holding that, if the instrument alone be looked to, complainant could claim only \$1,500, or about that sum, and, if

the parol proof be allowed to control, then the facts are that the maker only intended that amount to be paid. This parol evidence was introduced without objection, and the finding of the court of chancery appeals upon it is a matter of fact, and is perhaps conclusive of the entire controversy. We proceed to consider it, however, in the other aspect of the case.

The deed of assignment divides the debts, provided for, into 5 classes, from A to E, and they are to be paid in the order mentioned. Complainant's debt falls in class D (the fourth class), and is described as follows: "Class D. L. C. Hightower, \$1,500.00. It is directed that the debts be paid as follows: (1) The expenses; (2) class A in full; (3) class B in full; (4) class C in full; (5) to the payment of the amount due L. C. Hightower, described as 'Class D,' until he shall have been paid in full; (6) to the payment of the creditors in class E, and any other just debt owing by me, ratably, until they shall have been paid in full." It appears that complainant's debt, and the only one owing him by Mr. Wray, was a note originally for \$7,121.34, but having on it a number of credits, which reduced the principal to \$1,500. It had been running for several years, and much interest had accumulated. In the case of *Caldwell v. Bowman*, 1 Tenn. Cas. 601, there was a deed of trust. It provided to pay a "note for about \$76.00, if he shall produce the note"; referring to one E. Donaldson. A note for \$187 was produced and filed as the note intended to be secured, and it was held that the language used would not identify a note for more than double the sum mentioned; that the language used would serve to identify a note for a few dollars more or less, but not one for so great an amount. It is true that in the present case there is more to identify the note than in the case we have cited, and, indeed, there is no question but that the note sought to be set up in this case is the one intended and referred to in the deed of trust; but the decision is made to rest upon the great discrepancy between the actual amount of the note and the amount as described. The court of chancery appeals says, "Whether we look to the face of the deed alone, or to parol testimony, to gather the intention of the maker of the deed of trust, we find that the purpose and intention was only to secure \$1,500." We think this conclusion is correct. We are referred by the industrious and zealous counsel for complainant to a number of cases in which debts greater or smaller than these specified and described have been allowed. In *Browne v. Welr*, 5 Serg. & R. 401, a debt was described in the assignment as about \$11,000. It was in fact over \$13,000, and it was held that it should be allowed. In *Bank v. Richards*, 2 Metc. (Mass.) 105, the deed of trust described the debt as about \$4,500, and the creditor was allowed to prove claims to the amount of \$5,867. In *Canady v. Paschall*, 3 Ired. Eq

181, the debt was described as about \$1,000, and it was held to secure a debt of \$1,481.90. In *Roberts v. Vietor*, 130 N. Y. 585, 29 N. E. 1025, it was held that \$13,501 was secured under the term "about \$12,000." In *Bumpas v. Dotson*, 7 Humph. 310, the deed of trust provided for a debt of about \$2,000. It proved to be only \$1,040, and the court held that the discrepancy did not constitute evidence of intentional fraud, so as to vitiate the deed or exclude the debt. None of the cases cited goes to the extent to which we are asked to go in this case, and we think that the holding of the court of chancery appeals on this feature of the case is correct. The complainant will, however, after receiving the amount of \$1,500 and interest as preferred under class D, be allowed to prove the remainder of his debt and interest, and receive pro rata payment under the provision made for class E. This he is entitled to under the prayer for general relief, and with this modification the decree of the court of chancery appeals is affirmed. We do not think he is entitled to prorate upon his whole debt, but only on the balance after he has received the amount of \$1,500 and interest as preferred in class D.

UTLEY v. LOUISVILLE & N. R. CO.

(Supreme Court of Tennessee. Jan. 12, 1901.)

RAILROADS — INJURY TO ANIMALS — APPEAL FROM JUSTICES—STATEMENTS CONSIDERED AS PLEADING—EVIDENCE.

1. In response to an inquiry by the circuit court, the plaintiff, in a case appealed from a justice, stated, in the presence of the court and jury, that his cause of action was for the wrongful killing of his horse by one of defendant's moving trains. The defendant railroad's attorney, in answer to the court's inquiry, stated that his defense was that defendant had observed the precautions required by statute. The plaintiff's testimony did not show how the horse was killed, nor the nature of its injuries, nor that it was defendant's railroad that ran past the place of killing, nor that the horse was struck by the train, nor that the track was unfenced. At the close of plaintiff's case, defendant demurred to the evidence. *Held*, that all that was alleged in the plaintiff's statement, and not denied in the defendant's statement, should be taken as true, since in appeals from justice's courts, where both parties assent to the request of the court to state their cases, the cause should be treated as submitted on the issues made by the statements; and the demurrer should have been overruled, since the horse's value was all it was necessary for the plaintiff to prove to make out a prima facie case.

2. Where the parties in a case against a railroad for killing a horse, which was appealed from a justice's court, stated the cause of action, and the defense, respectively, in response to inquiries by the court, the fact that plaintiff introduced evidence on matters conceded by the statement of defense, if the statements were considered as pleading, did not vary the rule that statements under such circumstances would be taken as pleadings, the unnecessary evidence being treated as immaterial.

Appeal from circuit court, Davidson county; J. W. Bonner, Judge.

Action by Lem Utley against the Louisville & Nashville Railroad Company. From a judgment in favor of defendant, plaintiff appeals. Reversed.

Pardue & Bass, for appellant. Smith & Maddin, for appellee.

WILKES, J. This is an action commenced before a justice of the peace. The warrant states the cause of action as follows: "To answer the complaint of Lem Utley in a plea of debt due by damages (killing a horse)." In the circuit court, on appeal, the cause was heard before the court and a jury, and at the close of plaintiff's evidence it was demurred to, and issue was joined on the demurrer, and it was sustained, and suit dismissed, and the plaintiff has appealed and assigned errors. The bill of exceptions states that, after the jury had been regularly impaneled and sworn to try the matters in controversy, the plaintiff, in response to an inquiry by the court, said, in the presence of the court and jury, that his cause of action was for the wrongful killing of plaintiff's horse by one of defendant's moving trains. Thereupon the attorney for defendant, in response to an inquiry from the court, stated that his defense was that defendant had observed the precautions required by the statute. The plaintiff then introduced two witnesses, who testified to substantially the same facts, as follows: That plaintiff lived at Goodlettsville, Tenn., about 600 feet from the depot, at a place where the public road crosses the railroad. This public road is a turnpike going from Goodlettsville to Galatin. It crosses the railroad track running north and south. That plaintiff lives on the west side of the railroad, and on the north side of the turnpike. One of the side tracks comes down to within a short distance of the turnpike crossing. That plaintiff was absent from home when his horse was killed, but on his return found him lying dead in a field just south of the turnpike crossing, and on the east side of the track. That the horse was killed December 18, 1898. There is a cattle guard at the south side of the turnpike, where the railroad crosses it, and the horse was found dead beyond this cattle guard. The horse was worth \$70. Plaintiff did not see the accident nor know of it until he returned home. He turned the horse out to graze that morning. Plaintiff was in the habit of turning his horses out on the commons when not in use. The stable is just back of the house, and towards the depot. The horse was 50 or 60 feet from the fence, and south of the turnpike, and a few feet from the railroad track lying in the ditch. "Mr. Reed, the section foreman, went with plaintiff to see the horse. Isaac Drake and plaintiff's brother, John Utley, also saw him. Plaintiff told Mr. Reed, the section foreman, that, in order to settle the matter, he could report the horse as worth \$45 to the com-

pany. He agreed to Mr. Reed's valuation, thinking he would get his money right away, without any trouble. Horse was 15 hands high, gentle, sound, and all right." In substance, this was all the evidence.

It is insisted on the part of the defendant railroad company that this evidence does not make out a case of liability on the part of the railroad company,—in other words, that the evidence does not go far enough; that the plaintiff's proof fails to show how the horse was killed, or the nature of his injuries, if he had any, or that it was the defendant's railroad that passed by the place of the killing, or that any trains passed over it, or that the horse was struck by the train; that it is not shown that the track was unfenced where the horse was killed, or where it may have entered on the track; that the proof does not show that Reed, the section foreman, who valued the horse, was foreman of defendant's road. It is insisted on the plaintiff's part that the controverted questions in the case were narrowed by the statements of counsel to the simple question presented by the defendant's statement; in other words, that when the plaintiff said his cause of his action was the wrongful killing of plaintiff's horse by one of defendant's moving trains, and the defendant replied that its defense was that it had observed all statutory precautions, it was an admission on the defendant's part that one of its moving trains had killed the plaintiff's horse, and the only matter in issue left was whether the killing was wrongful, and this defendant denied, by stating that it had observed the statutory precautions. The insistence is that, the case having originated before a justice of the peace, where there were no formal pleadings, the agreement became a substitute for, and stood in the place of, such pleadings, and subject to the rules governing pleadings in other cases; that plaintiff's statement was his declaration, and defendant's counter statement was his plea. Under such circumstances, and in such cases, the provisions of the Code (section 4631) it is insisted apply, that all allegations in the declaration not denied in the plea shall be taken as true for all the purposes of that issue, and the familiar doctrine applies, as in pleadings in other law cases, that what is alleged in the declaration and not denied by the plea is conceded to be true. There is no statutory provision to the effect that, in cases appealed from a justice of the peace, on hearing in the circuit court the trial judge may compel the parties to state their contention, but it is certainly an excellent practice, and, where the requests are assented to by both parties, the cause will be treated as submitted on the issues made by the statements. It is helpful alike to the court, the jury, the attorneys, and litigants

that the issues shall be thus stated, in order that the scope and extent of the controversy may be known and announced, and the evidence limited to matters which are in dispute. The statements having been made, the controverted facts must be treated as being embraced in, and bounded by, the limits of the statements, and it is wholly unnecessary to introduce evidence beyond the facts which are controverted.

It is said by counsel for defendant that neither court nor counsel considered the statements as constituting pleadings in the case, and subject to the rules of pleading, and that this is evidenced by the fact that the plaintiff, notwithstanding the statements, proceeded to introduce evidence on many features that were conceded by the statement of defense, treating it as a pleading. It is true that some evidence in this case was introduced by the plaintiff which was wholly unnecessary, but, if this be conceded, it does not vary the rule, but the unnecessary evidence may be treated as immaterial. Indeed, on the part of plaintiff, there was but little, if any, necessity for introducing any proof, except as to value. The ownership was not denied, and must be considered as conceded. The killing by defendant's train was not denied, and must be treated as admitted, and, by the shape of the defendant's statement, it must be inferred that, under the circumstances of the killing, it was necessary to observe some statutory precautions, and that they were observed is alleged as an excuse for the killing, and a reason why no liability should attach. To allow a different holding of the case would operate as a surprise and hardship on the plaintiff. The cause has been heard in this court at a former term, when the facts were fully developed, and the cause was reversed and remanded for an error in the charge of the court. It is evident that upon this latter trial the plaintiff did not attempt to fully develop and present the facts in the cause, and this was evidently upon the impression that the issues had been narrowed down and confined to the matters presented by the statements of counsel. We are of opinion that, in this view of the case, the court below was in error in sustaining the demurrer, there being sufficient evidence to fix a liability on the road. No proof that any statutory precautions were observed which would relieve the defendant therefrom, and that being, in our opinion, the only matter of controversy left open by the statements, the judgment of the court below must be reversed, and the cause remanded for an assessment of damages on the evidence, unless the parties shall agree upon the same, and in that event final judgment will be rendered here. The defendant will pay all costs.

PAYNE et ux. v. NASHVILLE, C. & ST. L. RY. CO.

(Supreme Court of Tennessee. Dec. 15, 1900.)

INJURY TO PASSENGER—NEGLIGENCE—PLEADING—PROOF AND INSTRUCTIONS.

1. The only act attributed to the carrier being the announcement by its conductor, in compliance with Shannon's Code, § 3070, as the train approached a station, of the name of the station, and that change of cars was to be made, there is no negligence on its part, and no liability for injury to the passenger, who, going onto the steps of the car while it was in motion, fell therefrom, even though she was careful.

2. The theory of the declaration and proof of plaintiff being that she was thrown from the steps of defendant's car by "a sudden and violent jerk" of the train after it had stopped, and while she was attempting to alight, and defendant's theory being that she was injured by jumping from the train while in motion, and without invitation, plaintiff is not entitled to an instruction on the theory of the injuries having resulted from an "express or implied invitation" to get off the train while in motion.

Appeal from circuit court, Franklin county; Floyd Estill, Judge.

Action by W. L. Payne and wife against the Nashville, Chattanooga & St. Louis Railway Company. Judgment for defendant. Plaintiffs appeal. Affirmed.

Whitaker & Horton, for appellants. W. B. Lamb and Lynch & Lynch (Claude Waller and J. B. De Bew, of counsel), for appellee.

CALDWELL, J. W. L. Payne and wife, Sallie Payne, brought this action against the Nashville, Chattanooga & St. Louis Railway Company, to recover damages for personal injuries alleged to have been wrongfully and negligently inflicted upon her while alighting from one of its passenger trains at Bridgeport, Ala. Verdict and judgment being for the defendant, the plaintiffs appealed in error.

The averment on which the recovery was sought is as follows: "Plaintiff Sallie Payne, wife of plaintiff W. L. Payne, was a passenger upon one of defendant's trains of cars, having purchased a ticket at Decatur, a station on said defendant's road, to South Pittsburg, a station on said defendant's road; and, in order for plaintiff Sallie Payne to reach her destination, it was necessary for her to change cars at Bridgeport, Ala., and while she was undertaking to change cars as aforesaid, and was upon the steps in obedience to the direction or order of defendant's conductor or other agents and operatives, representatives and agents, managing and controlling the movements of said train of cars, wrongfully and negligently caused said train of cars to move with a sudden and violent jerk, throwing plaintiff Sallie Payne, without fault or negligence on her part, off the steps or platform aforesaid, violently to the ground, and so injuring, bruising, and maiming plaintiff," etc. The defendant pleaded not guilty, and upon the issue so made the case was tried. The only controversy of fact was in respect of the

manner and cause of the injuries sued for. The plaintiff introduced testimony tending to show that they resulted from the negligence imputed to the defendant in that part of the declaration just quoted herein; and the trial judge correctly instructed the jury that such facts, if established by a preponderance of the evidence, would entitle the plaintiffs to a recovery. The defendant introduced testimony tending to show that its agents, as the train neared Bridgeport, announced the name of the station, and that a change must there be made for South Pittsburg, and that Mrs. Payne thereupon, before the train reached the station, walked from her seat in the coach to the platform, down the steps, and alighted while the train was still in motion. As applicable to the defendant's theory of nonliability so disclosed, the trial judge instructed the jury that: "If the proof in this case shows that the employees of the defendant company while approaching the station at Bridgeport announced, 'Bridgeport; change cars for South Pittsburg,' and thereupon the plaintiff arose from her seat, and went upon the platform, and upon the steps of the platform, and alighted from the coach before reaching the station, and while the train was in motion, she would not be entitled to recover in this case." This instruction is the subject of the first assignment of error in this court, the criticism being that the trial judge thereby "takes the question of plaintiff's contributory negligence from the consideration of the jury, and declares a given statement of facts to constitute negligence per se." It is to be observed, in the first place, that the criticism misinterprets the instruction, and ascribes to it functions that it does not perform. The instruction does not in fact deal with the subjects of contributory negligence and negligence per se at all. In the next place, the instruction is entirely sound when properly limited to its own suppositional statement of facts. There is no interpretation of which those facts are susceptible that would give the plaintiffs a legal right of action. They disclose no actionable negligence on the part of the defendant. The announcement, as the train approached Bridgeport, of the name of the station, and the change there to be made, which is the only function attributed to the defendant in the hypothesis of this instruction, was not a negligent act, but a compliance with the statute (Shannon's Code, § 3070), and hence the discharge of a legal obligation. It follows inevitably, therefore, that this act, which, according to the defendant's theory, was its only connection with Mrs. Payne's injuries, could not have rendered it liable for them, and that the instruction of nonliability on that theory was correct, whether her conduct be characterized as cautious or as negligent in one degree or another. Upon its theory of its part in the matter as submitted in this

instruction, the defendant was manifestly guilty of no negligence whatever, and, as a consequence, it was free from liability whether Mrs. Payne was negligent or not. The first element of liability is wanting. If it were conceded that the instruction impliedly precludes consideration of the question of contributory negligence, the instruction, upon the facts submitted therein, would, nevertheless, be correct, for under those facts the defendant was undoubtedly blameless; and the doctrine of contributory negligence is never applicable unless both parties have been negligent. There can be no contribution of negligence, in the legal sense, by or to a person not himself negligent. If the court's reference in this instruction to the suppositive acts of Mrs. Payne be taken as an implied declaration that she was thereby guilty of negligence per se, the erroneous invasion of the province of the jury so made would be entirely harmless; since, without that declaration as with it, the defendant would inevitably have been protected against legal responsibility for her injuries by the utter lack of negligence on its part under the other facts submitted in the same instruction.

The other assignment of error complains of the action of the trial judge in refusing the request of the plaintiffs, seasonably made, to instruct the jury as follows: "If the jury find from the evidence that the plaintiff started to leave the train while the same was in motion, or walked out on the platform or steps while the same was in motion, and that this was done by the express or implied invitation of the agents or employes in charge of the train to get off, this would not be contributory negligence per se, such as would defeat plaintiff's right of recovery, but it becomes a question for the jury to determine, under all the circumstances, looking to the facts as to whether plaintiff was expressly or impliedly invited to alight, the speed of the train, to the physical condition of the plaintiff, and all the facts and circumstances surrounding the plaintiff at the time she left her seat for the purpose of alighting." The refusal to give this instruction was proper, if for no other reason, because it presents a question not embraced in any issue raised by the pleadings, and also because not applicable to any theory developed by the testimony on behalf of either party. The plaintiffs neither aver nor attempt to prove that the injuries sued for resulted from an "express or implied invitation" to get off the train while in motion; but, on the contrary, the theory of their declaration and of their testimony is that those injuries were caused by "a sudden and violent jerk" of the train after it had stopped, and while Mrs. Payne was on the steps, attempting to alight. The defendant's theory is that Mrs. Payne was injured by jumping from the train while in motion, and without invitation. Though in

conflict with each other, these theories are alike inconsistent with that submitted in the instruction refused. The instruction might have been proper, under the rule announced in the case of *Railroad Co. v. Stacker*, 86 Tenn. 343, 6 S. W. 737, if the plaintiffs had put their case, in pleading and proof, upon the ground of an invitation to alight from a moving train; but that rule was not applicable to the case they actually averred and attempted to prove, nor to the defense made by the defendant; consequently the instruction was properly, and not erroneously, refused. Let the judgment be affirmed.

STATE v. MOSS.

(Supreme Court of Tennessee. Feb. 2, 1901.)

HOMICIDE—REASONABLE DOUBT—INSTRUCTIONS.

An instruction in a homicide case that "by 'reasonable doubt' is not meant that which of possibility may arise, but it is doubt engendered by the investigation of the whole proof, and an inability after such investigation to let the mind rest easily upon the certainty of guilt or innocence," is ground for reversal; no defendant being required to prove his innocence.

Appeal from circuit court, Dekalb county; M. D. Smallman, Judge.

Connell Moss was convicted of murder, and appeals. Reversed.

Wade & Williams, for appellant. Clarence Garrett, Drake Bros., and G. W. Pickle, Atty. Gen., for the State.

WILKES, J. Defendant was convicted of murder in the second degree, and sentenced to 10 years in the state penitentiary, and has appealed.

It is said on behalf of the state that there is no legal bill of exceptions in the case. This is true as to the record, as originally presented, inasmuch as the bill of exceptions did not appear to have been signed by the trial judge, nor to have been filed within the 30 days allowed by order of the court. Upon a suggestion of diminution of the record, these defects have been supplied and remedied, and the transcript has been perfected.

Several errors are assigned,—one, that the verdict is not supported by the evidence; and, again, that there are errors in the charge of the court. The court, in defining "reasonable doubt," said: "By 'reasonable doubt' is not meant that which of possibility may arise, but it is doubt engendered by the investigation of the whole proof, and an inability after such investigation to let the mind rest easily upon the certainty of guilt or innocence." This is error, no doubt inadvertently and unwittingly committed by the learned trial judge, in requiring that the mind shall rest easily upon the certainty of innocence before the defendant can be acquitted. The law presumes that the defendant is innocent

until his guilt is proven beyond a reasonable doubt. But no defendant is required by the evidence to show such facts as will cause the jury to believe him innocent, and to rest easily upon the certainty of such innocence. This is such error as must cause the reversal of the judgment of the court below, and the cause is remanded for a new trial. The state will pay costs of appeal.

NELLUMS et ux. v. MAYOR, ETC., OF CITY OF NASHVILLE.

(Supreme Court of Tennessee. Jan. 12, 1901.)

MUNICIPAL CORPORATIONS—ACTION FOR PERSONAL INJURIES—DEFECTIVE WALK—PROOF UNDER GENERAL ISSUE—SURPRISE—NEW TRIAL—INSTRUCTIONS—ACCEPTANCE OF STREET.

1. Under the plea of not guilty, in an action against a city for personal injuries, it may show that it never accepted the portion of the street where the accident was alleged to have occurred.

2. A party who made no effort to obtain delay on account of testimony introduced under the pleadings cannot, after verdict found against him, apply for a new trial on the ground of surprise.

3. On an issue as to whether a city had accepted the portion of a street where an accident occurred to a pedestrian by reason of a defective crossing, the jury were told that if the city had not accepted the street, though it had been taken into the corporate limits, either by some formal act of acceptance, or by working the same or repairing it, they should find for defendant, but if it had accepted the same, or attempted to put it in condition for public use, they should ascertain whether it had constructed the cross walk and had exercised control over it, or permitted some other persons to erect the walk, and afterwards accepted it, and, if so, it should have kept it in repair, and would be responsible for negligent failure to do so. *Held* a sufficient presentation of the law.

Appeal from circuit court, Davidson county; John W. Childress, Judge.

Action by D. A. Nellums and wife against the mayor and city council of Nashville. From a judgment for defendant, plaintiffs appeal. Affirmed.

Rutherford & Rutherford and H. A. Luck, for appellants. E. A. Price and K. T. McConnico, for appellee.

WILKES, J. This is an action against the mayor and city council of Nashville for damages for personal injuries sustained by Mrs. Nellums on account of a defective plank walk upon what is called in the record "Bellville Street." There was a trial before a jury in the court below, and verdict and judgment for the city, and the plaintiff has appealed and assigned errors.

The first error assigned is that court below should have granted a new trial upon the ground of surprise and newly-discovered evidence. In support of this assignment, plaintiff states that the city did not disclose its real defense until its last witness, Pat Cleary, was examined. This witness, in substance, stated that the city of Nashville had never

done any work on the west side of Bellville street, nor had it in any other manner accepted the same as a street since it was included within the corporate limits of the city, in 1890. The insistence is that this was a great surprise to the plaintiff, inasmuch as the fact of nonuse and nonacceptance was not specially pleaded, and the street had been used by the public, and was in a thickly-settled part of the city, and had been recognized as a street by the public in numerous ways and at many times after it was taken into the city, and prior to the accident. The affidavit upon which the application of a new trial is based states this feature of surprise, and adds that plaintiff will make proof of use and many other facts showing acceptance on the part of the city, and it is supported as to the latter feature by the sworn statements of quite a number of witnesses. The city filed only one plea,—that of not guilty,—and upon this the plaintiff took issue. Under the plea, and upon this issue, we think it clear that the city might show by evidence that it had never accepted that portion of the street where the accident occurred. Some evidence was introduced upon this feature of acceptance, other than the testimony of Mr. Cleary, and at an earlier period of the trial. Mr. McConnico, the street overseer, testified that the portion of the street complained of was taken into the corporate limits in March, 1890, but that the city had done no work or repairing upon it up to the time of the accident, and it would be impossible to do it until a sewer was built, and that nothing had ever been done; that there is at the place an old ravine, through which a branch runs, and there were little footways running to the houses, across this. This being true, the plaintiff was bound to take notice of every defense that could be legally advanced under the plea of the general issue. Conceding the proposition to be correct that the evidence was within the issues presented by the pleadings, surprise cannot be predicated upon the fact that evidence was not anticipated along any line embraced within the pleadings. The doctrine is thus laid down in 16 Am. & Eng. Enc. Law (Old Ed.) p. 544: "The fact that an adversary's evidence is different from what it was supposed it would be is not sufficient. If there has been any want of diligence in ascertaining what the testimony of a witness would be, a new trial will be refused." In 15 Enc. Pl. & Prac. 733, it is said: "A party is bound to come prepared to meet the case made by his adversary, and he cannot plead surprise at material and relevant testimony." In support of this proposition are cited *Cole v. Coal Co.* (Sup.) 10 N. Y. Supp. 417; *Knapp v. Fisher*, 49 Vt. 94; *Davis v. Ruggles*, 2 Chand. 152; *Bragg v. City of Moberly*, 17 Mo. App. 221; *McNeally v. Stroud*, 22 Tex. 229; *Anderson v. Duffield*, 8 Tex. 237; and a number of other cases. Another principle of law applicable to motions for new trial upon the ground of surprise is

that the party who is thus surprised in the course of the trial must make all necessary efforts to secure delay by proper legal methods, in advance, to meet the matter of surprise. It appears from the affidavit of the plaintiffs that evidence of the acceptance of the street by the city could be readily had. Indeed, in the affidavit it is said that this evidence was so plentiful that they did not think it would be needed. The plaintiff D. A. Nellums was put back upon the stand after the evidence of Cleary had been given, and he failed to give any evidence on the point. No delay or indulgence was asked by the plaintiffs. The plaintiffs could not, without making any effort to obtain such delay, go to trial, and, when the verdict is found against them, ask for a new trial upon the ground of surprise. 18 Am. & Eng. Enc. Law, p. 533. The rule is thus laid down: "The first duty of counsel surprised at the trial is to secure delay by proper legal methods, but he cannot neglect this in hope of securing a verdict in spite of surprise, and then obtain a new trial." Id. See, to same effect, Railroad Co. v. Jones, 100 Tenn. 512, 45 S. W. 681; Shipp's Adm'r v. Suggett's Adm'r, 9 B. Mon. 5; Mehan v. Railroad Co., 55 Iowa, 305, 7 N. W. 613.

It is said that the court should have charged certain requests, seven in number, which the court erroneously declined to do. Upon examining the charge, we find it is quite full upon the subject of acceptance of the street by the city, and no complaint is made of any positive error in it. The requests go mainly to the question as to what acts would amount to or constitute an acceptance on the part of the city,—putting hypothetical or supposed cases of repairs made, work done, or other acts indicating acceptance. We think the charge of the court, as given, fully covered the facts as they appeared in the record, as to acceptance, and the duty of the city after acceptance was plainly stated. The jury were told that if the city had not accepted the street, although it had been taken into the corporate limits, either by some formal act of acceptance, or by undertaking to open that part of the street by working the same or repairing the same and putting it in order for the public use, then they should find for defendant, but if the jury should find that proposition against the defendant, and that it had accepted the same, or graded it or worked upon it, and attempted to put the same in a condition for public use, then they should ascertain whether the city had constructed the passway over or across one of its streets, or part of it, and had exercised control over it, or permitted some other person to erect the walkways, and afterwards accepted them, and, if so, it should have kept them in repair, and it would be responsible for negligent failure to do so. This appears to be a full charge upon the facts as they were presented by the record, and is a fair statement of the law, and is not, so far as it

goes, complained of. 2 Dill. Mun. Corp. § 642; Forbes v. Balenseifer, 74 Ill. 187; State v. Bradbury, 40 Me. 154, 160; Tied. Mun. Corp. § 223, p. 421. We think the several requests, so far as they are sound law, are covered by and embraced within the general charge, and that, upon the record as we find it, the charge was full and correct, and the requests very largely present hypothetical cases which are not presented by the record as made. We do not find any reversible error in the action and judgment of the court below, and it is affirmed, with costs.

OLIVER v. MAYOR, ETC., OF CITY OF NASHVILLE.

(Supreme Court of Tennessee. Jan. 19, 1901.)

MOTION FOR NEW TRIAL—WAIVER OF OBJECTIONS—APPEAL—RECORD—DEFECTIVE STREETS—INSTRUCTIONS—HARMLESS ERROR.

1. A formal technical objection to hearing of plaintiff's motion for new trial will be deemed waived, defendant having expressed a willingness for the motion to be heard on the merits, reserving exception to the sufficiency of the motion, and to the power of the court to hear it on the merits; the motion then being disposed of on its merits, the exception never being acted on, and there being no request for ruling of the court on it.

2. Special requests sufficiently appear from the record to have been made after delivery of the regular charge where they immediately follow the charge, and in several instances the memorandum of the trial judge is, in substance, "Declined; already charged in substance," and again, "Declined; charge sufficient."

3. Where the evidence is overwhelming that plaintiff was driving recklessly at a high speed, racing with others, and that his turning out of the safe track was that he might distance his competitors, and that, in consequence thereof, his wagon was overturned by striking an embankment on the side of the street, caused by the ends of ties of a railroad projecting into the street, and it fully appears that he could, with reasonable care, drive along such side of the street with safety, and the court charged that the city was liable if there was not enough space for passage with reasonable safety of vehicles driven with ordinary care, error in charging that the city is not required to keep its street open and reasonably safe for travel through its entire width is not ground for reversal.

Appeal from circuit court, Davidson county; J. W. Bonner, Judge.

Action by John G. Oliver, by next friend, against the mayor and city council of Nashville. Judgment for defendant. Plaintiff appeals. Affirmed.

Washington & Allen and W. M. Parham, for appellant. E. A. Price and K. T. McConico, for appellee.

WILKES, J. This is an action for damages for personal injuries claimed to have been sustained by the plaintiff, a minor, on account of the defective and unsafe condition of one of the streets of the city. There was a trial before the court and a jury in the court below, and a verdict and judgment

for the defendant, and the plaintiff has appealed and assigned errors.

Two preliminary questions are raised against any consideration of the assignments. In the first place, it appears that there is a rule in the court below that all motions for a new trial in both jury and nonjury cases shall specify the errors claimed to have been committed on the trial, and the ground upon which the motion is based, which shall be entered upon the motion docket and copied upon the minutes as they appear of record in the court. There was an entry upon the motion docket in substance as follows: "Plaintiff will move for a new trial on the grounds attached hereto." It is said in the argument, and the fact appears by affidavit in the bill of exceptions, that it is a common practice in the court below to write out the grounds of motion upon a separate slip of paper, and pin or attach such slip to the docket in connection with the entry, and they are frequently, for convenience of considering them, detached by counsel. It appears that the entry was made April 28, 1900, and the motion for new trial was heard May 5, 1900, and at that time a minute entry was made that the plaintiff had called up the motion for new trial for hearing on the 3d, upon the following grounds (setting out eight grounds, which were then copied on the minutes of the court). It appears, therefore, that the grounds urged for a new trial were regularly argued before and considered by the court on the motion for a new trial, and were regularly copied on the minutes. Counsel for the city objected to hearing the motion, but expressed a willingness for the motion to be heard on its merits, reserving the exception to the sufficiency of the motion and to the power of the court to hear the same upon the merits. The motion was then disposed of on its merits, and the exception which had been reserved was never acted upon, and there was no request for the ruling of the court upon it. We think the objection made is more technical than meritorious. It is very evident that the court considered the entire matter upon its merits, and that it had every opportunity to detect any error it may have committed. In such case the defendant must be treated as having waived the formal technical objection made, and to have consented to a hearing of the motion on the merits.

It is said, in the next place, that the special requests made do not, from the record, appear to have been made after the regular charge was delivered. It is true, there is no express statement to that effect, but these requests follow immediately after the general charge, and the action of the court shows quite clearly that they were made after the general charge, as in several instances the memorandum of the trial judge is, in substance, "Declined; already charged in substance," and again, "Declined; charge sufficient." This assignment we do not con-

sider as well made. The mere fact that the requests followed the charge, without more, would not be sufficient. Upon the merits of the case there is difficulty. It is objected that there is positive error in the charge of the court, as follows: "The plaintiff insists that Cherry street, at or about the point of the accident, was not kept open to its full width as located by maps and surveys, and that along its western side the cross-ties of a spur track of a steam railway projected over the line of the street, and that the ends of these ties were covered with sand or dirt, thus creating an embankment rendering travel along the street unsafe. The court instructs you that the city was not required by law to keep Cherry street open and reasonably safe for travel through its entire width as fixed by survey." Several requests were made bearing upon this feature of the case, and the real matter of contention is whether a city is obligated to keep its streets open and safe for their entire width, or only so far as may be reasonably safe, and sufficient for the usage of the public. As a general statement of law, we are of opinion that a city is obligated to keep its streets open and safe and in proper condition for their entire width, and any one injured upon any part of the street by reason of its defective condition is entitled to damages, provided the party injured was without fault. *State v. Barksdale*, 5 Humph. 154; *Mayor, etc., v. Brown*, 9 Heisk. 2; *Niblett v. Mayor, etc.*, 12 Heisk. 684; *Poole v. City of Jackson*, 93 Tenn. 67, 23 S. W. 57; *Beach, Contrib. Neg.* § 244; 2 *Thomp. Neg.* 769; 1 *Shear. & R. Neg.* § 352; *Jones, Neg. Mun. Corp.* § 77; 24 *Ain. & Eng. Enc. Law*, 108. But, on the other hand, if the street be defective in some parts or portions, this would not warrant a person in negligently, heedlessly, or recklessly going upon the dangerous portions; especially when there was ample room which was safe, secure, and accessible. The whole of the charge of the court must be considered together, and with reference to the facts of the case, in order to determine whether it is correct or not. The court charged the jury, in addition to what has been already stated, that: "If the space between the street-railroad track on the east and the embankment on the west was of such width and in such condition as to be reasonably safe for persons exercising ordinary care, then the duty of the city was performed." The court continued: "If, by the exercise of ordinary care, the plaintiff could, with reasonable safety, have driven along and through the space referred to, and, through his own negligence and willingness, drove upon the embankment already referred to, thus causing his wagon to be overturned, in such case you should find for the defendant, so far as this issue is concerned. On the other hand, if you find from the proof that the space between the street-railway track on the east

and the said embankment was not sufficiently wide for the passage with reasonable safety of vehicles, whose drivers were exercising ordinary care; if you further find that defendant city knew of such defects, or might have known of them by the exercise of ordinary care, and had the opportunity to repair the defects, and failed to do so, and this was the proximate (that is to say, the controlling and responsible) cause of the accident (that is the cause without which the accident would not have taken place); and you further find that at the time of the accident the plaintiff was exercising ordinary care for his own protection,—in such case you should find for the plaintiff.” The facts, as they appear from the weight of evidence, are that plaintiff was driving an express or transfer wagon, hauling passengers from the race track to the city. It appears that he had been drinking some, and had been racing along the road with other vehicles, and that he turned out of a safe track upon the street across the street-car tracks in order to reach the space on the west side of the track, so that he might be enabled to distance and pass his competitors. He was driving quite rapidly at the time, and his wheels were caught by the street-car track, and thrown out of their proper line. As a consequence, the wheels were thrown on the embankment, and the wagon was overthrown. We think it appears that the plaintiff was driving not only negligently, but rashly and recklessly, at a high rate of speed, racing with other vehicles, and that his turning out of the safe track was in order that he might distance his competitors; that, in consequence of this reckless driving and attempting to cross the street-car track, his wagon was deflected and overturned; and that his recklessness and negligence were the cause of his own accident and injury. It fully appears that he could, with the exercise of reasonable care and caution, have driven along the west side of the street. While it is the duty of the city, as we think, to keep its streets open and reasonably safe for their entire width, still, if there is a defect and danger in it, the city will not be liable for damages to one who heedlessly and recklessly runs into the danger, but only to those who inadvertently or ignorantly go into it, without fault on their part. If a party intentionally, and as a matter of choice or convenience, leaves the usual and safe track, he cannot hold the city liable if he recklessly and needlessly goes into danger. Taking the charge as a whole, while it is, as we think, erroneous in the particular feature stated, we do not, under the facts of the case, consider such error as reversible; but we are strongly persuaded the merits of the case have been reached, and the case should not be reversed, inasmuch as the merits have been reached. *Jones v. Telegraph Co.*, 101 Tenn. 443, 47 S. W. 699. We think the evidence is overwhelming that the plaintiff was guilty of gross carelessness and

recklessness, and that his injury is due to these causes, and upon a charge unexceptionable the same conclusion of nonliability on the part of the city must result. The judgment of the court below must, therefore, be affirmed, with costs.

LOVE v. BURTON.

(Court of Chancery Appeals of Tennessee.
Nov. 24, 1900.)

VENDOR AND PURCHASER—PAROL SALE OF LAND—RESCISSION BY VENDOR—RETURN OF CONSIDERATION.

1. Complainant, who was corroborated by several witnesses, testified that he made a parol contract with defendant to pay half of the cost of the erection of a mill on defendant's land for a half interest in the mill and site, and that he had performed his part of the contract. Defendant testified that complainant was simply to have half of the profits of operating the mill, but admitted that he had assisted complainant in trying to sell his interest. Held sufficient to justify a finding that defendant made a parol sale of a half interest in the property.

2. A vendor who repudiates a parol contract for the sale of land as a nullity under the statute of frauds, is bound to refund the purchase money paid to him by the vendee on the faith of the contract.

Appeal from chancery court, Dekalb county; T. J. Fisher, Chancellor.

Bill by R. L. Love against O. T. Burton. From a decree for complainant, defendant appeals. Affirmed.

Webb & Cantrell, for appellant. A. Avant, for appellee.

BARTON, J. The bill in this case was filed to set up and recover an undivided half interest in a certain mill and site, the complainant claiming a half interest under a verbal contract made with the defendant. The bill asked as alternative relief that, if the defendant refused to make a deed, or ratify the parol sale, he be given a decree for about \$400, which he had paid the defendant for a half interest in the land. The defendant answered, relied on the statute of frauds, and denied that he had ever sold, or agreed to sell, to the complainant, a half interest in the mill. Proof was taken. The chancellor heard the cause, and decreed that the complainant had paid the defendant \$400 on a parol sale of a half interest in the mill and site, and that, inasmuch as the defendant relied upon the statute of frauds, and refused to make a deed to the complainant for this half interest, the complainant was entitled to recover the amount paid by him, which was decreed a lien upon the mill and site, which was ordered to be sold in satisfaction thereof. The defendant appealed.

The facts, as we find them, are that the complainant is a son-in-law of the defendant. The defendant, in 1894, had commenced the erection of a mill, having cleared off a site on his own land. About this time he agreed with his son-in-law, the complainant, that

he (the complainant) would pay one-half the cost incurred and to be incurred in the erection of the mill, he should have a half interest; that, after the mill was erected, each should pay one-half of the operating expenses, and receive half of the profits of the mill. At the time the agreement was made it is understood that the complainant was not to be charged with the value of any work which had been done up to that time except what was owing to the millwright, and it was agreed that no charge should be made against him for the value of the land upon which the mill was located, but he was to pay one-half the charges of the work done by the millwright up to that time, and one-half of the further cost of the mill, and was to have a half interest, and the mill was to be operated as above set out. The defendant contends that he did not agree that the complainant was to have a half interest in the mill, but only agreed that, if he would furnish one-half of the money thereafter expended, he should have a half interest in the profits. It is unnecessary for us to go into a detailed discussion of the evidence. We find the facts to be as above stated, which, in substance, are that the defendant made a parol sale to the complainant of a half interest in this mill site, which would include such amount of ground upon which the mill was located, and immediately around it, as may be necessary to properly operate the mill. Upon the faith of this agreement the complainant paid and expended the sum of \$400. Defendant refuses to make a deed, and repudiates the parol trade. In view of one contention raised by counsel it is necessary that our finding of fact be accurately stated and understood. It is insisted that even the complainant's own evidence shows that the contract was simply one to share in the profits of the mill, but this insistence is not sustained by the proof. It is true that in one place in his deposition the complainant does state as follows: "I contracted with the defendant in 1894 in regard to the building of the water mill. The contract was that I was to help build the mill, pay half of expenses, and receive half of the profits." This statement is much enlarged on by counsel. But, as appears from a subsequent reading of his deposition, it was only a partial statement. Complainant goes on to show clearly that it was a sale of a half interest in the mill, and that he was to own a half interest in it after the mill was built. In one place he states, "He told me, when we were talking of building the mill, that any time after we got the mill completed, if I wanted to sell my interest, he would take it, and pay me my money." Being further examined about the matter, he stated: "When we commenced talking about it, some work had been done. They had commenced to clear off the mill site, and got the timbers for the dam. Burton told me that, if we went into a partnership, that what had been done at that time would not cost me

anything, except the work done by Brasswell, the millwright. I was to pay him one-half for my part of this work at that time. He told me that, if we went in together, my part of the mill site should not cost me anything." He further says in another place that, after the work was done, and they were to make a settlement, he told Burton to make his charges against him for his part of boarding the work hands, and that he said he was not going to charge anything on that account, and that he told Burton that they would let that be offset by \$10. Burton owed him for borrowed money. He says the arrangement about running the mill was that one was to run it one year and receive the profits, and the other the next year. He proves the payment of one-half of all the expenses except for the work done before the trade was made in clearing off the mill site. Again, in another place he says that he paid this amount of money under the agreement with Burton that "he was to own a half interest in the mill"; that he would not have made the payments if the contract had not been that "he was to own a half interest in the mill and site." On cross-examination he again states that the arrangement was to own a half interest in the mill. He makes this statement. In substance, in a dozen different places in varying language, but always meaning the same. In one place in his cross-examination he gives this answer: "After we had agreed to go in, I was to pay half the expenses of building the mill, and was to have a half interest in it. He said what work had been done, except what work Brasswell did, would not cost me anything; and my part of the mill site would not cost me anything if I would help him to build the mill." Again, in another place, he says: "He said my part of the mill site would not cost me anything, and he said, after we got the mill built and paid for he would buy my interest in it at any time." He says: "About two years after the mill was built, I asked him to make me a deed, and he refused, and said he would not make anybody else a deed to a foot of the land." In another place, in response to the question, "How much ground did Burton agree to let you have for a site?" he says: "He did not say how much. He just said I could have a half interest in the mill site. He did not say how much would be laid off. He just said half, or my part, of the mill site should not cost me anything." In another place he repeats this, and says, "He said, if he built that mill, my part of the mill site should not cost me anything." Such is the substance of the complainant's testimony, and we take it that there is no mistaking his version, when all his testimony is read, that he means to state distinctly that the agreement was that he was to be "an owner of an undivided one-half interest in the mill and site when the mill was completed," and that for this he was to pay one-half of the cost of the erection of the mill, and that in comput-

ing that cost the value of the site was not to be taken into consideration. Now, it is true that the defendant testifies that when the contract was made he and the complainant understood that the arrangement was that complainant was simply to have a half interest in the profits of running the mill, and his insistence is that, inasmuch as he has complied with this part of the contract, the complainant has no right of action. In the first place, if there was no evidence to corroborate either party, this story on behalf of the defendant would be extremely improbable, as it would certainly be an improvident and foolish contract for the complainant to make to advance one-half the cost of the structure on the faith of such an agreement. He could have no guaranty that his interest would last for any length of time. If he was not to own a half interest in the mill, then he would simply have a personal contract as to payment of profits, good only as between him and the defendant, subject to be defeated by the defendant's death and the descending of the property to his heirs, or by the alienation of the property by the defendant either voluntary or by judgment at law. It is clear that the complainant would not have gone into such a contract with his eyes open; and, as we say, the story is improbable.

Another theory advanced is that the complainant was only to have a half interest in the machinery and the building; but the mill, on its erection, became a fixture, not simply a trade fixture or machinery which could be easily removed. It is evident that a large part of the expense incurred was necessarily incurred in the erection of the mill building and in the construction of the mill race, dam, forebay, etc. In other words, a large part of the expense incurred in erecting the mill is obviously thrown away and lost to the parties if the machinery or mill be taken away. This being so, it is evident that the interest of the complainant, if he was to have a half interest in the mill, would be not only in the machinery and building, but in the dam, race, site, and so on. It seems quite improbable that he would be willing to make a contract, bear one-half of all the expenses, and to have only a half interest in the machinery. It seems equally improbable that he would be willing to pay half the amounts expended in the erection of this mill, and depend on a personal contract with the defendant to receive half the profits. This would appear to be the result if only the complainant and the defendant had testified. But when the testimony of other witnesses is considered no room is left for doubt. When we go to the testimony of the defendant himself, we think it is clear that he recognized the right of the complainant as the owner of an undivided half interest in this property. After he had testified the contract to be according to his version as above

set out, he then testified that the complainant said to him at one time that the pond was going to fill up, and that he wanted to sell his interest in the mill, and get what he could out of it, and that he wanted him (Burton) to assist him in selling the mill, as he was not going to spend another cent on the mill. Continuing, he says: "I told him I did not want it in the shape it was in, but that I would assist him in selling the mill. I went over to David J. Taylor's, and got up a trade for Lea's interest. I contracted the mill—his interest—for \$400, just what Love asked for it, and Taylor was to pay half cash and the other in good cash notes. Taylor told me to go back, and tell Love to come right on. I went back, and told him I had contracted his interest, and for him to go right on and close the trade. He wouldn't go, or didn't go." Again, he says: "After that I could hear of him trying to sell out; and Bill Brasswell came down. I told him if he would go and buy Love out I would loan him \$200 on his interest. He went on, and seen him, and came back, and said he had bought Love's interest. He said he was to pay him \$200 in cash and get one and two years on the other \$200, and the mill was to stand good until it was paid for; and Love was to be there the next morning, and put him in possession of the mill. He took me out, and had a private talk with me, and said he had sold out his interest to Brasswell for \$400, \$200 down and \$200 in one and two years' time; the mill to stand good until paid for. He said that he had been studying, and that if the mill should wash away he could not collect anything, as Brasswell had nothing, and, if I would secure the \$200 for Brasswell, he would let him have it. I told him I would not do that; that I was risking Brasswell for \$200, and he could do the same; and that if the mill washed away he would get nothing no way." Now here is the defendant's own admission that Love had an interest in the mill, and he was assisting Love to sell this interest. Now, what interest was that? Complainant has testified that it was a half interest in the mill as it stood, and witness after witness corroborates the complainant. D. J. Taylor testified as follows: "Burton and I were talking one day, and I told him I would give him [Lea Love] \$400, provided Love would take some notes I had. I don't recollect for sure what Burton said, but I think he said he would see him. My recollection is he said Love had a half interest in the mill, and that, if I bought Love out he (Burton) would make me a deed to one-half of the mill. That is my best recollection, but I am not positive about it." Says, "I understood from Burton that Love had a half interest." Another witness (Morgan Hayes) says that he heard Burton say that R. L. Love owned a half interest in the mill. Now, a half interest in the mill is not a con-

tract to receive one-half of the profits of the mill. R. Pedigo says that he heard Burton say Love owned a half interest in the mill known as "Burton's Mill." He says that he heard Burton say that Burton took a note for about \$240, which Lea had on his father, on the payment of the mill; that Burton said he took the note, and got the money on it from Byrd Sexton. "I understood," he says, "that the note was taken in payment on Love's interest." He said that Burton tried to get him to buy Love's interest in the mill; that he understood it was a half interest. John Conger testifies that he heard Burton say that Love owned a half interest. His language is, "My recollection is he said Love had a half interest in it." He testifies to Love paying him for some timber furnished in the erection of the mill. Sam Cantrell testifies that he heard Burton say that he owned a half interest in the mill. A. M. Conger testifies to the same effect, and, among other things, he says: "He," referring to Burton, "asked me to buy Love's interest. He said Lea wanted to put the effects he had in the mill in some land." He says, "He didn't say at that time exactly what the interest was, or what it was worth," but he understood that Love owned a half interest. Sam Hooper testifies that he heard Burton say Love owned a half interest in the water mill located on Burton's land known as the "Burton Mill." Bill Brasswell testifies substantially to the same effect. He says Love contracted to sell him his interest in the mill, after it was built, at the price of \$400; that Burton encouraged the trade, and agreed to loan him \$200 to make the cash payment. G. L. Love, the father of the complainant, testified that he gave to his son, R. L. Love, his note for \$200, which was transferred to Burton as part payment for the interest in the mill, and that this note was afterwards paid. But, without further discussion of the evidence in detail, we think this sufficiently shows the nature of our finding, and justifies that finding, and that is that the agreement was that, on condition that Love should pay half the cost, not including anything for the value of the site, nor the work done up to the time of the agreement, except that done by the millwright, he (Love) was to have and own a half interest in the mill, and necessarily in the site on which the mill, dam, race, etc., were placed. In other words, the exact facts, as we find them to be, are that Burton made a parol agreement to sell Love a half interest in the mill for the consideration named, and that Love was to be a half owner in this mill when it was completed, and that this ownership of a half interest was repeatedly recognized by Burton after the sale, and that he encouraged others to buy that half interest, and, indeed, agreed to make a deed.

It is urged that it would be a hardship

upon the defendant that he should now be charged with half the cost of the erection of the mill, or the amount paid by Love for his interest, inasmuch as the mill has depreciated in value, and inasmuch as it is shown that the dam and race have filled up with mud. The proof, however, shows that this has occurred frequently, and that they have been cleaned out, and can be. The mill has doubtless deteriorated, but the proof does not show that a half interest in the mill is not now worth the sum of \$400, allowed the complainant by the chancellor. But, however this may be, the contract absolutely made was that the complainant was to have a half interest if he would pay the amount that he did pay; in other words, there was a parol sale to him of a half interest, for which he paid. The defendant could have avoided all hardship even when this bill was filed, inasmuch as the complainant asked that he be compelled to make a deed according to the original contract, and only asked the alternative relief that he be repaid his money in case the defendant should rely upon the statute of frauds,—as he did,—and refuse to make a deed. The defendant could have discharged his liability simply by complying with this contract. This he refused to do, and we see no escape from the legal result that, having refused to comply with his contract, he should be compelled to refund the purchase money paid by Love.

We do not think this case comes within that class of cases where only the enhanced value of improvements made are allowed. This class of cases is illustrated by the cases of *Graham v. Weaver*, 97 Tenn. 485, 37 S. W. 221; *Treece v. Treece*, 5 Lea, 222; *Mason v. Swan*, 6 Heisk. 450; and many other cases of like nature. In all these cases the parol vendee was allowed not only the purchase money paid by him, but the value (meaning the enhanced value) of the improvements placed upon the property. Now, as we find the facts in this case as we understand them, it is not an attempt to recover for the value of improvements placed upon the property under parol sale, but it is an attempt to recover the purchase money paid for a half interest. Burton had commenced the erection of the mill upon his own ground. He says to Love: "If you will pay one-half of the cost of erecting this mill, you shall be a one-half owner in it. I will give or grant you a one-half interest in it." This is the meaning of the agreement; and, as we say, that this was the true understanding of the parties is shown not only by the testimony of both the parties, but by repeated recognitions of this fact on the part of Burton, and by his agreement with one witness to make a deed to this half interest if the witness would buy it from Love. So, in our opinion, it is not a case of improvements made under a parol agreement to sell, but it is a case of so much money paid and expended, \$200 of which was in

a note turned over directly to the defendant for this half interest. This being so, we agree with the chancellor that the complainant was entitled to recover this amount. The chancellor did not allow interest on the \$400 allowed the complainant, and this was proper, inasmuch as it was shown that he had received one-half the profits of the mill from the time it was completed, and the proof is that the mill paid about 6 per cent. on the investment. We think there was no error in the decree of the chancellor, and the same is affirmed, with costs. All concur.

Affirmed orally by supreme court, December 22, 1900.

GRIZZLE v. ADAMS et al.

(Court of Chancery Appeals of Tennessee.
Nov. 17, 1900.)

BILLS AND NOTES—PARTIAL PAYMENT—ACTIONS—FRAUD—SUBSTITUTION OF PAPERS.

Where the evidence in a suit to set aside a judgment on a note does not support the averments of the bill that defendants tampered with the papers in evidence on the trial of the suit on the note, and substituted a forged memorandum of payment for that produced by complainant, which was originally written on the note sued on, the dismissal of the bill will be affirmed on appeal.

Appeal from chancery court, Dekalb county: T. J. Fisher, Chancellor.

Bill by Dan Grizzle against P. C. Adams and others. From a decree dismissing the bill, complainant appeals. Affirmed.

Webb & Cantrell, for appellant. Wade & Robinson, for appellee Adams.

BARTON, J. This bill was filed to collect the balance alleged to be due on a promissory note, and to attack a verdict and judgment rendered in the circuit court against the complainant in this case in a suit on the same note for fraud, and as a bill of review of the judgment and decree in that case. The chancellor dismissed the bill, and the complainant appealed, and has assigned errors.

The note in question was executed on August 1, 1893, payable to the order of the complainant, and signed by the defendants H. L. Overall and P. C. Adams as principals, and by A. E. Hancock and C. L. W. Hall as sureties. A number of credits were indorsed on the note. Complainant in this case, on April 16, 1893, brought a suit before a magistrate of Dekalb county against all of the defendants upon this note. The cause was tried by the justice, and judgment rendered by him on May 21, 1893, adjudging that there was nothing due on the note, and dismissing the plaintiff's suit. The plaintiff appealed the case to the circuit court of Dekalb county, and the case was there again tried before a jury, and a verdict rendered against the complainant, and a judgment entered dismissing his suit, adjudicating that there was nothing due, and taxing the plaintiff, the

complainant in this case, with the costs. Thereupon, on May 25, 1899, the complainant filed the bill in this case, and charged as follows: That the verdict and judgment in the circuit court were obtained by the fraud of the defendants; that at the time of this judgment there was \$60 due on said note, but that the defendants claimed there was nothing due, and that the jury so found; that this was brought about by the defendants manipulating the evidence in the case. The complainant avers that in May, 1896, a payment of \$188.50 was made upon the note, and a verdict at that time was entered for that amount; that at the time of this payment defendant Adams paid part of the amount, and that Adams took the note, and entered with a pencil in one line at the bottom of the note on the face at the left-hand corner about these words and figures, "Paid P. C. Adams \$50;" and that Adams at the time said that he made this merely as a memorandum to show the amount paid by him, and that, on complainant remonstrating, he said they would all understand and recollect it, that it was simply a memorandum as between him and the defendant Overall. The plaintiff avers that when the cause was tried before the jury the slip upon which this had been written had been cut off, but was in the plaintiff's possession, and was produced before the jury, and read, as above stated, but that the defendant Adams wrote on a piece of paper resembling to some extent the one complainant had, and which Adams extricated from the file, in words and figures following: "\$50.10. Received on this note fifty dollars $\frac{10}{100}$ by P. C. Adams." This was written in defendant Adams' handwriting, and fraudulently and clandestinely put into the files, and the other piece of paper extricated by him, and this forged paper was used and considered by the jury in connection with his swearing and other evidence; the defendant Adams as witness testifying that he had paid as a credit \$50.10, in addition to the credits entered on the back of the note, and that he had paid the same in the presence of one Leverette Yeargin, who was then not in reach of the process of the court so as to have his evidence before the court at that term. The bill further avers that the forgery was the basis for the jury's verdict, and controlled their verdict; that complainant's attention had only recently been drawn to the forged piece of paper. Complainant further avers that since the trial he has learned that he can prove by Yeargin that no such payment was made in his presence, as testified to by Adams, and also that since the trial Adams has been discredited as a witness, and that he is not entitled to full faith and credit upon oath; that at the trial he did not know that Adams could be so fully discredited. He charges that he will be able to prove that the piece of paper used before the jury was not the slip of paper originally on the note, and cut off by him or his son, and which was in his possession, and was

not the original memorandum written, but a forgery contrived by Adams to defeat the complainant. The prayer of the bill is that the verdict and judgment in the circuit court be set aside for fraud, and that the complainant have a decree for the balance on the note. The defendants demurred and answered. The substance of the demurrer is that the bill does not state the case sufficient to justify a court in setting aside the decree, judgment, and verdict in the circuit court for fraud, and that the newly-discovered evidence set out is simply cumulative. The answer denies all the allegations of fraud; denies that there is anything due on the note; avers that it is all paid; denies that the defendants, or any one for them, manipulated the piece of paper referred to, or changed or altered it in any way; avers that it was the same memorandum originally written on the note, and produced on the trial by the complainant himself. The answer further pleads and relies upon the adjudication in the circuit court as *res adjudicata*. Proof was taken, as stated, and the chancellor dismissed the bill.

Without going into a detailed discussion of the evidence, we find that there is but one material issue of fact necessary to be settled, and that is whether or not the defendant Adams, or any of the defendants, or any one for them, tampered with the papers in evidence in the circuit court, and substituted a forged or different paper or memorandum for that produced by the complainant, and which was originally written on the note sued upon. We deem it sufficient to say that, after a careful study of the evidence, the complainant does not make out his case upon this issue. On the contrary, we think the weight of the evidence is with the defendants, and we find that the piece of paper now produced was the same piece of paper used on the trial before the jury, and produced by the complainant, and was originally a part of the note sued on; and that the evidence does not show that the defendants, or any of them, or any one for them, committed any fraud on the trial of the case in the circuit court. This being so, it is unnecessary for us to consider the legal question involved as to whether the fraud charged, if made out, would be sufficient to set aside the verdict and judgment of the court. The finding of fact is that the alleged fraudulent contrivance used is not shown to have been used by the defendant, and it is not shown that he or any of the defendants perpetrated a fraud upon the jury, the court, or upon the complainant. In addition to this, we may say that we find the weight of the evidence is that the notes sued on had been fully paid. Such being our finding of fact, the result is that the chancellor committed no error in dismissing the complainant's bill, and his decree is affirmed, with costs. All concur.

Affirmed orally by supreme court, December 22, 1900.

OSBORNE v. BOSWELL.

(Court of Chancery Appeals of Tennessee.
Nov. 3, 1900.)

SALE OF LAND—PART PAYMENT—EVIDENCE—ALLEGATIONS AND PROOF—VARIANCE—LIMITATION OF ACTIONS—APPEAL FROM FAVORABLE DECREE—DISMISSAL.

1. Complainant testified that he sold land for \$330, receiving certain payments, and that the purchaser assumed a balance due complainant's vendor, leaving \$65 unpaid, and that he had received in part payment a note held by the purchaser, which he had allowed the latter to retain for collection. The purchaser denied the transfer of the note, and claimed to have fully paid the purchase price. The only corroboration of complainant's evidence was a conversation of his brother with the purchaser two years before the trial, in which the latter said "he would pay the remainder if complainant would pay for the land that was short." The purchaser showed receipts for payments greater than the amount stated to be due complainant's vendor at the time of the sale. *Held*, in a suit against the purchaser to recover the proceeds of the note, that the evidence showed that the note never went into the trade.

2. Where defendant, in a suit to recover the proceeds of a note alleged to have been left with him for collection, testified, without contradiction, that he had treated the note as his own, and that all money collected thereon was collected more than six years before the suit was brought, the statute of limitations would apply.

3. Where a bill was brought to recover the proceeds of a note alleged to have been collected for complainant, and due him in part payment on a land trade, a judgment against defendant could not be sustained on the theory of conversion of the note.

4. Where a complainant prays and prosecutes a broad appeal from a judgment in his favor for less than the relief demanded, no error being assigned by defendant, his bill will be dismissed on appeal, if there is nothing in the record to warrant the decree rendered in his favor.

Appeal from chancery court, Franklin county; M. M. McConnell, Chancellor.

Bill by Mark Osborne against Ben Boswell. From a decree for complainant for less than the relief prayed, he appeals. Bill dismissed.

Frank L. Lynch and W. P. Davis, for appellant. Geo. E. Banks, for appellee.

BARTON, J. The bill in this case was filed July 7, 1899, to collect from the defendant \$60, with interest from February, 1888, which sum the complainant claimed the defendant owed him on account of the proceeds of a note belonging to the complainant which was left with the defendant for collection, and which it was averred he had collected and failed and refused to account for. The transaction, as detailed by the complainant, was as follows: He says that he (the complainant) had bought a tract of land from one Baker for \$300; that he had paid Baker therefor \$235, and owed him a balance of \$65; that he then sold his trade or bargain for the land to the defendant, Boswell, and that Baker was to make the deed to Boswell, and afterwards did so; that the price to be paid to the complainant by the defendant was \$330; this was paid and

to be paid as follows: \$50 cash, which was paid, the defendant's note for \$50, which was given and subsequently paid, a horse taken at a valuation of \$75, and a wagon at \$30; that the defendant, Boswell, assumed the balance due to Baker, which was \$65, and that this left unpaid \$65, and that to pay this the defendant turned over to him a note, which he, the defendant, held on the brother of the complainant; that the complainant accepted the note as part payment for the land, but left it with the defendant for collection, preferring to do that, as his brother might be slow in paying it to him; and he alleges that the defendant had collected the money on this note, and had failed and refused to account for it. The defendant answered the bill; admitted the purchase of the land; but denied that he ever transferred the note on the complainant's brother to the complainant, but said that he otherwise paid for the land; that he had paid for the land in full; that, while he had collected part of the note in question, it was as his own money, and that he owed the defendant nothing; and he also pleads and relies upon the statutes of limitations of six and ten years. Proof was taken, the cause heard, and the chancellor held that defendant had traded to the complainant the note on his brother known as the "Dick Osborne Note," and that the defendant had collected all of the note except some \$12 of the principal, which, with interest thereon, remained due and unpaid. But the chancellor held that, inasmuch as the amount collected had been collected more than six years before suit brought, the complainant's right of action as to this was barred, but that he was entitled to recover from the defendant the amount still uncollected on the note, with interest, but adjudged and decreed that this decree, which was for \$17.76, might be satisfied by the defendant by his placing in the hands of the clerk and master of the court the Dick Osborne note. From this decree the complainant prayed a broad appeal, which he has perfected, and here assigns errors. The defendant did not appeal, and has assigned no error.

We find as follows: The complainant testifies that the defendant did turn over the Dick Osborne note to him as part payment for the land which he sold the defendant for \$330. He testifies that he had frequently tried to get the defendant to pay this sum, but had been unable to do so, and that the defendant had not denied that the note belonged to the complainant, nor its collection. On the other hand, the defendant expressly testifies that he never had transferred the Dick Osborne note to the complainant; that this note had remained his own; that at the time of the trade he had offered it to the complainant, but that the complainant had declined to take it, and that he had afterwards collected what he did collect on it, which was prior to 1891, as his own money, and that

he had held and claimed the note as his own; that there was still a balance of some \$12 and interest thereon due and unpaid on the note. The defendant swears, and produces receipts which go to corroborate him, that he had paid \$150 to Baker on the amount that remained due and unpaid to him at the time of the trade. He says that there was more due to Baker by the amount of \$7 than the complainant at the time represented. He says that his agreement was to pay the complainant a mare at \$75, a wagon at \$30, \$50 in cash, his own note for \$45, and to assume the balance due to Baker, which he says turned out to be \$150, or \$7.50 more than the complainant had represented. There is nothing to disprove the defendant's testimony as to the amount paid by him, and, taking the amount which the complainant says he sold the land for to the defendant, it would appear that the Dick Osborne note was not included in the trade.

The testimony of neither party is entirely clear and satisfactory, owing, doubtless, to the long lapse of time,—some 10 or 12 years after the transaction. But we have these facts: That the complainant says the price of the land was \$330; that he admits having received \$50 in cash, the payment of the \$50 or \$45 note, and the mare and the wagon; and, this being so, it is clearly proven that the amount due Baker, and which he says the defendant assumed, more than covered the balance of the price of the land. So the Dick Osborne note could not have gone into the trade. The only evidence to corroborate the complainant is that of a brother of his, one Jeff Osborne, who says that he called upon the complainant several years ago in reference to money due Mark Osborne from Ben Osborne. He was asked to state whether at any time since that he had had a conversation with Boswell in reference to this litigation, and when it was, and what Boswell said. He said: "I had a conversation, and Ben told me that, if Mark would pay for the land that was short,—it lacked eight acres of being the land,—and he had paid some back taxes on Mart's, that he would pay him the remainder." He says: "This was something like two years ago." Now, this is all the evidence there is to corroborate the testimony of the complainant. So, upon the evidence as it stands in the record, we are bound to find that as a matter of fact the Dick Osborne note never went into the trade,—at least, the clear weight of the evidence is against him,—and therefore the defendant owed the complainant nothing at the time of the bringing of this suit.

We further find as a fact that whatever was collected by the defendant on the Dick Osborne note was collected more than six years before the suit was brought in this case, and prior to 1891. We are unable to see upon what basis the chancellor founded a decree against the defendant for the \$17.65

adjudged against him. It is true that the chancellor concluded that the Dick Osborne note had been transferred to the complainant, and that he was the owner of it, and he gave a judgment against the defendant for the uncollected balance. But if it be conceded that the chancellor was right in his finding of fact that the note had been transferred at the time of the land trade, and become the property of the complainant, this decree could only be sustained on the ground of the conversion, and the proof shows that the complainant had all the while been claiming the note as his own, and certainly for more than three years before the bringing of this suit. The chancellor's decree was evidently based upon the theory of conversion. But besides the bar of the statute, which was complete, the bill was not brought for a conversion, but to recover for money collected on the complainant's account. The bill avers that every cent of the money was collected, and collected on complainant's account. There is no charge in the bill, and no facts set out, going to show a conversion of the note, nor any neglect in its collection; it being alleged that every cent of the note had been collected.

The defendant did not appeal, but the complainant prayed and prosecuted a broad appeal, which leaves the entire matter open. The defendant has not assigned error, and we would be content to affirm the chancellor's decree for the small amount against the defendant, but for the fact that there is nothing in the record, either in the proof or in the pleadings, on which such a decree can stand. The explanation made by defendant's counsel is that the matter was too small to further litigate about, which appears to have been a very sensible view. But, the matter being now before us, we feel bound to render such a decree as the chancellor should have rendered, and dismiss the complainant's bill outright, which will accordingly be done. All concur.

Affirmed orally by supreme court, December 11, 1900.

ROBINSON et al. v. BAUGH et al.

(Court of Chancery Appeals of Tennessee.
Nov. 3, 1900.)

FRAUDULENT CONVEYANCES — MORTGAGES — ILLEGAL RESERVATION — CONFIRMATION — TRUST DEED — VALIDITY.

1. A mortgage of a stock of goods and real estate which reserves to the mortgagor the right to retain possession and dispose of the goods as though he had made no mortgage is wholly void as to creditors, though the illegal reservation applies only to the goods.

2. When there is no attempt to amend a mortgage containing a fraudulent reservation in favor of the mortgagor by means of a subsequent trust deed to secure other debts, or to incorporate the mortgage into the deed, the validity of the deed is not affected by the invalidity of the mortgage, though the mortgage debt is made a preferred debt in the deed.

3. A trust deed embracing all the debtor's assets except his equity of redemption in the real estate conveyed, which directs the trustee to execute his trust as speedily as possible and to close up all the business within 18 months from the date thereof, and authorizing him to sell the real estate on six or twelve months' time, does not allow the trustee to delay the execution of his trust, or to include the two-years redemption in the time given for winding up the business, and hence is not fraudulent, as hindering and delaying creditors.

Appeal from chancery court, Franklin county; T. M. McConnell, Chancellor.

Bills by J. H. Robinson and others against J. L. Baugh and others. The cases were consolidated. From a decree for complainants, defendants appeal. Modified.

Geo. E. Banks, for appellants. Lynch & Lynch and Embry & Taylor, for appellees.

NEIL, J. In these consolidated cases there were four bills attacking as fraudulent a mortgage and a trust deed made by J. L. Baugh, a merchant of Winchester,—the first to S. M. Alexander for the benefit of the Home Bank, of that city, and the second a trust deed to George E. Banks for the benefit of sundry creditors. The chancellor sustained the bills, and the defendants, Home Bank, S. M. Alexander, J. L. Baugh, and George E. Banks prayed and obtained an appeal, and have assigned errors.

The mortgage for the benefit of the bank is as follows: "Whereas, I am indebted to Home Bank, Winchester, by note dated March 25th, 1890, and due July 22nd, 1899, for the sum of \$1,500.00: Now, for the purpose of making said bank safe and secure in the payment of said note, and for any other I may owe said bank hereafter, I, J. L. Baugh, have this day bargained, sold, transferred, and conveyed unto S. M. Alexander, cashier of Home Bank, the following described storehouse and lot; being the storehouse where I am doing business, on the corner of the public square, Winchester: Bounded on the north by street, east by Lawing, west by street, and south by hotel property and S. A. Billingsley. To have and to hold said storehouse and lot to the said S. M. Alexander, cashier Home Bank, his assigns and representatives, forever. I covenant that I am lawfully seised and possessed of said property, and I will warrant and defend the title to the same against the lawful claims of all persons whomsoever. I also transfer and convey my entire stock of goods in said storehouse to said S. M. Alexander, cashier Home Bank, as further security for the payment. Said goods consist of clothing, boots, shoes, hats, caps, dry goods, and notions. But all of the property in said building is transferred, but the said J. L. Baugh has the right to sell any of said goods at retail. I warrant the title to all of said personal property to the said S. M. Alexander, cashier Home Bank. Witness my hand this 25th day of March, 1899. J. L. Baugh." The trust deed to George E. Banks

is in form a special deed in trust conveying to Mr. Banks the same storehouse and lot described in the first instrument; also J. L. Baugh's stock of goods, and furniture and fixtures in his store; also his book of accounts marked "A." It secures by name 21 creditors in an amount aggregating \$5,273.28,—among others, the Home Bank in the sum of \$1,500. This trust deed contains the following directions: "The said Geo. E. Banks, trustee, will take immediate possession of said property. He will make an immediate inventory thereof as described and required by law. He will sell said property to the best advantage of the beneficiaries of this trust, either in wholesale, in bulk, or in lots, or at retail, at public auction or private sale, for cash or on credit, taking notes at six months, with two good, solvent securities on each note. He will sell said storehouse and lot, as he may deem to the best advantage, on not longer than six and twelve months' time, taking notes with good and solvent securities, and taking a lien on the property; and said trustee will be empowered to make the purchaser a deed. Out of the proceeds of the said storehouse and lot he will first pay the mortgage debt and interest due the Home Bank. He will collect all of said accounts on the book marked 'A,' and the proceeds of all of said property, after paying the Home Bank debt and the interest, he will apply as follows: First, to the expense of this trust, including clerk hire, trustee's and attorney's fees, and other necessary expenses; second, he will pay the debts in full of the creditors heretofore specified in this deed of trust, and the balance, if any remains, he will pay to me. The trustee will execute his trust and wind up as speedily as possible, but he will close up all of said business within eighteen months of this date." It should be stated that in this trust deed the following reference is made to the mortgage: "Said storehouse and lot is conveyed subject to a mortgage executed to the Home Bank, at Winchester, Tennessee, on the 25th day of March, 1899, for the sum of \$1,500." At the time the mortgage to the bank was executed, Mr. Baugh executed a note for \$1,500, maturing at four months after date. This note, on its face, refers to the mortgage as collateral. Interest was paid on this note from time to time to July 25, 1900. It should be stated that the bank filed a cross bill to enforce the collection of the above-mentioned note by a sale of the property under its mortgage through the agency of the court. It is observed that by the terms of the mortgage in favor of the bank the right to retain and sell the stock of goods was reserved to J. L. Baugh. The testimony shows that he exercised this right, and remained in possession of the goods after that mortgage was executed in the same way as before, replenishing and selling at retail as is the custom of retail merchants. In short, the mortgage made no change in

his control of the goods, or his appropriation of the proceeds as he deemed his own interests required. This mortgage was not put to registration until the date of Mr. Baugh's failure, and then was registered but an hour prior to the making of the trust deed. After the trust deed was made, Mr. Banks, as trustee, employed agents, and had an inventory made. This inventory shows that the total value of the property, real and personal, is \$7,441.85. Of this sum, about \$1,800 is fixed in the testimony as the value of the storehouse, the rest is the value of the goods and the book of accounts; the latter containing accounts estimated to be worth \$120. The debts amounted to \$5,273.28, on the face of the trust deed. As to the mortgage, there is no evidence of a fraudulent purpose, except such as may be inferred from the clause therein contained authorizing the retention of the stock of goods and its use and appropriation by Mr. Baugh, and his actual use of the property in accordance with the reservation in his favor in that instrument, and the further fact that this mortgage was withheld from registration up to the day of Mr. Baugh's failure. The bank, however, qualifies this latter circumstance by showing in the testimony that at the time the mortgage was taken the officials of the bank were informed by Mr. Baugh that he owed only \$1,500, and that this money was procured for the purpose of paying that indebtedness. The officials of the bank did not know until about the time the trust deed was executed that Mr. Baugh owed any other debts. It now turns out that at the time he executed the mortgage he owed debts amounting to about \$2,000; that after the mortgage he incurred debts amounting to about \$1,800 over and above the debt to the bank itself.

The only points urged against the trust deed are that by its reference to the mortgage it incorporates the latter, and it is said that, inasmuch as the mortgage is fraudulent, it makes the trust deed likewise fraudulent. It is also urged that the trust deed allows too long a time for winding up. It is construed in the briefs as allowing a period of 18 months before there can be a final closing out, and it is said that then the property may be sold on 12 months' time. It is pointed out that the real estate is conveyed subject to the right of redemption, and it is suggested that there may be thus a period of three years before there can be any final settlement of the matter according to the terms of the trust deed, even after the expiration of the 18 months. It should be stated that the complainants acquit Mr. Banks of any intentional or actual fraud. Their allegations are based, as stated, upon the face of the instrument, in the manner just pointed out. However, they insist, and such is the fact, that Mr. Banks drew the mortgage in favor of the Home Bank, and hence knew its contents, and was also aware of the fact that

Mr. Baugh was in possession of the goods, using and selling them as any other retail merchant; and this knowledge was possessed by him at the time he became trustee under the second instrument. It should further be stated, with regard to the amount we have set forth as the aggregate of the indebtedness secured in the trust deed, that there is included in this a debt of \$683.95 to the Winchester Cemetery Company, and that the trust deed states on its face that this is subject to a reduction for services. The Winchester Cemetery Company is a party to this cause as complainant in one of the bills, but the chancellor failed to render a decree in behalf of the company, not mentioning the matter one way or the other in the decree, and there is no appeal from this decree by the cemetery company. Moreover, in the deposition of Mr. Baugh it is shown that he is entitled to credits amounting to a sufficiency to cover the whole debt. In this view, the aggregate of actual indebtedness secured by the trust deed would be \$4,589.33, instead of \$5,273.28. We should further add that nine of the principal creditors secured by the trust deed joined in the several attachment bills attacking both instruments, and there are still left nine other creditors, besides the Home Bank of Winchester, who did not attack the instrument. These aggregate about \$400, and, with the debt of the Home Bank, about \$1,900 still inside of the trust. These nonattacking creditors, except the Home Bank, are represented in this case only by the trustee, George E. Banks; they not having been made parties individually. It should also be stated that the property conveyed in the trust deed practically embraced all of the assets of Mr. Baugh, except his equity of redemption in the storehouse. This latter was not waived in either instrument.

Now, addressing ourselves to the legal questions involved, we think there can be no doubt that the mortgage to Mr. Alexander for the benefit of the Home Bank is void on its face, inasmuch as it reserves to Mr. Baugh the right to keep possession of, and to sell and dispose of, the goods just as though he had made no mortgage. *Bank v. Ebbert*, 9 Heisk. 153; *Bank v. Brier*, 95 Tenn. 331, 32 S. W. 205. Although the offending provision applied only to the personal property conveyed, yet this made the instrument altogether void. 95 Tenn. 333, 32 S. W. 205.

It is insisted that, inasmuch as this mortgage was recognized in the trust deed, the two became one instrument, and the illegal nature of the first vitiated the second. In support of this proposition we are referred to *Overton v. Holinshade*, 5 Heisk. 683, 685. Reference to the latter page by counsel is for the benefit of a remark *arguendo* by Nicholson, C. J., to the effect that where there had been an illegal reservation in a prior trust deed, and the second was made, recognizing and confirming the first, and adding

the property previously reserved, and releasing any claim thereto, the two deeds constituted one conveyance, and should be examined together. We are also referred to 14 Am. & Eng. Enc. Law (2d Ed.) p. 455, note 1, to the effect that, where a new assignment is made to obviate fraudulent provisions in a previous assignment, such fraudulent provisions must be entirely abandoned. The note mentions the case where there was a deed of assignment for the benefit of certain creditors which provided that the debtor should remain in possession of the property assigned, and should sell the same in the usual course of business. It is said that this, being void as against creditors, was not cured by the second deed, releasing to the trustee the debtor's rights reserved by the first, and leaving it at the trustee's option whether to take possession or not. *Martin v. Rice*, 24 Mo. 581. These authorities, in our judgment, do not fit the present case. There is here no attempt to amend the mortgage by means of the trust deed, or to incorporate the former into the latter. All that appears upon this subject is that in the latter the former is referred to, and it is said that the trust deed is made subject thereto, and the debt secured by the first instrument is made a preferred debt in the second. If the trust deed had merely stated the existence of the mortgage, and had made the conveyance of the storehouse and lot in subordination thereto, without undertaking to secure the debt itself, then upon setting aside the mortgage the result would merely be that the property conveyed in the trust deed would be relieved from the prior seeming incumbrance. But from a mistake of law in treating, in the second instrument, as valid a prior instrument which was void on its face, no more serious result could supervene than as just indicated. But the trust deed went further, and itself undertook to secure the debt provided for in the former instrument. This being true, the setting aside of the prior paper would have no effect upon the security provided in the second for the debt purporting to be secured in the first. It is possible that such a new situation would furnish ground for a bill to reform the instrument, if it be true that the preference granted in the second would not have been created by the parties if they had taken into consideration the void character of the mortgage. However, we have not the matter of reformation before us, and we need not consider it. We may close our observations upon this particular point with the remark that, even if we should apply to this case the rules contended for by the complainants, the result insisted upon could not follow. That is to say, if we treat the mortgage as incorporated into and amended by the trust deed, and the two as one instrument, then the offending provision was cured before any of the attachment bills were filed, because it appears from the trust deed that the trustee was re-

quired to take charge of the property and to close it out as soon as possible. For these reasons we are of the opinion that the validity of the trust deed is not affected by the invalidity of the mortgage.

The next point urged against the trust deed is that too long a time is given for winding up. The argument in favor of this objection, as we understand the briefs of counsel and as we remember the oral discussion, is that the trustee was allowed 18 months for winding up, that he was permitted to sell the storehouse and lot on 6 or 12 months' time, and that the right of redemption on the real estate was not waived. From these statements of fact it is argued that more than 4 years must elapse before the instrument could be finally closed out. There is more than one fallacy in the argument. It is not proper to include the 2-years redemption in the time given for winding up. The debtor had the right to waive the right of redemption in the trust deed, or not, as he might choose. If he failed to waive it, the right of redemption remained outstanding in him, as an asset which could be subjected by any creditor by proper proceedings. The complainants say there is no law compelling creditors to buy subject to the right of redemption, and to await the debtor's pleasure for 2 years. This is true. They need not buy unless they desire to do so. Again, if they buy they are not compelled to await the debtor's pleasure, because the law allows them to subject the equity of redemption as property. Again, it is urged, as we understand the argument, that the law does not compel creditors to accept such a security. This is true. They may accept or refuse. But where there are sundry creditors, and some accept and others refuse, those who accept cannot be deprived of their security on the ground that the real estate was conveyed without waiver of the right of redemption. In other words, the failure to waive redemption is not a badge of fraud. This deducts 2 years from the time which it is alleged the trust deed allowed the trustee for winding up. But, if we turn to the instrument itself, it is seen that not even 18 months is allowed to the trustee. The direction to him is as follows: "The trustee will execute his trust and wind up as speedily as possible, and he will close up all of said business within eighteen months of this date." The limit of 18 months is an outside one. If the trustee complies with the requirements of the authority under which he acts, he must begin the winding-up process immediately, and act with all due expedition. He could not, while acting in accord with the terms of the authority conferred upon him, delay even for 18 months, unless there should be good reasons therefor, growing out of the protection of the best interests of the creditors secured. Under this instrument, if he should unreasonably delay the execution of the trust, even within the limit of 18 months, he would be personally

liable, and liable upon his bond for any injury that might result from such negligence. Moreover, his tardiness could be quickened by a bill filed by the creditors interested. In this view, we think that the charge made against the trust deed, that it allows a delay greater than the law's delay, is not sustainable. It is true that he has authority to sell the real estate upon 6 or 12 months' time, but we apprehend that, when this authority is taken in connection with the direction to him to execute the trust and wind up as speedily as possible, it would be a bold trustee, not to say a reckless one, who would dare to rely alone upon the provision as to 18 months, and fail to make any effort to sell the real estate before the expiration of that time, and thereby add 1 year to the 18 months. If the real estate could be sold at any time after the execution of the trust deed for a reasonable price, then it would not only be the duty of the trustee, under the terms of this deed of trust, to sell the property, but upon his failure to do so a bill could be filed against him by the creditors, and the sale of it compelled. The whole trust deed must be taken together, and its true meaning thus ascertained. So considered, we are not able to find on its face any evidence of fraud whatever. Nothing could be more imperative than the direction to the trustee that he should execute his trust and wind up as speedily as possible. The effect of this stern direction is not in the least weakened by the further clause to the effect that the whole business must be ended within 18 months. This clause does not operate as a license, but, rather, as a limit. We are quite familiar with the line of cases holding that where property greater than the amount of the debt secured is conveyed in an instrument, and the time allowed for winding up is greater than the law's delay, such instrument is void on its face. We are also familiar with the case of *Bank v. Martin*, 96 Tenn. 1, 33 S. W. 565, where this same doctrine seems to have been extended by the supreme court to the case of a general assignment where the property was less than the amount of the debt secured. These cases, of course, would all apply to the present one if the time granted were too long, because it appears from the finding of facts supra that the amount of property conveyed is greater than the amount of debts secured. But, as already stated, we do not think that such delay was authorized in the instrument as would vitiate it.

Our conclusion is that the chancellor erred in setting aside the trust deed, and in sustaining the attachments of the complainants upon the property conveyed therein. In these respects his decree will be reversed. It will be affirmed in so far as he adjudges the mortgage to Alexander in favor of the Home Bank void, and in so far as he renders a personal judgment in behalf of several creditors whose names are mentioned in his decree. The defendant J. L. Baugh will pay all the costs

cident to taking a personal judgment against himself in the court below. All other costs of the court below and all the costs of this court will be paid by the complainants. All the judges concur.

Additional Findings of Fact.

This case was decided by us at a former day of the term, and an opinion then filed. The case is now before us for an additional finding of facts. In our former opinion we directed a decree disallowing the debt of the Winchester Cemetery Company. As the record then stood, this was a proper direction; but counsel now bring before us by agreement the fact that this question was reserved by writing in the court below between the parties, which was omitted by mistake from the transcript. We are asked to find this fact, and do so, setting out the agreement of counsel presented to this court, which is as follows:

"In this cause it is agreed, and before the cause was tried before the chancellor the counsel agreed, that the cause should be heard as to all the issues except the claim of the Winchester Cemetery Company, which was segregated from the record, and held to be governed by, and take the same course of, the balance of the cause, after the compensation of Baugh was fixed, if he was entitled to compensation, or, in other words, the question as to his compensation settled, and that a written agreement was entered into and filed in the record, and that the claim of said Winchester Cemetery Company was not adjudicated by the chancellor for this reason. Said agreement was inadvertently left out of the transcript. It is further agreed that the honorable court of chancery appeals may find this fact, and is requested to do so.

"Geo. E. Banks, for Defts.

"Branner & Branner, for Defts.

"Lynch & Lynch, Sol. for Compls.

"Embry & Taylor, Sol. for Compls."

The finding of facts contained in our former opinion will be modified, with regard to the debt referred to, pursuant to the above agreement. All the judges concur.

Affirmed orally by supreme court, December 22, 1900.

WEIDMAN v. TEMPLETON et al.

(Court of Chancery Appeals of Tennessee.
Nov. 8, 1900.)

TRUST DEED — ANNULMENT — ACKNOWLEDGMENT OF MARRIED WOMAN — TAKING BY TRUSTEE.

That the acknowledgment of a trust deed by a married woman was taken by the trustee named therein is not alone sufficient ground for annulling it at her instance.

Appeal from chancery court, Franklin county; T. M. McConnell, Chancellor.

Bill by Mrs. Lillie Weidman, by next friend, against H. M. Templeton and others. From a decree in favor of defendants, complainant appeals. Affirmed.

Jesse M. Littleton, for appellant. Geo. E. Banks, for appellee Templeton.

WILSON, J. The bill in this case was filed February 18, 1899, by Mrs. Lillie Weidman, a married woman, by her next friend, Jacob Weidman, against the defendants, her husband, G. F. Weidman, among the number, to enjoin the defendant Templeton from selling a house and lot in the town of Winchester, and to set aside a deed of trust thereto, executed by her and her husband to secure the payment of a note executed to the defendant Banks, and by him assigned to the defendant Taylor. The bill avers, in substance: (1) That the complainant is the daughter of Mary Schrom, deceased, who was the owner, at the time of her death, of two pieces of real estate in the town of Winchester, and that at the time of her death she left two heirs, the complainant and her sister, Mrs. Fannie Taylor, the wife of defendant A. W. Taylor. (2) That one piece of property, consisting of a house and lot occupied by complainant, is worth \$800, and that the other piece of property, being a business house located a short distance from the public square in Winchester, is worth \$2,000 or \$2,500. (3) That before the death of complainant's mother she gave the house and lot described in an exhibit to the bill to complainant, but executed no deed thereto, so that the title of complainant was never made perfect, but that, believing that she owned the place, she, after her marriage, made improvements on the same, and spent considerable money, time, and labor in beautifying the same and making it a pleasant home. (4) That after the death of her mother, and in August, 1897, complainant being advised that the verbal gift of her mother did not vest the title to the property in her, and being anxious to have her property in a shape so she could use and improve it, she filed a bill in the chancery court for the purpose of having all the property sold, and the proceeds divided between her and her sister, Mrs. Taylor; that this suit was brought in the name of herself and husband, and that while it was pending the defendant Taylor, who, for some reason, disliked complainant and her husband, went to the defendant, her husband, and wanted to settle the matter, as he said, out of court; that Taylor is a shrewd business man, and a money grabber, and that her husband has little knowledge of business affairs, being a printer, and having had no experience in trading or in business, and that Taylor induced her husband to dismiss said bill, which had been filed to have the property sold, and also induced him to enter into a partition agreement, and quitclaim his, and have complainant quitclaim her, interest in

the business house, worth \$2,500, and pay the defendant \$300, in consideration of which Taylor and wife executed to complainant a deed to the house and lot, worth \$600, it being the property described in Exhibit A to her bill, and being complainant's homestead, and the only realty of which she is the owner and possessor. (5) That this arrangement of matters was made by her husband without her knowledge, and over the protest of her solicitor, and it is alleged that her husband, without acquainting complainant with the nature of the settlement he had made, or without advising her that her attorney did not approve of it, simply stated that it was satisfactory and was well settled, and that thereupon complainant signed and acknowledged the deed to the defendant Banks, conveying the business house and lot to him, and which he afterwards conveyed to defendant Taylor. (6) That, in order to pay the \$300, the defendant Weidman, her husband, borrowed the amount and \$20 more, and executed a deed of trust on the house and lot worth \$600, and which instrument is made Exhibit A to the bill, and that the note executed for said amount so borrowed was made payable to defendant Banks, and that he is named as a beneficiary in the trust deed. It is charged, however, upon information, that the defendant Taylor was the real beneficiary, and that Banks merely allowed his name to be used, because he knew there was ill feeling between defendant Taylor and complainant, and that it was known that complainant's husband would not want to borrow money from Taylor. It is further alleged, in this connection, that the defendant Weidman, the husband of complainant, insisted on being allowed to pay a part of said note at the end of one year, and renew the balance for twelve months, and it was agreed that this might be done, but that the defendant Taylor determined to get possession of all of complainant's property, and after the note was assigned to him refused to renew it. The charge is made in the bill that the husband of complainant, because of his inefficient business sense, acceded to all of these unjust and inequitable arrangements. It is said that the note referred to, secured by the deed of trust upon the house and lot claimed by complainant, is dated December 18, 1897, and payable one year after date, and that it had been transferred to defendant Taylor, who, however, was the real payee from the beginning. It is further charged in the bill that, when complainant signed and acknowledged the deed of trust conveying her property to defendant Templeton, she did not understand what it was, as it was not read and explained to her, she trusting to her husband, whose business capacity, or lack of business capacity, she did not then know, and therefore she signed the instrument wholly ignorant of what it meant. It is further alleged that the defendant Templeton, trustee in said trust deed, was at the time deputy county court

clerk and the attorney for defendant Taylor, and that he helped Taylor make the settlement with her husband, the defendant Weidman, and came with her husband to take the acknowledgment of complainant to said deed of trust. It is averred that her acknowledgment was taken in the presence of her husband, and that she would not have signed and acknowledged said instrument if it had been read to her and explained to her so that she might have understood it. In other words, it is charged that complainant did not execute the deed of trust understandingly. It is alleged, again, that the defendant Templeton, named as the trustee in the deed of trust, is the same individual who took her acknowledgment thereto to himself, and the insistence is that for this reason the instrument should be declared null and void and canceled. In this connection, it is alleged in the bill that the trustee named in the deed of trust fraudulently procured the acknowledgment of complainant thereto, and it is insisted that for this and the other reason stated it is a nullity, and should be canceled. It is further alleged that the defendant Templeton, as trustee, at the instance of defendant Taylor, is about to advertise said property under said void deed of trust for sale to pay off and satisfy the said note given to defendant Banks, and transferred by him to defendant Taylor, to secure which said deed of trust purports on its face to have been executed, and it is insisted that, unless restrained, said trustee will advertise and sell said property, and thereby cast a cloud upon complainant's title thereto. The prayer of the bill is that an injunction issue restraining the defendant Templeton from selling said property, or doing any act that would cast a cloud upon complainant's title, and that the acknowledgment of complainant to said deed of trust be declared void, and the instrument be declared a nullity, in so far as the rights of complainant to the property in question are concerned, and for general relief.

All of the defendants, except the husband of complainant, answered the bill, and denied all of its material allegations upon which the relief prayed was predicated.

Quite a volume of proof was taken in the cause, more or less of it being, in our opinion, wholly irrelevant to the real issue presented by the averments of the bill.

It should have been stated that the defendant Taylor filed his answer as a cross bill, and thereunder asked for a decree for the amount of the note assigned to him by defendant Banks, and for a foreclosure of the deed of trust, and a sale of the house and lot to secure its payment.

The chancellor heard the cause, upon the pleadings and proof, January 27, 1900. He held and decreed that the complainant was not entitled to the relief sought, and dismissed her bill, with costs. He gave defendant Taylor a decree, under his cross bill, for the amount of the note executed by th

complainant and her husband to defendant Banks, and by the latter assigned to said Taylor; the amount of his decree, including interest and an attorney's fee, provided for in the face of the note, being \$372.80. A decree for this sum was given against complainant, Lillie Weidman, and her husband, G. F. Weidman, and it was decreed that, unless this sum was paid into court within 90 days, the clerk and master should proceed, as the law directs, and sell the house and lot described, on a credit of six and twelve months, and in bar of the equity of redemption; this having been prayed for in the cross bill of the defendant Taylor. The property thus offered to be sold was described in the pleadings, and is described in the decree of the chancellor. From this decree the complainant prayed and was granted an appeal to the supreme court.

After this decree was rendered, during the same term of the court, upon application of the defendants, supported by affidavit, a receiver was appointed to take charge of and rent out the property pending the appeal.

The complainant perfected her appeal, and has assigned the following errors: First, the chancellor erred in his decree in not adjudging that the trust deed, and the note it was given to secure, should be canceled, for the reason that the party taking the acknowledgment was not only the party to whom the property in the deed of trust was conveyed, but because he was interested and partial to the beneficiary; second, that the chancellor erred, under the evidence and the equities disclosed thereby, in not decreeing a cancellation of said deed and the note it was given to secure, so that there might have been an equal distribution of the property of the mother of the complainant and Mrs. Taylor, her sister; third, that the chancellor erred in rendering a decree against the husband of complainant, inasmuch as he files no answer, and no confesso was taken against him under the cross bill against him and others.

We have carefully read, more than once, the evidence in this record bearing upon the disputed questions of fact in the case. After doing so, we are satisfied that there is no error in the decree of the chancellor, and that it should be affirmed. Every single allegation of the bill, material to the relief sought thereunder, is specifically denied in the answers of the implicated defendants, and the weight of the proof, instead of sustaining the averments of the bill, sustains the denials of the answer. The facts appearing in the record necessary to be stated are few, and they are abundantly sustained by the unmistakable weight of the evidence. Mrs. Mary Schrom, the mother of the complainant and of Mrs. Fannie Taylor, wife of defendant Taylor, died in Winchester, the owner of two parcels of real estate, one a residence property and the other a business house, in which her husband carried on,

first, a bakery, and subsequently operated a saloon. When she died this real estate was incumbered by mortgage. The complainant and her husband filed a bill in the chancery court to sell the property, and for a division of the proceeds, after the payment of the charges on it, between complainant and her sister Mrs. Taylor. Pending this suit, the parties interested entered into an agreement by which, in effect, the business house was to be sold to defendant Banks for \$1,800, and the residence property to be taken by the complainant at the price of \$600. After the payment of the debts which were a charge upon the property, and the value of the life estate of the father of the complainant, which was fixed at \$400, there was left for division, between complainant and her sister Mrs. Taylor, \$300. As complainant desired to keep the residence property, she was indebted to her sister in the sum of \$300. This sum and \$20 additional she and her husband borrowed from defendant Banks. They gave their note for the sum thus borrowed, and executed a mortgage or deed of trust on the residence property, to secure the same, to defendant Templeton as trustee. Said Templeton at the time was deputy county court clerk of Franklin county, and took the privy examination of complainant to the deed of trust. Banks, after his purchase of the storehouse, sold it to defendant Taylor, and also sold and transferred the note of complainant and her husband, given for the money borrowed from him, and secured by the deed of trust, to said Taylor.

The charge made in the bill that the defendant Taylor was the real purchaser of the storehouse, under the arrangement made to dispose of the property of the mother of complainant and to divide the proceeds, and that he was the real beneficiary of the deed of trust given by complainant and her husband on the residence property at the time it was given, is not sustained by the proof. Neither is the charge in the bill that defendant Taylor colluded with and fraudulently procured the husband of the complainant to enter into the arrangement under which the property of their mother was disposed of, under the bill of complainant for its sale and division between her and her sister, sustained by the weight of the proof; and, under the weight of the proof, Banks purchased the storehouse in good faith, and paid a fair price for the same. Said Banks, also, in good faith, in his own right and behalf, loaned complainant and her husband the money with which to pay her sister Mrs. Taylor the sum due her under the arrangement by which complainant was to have the residence property. Her acknowledgment of the deed of trust to the residence property was regularly taken. The weight of the proof does not sustain the charge that she was ignorant then, in a legal sense, of the purport of said deed of trust. It does

not sustain the charge that her privy examination to said deed of trust was taken in the presence of her husband. Defendant Banks transferred the note to secure which the deed of trust was given to defendant Taylor in good faith, and for a full consideration. It is true that defendant Templeton, trustee in the deed of trust on the residence property, the only property in issue here under the bill, was at that time deputy county court clerk of the county, and that he took the acknowledgment and privy examination of the complainant to the deed of trust; but it is not true, under the clear and undisputed evidence in the record, that he was the attorney of the defendant Taylor, nor that he had anything to do with the arrangement under which the property of the mother of the complainant was sold, and the basis of the division of the proceeds fixed. As a matter of fact, under the evidence, said Templeton did not know that he was named as trustee in the deed of trust on the residence property to secure the note to Banks until he was carried to said residence property by the husband of the complainant for the purpose of taking her acknowledgment to the deed and until he read it to her. He had no interest whatever in the note or the subject-matter. He was in no way connected with the parties, either as attorney or otherwise.

While our supreme court has reprehended the practice of the privy examination of married women being taken before officials in any way connected with the parties, or interested in the subject-matter of the conveyances, it has repeatedly refused to annul such conveyances at the instance of feme covert where it appeared that the official was disinterested, had no interest in the matter, and where no advantage was taken of the feme covert. In other words, the fact that the official might be related to either party, or remotely interested, does not invalidate the acknowledgment, where it appears that no advantage was taken, and no improper conduct was resorted to to secure the acknowledgment or to impose upon the married woman. *Cooper v. Association*, 97 Tenn. 285, 37 S. W. 12, 33 L. R. A. 838 et seq., and cases cited. All the material and available grounds of relief stated in the bill are specifically denied in the answer, and they are not sustained by the weight of the proof. The question of the sale of the storehouse to Banks, and his subsequent sale of it to defendant Taylor, is really not a matter in issue under the averments of the bill, and the large mass of evidence in the record in relation to this matter is irrelevant. The decree of the chancellor will be affirmed, with costs. The other judges concur.

Affirmed orally by supreme court, December 22, 1900.

JONES v. STEWART et al.

(Court of Chancery Appeals of Tennessee.
Nov. 17, 1900.)

EQUITY—PRACTICE AND PLEADING—BILL—DISMISSAL—PART DEFENDANTS—APPEAL—STATUTES—ATTACHMENT—REPLEVIN BOND—TITLE TO PROPERTY—RECEIVERS—SUPREME COURT—JURISDICTION—PROPER REMEDY.

1. A bill to prevent interference with a stock of goods, which alleges only that one of the defendants "had greatly intermeddled with the affairs that involved said goods," the bill was insufficient, and properly dismissed as to such defendant.

2. Under Code, § 8157 (Shannon's Code, § 4889), providing that the chancellor, in his discretion, may allow any party to appeal from a decree which settled his right, though the case may not be disposed of as to others, an appeal may be taken from a decree dismissing a bill in equity as to a part of the defendants, where the defendants against whom the bill still stood had not been served with process nor entered an appearance in the cause; and hence a motion to dismiss the appeal as premature was not well taken.

3. Complainant purchased a stock of goods of one of the defendants, not knowing that the same had been attached, and had been restored to the defendant on his executing a replevy bond. On the rendition of the judgment in the attachment suit the defendants M. and O. took possession of the goods by direction of the court. *Held*, in a proceeding in equity to restrain further interference with the goods by defendants, that the possession of the goods by M. and O. was unlawful, the court having lost custody of the same by accepting the replevy bond; and hence it was error for the court to dismiss the bill alleging such facts for want of equity.

4. Complainant purchased a stock of goods from one of the defendants, not knowing that the same had been attached, and that the possession had been retained by the defendant executing a replevy bond. On the rendition of the judgment in the attachment M. was appointed receiver by the court to take possession of the goods to satisfy the judgment. *Held*, in a proceeding in equity to restrain the further interference with the goods by the receiver, that, as the bill described the cause in which the receiver had been appointed, and was filed in the same court appointing him, and he appeared therein, the relief by bill was a proper remedy, though it was a separate action from that in which the receiver had been appointed.

5. Complainant purchased a stock of goods from one of the defendants, not knowing that the same had been attached, and that the possession of the same was retained by the defendant on his having executed the required statutory bond. On the rendition of the judgment in the attachment suit a receiver was appointed by the court to take possession of the goods to satisfy the judgment. Pending an appeal from this judgment, to which action complainant was not a party, complainant filed a bill in equity to restrain the receiver from interfering with the property. *Held*, that though, by the appeal, the supreme court acquired jurisdiction over the receiver, strangers to the action in which the receiver had been appointed could not seek relief by application to the supreme court, and, as no other adequate remedy existed, it was error for the court to dismiss complainant's bill for want of equity.

6. Where an appeal had been taken from a judgment in attachment, it was error for the court to dismiss a bill filed by a stranger to the attachment, who claimed title to the property attached, for want of equity, since complainant could not seek relief by petition in the

court below, as the appeal had removed the cause from that court.

Appeal from chancery court, Dekalb county; Floyd Estill, Chancellor.

Bill by Brunette Jones against G. W. Stewart and others to restrain interference with a replevin suit brought by complainant to recover a stock of goods taken from her by defendants, and to prevent interference by the defendants with the stock of goods. From a decree in favor of the defendants complainant appeals, and the defendants move to dismiss the appeal. Motion denied, and decree reversed.

Webb & Cantrell, for appellant. Wade & Robinson, for appellee Stewart.

NEIL, J. This bill was filed in the chancery court at Smithville, naming in the caption as defendants G. W. Stewart, J. B. Moore, clerk and master and receiver, J. T. Odom, sheriff, and praying that these persons be made defendants, and also the following persons, who were complainants in another proceeding complained of in this case, viz.: Phillip Butorff Manufacturing Company, Gray Didley Hardware Company, J. Coony & Co., Montgomery Moore & Co., Trounstate Bro. & Co., Chattanooga Plow Company, J. S. Reeves & Co., and Richardson Bros. & Co. Process was issued only against those named in the caption, but does not seem to have been served upon any of them. However, an order was entered in the cause reciting that "on motion of defendants, except G. W. Stewart, to dismiss the bill for want of equity on its face," it was so dismissed on this ground as to all of the defendants except G. W. Stewart. From this decree the complainant appealed, and assigned errors. Thereupon the defendants moved in this court to dismiss the appeal because prematurely granted, the cause still pending in the court below as to G. W. Stewart. The allegations of the bill, so far as necessary to be recited, are, in substance, as follows: That Phillip Butorff Manufacturing Company and other persons mentioned above in that connection, creditors of one E. L. Williams, had filed a bill in the chancery court at Smithville against E. L. Williams and G. W. Stewart, and attached in the hands of the latter a stock of goods which that bill alleged had been fraudulently sold to Stewart; that thereupon Stewart executed in that cause a replevy bond for the stock of goods in double the value thereof, with solvent sureties; that upon the execution of this bond in the cause referred to the stock of goods had been restored to Stewart; that, after the replevy bond above referred to had been executed, and after the stock of goods, in consequence thereof, had been so released and restored to Stewart, she, the present complainant, without any knowledge of the proceedings in the said case of Phillip Butorff Manufacturing Company and others against E. L. Williams, in which the stock had been so attached and released and redelivered to said Stewart, purchased the

stock from Stewart in good faith, and for a fair and valuable consideration, and took possession thereof; that after this time such proceedings were had in the said case of Phillip Butorff Manufacturing Company against E. L. Williams and others as that a judgment was rendered in favor of the creditors therein suing and against said Williams for the aggregate sum of \$1,397.56; that Williams prayed an appeal; that thereupon the clerk and master of the court, J. B. Moore, defendant hereto, was by the chancellor appointed receiver in the cause, and ordered to take possession of the said stock of goods, and to sell the same to pay the aggregate recoveries referred to; that to accomplish this purpose a writ was issued to the sheriff, defendant hereto, J. T. Odom, commanding him to seize the stock of goods, and turn it over to the said receiver; that pursuant to this writ the sheriff did seize the stock, but that complainant was not advised whether he had actually turned the property over to the receiver or not; that complainant herein had no previous knowledge of said case of Phillip Butorff Manufacturing Company against E. L. Williams, and was not concerned therein; that, in view of the circumstances under which the said stock was taken away from her, she was at the time the present bill was filed about to institute replevin proceedings in the circuit court at Smithville to recover the stock, and had gone so far in this matter as to file a good and solvent bond in that court in a sum double the value of the goods, desiring to prosecute her rights in that court. The prayer of the bill was for an injunction to prevent interference with the replevin suit and further interference on the part of defendants with the said stock of goods. The bill contains no allegation against the defendant Fisher, except the following: "Defendant Fisher has greatly intermeddled with the affairs that involve said goods, and she will insist that he should be enjoined from interfering further, and she holds an account against him which she will ask to enjoin the payment of, as she will insist the receiver has no right to it; as it never did belong to said Williams, and she will ask to hold him liable therefor." There is no allegation whatever against G. W. Stewart, and no relief is sought against him. From the face of the bill he is merely a nominal party, and not even a proper party.

Upon the controversy thus raised by the bill, the motion to dismiss in the court below for want of equity, and the motion in this court upon the part of the defendants to dismiss the appeal for prematurity, our conclusions are as follows:

1. That the chancellor's decree was correct in dismissing the bill as to Fisher.
2. That the motion to dismiss the appeal as premature is not well taken, and should be disallowed. It is true that, where a case is decided in the court below on demurrer as to some of the defendants, but remains undetermined as to others, there can be no ap-

peal, even under section 3157 of the Code (Shannon's Code, § 4889), allowing appeals in certain cases in the discretion of the chancellor (Hunter v. Gardenhire, 10 Lea, 87; Sigler v. Vaughn, 11 Lea, 134; Peters v. Neely, 16 Lea, 280; Younger v. Younger, 90 Tenn. 25, 16 S. W. 78); and, so far as concerns the question in hand, a motion to dismiss for want of equity would stand on the same footing as a demurrer, being in principle the same. But the rule would not apply to a case where all the parties against whom any relief was sought, and who were in any way proper parties, had joined in the motion, and the bill had been dismissed as to them. In such a case the decree would be final. It would not matter that the bill was not acted on in the court below as to a person who the bill showed on its face was not a proper party, and against whom no relief was sought; and, a fortiori, where it appeared, as here, that that party had not been brought before the court by process, and had entered no appearance in the cause.

3. We think the chancellor erred in dismissing the bill as to the other defendants. If the facts stated in the face of the bill are true as we have above recited them (and on this hearing they must be taken as true), then the chancellor's action in appointing a receiver of the goods under the circumstances stated, and directing their seizure by the sheriff, and delivery to the receiver, was *coram non judice* and void. The court had already lost custody of the goods in the manner provided by law; that is, on the execution of a proper replevy bond (Shannon's Code, § 5269, and note 4) they passed lawfully into the possession of Stewart, the bond standing in their place; and he could sell them, or otherwise dispose of them, without violating any obligation assumed in law to the parties concerned in the case in which the bond had been given. The only object on the part of Stewart in keeping the goods would be to satisfy the bond if he should be cast in the suit, but he was not bound to keep them. If he chose, he could accept the other alternative, and satisfy the bond by paying the value of the goods into court, or a sufficiency to pay the debt and costs of the complainants in that case, or submit to judgment on the bond. The selection of the alternative that should be performed was with the maker of the bond, not with the chancellor. The bill, then, showing on its face a meritorious claim to relief, the next question to be determined is whether the proper practice was adopted to obtain the relief. The defendant invokes the well-known principle that no one can in this state lawfully interfere with a receiver in chancery by a proceeding in another jurisdiction, but, if he conceives that injury has been done him by the receiver, he must apply for redress to the court which appointed the receiver, and in the cause in which he was appointed. Here the application for relief

was to the court which appointed the receiver, but not in the cause in which the appointment was made. This latter feature, however,—that contained in the last clause of the preceding sentence,—is not of the essence of the rule. If the bill asking relief specifies clearly the cause in which the objectionable action was taken, and be filed in the same court, and bring before the court under the bill the receiver and the parties asserting the right claimed through the receiver, every purpose of the rule is met. The present case falls within this description. It is true that none of the persons named were served with process, though named in the bill as defendants; but it seems they came in voluntarily, and made the motion to dismiss, and this took the place of process. It should be remarked in this connection that, while the petition in the cause is preferable, as better enabling the court to protect the rights of all parties at the time, and as not in any sense involving the danger of committing a contempt, yet a bill in the same court, presenting a proper case, should not be ignored. The rights of all parties can be equally as well protected by requiring bonds and the like, and, if need be, by treating the bill as a petition in the cause. If any contempt has been committed by procuring a fiat for the injunction from the judge of another jurisdiction, that is a matter to be dealt with on its merits; but the bill, being in the same court under which the receiver is acting, should, for the reasons above given, not be ignored. It should further be noted in the present case—a fact probably not sufficiently marked in our recital of the contents of the bill *supra*—that (in the language of the bill) “defendant Stewart appealed from said decree at the time mentioned, and before said goods were seized, and the creditors' right to subject said goods to the payment of the debts of E. L. Williams is now pending in the supreme court, and undisposed of.” We infer from other statements of the bill that the receiver was appointed after the entry of the final decree, but before the prayer for appeal; that defendant Stewart then was granted an appeal; that the receiver was instructed to take charge of the stock of goods, and to sell them; that, pursuant to this order, he did take charge of the stock after the appeal was granted and the cause was in the supreme court; and that, when the present bill was filed, he was about to sell the goods at private sale at 50 cents on the dollar, and that there would be a ruinous sacrifice of complainant's said property. There is no doubt that a receiver may be appointed under the circumstances just stated (assuming the property to be within the jurisdiction of the court), and that, unless restrained, the receiver may proceed to execute the directions contained in the order appointing him, although the cause should afterwards be appealed, and the cause be per

ing, at the time he undertakes such execution, in the supreme court. *Enochs v. Wilson*, 11 Lea, 228, 231-234. In such a case the remedy of a party to the cause who conceives the appointment to be oppressive, or the management of the receiver to be legally objectionable, is to apply to the supreme court, inasmuch as the appeal carries up the receivership, and the receiver ipso facto becomes an officer of the supreme court, and subject to its control and direction. So, if any affirmative action is required of the receiver which is not covered by the order made in the court below creating the receivership in the cause, application in this matter, too, must be made to the supreme court. This is the form in which parties to the cause may seek relief in the matter of the receiver's office and duties. But strangers to the cause have not this redress. They cannot apply to the supreme court by motion or petition, because they have no status in the cause; nor could the supreme court entertain their application without going beyond its powers, and exercising original jurisdiction. It is true, the supreme court can, in aid of its appellate jurisdiction, do many things that have something of the form and color of acts of original jurisdiction. It can supervise the doings of its receivers, direct them, settle their accounts, allow compensation, and direct the distribution of funds in the hands of such officers. It can, when necessary, order and execute accounts in causes pending before it, issue writs, and punish for contempt of or interference with its final process; and do many other things of a like nature. But certainly it would not have power to entertain an application in behalf of a rank outsider to take from the receiver and hand over to such intruder all the property in the custody of the receiver, on the ground that the order in the court below was without authority as to such third party, and conferred no rights upon the receiver. Nor, in such a case as we have before us, could the injured person seek relief in the court below by petition in the cause, and this for the potent reason that the cause is no longer there. The conclusion seems inevitable that the only form in which relief could be sought in the case made here was by original bill.

It is also insisted by the complainant that the bill should be sustained as an application to the chancellor for leave to proceed with the replevin suit. We do not think it necessary to dispose of this question, it being clear, at all events, that complainant, on the face of the bill, had the right to the injunction sued out to the extent, at least, of preventing any disposition of the goods until a hearing could be had upon the merits of the contention raised by it. We may remark, however, that it would seem idle to call upon the chancellor to exercise auxiliary jurisdiction in a cause that had already passed entirely beyond his reach. In our opin-

ion, the only jurisdiction he could exercise in such a case as the present bill makes is entire, and not adjuvant. So, whichever of the several views suggested may be taken, it is clear the bill was not devoid of equity upon its face, and the chancellor was in error in dismissing it. The result is, a decree must be entered reversing the chancellor's decree, except as to defendant Fisher, and remanding the cause for further proceedings. The defendants, except Fisher and Stewart, will pay the costs of the appeal. The costs of the chancery court will be paid as may be hereafter decreed by the chancellor.

BARTON, J., concura. WILSON, J., absent on account of illness.

Affirmed orally by supreme court, December 22, 1900.

BOZARTH et al. v. WATTS et al.

(Court of Chancery Appeals of Tennessee.
Dec. 15, 1900.)

TRUSTS—DEED TO CHILDREN—CONSTRUCTION—TERMINATION OF TRUST—PRESUMPTION—ADVERSE POSSESSION—RESULTING TRUST.

1. A conveyance by a father to his minor children recited that the deed was executed to secure their support against any misfortune which might overtake the father, and reserved the right to the father to be the trustee of the children, and to sell the property and reinvest the proceeds for their interest, and to insure their support during their tender years and their dependency on the father. *Held*, that the deed conveyed the fee to the children, subject to the control of the father as trustee until the children ceased to be dependent on him.

2. A deed by a father creating a trust in favor of his minor children, to continue during their dependency on him, will be presumed to be terminated after the expiration of 30 years.

3. Where a father who conveys real property to his children remains in possession thereof, but does not claim any interest therein adverse to the children, their interest therein is not defeated by adverse possession.

4. Where a trustee sells the trust real property under a power, and purchases other property in his own name with the proceeds, the beneficiaries have a resulting trust therein.

Appeal from chancery court, Dekalb county; T. J. Fisher, Chancellor.

Suit by L. L. Bozarth and others against John Watts and others for an injunction and other relief. From a decree dismissing the bill, complainants appeal. Reversed.

Webb & Cantrell and A. Avant, for appellants. T. W. Wade, for appellees.

NEIL, J. This case comes before us on bill and motion to dismiss, equivalent to a demurrer. The rights of the parties on the present hearing are to be determined on the face of the bill, and the proper construction of a deed exhibited with the bill, and which is the subject of the contest raised. The deed referred to was made on the 19th day of December, 1870, and reads as follows:

"I, Pleasant Watts, have this day bargain-

ed and sold, and do hereby convey, to my children, Roxana Watts, Georgiana Watts, Louisiana Watts, John Watts, Catherine Watts, and Isabella Watts, for the love and affection which I bear towards them, four mules, one roan mare, four feather beds and bedclothing, and four bedsteads, and all my household and kitchen furniture which I now own, thirty-five head of stock hogs, one yoke of oxen, and two cows and calves, and thirty head of sheep, and a tract of land in the state of Tennessee, Dekalb county, and district number 10, containing by estimation one hundred and sixty acres, more or less, and bounded as follows: On the east by the lands of Tennessee Hooper, on the south by the lands of G. Eastham and A. L. Davis, on the west by the lands of Alexander Fennill, on the north by the Caney Fork river. To have and to hold the same to the said Roxana Watts, Georgiana Watts, Louisiana Watts, John Watts, Catherine Watts, and Isabella Watts, their heirs and assigns, forever. I do covenant with them that I am lawfully seised of said land and of the personal property herein conveyed; that I have a right to sell, give away, or dispose of the same. I covenant and bind myself and representatives to warrant and forever defend the title to the said personal and real property herein conveyed, and every part thereof, to the said Roxana Watts, Georgiana Watts, Louisiana Watts, John Watts, Catherine Watts, and Isabella Watts, their heirs and assigns, forever. But this deed is made for the following uses and trusts, and for no other purpose: That is to say, the said Roxana Watts, Georgiana Watts, Louisiana Watts, John Watts, Catherine Watts, and Isabella Watts have no mother living to take care of them, and no person but myself to support them, and the object of this conveyance is to make certain a living and support for said children against any misfortune or bad luck that may overtake me in declining years. I hereby reserve to myself the right to use said property as I may deem best for the support of said children aforesaid. I reserve to myself the right to be their special trustee and agent, to have the right reserved to buy and sell said property when I may deem it advantageous to said children, and then to reinvest the proceeds of the same when I think it proper to do so, for the purpose of enhancing their interest and insuring to the said children a support during their tender years, and especially during their dependence on me. In witness whereof I have this day set my hand and seal, this the 19th day of December, 1890.

his
 "Pleasant X Watts.
 mark.

"Acknowledged in our presence this the 19th day of December, 1870.

"T. J. Bradford.
 "R. C. Nesmith."

The bill was filed October 15, 1900. The complainants originally were L. L. Bozarth and wife, Georgiana Bozarth, formerly Watts; Alex. Pedigo and wife, Roxana Pedigo, formerly Watts; John Parsley and wife, Louisiana Parsley, formerly Watts; J. W. Pack and wife, Isabella Pack, formerly Watts; L. H. Pack and Connie Pack, the last two being children of Catherine Watts, who died leaving these two children as her only heirs at law. The defendants are John Watts, in his individual right and as administrator of Pleasant Watts; Nancy Watts, widow of the decedent, Leander Watts; Bettie Carr; Robert Carr; Etta Watts; Paricetta Watts; Sid Harrell and wife, Martha Harrell; and Calvin Watts. After setting out the substance of the deed above copied, the bill alleges that Pleasant Watts took possession of the lands and personal property described therein as trustee, and used and controlled the same for the beneficiaries, and some time after that sold out all of said property, and took the means arising from this sale and reinvested them in certain lands described in the bill, and other personal property, taking title to the real estate in his own name. After setting out the description of the land, and alleging that Pleasant Watts had died in September, 1899, and that the defendant John Watts had qualified as his administrator, and had sold a considerable amount of personal property, and had caused a year's support to be set apart to the widow, the bill proceeds: "Your complainant would further show that at his death Pleasant Watts had in his possession considerable personal property, consisting of horses, cattle, hogs, sheep, and mules, grain and wheat and fodder, bacon, lard, oats, household and kitchen furniture and farming implements, accounts and notes, and judgments, and considerable other personal property, which they will endeavor to show upon the hearing. Your complainant would further show that said land and other personal property was the result and outgrowth of the trust effects in the hands of said Pleasant Watts under the conveyance aforesaid, and complainants charge that said Pleasant Watts at his death had no estate to be administered, and that the whole of said lands and effects belong to complainants and defendant John Watts." The bill alleges that the year's support set apart to the widow was exorbitant in amount, and that the administrator was recklessly incurring expenses, and was dividing among the defendants the property which belonged to the complainants, and alleged that complainants had a resulting trust in all this property, and that they had a right to have it partitioned between them. The prayer of the bill was for an injunction to restrain John Watts from proceeding with the administration, and the defendant Nancy from using or disposing of any of the property set apart to her as a year's s

port, and that the administration be transferred to the chancery court; that a resulting trust be declared in favor of the complainants; that a sale of the property be had, and the proceeds be divided according to the real rights of the parties; that the administrator be held to account for what he had used and disposed of. An amendment was made to the bill to the effect that since the filing of the bill the complainants had learned that John Watts had filed a bill in the circuit court of Dekalb county for a sale of the land described in the bill for partition, not recognizing the rights of the complainants as herein set forth; that this bill was filed without the knowledge or consent of the complainants, and concealed from them. After the bill was filed, Alex. Pedigo and wife, Roxana Pedigo, and John Parsley and wife, Roxana, asked the court to change their place in the record from complainants to defendants. The order upon this subject recited that complainant Bozarth had caused them to be made complainants without authority. The chancellor thereupon ordered that said Pedigo and wife and Parsley and wife be made defendants, according to their request. Thereupon the defendants moved the court to dismiss the bill on the following grounds: "(1) For want of equity on the face of the bill. The bill shows by Exhibit A, which is made of the bill, that the deed was made to secure to the vendees a support during their tender years, and especially during their dependency on the vendor, and for no other purpose, which deed was made nearly thirty years ago. The bill is filed after the vendees have reached their majority, and contains no charge showing their dependence on the maker of said deed. (2) The maker of said deed reserved the right to use said property for the support of the children named therein, and there is no charge that the whole of said property was not so used, or that said children are dependent on the maker, or are of tender years. (3) The maker of said deed reserved the right to sell said property, etc., and there is no charge that said property was not sold by the maker of the deed under said rights. (4) The bill does not charge that the property mentioned in said deed, or any part thereof, is now, or was at the maker's death, on hand. (5) The children named in said deed took no vested interest in said property. Their rights under said deed ceased when they reached their majority, and if they had taken any other rights, more than a support during their minority, their claims would be barred by the statute of limitations of three years and seven years." This motion was sustained by the court, and the bill dismissed. From this action the complainants appealed, and have assigned errors.

The first, second, third, and fourth grounds of the motion all present the same question,

in different aspects. The same is true of a part of the fifth ground. There are really only two points presented: First, that stated in ground No. 1; secondly, the statute of limitations, put forward in ground No. 5. But, before going into a construction of the deed, it is proper to say, with regard to the second, third, and fourth grounds, that the bill distinctly charges, as appears from our recital of its contents above, that the property was sold by the trustee and reinvested in the land and other property now sought to be reached. So, as stated, only two questions are left,—those just indicated above.

This brings us to a construction of the deed. It is seen that the instrument is an ordinary deed, conveying land in fee simple to the children named, down to that portion which reserves certain powers in the maker as trustee. This language is: "But this deed is made for the following uses and trusts, and for no other purpose: That is to say, the said Roxana Watts, Georgiana Watts, Louisiana Watts, John Watts, Catherine Watts, and Isabella Watts have no mother living to take care of them, and no person but myself to support them; and the object of this conveyance is to make certain a living and support for said children against any misfortune or bad luck that may overtake me in declining years. I hereby reserve to myself the right to use the said property as I may deem best for the support of said children aforesaid. I reserve to myself the right to be their special trustee and agent, to have the right reserved to buy and sell said property when I may deem it advantageous to said children, and then to reinvest the proceeds of the same when I think it proper to do so, for the purpose of enhancing that interest, and insuring to said children a support during their tender years, and especially during their dependence on me." We can see in this language no purpose on the part of the maker of the deed to withdraw from his children, upon their passing out of their tender years and ceasing to be dependent on him, the property which he had conveyed to them in the former part of the deed. The more reasonable construction is that, when they should no longer need his service as trustee, the trusteeship should cease, and the property should belong to the children, free of any control on his part. Such, indeed, is the rule applicable to this class of subjects. A trust will last no longer than necessary to accomplish its purpose. *Ellis v. Fisher*, 3 Sneed, 231, and cases cited in headnote. See, also, *Hooberry v. Harding*, 3 Tenn. Ch. 680; *Beecher v. Hicks*, 7 Lea, 213; *Turley v. Massengill*, Id. 359; *Henderson v. Hill*, 9 Lea, 32; *Hooberry v. Harding*, 10 Lea, 396; *Jourolmon v. Massengill*, 86 Tenn. 92, 5 S. W. 719. In *Smith v. Metcalf*, 1 Head, 65, it appeared that in the body of his will the testator had given to his daughter Harriet H. Grills a one-seventh part of his estate in fee simple. In a codicil he used the following

language: "I revoke that portion of my will which gives to my daughter Harriet Grills the portion of property set apart in the foregoing will; and the reason why I revoke said portion of my will is that I wish my executors to take the same into their control and management, and direct that they (my executors) manage said property heretofore given to Harriet Grills in the same way that they are directed to control and manage the property given in the will to Elizabeth Emeline Lowry and Nathaniel D. Smith. I make this change in my will, being fully of the opinion that Jefferson Grills will not take that care of said property that he should do." In the will the shares of Nathaniel and Elizabeth Emeline Lowry were not given to them, but to their children, "to be under the control and direction of my executors, and not at all to be under the control either of my son Nathaniel D. Smith or my son-in-law Alexander M. Lowry. I wish my executors to apply the rents and hires, if any, to the maintenance and education of said grandchildren, or dispose of it to the best advantage to the grandchildren, as they may think best." Harriet Grills died leaving her husband, Jefferson Grills, surviving her; also leaving children, some of whom were infants, and some adults. After the death of Harriet Grills, the executor, William B. Smith, undertook to take charge of certain property under the language which we have quoted from the codicil. The court said the only question in the case was whether the testamentary trust created by the will determined by the death of Harriet H. Grills. If it did, it was said that the plaintiff could not maintain the action, because his estate as trustee in the property had ceased. The circuit judge charged that the estate of the trustee had ceased by reason of the death of Harriet Grills. The supreme court affirmed this action of the circuit judge, saying: "We think this charge of his honor, the circuit judge, was correct. It is plain that the testator, as to the share of Harriet H. Grills, would not have changed his will but for his fears of the profligate habits of her husband, and his wish to exclude him from any control over the property during the coverture. That some of her children are yet infants can make no difference, since the trust was not created because of the infancy of the children, but merely to protect the property against the marital rights of the husband. It is well settled that an estate coextensive with the duties to be performed will vest in the trustee, and that he will take exactly that quantity of interest which the purposes of the trust require, which being executed, the trust estate ceases. The case of *Ellis v. Fisher*, 3 Sneed, 231, is very much like this. There the husband survived the wife, who left infant children. The language creating the trust was very comprehensive; yet, it being evident it was only intended to protect the property against the marital rights of

the husband, the trust estate was declared to cease at the wife's death, and the estate itself eo instante to go to the children." So, in *Murdock v. Johnson*, 7 Cold. 606, it was held that where a testator devised all his real property to trustees, with power of sale to pay specific debts, and afterwards, in the same will, devised all of his realty to his children, the trustees would not have any power to sell said realty after the satisfaction of said debts. *Id.* 611, 612. In *Henderson v. Hill*, 9 Lea, 25, 32, the court used this language: "The question, as a general rule, is not what estate the language used will convey to the trustee, but what interest the exigencies of the trust demand," etc. In *Davis v. Williams*, 85 Tenn. 646, 4 S. W. 8, the following syllabus expresses the contents of the case upon the particular point in hand: "The estate of a trustee will be limited and controlled by the expressed purposes of the trust, and will terminate when those purposes are accomplished; and, therefore, if a testator devise lands to a trustee, to collect rents and pay them over to his children for their lives, and thereafter to his grandchildren, without limitation of time, the trustee's estate will terminate upon the death of all of testator's children, and an absolute legal title to the lands will then vest in the grandchildren." See, also, *McReynolds v. Graham* (Tenn. Ch. App.) 43 S. W. 138, 139. The other authorities referred to illustrate the principle in various aspects. It is unnecessary to further refer to them in this opinion.

We think it is clear, under the principle recognized in the foregoing authorities, that the trustee's estate in the property conveyed in the deed ceased when his children were no longer dependent upon him. The deed having been made 30 years before the bill was filed, it may be inferred that they were no longer dependent, and that the trustee's estate had ceased before the bill was filed. We may remark that there is nothing whatever in the face of the deed to indicate that it was the purpose of the maker of the deed that, upon the cessation of the dependency of the children upon him, their interest in the property should terminate. There is, indeed, some call for such a construction in the language with which the declaration of the trust starts off, namely, "But this deed is made for the following uses and trusts, and for no other purpose; that is to say," etc. But a closer examination will indicate that he meant the conveyance to be a permanent benefit. He says: "They have no mother living to take care of them, and no person but myself to support them, and the object of this conveyance is to make certain a living and support for said children against any misfortune or bad luck that may overtake me in my declining years." The thought here indicated is that notwithstanding he might fail to support his children by reason of the weakening of his strength in course of years, yet

that the property conveyed would act as his substitute. The thought conveyed is not that this property was intended to support the children merely during their minority or dependence upon him, but was intended to be absolutely for them, in view of the fact "that by reason of his declining years" he might be unable to afford them the support they needed. Here there is no suggestion that after the children shall have arrived at years of discretion, or shall become self-supporting, or shall marry, then the property is to revert to the maker of the deed, to be enjoyed by him. The keynote of the construction at this point is that he conceived himself to be in his declining years, and that, as a natural result of the progress of this decline, he would pass away, and would leave the property to perform for him the duties, and, so to speak, the parental offices, he could no longer discharge. The remaining portion of the deed merely defines the powers of the trustees in the management of the property for purposes of support and reinvestment.

This disposes of the first point; also, as we have above indicated, points 2, 3, and 4. There is nothing in the fifth,—the statute of limitations. It does not appear from the bill that Pleasant Watts ever set up an adverse interest to that of his children. It is seen from the recital of facts that he died in September, 1899, and the present bill was filed soon thereafter. It results that the second point—that embraced in the fifth ground of the motion—must be overruled.

It is, of course, clear that the allegation of the bill, if true, to the effect that Pleasant Watts sold the trust property and invested it in the land described in the bill, would raise a resulting trust in favor of the cestui que trustent. *Turner v. Petigrew*, 6 Humph. 437, and cases cited. We do not mean to be understood, however, as holding that a resulting trust could be established in perishable personal property. *Lyon v. Lyon*, 1 Tenn. Ch. 225; *Bank v. Baker*, 8 Humph. 447; 1 Perry, Trusts, § 130. This point, however, is not specially raised by the motion, and need not be further considered. It results that the decree of the chancellor dismissing the bill must be reversed, and the cause must be remanded for further proceedings. The defendant will pay the costs of the appeal. All concur.

Affirmed orally by supreme court, December 22, 1900.

MALONE et al. v. DICK.

(Supreme Court of Texas. March 4, 1901.)

BOUNTY WARRANTS—RECITALS—WEIGHT AS EVIDENCE—BURDEN OF PROOF—HEIRS OF GRANTEE—EVIDENCE—SUFFICIENCY.

1. In 1838 a bounty warrant was issued by the secretary of war of the republic of Texas, that M. or his heirs were entitled to 1,920 acres of land, and recited that M. fell in the massacre of the Alamo on March 6, 1836. *Held*, that

where the land was claimed by the heirs of a soldier of the republic named M., who survived the war and died in 1880, the burden was on them to show that the person named in the warrant did not fall at the Alamo, and that their ancestor was entitled to the warrant, and that it was issued to him or in his right, since the recital was strong prima facie evidence that the person mentioned in the warrant fell at the Alamo.

2. In 1838 a bounty warrant was issued by the secretary of war of the republic of Texas, that M. or his heirs were entitled to 1,920 acres of land, and recited that M. fell in the massacre of the Alamo, and that M. served from September 26, 1835, to March 6, 1836. Plaintiffs brought suit to recover the land as heirs of a soldier named M., whose services terminated April 21, 1836, and who survived the war and died in 1880. It was not shown that the warrant was issued to plaintiffs' ancestor, or to any person representing him. The official records of those who fell in the Alamo, and which were in the hands of the secretary of war in 1838, were destroyed by fire in 1855; and in the muster roll of the massacre, as subsequently made up, the name of M. did not appear. *Held*, that the evidence did not show that plaintiffs were heirs of the M. mentioned in the warrant, as it was insufficient to overcome the recital in the certificate that M. fell in the Alamo, and hence plaintiffs could not recover.

Error to court of civil appeals, Second supreme judicial district.

Trespass to try title by S. C. Malone and others against J. F. Dick. From a judgment of the court of civil appeals (58 S. W. 168) reversing a judgment of the district court in favor of plaintiffs, plaintiffs appeal. Affirmed.

Kimbell Bros. & Blackmon, for plaintiffs in error. A. H. Culwell, for defendant in error.

BROWN, J. The land in controversy in this case was located and surveyed by virtue of a bounty warrant issued by the secretary of war of the republic of Texas July 5, 1838, which is as follows: "Republic of Texas. Know all men to whom these presents shall come, that Wm. T. Malone, having served faithfully and honorably for the term of five months from the 28th day of September, 1835, to the sixth day of March, 1836, and having fallen in the Alamo, is entitled to nineteen hundred and twenty acres bounty land, for which this is his certificate. And said Wm. T. Malone or legal heirs is entitled to hold said land, or to sell, alienate, convey, and donate the same, and to exercise all rights of ownership over it. In testimony whereof, I have hereunto set my hand at Houston this fifth day of July, 1838. Geo. W. Hockley, Secretary of War." The patent was issued upon the land on the 20th day of August, 1872, to the "heirs of W. T. Malone, deceased." There is no evidence to show when the location of the certificate was made, nor is there any proof as to the person to whom the certificate was delivered, or upon whose application it was issued. The index of the muster rolls deposited in the general land office, so far as they were produced on the trial, did not show that there

was any such name as William T. Malone among those who fell at the Alamo; and one witness who knew the ancestor of the plaintiffs testified that he knew him as a soldier in the army of the republic of Texas, and did not know of any other William T. Malone in the said army. Plaintiffs proved that they were the children and heirs of William T. Malone, who died in the year 1880 in Lee county, Miss., and that their ancestor was a soldier in the army of the republic of Texas; and the muster rolls of Capt. Parrott's artillery company show that there was in said company at Bexar on the 23d day of November, 1835, a man by the name of William T. Malone. The defendant in the court below did not connect the chain of title under which he held possession with the state. The trial court submitted the case under instructions to the jury presenting the issue whether the plaintiffs were the heirs of the grantee in the certificate; and the jury found in favor of the plaintiffs, upon which judgment was rendered, and appeal taken to the court of civil appeals, where the judgment was reversed, and judgment rendered for the defendant.

In the trial of this case in the district court the sole issue submitted to the jury was, did the plaintiffs show that they were the heirs of the William T. Malone named in the bounty warrant, by virtue of which the land in controversy was located and patented? The judgment of the court of civil appeals rests upon the proposition that the testimony introduced by the plaintiffs is not sufficient to support the finding in favor of plaintiffs upon that issue. Plaintiffs' ancestor bore the name of William T. Malone,—the same as that in the bounty warrant. He came to Texas in 1835, and was in the army of the republic for an uncertain time, and died in 1880 in Mississippi, whence he came. There is no proof of the length of time he served, or the point at which he served, except that the name "Wm. T. Malone" appears on the muster rolls of Capt. Parrott's company, which was at Bexar on the 23d day of November, 1835. There is no proof that plaintiffs' ancestor was the William T. Malone whose name appears upon that muster roll, or that he belonged to that company. The bounty warrant by which the location was made was issued on the 5th day of July, 1838, by the secretary of war of the republic of Texas, reciting that William T. Malone had served in the army of the republic from the 6th day of September, 1835, to the 6th day of March, 1836, and, having fallen at the Alamo, his heirs were entitled to a bounty warrant for 1,920 acres of land. The law was in much confusion upon this subject, and the courts of this state have found it necessary to indulge the presumption that the officer who issued such warrants followed the construction placed upon the laws at that time. *Rogers v. Kennard*, 54 Tex. 30. We do not deem it necessary to discuss the

different provisions, to determine for what service all of these lands were granted; for it is manifest from the recitals in the bounty warrant that 640 acres of the land were granted because of the fact that the soldier fell in the massacre of the Alamo on the 6th day of March, 1836. That recital was an official act performed in obedience to the requirements of the statute, and expresses a conclusion arrived at upon investigation, and must be taken as true. *Pasch. Dig. art. 4061; McPhail v. Burris*, 42 Tex. 142. In the case cited, Judge Moore, for the court, said: "It certainly cannot be seriously denied that it was the duty of the boards of land commissioners to determine under what law applicants were entitled to the certificate issued to them. In doing this, evidently, the board determined the class to which the certificate belonged. In the absence of controverting testimony, the action of the board must be regarded as sufficient to establish the fact to be as determined by it, if, indeed, the class to which the certificate belonged, which necessarily entered into the decision of the appellant's right to the certificate, can collaterally be brought in question." Upon the authority of that case, we are satisfied to rest the proposition that the recital in the bounty warrant established a strong *prima facie* case that the W. T. Malone mentioned fell in the massacre of the Alamo; and, in order for the plaintiffs to recover, it was necessary for them to make such proof as would overcome that recital, and establish the fact that their ancestor was entitled to the bounty warrant, and that it was actually issued to him, or in his right. There is no evidence from which the conclusion can be reached that this bounty warrant was issued upon the application of the ancestor of the plaintiffs, made either in his person, or by any person representing him, or that his claim to that warrant was under investigation by the secretary of war at the time this bounty warrant was issued. The recitals in the warrant proved that the W. T. Malone mentioned died on the 6th day of March, 1836. The proof shows that the ancestor of the plaintiffs was living at the time the warrant was issued; that he did not fall at the Alamo, but died after the land was patented. The recitals in the warrant show that the services of the Malone named began in September, 1835, and terminated on the day of the massacre at the Alamo. The proof does not show when the services of plaintiffs' ancestor began, but does show that it did not terminate until after the battle of San Jacinto, on the 21st of April, 1836. The bounty warrant in this case establishes that the W. T. Malone named in it was entitled to 1,920 acres of land as a bounty for his services, and for the fact of his death at the Alamo; but the plaintiffs' proof failed to show to what amount of bounty land their ancestor was entitled, except for enlistment in the army of the republic. The discrepancies be

tween the recitals of the warrant and the facts connected with plaintiffs' ancestor are so great that it devolves upon them to prove such facts as would justify the jury in believing that this bounty warrant was in fact issued upon the investigation of the right and claim of plaintiffs' ancestor, and was in fact intended for him and issued for his benefit. The only evidence in the record that tends in the remotest degree to discredit the recitals of the warrant is that the rolls of those who fell at the Alamo did not contain the name of William T. Malone. We know as a matter of history that in 1855 the office of the adjutant general of the state of Texas, in which the muster rolls of the men who fell at the Alamo were placed, was destroyed by fire, and the absence of the name of W. T. Malone from the rolls as subsequently made up and deposited in the land office does not prove that he did not fall at that time and place. The investigation upon which the bounty warrant was issued was made in 1838, when the archives were in the possession of the secretary of war, and when the testimony of living witnesses could be had to prove the facts recited; and it would require strong and convincing evidence to overturn the deliberate conclusion arrived at by the secretary of war, which may have been based on evidence now lost. The plaintiffs wholly failed to show themselves to be the heirs of the person to whom the bounty warrant was granted. We regard this as the ground upon which the court of civil appeals entered its judgment, and upon this ground we sustain that judgment. We do not find it necessary to determine whether the recitals in the bounty warrant are absolutely conclusive, because no testimony is presented which contradicts the recitals. There is no error in the judgment of the court of civil appeals, and it is therefore affirmed.

STATE v. BROWNSON et al.

(Supreme Court of Texas. March 11, 1901.)

SCHOOLS AND SCHOOL DISTRICTS—CREATION—CONSTITUTIONALITY—POWER OF LEGISLATURE—INCLUDING CITY—VALIDITY.

1. Under Const. art. 7, § 3, as amended in 1883, providing that the legislature may provide for the formation of school districts within the counties of the state by general or special law, without the local notice required in other cases of special legislation, it was proper for the legislature to pass Gen. Laws 1890, p. 151, creating an independent school district, without the notice of an intention to apply for the passage of such an act having been given as required by Const. art. 3, § 57.

2. The inclusion of a city with contiguous territory within a school district created by the legislature is authorized by Const. art. 7, § 3, as amended, authorizing the legislature to form school districts within all or any of the counties of the state.

Certified questions from court of civil appeals of First supreme judicial district.

Information in the nature of quo warranto in the name of the state of Texas against J. M. Brownson and others, officers of a school district. On appeal by the state from an order sustaining a demurrer to the information, a question was certified by the court of civil appeals. Question answered.

J. V. Vandenberg, Dist. Atty., for the State. Proctors and Dabney & Lockett, for appellees.

GAINES, C. J. In this case the court of civil appeals for the First supreme judicial district have certified for our decision the following question: "This is an information in the nature of a quo warranto filed in the district court of Victoria county, in the name of the state of Texas, by the district attorney for the 24th judicial district, against J. M. Brownson and others, claiming to be officers of the Victoria independent school district, under an act of the 26th legislature approved May 1, 1899 (Gen. Laws, p. 151), to oust them from the offices claimed by them, and to have said offices declared to be without warrant of law. The court below sustained a demurrer to the information, and rendered judgment in favor of the respondents. The sole question of law presented upon the appeal is the constitutionality of the act of the 26th legislature approved May 1, 1899 (chapter 90 of the General Laws passed at the regular session), and that is certified to the supreme court for decision." After the certificate was filed here, the court sent up the following additional statement: "The certificate made in this case on the 14th inst. is amended so as to show that the petition alleged that no notice was given, as provided by article 3, § 57, of the constitution, of an intention to apply for the passage of the act in question."

We are of opinion that the legislature did not exceed its authority in passing the act in question. The legislative department of a state government may make any law not prohibited by the constitution of the state or that of the United States. Therefore the rule is that, in order for the courts to hold an act of the legislature unconstitutional, they must be able to point out the specific provision which inhibits the legislation. If the limitation be not express, then it should be clearly implied. The present constitution, as originally adopted, with but few exceptions, gave the legislature unlimited power over the distribution and management of the free-school fund. Sections 1 to 8, inclusive, of article 7 of that constitution relate to the public free schools of the state. Sections 2 and 3 provide what should constitute the public free school fund. Section 4 makes provision for the sale of the lands belonging to that fund, and the investment of the proceeds. Section 5 prescribed what part of the fund should be permanent fund, and what should be available for the maintenance

of the schools, and prohibited the application of either to any other purpose, or to the support of any sectarian school. It also directed that the available fund should "be distributed to the several counties according to their scholastic population, and applied in [such] manner as may be provided by law." Section 7 provides for separate schools for white and colored children, and declares that impartial provision shall be made for both. Section 56 of article 3 prohibited the passage of any local or special law, except as otherwise provided by the constitution, "regulating the affairs of counties, cities, towns, wards or school districts." Section 10 of article 11 declares that "the legislature may constitute any city or town a separate and independent school district," and authorizes the levy of a local tax for the support of the same, under certain restrictions. This grant of power was probably conferred in view of the restriction upon local and special legislation mentioned above; for, in the absence of that restriction, it seems to us no such grant was necessary. In 1883 an amendment of section 3 of article 7 was adopted by a vote of the people, which, among other provisions, contained the following: "And the legislature may also provide for the formation of school districts within all or any of the counties of this state, by general or special law, without the local notice required in other cases of special legislation." Four legislatures had assembled under the constitution when this amendment was submitted to the popular vote; and it seems obvious that when submitted it was considered that, under the then existing limitations upon the legislature with reference to the public schools, the varied needs of special localities could not be met, and that the purpose of the provision quoted was to give the legislature a free hand in establishing independent school districts. Being the last expression of the will of the people, any provisions of the constitution previously existing must, if in conflict, yield to it. We do not see that there were any save that as to special and local legislation, if that be one, and that restriction is expressly removed. But it is argued that the language, "The legislature may provide for the formation of school districts," does not authorize them to create directly a school district. But we do not concur in this proposition. It is clear that the provision was intended to empower the legislature to establish separate school districts, and, in order to provide for them, they must first be created. We see no reason why they might not be created by direct act of the legislature, just as a city government may be created in our state for any city having 10,000 inhabitants or more. The fact that the legislature was empowered to act by special law shows that it was contemplated that it might be desirable to pass an act creating one district only. The separate school district in question was pro-

vided for when the legislature fixed the limits of the territory, and declared that it should constitute an independent district, and provided a governing board for the management of its affairs.

The act in question includes within the territory of the district the city of Victoria, but we are of opinion that the inclusion of a town or city with contiguous territory in one district is not prohibited by the constitution. The provision quoted from section 10 of article 11 is clearly permissive only, and does not make it the duty of the legislature to constitute every incorporated town or city a separate school district. This provision would hardly have been inserted if amended section 3 of article 7 had been a part of the original instrument. Under the amendment, the legislature clearly has the power to make a city or town an independent district, even had there been no express provision to that effect. Therefore the express provision, although not repealed, is practically superseded by the amendment. Our opinion is that the act in question is valid, and it will be so certified.

WILLIAMS v. SAPIEHA.

(Supreme Court of Texas. March 11, 1901.)

INSANE PERSONS—IMBECILE—POWER OF ATTORNEY—VOIDABLE—RESCISSION—RETURN OF CONSIDERATION—COSTS—ATTORNEY'S FEES—ABSENT DEFENDANT.

1. An imbecile about 35 years old, without mental capacity to manage his affairs, had been in that condition from birth, though he had never been under guardianship, nor judicially declared of unsound mind. He duly executed a power of attorney to sell his interest in lands, which was duly recorded, and a deed was made in pursuance thereof by the attorney. The incompetent's brother, his co-tenant, joined in the deed, and the purchaser had no knowledge or notice of the incompetent's mental condition, nor knowledge of any fact which should have led him to inquire as to such mental condition. The price paid was fair and adequate, the deed reciting the amount, and its payment. *Held*, that the power of attorney was not void, but only voidable.

2. In the absence of proof that the imbecile still had the money paid for the land in his possession, or any property acquired with it, or that it had been expended for him or by him for necessities, he will not be required to return the consideration paid before rescinding the power of attorney and the deed made in pursuance thereof.

3. Where defendant, who was a nonresident, was cited by publication, but did not appear, and judgment was given in his favor, it is proper to allow a reasonable attorney's fee to the attorney appointed by the court to appear for him, and to tax it as costs of the suit, under Rev. St. arts. 1212, 1346, providing that, where a defendant cited by publication does not appear, an attorney shall be appointed to appear for him, to whom a reasonable fee shall be allowed, and taxed as costs of the suit; judgment to be rendered the same as in other cases.

Certified questions from court of civil appeals of First supreme judicial district.

Suit by E. J. Williams, as guardian of T. D. Mason, an incompetent, against Louis Sapieha. A judgment for defendant was

affirmed by the court of civil appeals (59 S. W. 947), and on motion for rehearing the court of civil appeals certified questions to the supreme court.

Slyfield & Davidson, for appellant. Pearson & Wharton, for appellee.

BROWN, J. The court of civil appeals for the First district has certified to this court the following statement and questions:

"In this cause, now pending before this court on motion for rehearing, we respectfully certify for your decision the questions hereinafter set out. The facts are as follows: T. D. Mason, by his guardian, brought this suit to remove cloud from his title to certain lands, alleging title in himself. The instruments which are alleged to constitute the cloud are a power of attorney purporting to have been executed by T. D. Mason to one J. W. Tolson, and a deed from Tolson to the appellee, Sapieha, conveying the land in question. Mason seeks to have both annulled on the ground that he was an imbecile at the date of their execution. Mason acquired the land through the will of his deceased grandfather, the tract being devised to him and his brother, D. O. Mason, as tenants in common. On 6th day of July, 1878, T. D. Mason executed and delivered to J. W. Tolson a power of attorney, whereby Tolson was authorized, as his attorney in fact, to sell his interest in the land, and to make a deed to the purchaser. This instrument was duly signed and acknowledged by him, and was promptly placed of record in the county where the land was situated. On the 19th day of March, 1879, Tolson, as such attorney in fact, executed and delivered to the appellee, Sapieha, a deed conveying the entire tract of land; D. O. Mason, the brother of T. D. Mason, joining in such deed, and thereby conveying his interest also. Appellee paid a fair and adequate price for the land, the deed reciting the amount, and its payment, and the transaction was in all respects fair and open. At the date of the execution of the power of attorney, T. D. Mason was about 35 years old, and the undisputed evidence shows that he was at that time, had been from his birth, and was at the date of the trial, an imbecile, without mental capacity to manage his affairs, and that on that account he was without mental capacity to contract at the dates of the two instruments above named. Sapieha had no knowledge or notice of Mason's mental condition, and dealt with Tolson without knowledge of any fact which should have led him to inquire as to the mental condition of T. D. Mason. T. D. Mason had never been under guardianship at the date of these transactions, and had never been judicially declared of unsound mind. A guardian was first appointed for him in 1891. In the absence of opposing testimony, we find, as did the trial court, that T. D. Mason received the consideration paid

by Sapieha for his interest in the land. Wade v. Love, 69 Tex. 524, 7 S. W. 225. Notwithstanding the pleadings of appellant set up the power of attorney and deed which he assails, no offer is made to return the consideration, nor was it shown that the appellee could be placed in statu quo.

"The questions propounded are: (1) Is the power of attorney from T. D. Mason to Tolson void as against the appellee, the principal being non compos mentis at the date of its execution? (2) If only voidable, will the appellant be permitted to rescind the power of attorney and deed made in pursuance thereof, in the absence of an offer to return the purchase price, or otherwise place the purchaser in statu quo? In disposing of this appeal this court, in view of expressions in *Cummings v. Powell*, 8 Tex. 81, *Askey v. Williams*, 74 Tex. 294, 11 S. W. 1101, 5 L. R. A. 176, and other Texas cases, treated the deed to Sapieha as if it had been made by Mason in person; and held the power of attorney, as well as the deed, voidable only. The question seems not to have been directly decided in this state, and we therefore certify the above questions. Your attention is called to valuable notes in 16 Eng. Rul. Cas. 735, 6 Eng. Rul. Cas. 54, and *Swafford v. Ferguson*, 31 Am. Rep. 629. Sapieha, being a nonresident of the United States, was cited by publication, and, not appearing either in person or by attorney, the trial court appointed an attorney to represent the nonresident. Judgment being rendered in Sapieha's favor, a fee was allowed him for his services, which was taxed as costs against the plaintiff. Question: Was it lawful to tax such fee against the plaintiff in a suit of this character?"

To the first question we answer, the power of attorney mentioned in this question was voidable, but not void. *Elston v. Jasper*, 45 Tex. 409; *Askey v. Williams*, 74 Tex. 294, 11 S. W. 1101, 5 L. R. A. 176; *Ferguson v. Railway Co.*, 73 Tex. 344, 11 S. W. 347; *Cummings v. Powell*, 8 Tex. 81. The deed of an insane person is not void, but, like that of an infant, is voidable, at the election of the party. *Irvine v. Irvine*, 9 Wall. 626, 19 L. Ed. 800. We believe that this doctrine is not now seriously controverted in the courts of this country. We can see no difference in principle between the act of making a deed which passes the title and making an instrument which authorizes another person to do the same thing. In this state the powers of persons over real and personal property are so nearly the same that no distinction can be said to exist in the capacity required for making a sale and transfer of the one or the other. The law provides different methods of executing the will of the party, but places no greater restriction upon the power to sell the one than the other. It has been held upon sound reasoning that a lunatic or an infant may make a power of attorney by which simple contracts might be entered into for them; such as the signing of

notes, or the indorsement and transfer of commercial paper. *Whitney v. Dutch*, 14 Mass. 457, 7 Am. Dec. 229; *Hastings v. Dollarhide*, 24 Cal. 195; *Hardy v. Waters*, 38 Me. 450. In the case of *Whitney v. Dutch*, cited above, a partnership was formed between an adult and a minor, and in the course of the business the adult partner executed a note in the firm name. When the minor became of age he ratified the note, but when suit was brought upon it he pleaded his infancy, and claimed that the note was void, and not subject to ratification. The supreme court of Massachusetts held that the note was voidable, and that it, having been ratified by the minor after reaching his majority, was a valid claim against him. That court said: "Then, upon principle, what difference can there be between the ratification of a contract made by the infant himself and one made by another acting under a parol authority from him? And why may not the ratification apply to the authority as well as to the contract made under it? It may be said that minors may be exposed if they may delegate power over their property or credit to another. But they will be as much exposed by the power to make such contracts themselves, and more, for the person delegated will generally have more experience in business than the minor. And it is a sufficient security against the danger from both these sources that infants cannot be prejudiced, for the contracts are in neither case binding, unless, when arrived at legal competency, they voluntarily and deliberately give effect to the contract so made. And in such case justice requires that they should be compelled to perform them." In the cases of *Hardy v. Waters* and *Hastings v. Dollarhide*, before cited, the issue was upon the validity of the transfer of a promissory note made by the agent of the payee, who was a minor; and it was claimed that the transfer was void because the minor could not confer power upon another to transact such business for him. In each of the cases, however, the court held the transfer good when ratified by the minor after arriving at majority. In other words, the court held the power of attorney to be voidable, and the act, being ratified, became valid, just as if it had been done by the infant himself. The supreme court of this state in the case of *Cummings v. Powell* intimated very strongly the opinion that a power of attorney executed by an infant or a lunatic authorizing the sale and conveyance of real estate was merely voidable; but the question was not involved, and the opinion is not authority. In the case of *Ferguson v. Railway Co.* the court did in fact decide that the power of attorney given by an infant was voidable only. The question was in the case, a proper subject for its decision, but in the close of the opinion the court placed the decision upon another question. In *Askey v. Williams* the defendant, a minor, employed an attorney to defend him against a criminal charge, and to

secure the fee gave a note with a deed of trust upon land containing a power of sale. The debt being unpaid, the trustee sold the land to pay the note, and in suit for the land the validity of the sale was in issue. It was held that the deed of trust which contained the power of sale was voidable; that the sale made by the trustee under the power was subject to be avoided by the minor, just as if the deed had been executed by the minor in person. We regard this case as directly in point, and as deciding the very question presented. It is true that in the course of the opinion Judge Gaines remarked that powers given by a minor, when coupled with an interest, were held to be voidable; but the opinion is not placed upon that ground. The following language of the court shows that the power was sustained as if it had been a deed, placing them upon the same basis: "If the infant had conveyed the land absolutely as a fee, his deed would not have been void, but he could have avoided it within a reasonable time after coming of full age upon payment of a just compensation for the services rendered by his grantee. We think the same rule should apply in this case." The contention of the appellant that the power of attorney and the deed made under it which are involved in this controversy are absolutely void because the maker of the power of attorney was at the time a lunatic is supported by the greater number of adjudicated cases. It is the doctrine of the English courts, and has been followed in the supreme court of the United States and by the supreme courts of a number of the states without questioning the soundness upon which it is based, or its consistency with the system of laws under which property rights are held in this country. Of the cases which sustain this rule we cite the following: *Dexter v. Hall*, 15 Wall. 9, 21 L. Ed. 73; *Philpot v. Bingham*, 55 Ala. 435; *Armitage v. Wildoe*, 36 Mich. 124; *Fetrow v. Wiseman*, 40 Ind. 148; *Lawrence's Lessee v. McAter*, 10 Ohio, 37; *Fonder v. Van Horn*, 15 Wend. 631; *Pyle v. Cravens*, 4 Litt. 17. In *Dexter v. Hall*, cited above, the supreme court of the United States reviews at length the English cases, and criticises the doctrine that the contracts of infants and lunatics are voidable only; finally basing its judgment upon the proposition that contracts made by infants and lunatics, and not delivered by the hand of the maker, are void. We quote the following to show the basis of that opinion: "The doctrine that a lunatic's power of attorney is void finds confirmation in the analogy there is between the situation and acts of infants and lunatics. Both classes of persons are regarded as under the protection of the law. * * * Yet it is universally held, as laid down by Lord Mansfield in *Zouch v. Parsons*, 3 Burrows, 1804, that deeds of an infant which do not take effect by delivery of his hand (in which class he places a letter of attor-

ney) are void. We are not aware that any different rule exists in England or in this country." In the same court, the same judge, Justice Strong, delivered an opinion in the case of *Irvine v. Irvine*, 9 Wall. 617, 19 L. Ed. 800, which involved the validity of a sale made under power contained in a mortgage, in which case that court held that the sale was voidable; saying: "Whatever may have been the doubts once entertained, it has long been settled that the deed of an infant, being an executed contract, is only voidable at his election; that it is not void. It operates to transmit the title." The ablest judges who have dealt with this question have not undertaken to sustain by reason the rule adopted by the supreme court of the United States. In the case of *Armitage v. Widoe*, before cited, Judge Cooley said: "On the authorities, no rule is clearer than that an infant cannot empower an agent or attorney to act for him." And that able judge contented himself with a citation of authorities in support of a rule for which he could assign no sound reason. In *Philpot v. Bingham*, before cited, Judge Stone, of the supreme court of Alabama, said of this question: "From such an array of authorities, sanctioned as the principle has been by this court, we do not feel at liberty to depart, although the argument in favor of the exception is rather specious than solid. We therefore hold that the power of attorney under which the plaintiff's land was sold, made, as it appears to have been, while he was an infant, was and is what the law denominates void." In the case of *Fetrow v. Wiseman*, above cited, the supreme court of Indiana, after having stated the proposition, said: "The proposition may not be founded in solid reason, but it is so held by all the authorities." These are fair samples of the cases which uphold the doctrine that the power of attorney of an infant or a lunatic is absolutely void. The fundamental principle of the cases in which the doctrine originated is wholly absent from and at variance with our system of laws, and we feel that the strong reasoning of Judge Hemphill in *Cummings v. Powell*, and the qualified decision in *Ferguson v. Railway Co.*, supported by the later case of *Askey v. Williams*, furnish a safer guide by which to regulate the property rights of the people of this country, and are more in harmony with our system of laws. We therefore follow them in preference to the arbitrary rule asserted in the greater number of decisions upon that question.

We answer the second question that the facts stated in connection with the certificate do not show that the lunatic still had in his possession any of the money paid for the land or any property acquired with it, nor that it had been expended for him or by him in the purchase of necessities. In the absence of such proof, he would not be required to return the consideration received.

Bullock v. Sprowls, 98 Tex. 188, 54 S. W. 661, 47 L. R. A. 826.

To the third question we answer that the court had the authority, under the statute, to allow a reasonable attorney's fee for the defendant in this case, and to tax it as costs of the suit. Rev. St. arts. 1212, 1346.

DAWSON v. ST. LOUIS EXPANDED METAL FIREPROOFING CO.

(Supreme Court of Texas. March 7, 1901.)

JUDGMENT OF COURT OF CIVIL APPEALS—JURISDICTION OF SUPREME COURT—WRIT OF ERROR.

Where the court of civil appeals reverses a judgment, and remands the cause for the insufficiency of the evidence, without instructing the trial court to direct a verdict for the defendant if the same evidence was introduced on a retrial, its decision does not practically settle the cause, and hence the supreme court has no jurisdiction to grant a writ of error to its judgment.

Error from court of civil appeals of Fourth supreme judicial district.

Action by Frank B. Dawson against the St. Louis Expanded Metal Fireproofing Company and another. From a judgment of the court of civil appeals (59 S. W. 847) reversing a judgment in favor of the plaintiff against defendant corporation, the plaintiff brings error. Cause dismissed.

Summerlin, Walling & Norton and James Routledge, for plaintiff in error. P. H. Swearingen, for defendant in error.

GAINES, C. J. In disposing of this case, we are confronted at the threshold with a question of some difficulty. It is, however, a technical question; that is to say, one involving a construction of the laws which fix the jurisdiction of this court, rather than one of practical importance to the parties to the suit. If we have not jurisdiction of the case, then it must be dismissed, and the cause will go back for a new trial, under the remand of the court of civil appeals. If we have jurisdiction, then the evidence, as we think, being conflicting upon the issue upon which the case was made to turn, and the court of civil appeals having practically set aside the finding of the jury upon that issue, we can neither affirm the judgment of the trial court, nor reverse that judgment, and render judgment here in favor of the defendant in error. The court of civil appeals having reversed the judgment of the trial court, and remanded the cause (59 S. W. 847), the plaintiff in error, in order to give us jurisdiction, averred in his petition for the writ of error that the decision of the court of civil appeals practically settled the case; and, when we granted the writ, we were of opinion that, if the plaintiff below was unable to adduce any additional evidence upon the main point at issue, this averment was true. But an examination of the testimony adduced upon the trial, in connection with the opinion of the court of civil

appeals, has now led us to a contrary conclusion.

Upon the trial of the case, the question of negligence on the part of the defendant in error depended upon the further question whether Jester, its superintendent, had any reasonable grounds to anticipate that the carpenters of the original contractor would go upon the floor to work before the panel, the falling of which caused the injury, had time to harden. There was no evidence that the floor had been formally turned over to the main contractor as finished by the defendant in error, and there was direct evidence to the effect that the carpenters were on the day of the accident, and had been for several days before, on another wing of the building. On the other hand, the plaintiff testified: "I don't know how long that piece that I fell through had been there, but we had been at work on it several days,—a week or two."

* * * I was employed by Mr. P. T. Shields as a carpenter. He had a good many other employes." Also, in reply to the question, "That flooring had been there several weeks, and you had been working on it several days?" he answered, "Yes." Again he answered the following question in the affirmative: "State whether or not any of the other employes of defendant Shields had been working on that building a few days prior to the accident." In reference to this matter, the court of civil appeals found the following facts: "From the time that the scaffolding was removed from underneath until about the time the order to repair the panel was given, the floor may have been used by Shields' employes in performing their work upon the building. But at the time Shields ordered the panel repaired his hands had no work to do in that part of the building, but were working in the south wing and hospital of the asylum." In their conclusions of law they say: "All the panel, which broke through under the weight of defendant in error and his fellow servant, lacked of being completed was time to undergo the natural process of hardening. Nothing more to complete it had to be done by the plaintiff in error, and it was entitled to have the panel let alone and left unmolested by Shields and his servants until sufficient time had elapsed for it to undergo this process. Until then the plaintiff in error must be regarded to have and exercise the same right and control over it as if it were the owner, and, not having authorized the defendant in error to go upon it, he took all the risks upon himself for the use he was making of it, and he has no right to complain of the defect which caused his injury; it being shown by the evidence that plaintiff in error could not have reasonably anticipated that the panel would be used by defendant in error or some other of Shields' servants, at the time and manner it was, before it had become sufficiently hardened to sustain their weight. Shear. & R. Neg. § 705; Dobbins v. Railway Co., 91 Tex. 60, 41 S. W.

62; Railway Co. v. Bigham, 90 Tex. 225, 38 S. W. 162. Therefore we conclude that the evidence in this case is not sufficient to show negligence on the part of plaintiff in error, and for that reason the judgment against plaintiff in error company should be reversed, and the cause remanded as between it and defendant in error."

If the court of civil appeals had remanded the cause, with an instruction to the trial judge, in case the evidence should be substantially the same upon another trial, to direct a verdict for the defendant, then clearly their decision would have practically settled the case, provided the plaintiff in error, as alleged in his petition for the writ of error, is unable to adduce any additional evidence in support of his cause of action. So, also, if the opinion, without expressly instructing a verdict, had been such as to make it the duty of the trial court to give such instruction,—for example, if the court of civil appeals had announced that there was no evidence of negligence,—we would have been bound, under the allegations in the petition for the writ, to have taken jurisdiction of the case. But we do not so construe the opinion. It was within the power of that court to disregard a finding of fact by the jury if contrary to the great weight of the credible testimony, and in effect to set aside the finding, and to remand the cause, and we understand them to mean that, under the facts as found by them under the evidence, there was no negligence. They reversed the judgment because the evidence of negligence was not sufficient, not because there was in their opinion no evidence of negligence. Under this ruling, the trial judge, in the event the testimony should be the same on another trial, might feel it his duty to grant a new trial, but he would not be constrained to instruct a verdict. Such being our construction of the opinion of the court of civil appeals, the case falls within the rule laid down in Choate v. Railway Co., 91 Tex. 406, 44 S. W. 69, and not within that of Lee v. Same, 89 Tex. 583, 36 S. W. 63. We conclude that the decision of the court of civil appeals does not practically settle the case, and that we therefore erred in granting the writ of error. The cause is accordingly dismissed.

BAINES v. STATE.¹

(Court of Criminal Appeals of Texas. Feb. 21, 1901.)

CRIMINAL LAW—CONTINUANCE—ABSENT WITNESS—AFFIDAVIT—ALIBI—APPEAL.

1. Where an application for continuance on account of the absence of a material witness, coupled with an affidavit of such witness, showed due diligence in endeavoring to secure his presence, and that his testimony, if true, would clearly prove an alibi for defendant, a continuance should be granted.

2. Where an affidavit of an absent witness is produced on motion for a new trial in a criminal proceeding, showing absolutely that

¹ For dissenting opinion, see 61 S. W. 312.

he would testify to the facts set up in the application, the appellate court will not assume that the evidence of alibi is probably untrue, though the testimony in the trial court is strongly indicative thereof.

Brooks, J., dissenting.

Appeal from district court, Erath county; J. S. Straughan, Judge.

Dock Baines was convicted of an assault with intent to murder, and he appeals. Reversed.

Kearby & Kearby and Daniel & Keith, for appellant. D. E. Simmons, Acting Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of an assault with intent to murder, and his punishment assessed at six years' confinement in the penitentiary.

Appellant made a motion for continuance on account of the absence of O. R. McCoy and Jim White. The diligence used to procure the witness McCoy was sufficient. We do not regard the diligence as to White sufficient, nor was his testimony material. However, as shown by the application for continuance, the testimony of McCoy was material; that is, the state's case depended alone on circumstantial evidence. Appellant's defense was an alibi. He lived some three or four miles from the place where the shooting occurred. Both of the state's witnesses who speak as to time place this at night, between 8 and 9 o'clock. Minnie Freeman (prosecutrix) states: "I was shot on the night of the 9th of August, 1900, at my father's house, and in the yard that surrounds the house." Mrs. J. O. Freeman states: "I was at home the night that Minnie was shot. It happened about eight o'clock." These were the only two witnesses present at the time of the shooting, and neither of them identifies the defendant as the party. The application for continuance alleged "that the absent witness, McCoy, would testify that he was at the defendant's house, in Hood county, Texas, on the evening of August 9, 1900 (the evening or night that Minnie Freeman was shot), from six o'clock in the evening until nine o'clock in the night of said day, and that defendant was at home, three and one-half miles from the place where Miss Minnie Freeman was shot, from the hour of six o'clock p. m. until nine o'clock p. m. of said evening, and that witness left defendant at his home at nine o'clock on said night." This application was overruled. In connection with the motion for new trial on the ground of erroneously overruling the application for continuance, appellant appended the affidavit of this witness, McCoy, who swore "that he was a citizen of Parker county on the 20th of October, 1900, and before that time; that he was acquainted with Dock Baines, who resided in Hood county, Texas; that affiant was at Dock Baines' house, where Baines lived, on the evening of the 9th of August, 1900, from

about the hour of five o'clock of said evening until the hour of nine o'clock in said night; and that Dock Baines was at his (Baines') home all the time between the hours of five o'clock p. m. and nine o'clock p. m. of said 9th day of August, 1900." In that connection is also appended the affidavit of Mrs. Baines, stating that there were some business matters between her husband and said McCoy, and that, of her knowledge, McCoy had visited her husband during the preceding March in relation to said business matters. The statement of facts shows, also, that on the night of the shooting Mrs. Baines, the wife of appellant, was absent from home. It will be seen from this statement that the testimony of McCoy as to the alibi directly and pertinently meets the state's case. The statement contained in the absent witness' affidavit is unequivocal, and covers the entire space of time fixed by the state in the commission of the offense, and, if McCoy's affidavit is untrue, he is undeniably guilty of perjury. It is insisted, however, that the state's case, though depending on circumstantial evidence, is exceedingly strong on the question of identity, and that in the face of this testimony the evidence of alibi is not probably true, and that it is competent and proper for this court to so declare; and a number of cases have been cited in which we have so held. Where an affidavit of the absent witness has been produced on motion for new trial, showing absolutely that he would testify to the facts set up in the application, we do not think any case can be found where we have assumed the prerogative of saying that the testimony was not probably true. To so hold. It seems to us, would be not only to usurp the functions of the jury, but to announce in advance that the absent witness had committed perjury. In our opinion, on the showing made, the judge should have granted the motion for new trial. *Hull v. State* (Tex. Cr. App.) 47 S. W. 472.

We have examined the other errors assigned, but do not believe that any of them are well taken. On account of the action of the court in overruling the motion for continuance, and then refusing to grant a new trial on that ground, the judgment is reversed and the cause remanded.

BROOKS, J., dissenting.

HANSON v. STATE

(Court of Criminal Appeals of Texas. Feb. 21, 1901.)

CRIMINAL LAW—COMPLAINT—INFORMATION—VARIANCE.

A complaint alleged that one J., with force and arms, and before making this affidavit, did then and there in and upon said H. make an assault, and, by means of threats, willfully and without authority of law, and against the consent of said H., detain said H.,

thereby restraining said H. from removing from one place to another as he might see proper, etc. The information was that J. before the filing of this information did then and there unlawfully in and upon said H. make an assault, and, without lawful authority, forcibly confine and falsely imprison the said H., and did then and there, willfully and by assault, and by actual violence and by threats, detain said H. against his consent, and did thereby restrain him from moving from one place to another as the said H. might see proper, etc. *Held*, that there was a variance between the complaint and information, vitiating the latter.

Appeal from Erath county court; L. N. Frank, Judge.

John Hanson was convicted of false imprisonment, and he appeals. Reversed.

J. E. Sanders and Daniel & Keith, for appellant. D. E. Simmons, Acting Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of false imprisonment, and his punishment assessed at a fine of \$10.

Appellant insists, by motion to quash, that there is a variance between the complaint and information. The charging part of the complaint is as follows: " * * * On or about the 13th day of January in the year of our Lord one thousand and nine hundred, in the said county of Erath and state of Texas, one John Hanson, late of said county and state, with force and arms, and before making this affidavit, did then and there in and upon Hunter Williams make an assault, and did then and there, by means of threats, willfully, and without authority of law, and against the consent of the said Hunter Williams, detain the said Hunter Williams, thereby restraining the said Hunter Williams from removing from one place to another as he might see proper," etc. The charging part of the information is as follows: " * * * That John Hanson, in the county of Erath and state of Texas, on or about the 13th day of January, A. D. 1900, and before the filing of this information, did then and there unlawfully in and upon Hunter Williams make an assault, and, without lawful authority therefor, did then and there forcibly confine and falsely imprison the said Hunter Williams, and did then and there willfully and by assault, and by actual violence and by threats, detain him, the said Hunter Williams, against his consent, and did thereby restrain him, the said Hunter Williams, while so unlawfully detained, from moving from one place to another as the said Hunter Williams might see proper," etc. We think the motion to quash was well taken, and should have been sustained. The information must, in substance, charge the same offense as that alleged in the complaint, and a want of conformity in the charges vitiates the information. *Robinson v. State*, 25 Tex. App. 111, 7 S. W. 581; *Collins v. State*, 5 Tex. App. 87. And, for collation of authorities, see *White's Ann. Code Cr. Proc.* § 396. The complaint

is valid, and it is only necessary for the information to conform to the complaint. The county attorney can file a new information upon the complaint, and proceed with the prosecution.

We have carefully reviewed the evidence and must say that it is not sufficient to sustain the verdict of the jury. If the record before us contains all that the state can prove upon another trial, the prosecution should be dismissed. The judgment is reversed, and the cause remanded.

BRICE v. STATE.

(Court of Criminal Appeals of Texas. Feb. 21, 1901.)

CRIMINAL LAW—TRIAL—ABSENCE OF COUNSEL—CONTINUANCE—ABSENCE OF WITNESS—JURY—MISCONDUCT—NEW TRIAL—NEWLY-DISCOVERED EVIDENCE.

1. Accused had not procured counsel, though he and his brother knew of the pendency of the case two weeks before the day it was called, in the last week of the term. At such time, the attorney with whom he was negotiating not being present, the case was postponed until evening, to procure his presence. The case having commenced before he came in, he was given an opportunity to re-examine any witnesses. *Held*, there was no error.

2. Where, in a prosecution for assault with intent to murder, defendant had made no effort to secure the attendance of a witness who was inside the house at the time of the shooting, but did not see it, a refusal of a continuance because of his absence did not prejudice defendant.

3. It was not misconduct for the jury to discuss the character of the accused, there being evidence on such question.

4. Where the alleged newly-discovered evidence in a motion for a new trial was merely in the nature of impeaching evidence, it was not error to deny the motion.

Appeal from district court, Wood county; J. G. Russell, Judge.

Hub Brice was convicted of an assault with intent to murder, and appeals. Affirmed.

D. E. Simmons, Acting Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of an assault with intent to murder, and his punishment assessed at two years' confinement in the state penitentiary; hence this appeal.

There are no bills of exception in the record. Appellant insists that the court committed a material error in forcing him to trial in the absence of his counsel. It is shown on the part of the state that the request was made to postpone the case in order to enable appellant to procure counsel. This was the last week of court, and appellant and his brother knew of the pendency of the case some two weeks previous thereto, and should have made some effort to secure counsel earlier. However, when the case was called, counsel with whom appellant was negotiating not being present, the court post-

poned the case until evening, to enable him to be present. Counsel came in after the trial of the case began, and was afforded full opportunity to re-examine any witness or witnesses. In this proceeding we do not see any error calculated to injure appellant.

As to the absence of the witness John McCain, no effort was made by appellant to secure his attendance. The state, however, endeavored to have him present. If he had been present, so far as the testimony discloses, he would not have benefited appellant. He was inside the house at the time the shooting occurred, according to the testimony as developed, and did not see it.

We cannot regard the showing as to the misconduct of the jury as error. If the jurors discussed the character of appellant, they were authorized, under the testimony, to do so. But, from the showing made, this is even rendered doubtful.

We cannot regard the alleged newly-discovered evidence as of that character. The intent with which the shot was fired was a material issue in the case, and appellant should have thoroughly cross-examined the prosecuting witness on that subject. At any rate, the proposed testimony was merely in the nature of impeaching evidence, and new trials are rarely granted on this ground. The evidence supports the verdict of the jury, and the judgment is affirmed.

GARCIA v. STATE.

(Court of Criminal Appeals of Texas. Feb. 21, 1901.)

CRIMINAL LAW—CONTINUANCE—IMMATERIAL WITNESS—ABSENCE—THEFT—INSTRUCTIONS—REFUSAL—EVIDENCE.

1. Where the testimony of an absent witness was neither material nor probably true, it was not error to refuse a continuance because of his absence.

2. Where, in a prosecution for theft of a horse, the evidence conclusively showed that it was in possession of a certain person, and there was no testimony that it was in the possession of any one else, it was not error to refuse an instruction that if the horse was in the possession of some other person, or there was a reasonable doubt as to whether it was in the possession of such person at the time it was stolen, defendant should be acquitted.

Appeal from district court, Duval county; A. L. McLane, Judge.

Pablo Garcia was convicted of theft and appeals. Affirmed.

D. E. Simmons, Acting Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of horse theft, and his punishment assessed at two years' confinement in the penitentiary. The first error complained of by appellant is that the court erred in refusing to postpone his case until the witness Leo Trevino could be procured. It is not necessary to state the testimony expected to be proved by this wit-

ness. In the light of this record, it is neither material nor probably true.

Appellant's second contention is the court erred in refusing the following special charge: "If you believe from the evidence that horse with which defendant is charged with the theft of was in the possession of some person other than Mateo Martinez, or have a reasonable doubt as to whether or not he was in possession of Mateo Martinez at the time he was alleged to have been stolen, you will acquit him." There is no evidence authorizing this charge. The evidence conclusively shows the horse was in the possession of Mateo Martinez, and there is not a suspicion of testimony that he was in possession of any one else. The evidence is ample to support the conviction, and, no error appearing in the record, the judgment is in all things affirmed.

McCLARNEY v. STATE.

(Court of Criminal Appeals of Texas. Feb. 21, 1901.)

CRIMINAL LAW—APPEAL—RECOGNIZANCE—STATEMENT OF PUNISHMENT.

Where, on appeal from a conviction, the recognizance does not state the amount of punishment assessed against defendant, the appeal will be dismissed.

Appeal from Eastland county court; G. W. Dakan, Judge.

J. P. McClarney was convicted of violating the local option law, and appeals. Affirmed.

D. E. Simmons, Acting Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted for violating the local option law, and his punishment assessed at a fine of \$75, and 60 days' confinement in the county jail. Motion is made by the assistant attorney general to dismiss the appeal for want of a legal recognizance, in that it fails to state the amount of the punishment assessed against appellant. An inspection of the record sustains this contention. The appeal is dismissed.

Ex parte OGLE.

(Court of Criminal Appeals of Texas. Feb. 20, 1901.)

GRAND JURY—CONSTITUTIONAL PROVISION—THIRTEEN MEMBERS.

Under the constitutional provision that a grand jury shall consist of 12 jurors, one convicted under an indictment found by 13 will be released on habeas corpus.

Habeas corpus by the people, on the relation of S. W. Ogle, to J. S. Rice, as superintendent of the state penitentiary, to secure relator's release from custody. Relator discharged.

Word & Word, for relator. Dave Derden, B. Y. Cummings, C. F. Greenwood, Co. Atty., and D. E. Simmons, Acting Asst. Atty. Gen., for the State.

BROOKS, J. This is an original application for the writ of habeas corpus on the part of the relator. The record before us shows that relator was convicted on the 22d day of October, 1883, upon an indictment charging him with murder, and that the grand jury which returned the bill of indictment was composed of 13 jurors. There is an agreed statement in the record supporting this. The constitution of this state provides that the grand jury shall consist of 12 jurors, and a grand jury composed of more or less than that number is an unconstitutional grand jury. It further appears by the record that relator is now illegally confined in the state penitentiary, under said conviction, at Huntsville, Walker county, Tex., and that J. S. Rice is superintendent of said penitentiary. It is therefore ordered and adjudged by this court that the said Rice immediately release relator from the penitentiary and from confinement, and restore him to his liberty.

GLENEWINKEL v. STATE.

(Court of Criminal Appeals of Texas. Feb. 21, 1901.)

HOMICIDE—SELF-DEFENSE—EVIDENCE—BAD REPUTATION OF DECEASED—CARRYING DEADLY WEAPONS—DEFENDANT'S KNOWLEDGE THEREOF.

1. Where defendant interposed a plea of self-defense, based on threats made by deceased to him in person prior to the homicide, and also on previous difficulties between them, it was error to exclude evidence of a difficulty between them, which, though not a part of the *res gestæ*, indicated defendant's desire to avoid deceased, who was the aggressor therein.

2. In a prosecution for homicide, defended on the ground of self-defense, it was error to exclude evidence that deceased had the general reputation of habitually carrying deadly weapons, such as pistols, knives, and brass knuckles.

3. It was also error to exclude evidence that defendant knew, of his own knowledge, that deceased carried such weapons.

4. It was also error to exclude defendant's offer to prove by himself that the general reputation of deceased was known to him, and what it was; such testimony being offered to explain why defendant, after a difficulty with deceased, went back to a saloon where it occurred, and where the killing took place, to get his neighbor to go home with him, in view of the fact that deceased was a dangerous man, and defendant had good reason to believe that he would follow him and injure him.

Appeal from district court, Guadalupe county; M. Kennon, Judge.

Charles Glenewinkel was convicted of manslaughter, and he appeals. Reversed.

Dibrell & Mosheim, for appellant. D. E. Simmons, Acting Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of manslaughter, and his punishment assessed

at two years' confinement in the state penitentiary.

By bill of exceptions No. 1 it is made to appear: That "defendant offered to prove by witness August Wahl that he was in the saloon of Ziegenhals on the afternoon of the killing, and that there was a difficulty between defendant and deceased; that it was about the middle of the afternoon,—of same afternoon upon which deceased was killed; that said witness was in the saloon for several hours during the afternoon, and defendant and deceased were in the saloon together; that defendant, in company with witness and one Schorn, were seated at a table in said saloon, playing cards, and deceased came up, uninvited, and accused defendant of cheating in the game; defendant made no reply to deceased; that deceased then got behind the chair of defendant, who was seated at the table, and pushed defendant's hat down over his face, and struck defendant in the back with his fist; that defendant, without resenting the attack, told deceased that he (defendant) was an old man, over fifty years old, with a large family; that deceased was a young man, in his prime; and that he (defendant) could not stand up against deceased; and that deceased then called defendant a 'gray-headed son of a bitch,' and said defendant had to fight him (deceased); that deceased continued such treatment towards defendant until witness left the saloon; that defendant all the time protested against fighting deceased, and never at any time scuffled in merriment with deceased, but pushed him back to prevent an unlawful attack upon his person, and that defendant never at any time, while said witness was in said saloon, called deceased a 'son of a bitch,' but replied only once to deceased that deceased was 'another,' after deceased had repeatedly called defendant a son of a bitch, and after deceased had caught defendant in his beard and shook him and told him he had to fight; that the abuse was not mutual, but was all on the part of the deceased. That said witness Wahl would have testified to the foregoing facts, had the court permitted him to do so, but the court, upon objection of state, rejected it on the ground that it was not competent because witness did not locate the time of the afternoon sufficiently to make said testimony a part of the *res gestæ*. Defendant offering said testimony for the purpose of showing that deceased was the aggressor, and for the further purpose of showing that there was no mutual abuse, but that deceased did all the abusing, and was tempting defendant to fight, and for the further reason that such testimony tended to explain the action of defendant in taking the life of deceased," etc. The court adds the following explanation to the bill: "That the witness was not able to locate the time so that the court might determine whether the matter was *res gestæ* or not, and, further, that at the time he was offered there was no evi-

dence in the record tending to show that deceased was engaged in a difficulty with defendant at the time of the homicide, and the testimony was not again offered after the time had been fixed, or after there was evidence to the effect that deceased was the aggressor." We think this testimony was admissible, and the court erred in rejecting it. Where, in a prosecution for homicide, defendant interposes the plea of self-defense, based upon threats made by deceased to defendant in person prior to the homicide, and also upon previous difficulties between the parties, it is proper, in order to show whether the grounds for fearing death or serious bodily harm were reasonable, to permit appellant to lay before the jury all circumstances which would go to show the character of the threats, the intention with which they were made, and the grounds of fear on which defendant acted; and hence evidence of previous conversations, difficulties, attacks, and threats is admissible. *Russell v. State*, 11 Tex. App. 288. We have also held that where the defense proved peaceable character of defendant, and the violent, malicious, and dangerous character of deceased, the commission of divers acts of violence upon appellant by deceased, and the threats of deceased to kill defendant, it is then permissible on the part of the defense to introduce an indictment, filed about one month before the killing, charging deceased with an aggravated assault and battery upon defendant about two months before the killing; one of the issues in the case being whether or not defendant had reasonable grounds of fearing death or serious bodily harm at the hands of deceased. To decide this question correctly, it is permissible to introduce the exact relations of the parties to one another, and their feeling towards each other and their motives should be known to the jury. This being understood, an act, gesture, or word which was spoken or done at the homicide, as viewed and weighed in the light of these remote relevant facts, becomes important. *Johnson v. State*, 28 App. 17, 11 S. W. 967. As indicated, this testimony is admissible whether *res gestæ* or not.

Bill No. 2 complains that the court refused to permit appellant "to prove by the witnesses Fred Galle and Max Starcke, and defendant himself, the general reputation of deceased, Bernhardt Strempele,—as to whether said Strempele was a person who habitually carried on his person deadly weapons, such as pistols, knives, and brass knuckles,—and that this was his general reputation in the community in which he lived." This testimony was clearly admissible, since knowledge of the general reputation of deceased on the part of appellant in this regard would tend strongly to illustrate, explain, and render probable the reasonable appearances of danger insisted upon by appellant to have existed at the time he committed the homicide. *Horbach v. State*, 43 Tex. 244; *West*

v. State, 18 Tex. App. 640; *Lilly v. State*, 20 Tex. App. 7. And bill No. 5 complains of the court's refusal to permit appellant to testify that he knew, of his own knowledge, that deceased habitually carried on his person deadly weapons, such as pistols, knives, and brass knuckles. This testimony should also have been admitted.

By bill No. 3 it is made to appear that defendant "offered to prove by himself that the general reputation of deceased was known to him, and that his general reputation was that he followed persons upon the road, and assaulted and inflicted serious bodily injury upon them, and would have so testified. He offered such testimony for the purpose of explaining why defendant went back to Ziegephals' saloon the last time to get his neighbor, August Wahl, to go home with him, in view of the fact that deceased had been a desperate and dangerous man, and defendant had good reason to believe deceased would follow him on the road and inflict serious bodily injury upon him. The state objected to the admission of said proposed testimony upon the ground that it was immaterial, and the court sustained said objection." If appellant knew the fact, if it was a fact, that deceased was in the habit of following other parties out on the road and beating them, and, apprehending similar treatment at the hands of deceased, he went back to the saloon to secure the company of August Wahl against such anticipated assault, the court erred in refusing to permit him to so testify. For the errors discussed, the judgment is reversed and the cause remanded.

HARRIS v. STATE.

(Court of Criminal Appeals of Texas. Feb. 13, 1901.)

CRIMINAL LAW—APPEAL—INSTRUCTIONS.

Accused cannot complain of a charge given by the court on its own motion, when there is no difference between it and the charge requested by himself.

Appeal from Young county court; N. J. Timmons, Judge.

J. R. Harris was convicted of violating the local option law, and appeals. Affirmed.

D. E. Simmons, Acting Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted for violating the local option law, and his punishment assessed at a fine of \$25 and 20 days' confinement in the county jail. In motion for new trial, appellant complains of the charge of the court in instructing the jury that defendant must have acted in good faith in accepting the agency of the prosecutor to buy the whisky for him. We see no difference in this respect in the charge given by the court and that requested by appellant. We think the question of sale or purchase as agent of the prosecutor was

fairly submitted to the jury, and the facts sufficiently authorized the verdict. The judgment is affirmed.

BENAVIDES v. STATE.

(Court of Criminal Appeals of Texas. Feb. 21, 1901.)

ASSAULT WITH INTENT TO KILL—ALIBI—INSTRUCTIONS—SUFFICIENCY.

1. Defendant and his confederates attacked the injured party at the door of a ballroom, and he retreated within the room, where they followed and again attacked him. Persons living near heard the shooting, and on arriving on the scene, several minutes afterwards, found defendant and his confederates in the yard outside the house. *Held*, in a prosecution for assault with intent to murder, that it was not error to fail to charge the law applicable to alibi, since the testimony did not raise such issue.

2. An instruction that, as all persons are principals who are guilty of acting together in the commission of an offense, if defendant's confederates committed the assault he could not be convicted unless he was present, and, knowing their unlawful intent, aided them in committing such assault, and if there was reasonable doubt on such question he should be acquitted, sufficiently presented the issue of alibi.

Appeal from district court, Duval county; A. L. McLane, Judge.

Matilde Benavides was convicted of assault with intent to murder, and he appeals. Affirmed.

D. E. Simmons, Acting Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of an assault with intent to murder, and his punishment assessed at two years' confinement in the penitentiary.

The only question presented by the motion for new trial is alleged failure of the court to charge the jury the law applicable to alibi. We do not believe the testimony raises this issue. The evidence for the state is clear and conclusive: That appellant was one of several who made a murderous assault upon S. Garza. The difficulty occurred at a social gathering or ball. That Garza was acting in the capacity of manager, and refused admittance to the attacking crowd because they were drunk and not invited. They immediately assaulted him with knives and pistols. This occurred at the door, and he retreated inside the room, followed by appellant and his confederates, where Garza was again seriously attacked with knives and pistols. This is, in substance, the state's case. Appellant introduced several witnesses who stated that they heard the shooting at the ballroom, and left their respective residences for the scene of the trouble; that it took several minutes to reach the place, and upon arriving they saw appellant and one of his confederates in the yard just outside the house. This is the evidence upon which alibi is predicated. We do not believe this evidence suggests the issue of alibi. Among other things, however,

and relative to this phase of the case, the court charged the jury as follows: "Defendant Matilde Benavides is indicted as a principal offender. You are charged that all persons are principals who are guilty of acting together in the commission of an offense. So that, if you believe that S. Garza was assaulted by Adolpho Saenz, Felix Saenz, and I. Vela, or either of them, then you must not convict this defendant for their act, unless you are satisfied that defendant was present, and, knowing their unlawful intent, aided them by his acts in committing such assault; and, if upon this issue you have a reasonable doubt, then you should give him the benefit of the doubt and acquit him." There was no exception reserved to this portion of the charge for its insufficiency, if, indeed, such objection could be urged. This presents the issue of alibi. We find no error in the record before us authorizing a reversal of the judgment, and it is therefore affirmed.

LYON v. STATE.

(Court of Criminal Appeals of Texas. Feb. 13, 1901.)

CRIMINAL LAW—APPEAL—STATEMENT OF FACTS—BILL OF EXCEPTIONS—INTOXICATING LIQUORS—LOCAL OPTION—EVIDENCE—CONSPIRACY.

1. Where the trial court, in preparing the statement of facts in an appeal from a conviction for violating the local option law, does not insert the orders of the commissioners' court putting the law in force, but makes a memorandum directing the clerk to insert such orders, which the clerk does, the orders so inserted are not properly in the record, and should be stricken out.

2. Failure of the statement of facts on an appeal from a conviction for violation of the local option law to contain the orders of the commissioners' court putting the law in force is cured by a bill of exceptions which shows that such orders were introduced in evidence.

3. A county voted to abolish prohibition therein, and the result was declared by the commissioners' court, but it failed to publish the result, and it thereupon ordered a local option election in a certain precinct in the county. *Held*, that a conviction for violation of the local option law, as adopted in such precinct, would not be reversed on the ground that the order of election was void because prohibition was in force in the county at the time it was made, since the publication of the result of the county election was not necessary to the abolition of prohibition.

4. Where the prosecuting witness in a prosecution for a violation of the local option law admits a dislike to defendant and of having had business troubles with him, and it is shown that defendant lowered prices in a rival business, it is error to refuse to admit testimony that the prosecuting witness was in a similar line of business with defendant, and had entered into a conspiracy to break up his business.

Appeal from Hunt county court; R. D. Thompson, Judge.

Lee Lyon was convicted for a violation of the local option law, and he appeals. Reversed.

Evans & Elder, for appellant. D. E. Simmons, Acting Asst. Atty. Gen., for the State.

DAVIDSON, P. J. This conviction was obtained for violating the local option law in precinct No. 3 of Hunt county.

Motion is made by appellant to strike out certain portions of the statement of facts. It appears in this connection that the court made up the statement of facts, and did not embody therein, either in whole or in substance, the orders of the commissioners' court showing the putting in force of the local option law in said territory, but simply made a memorandum directing the clerk at that particular point to insert said orders, and the clerk, in making up the transcript, did insert them. This cannot be done. See *Ratcliff v. State*, 29 Tex. App. 243, 15 S. W. 596. The motion is sustained, and that portion of the statement of facts eliminated. None of the bills of exception makes it appear that these orders were in fact introduced in evidence. If it had been made so to appear, this would have been sufficient to supply the defect in the statement of facts. *Burke v. State*, 25 Tex. App. 172, 7 S. W. 873; *Jackson v. State*, 28 Tex. App. 143, 12 S. W. 701.

During the trial appellant sought a continuance on account of the absence of two witnesses, by whom he expected to show that the alcohol he is charged with selling was not entered upon his books of account against the alleged purchaser, as testified by said purchaser. These witnesses had been clerks of appellant, and were thoroughly familiar with his business and account books,—in fact, seem to have managed the business for him. This was the crucial point in the testimony against appellant, and these witnesses were very important. However, it is not necessary to go further into this question, as these witnesses can be obtained upon another trial.

Appellant contends the order for the local option election as held in precinct No. 3 was void for the reason that prohibition was in force in the county at the time. The bill shows that in 1896 local option was put into operation throughout the entire county of Hunt. Two years later another election was held in said county, which resulted against prohibition. The commissioners' court declared the result of the last election, but failed to publish the result, and it is therefore contended that local option still remained in force throughout the county. This is not correct. If in fact it was necessary that the county judge should declare the result, his failure to do so would not render invalid the will of the people as declared at the polls. They had the right to declare local option out of the county, and did so, and the commissioners' court so declared. The election in precinct No. 3, under which this conviction occurred, was ordered by the commissioners' court at the term which declared the result of the defeat of prohibition in the county. This was in accordance with the statute.

During the trial appellant proposed to prove that the prosecuting witness was also

in the same line of business in the same village, and had entered into a conspiracy with others to break him up in business. Under the facts of this case, we believe this testimony should have been admitted. The prosecuting witness admitted on the trial his dislike for appellant, and further that they had had some business troubles. It is further shown that when appellant entered into business he lowered the price of goods of the character he was selling, and to some extent this interfered with the business of the prosecuting witness, and seems to have outraged his feelings. As the matter of motive and feeling of the prosecuting witness towards appellant had been entered into in different directions, it occurs to us that the evidence excluded was but a part and parcel of this same character of evidence, and should have been admitted. It further tended to affect the standing of the witnesses before the jury as to credibility.

Objection was urged to the refusal of the court to give special instructions requested by appellant in regard to remarks alleged to have been made by the prosecuting attorney. We will not enter into a discussion of this matter, as the judgment will be reversed for the matters indicated above. Speeches of the character indicated should not be indulged by prosecuting attorneys. Matters dehors the record should not be referred to by way of argument. They do not form parts of the case, and the use of such expressions, and the indulging of such remarks, and weaving such outside matters in the case, are wrong. Its tendency is, at least, injurious, and decidedly contrary to the spirit of fair trial. We trust that counsel in the future will avoid this character of argument, and that our trial courts will use authority to suppress such matters. The judgment is reversed, and the cause remanded.

RAMEY v. STATE.¹

(Court of Criminal Appeals of Texas. Feb. 6, 1901.)

INTOXICATING LIQUORS—INSTRUCTIONS—EVIDENCE.

1. A special charge, requested by accused, is properly refused, when it is embodied in the main charge given.

2. The fact that an employé has no control of the building or the conduct of the business is no defense to a prosecution against him for keeping open a saloon for traffic on Sunday, in violation of a statute authorizing a conviction of an employé as well as the proprietor.

3. Evidence that accused was in a saloon on Sunday, and engaged in the business, and would have made a sale but for the appearance of the county attorney, is admissible to show that he was keeping open the place for traffic.

Appeal from Ellis county court; J. E. Lancaster, Judge.

Austin Ramey was convicted of keeping open his place of business on Sunday, and appeals. Affirmed.

¹ Rehearing denied February 27, 1901.

D. E. Simmons, Acting Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of keeping open his place of business, to wit, his saloon, for the sale of whisky, beer, etc., on Sunday, and his punishment assessed at a fine of \$20. The proof showed he was a clerk or porter in the employ of one Howell, and that the house or room where the business was carried on also contained a restaurant, and that the entry to the two places was through the same doorway. There was no partition between the restaurant and saloon. The restaurant was kept open on Sunday. On the particular Sunday in question it was shown appellant was in his place of business,—that is, where he was employed,—and that one Buckingham, who seemed to have been in Waxahachie at the time attending a conference, went into the saloon for the purpose of buying some whisky. He applied to appellant to buy some whisky, who responded that he guessed he could get it, and walked in behind the bar, and Buckingham gave him a \$10 note, and told him he wanted a pint of whisky “spiked” with blackberry. Appellant came from behind the counter presently, with \$9.50 in change, and a pint bottle of what witness took to be whisky. Just about that time Lee Hawkins, county attorney, walked in, and defendant turned around, and went back behind the counter, and came back, and gave witness \$9.50, but did not deliver him the bottle of whisky. He subsequently gave him the other 50 cents. Appellant was not convicted for a sale, but for keeping open his place of business.

The court charged on principals; and also charged that if the jury believed from the evidence, beyond a reasonable doubt, that defendant and one George Williams, at the time alleged, were in the house and around the bar for the purpose of traffic, to find defendant guilty. Appellant excepted to this charge, and also asked certain special instructions.

The first special instruction was not rendered necessary, as the court gave it, in substance, in the main charge; that is, that the restaurant had the right to keep open on Sunday.

Appellant also asked the court to instruct the jury, if they believed from the evidence that L. B. Howell was a merchant and engaged in the retailing of liquors in the house or building, and that the same building was occupied in connection with a restaurant, and that the building was open, that Austin Ramey was an employé of Howell, but that defendant had no control over said building, and was not permitted to open or close said building, or have any control whatever over or conduct of said business, to acquit defendant. Appellant insists that the charge of the court on principals, as affecting appellant, was erroneous, and that the charge above should have been given instead thereof. The

statute in question authorizes a conviction, not only of the owner of a store, but of his agent or employé; and the agent or employé can be convicted for keeping open, or being engaged in keeping open, a store as well as the owner, and, if he does so for the purpose of traffic, will be amenable to the penalty prescribed in the statute. Now, the proof showed that appellant was present in the saloon; that he was there for the purpose, and was actually engaged in the business, and, but for the appearance of the county attorney, would have perfected a sale of liquor. This evidence was legitimate to show that he was there engaged in the business; that is, in keeping open a saloon for the purpose of traffic. There was no error in the court's charge, and the instruction asked to be given by appellant was properly refused. The judgment is affirmed.

TRACY v. STATE.¹

(Court of Criminal Appeals of Texas. Feb. 13, 1901.)

DISORDERLY HOUSE — WHAT CONSTITUTES — APPEAL—FAILURE TO REQUEST INSTRUCTION.

1. Where the defendant, in a prosecution for misdemeanor, does not request a written charge as to the weight of accomplice testimony, the failure to instruct thereon will not be considered on appeal.

2. Under Pen. Code, art. 360, providing that any room or other place appropriated for the purpose of prostitution shall be a disorderly house, one who employs women for the purpose of prostitution, and travels with them, and receives a portion of the proceeds of the business, which is conducted in wagons, may be convicted of keeping a disorderly house.

Appeal from Wise county court; S. G. Tankersley, Judge.

Charles Tracy was convicted of keeping a disorderly house, and he appeals. Affirmed.

Bullock & Basham, for appellant. D. E. Simmons, Acting Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted for keeping a disorderly house, and his punishment assessed at a fine of \$200; hence this appeal.

Appellant complains in the motion for new trial that the court did not give a charge on accomplice testimony, and he contends that two of the witnesses were accomplices, and that such a charge should have been given by the court. The record suggests appellant is correct as to two of the witnesses occupying the attitude of accomplices. See *Stone v. State*, 22 Tex. App. 185, 2 S. W. 585. However, appellant asked no charge on this subject, and, it being a misdemeanor case, before he can complain a written charge should have been requested and refused.

Appellant also insists that the evidence fails to support the verdict, in that it is not

¹ Rehearing denied March 6, 1901.

shown, if appellant was engaged in using lewd women for immoral purposes, that he was so engaged at any house. Under our construction of article 360, Pen. Code, we do not believe it was necessary to prove that appellant was keeping the lewd women at some house for other men's uses, as the statute says that "any room or part of a building or other place appropriated or used for either purposes above enumerated is a disorderly house within the meaning of this chapter." The proof shows that appellant was carrying the women around through the country, stopping at various places, and, while lewd practices were not carried on in a tent, they had a tent along with them, and the prostitution was carried on in the hack and wagon, which were under appellant's control. He was evidently the keeper, and received a part of the proceeds paid them for prostitution. Moreover, he is shown to have hired them by the month to travel with him in the capacity of prostitutes. The judgment is affirmed.

YORK v. STATE.

(Court of Criminal Appeals of Texas. Feb. 27, 1901.)

CATTLE THEFT—CIRCUMSTANTIAL EVIDENCE.—INSTRUCTIONS—EVIDENCE—ADMISSIBILITY.

1. Defendant was hired to deliver 28 head of cattle, which he had never seen, to a person in another county. The defendant and a negro who assisted him had trouble in getting the cattle across a certain creek, and some got scattered in the timber. The negro testified that some loose cattle ran through the highway at a place near where the stolen cow was kept. The owner of the house where defendant stopped for dinner testified that defendant only had 27 head of cattle, but he delivered 28 head, including the stolen cow. Defendant claimed that he did not know he had the stolen cow until after the cattle were delivered. *Held*, that it was error to fail to submit the issue of circumstantial evidence in a prosecution for theft.

2. Where an indictment for cattle theft alleges that A. was holding the property for G., who was the real owner, and the evidence establishes such possession, it is error to instruct that defendant cannot be convicted unless G. was the owner or had the actual care and control of the stolen animals, since the accused could only be convicted on a showing that A. had possession as special owner, with the real ownership in G.

3. It is error, in an action of cattle theft, to allow a witness to testify to a material statement of facts made subsequent to the transaction by a third party.

Appeal from district court, Victoria county; James C. Wilson, Judge.

John York was convicted of cattle theft, and he appeals. Reversed.

Davidson & Bailey, for appellant. Cowan & Burney and D. E. Simmons, Acting Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of cattle theft, and his punishment assessed at two years' confinement in the penitentiary.

Exception was reserved to the court's charge for failing to submit the issue of circumstantial evidence. This was error. The facts conclusively show this is a case of circumstantial evidence. In order to make this apparent, it is not necessary to detail all of the testimony. A few of the facts will be sufficient. Appellant, employed by Thomas & Friar, undertook to deliver 28 head of cattle; driving them from Inez, in Jackson county, to the Wofford pasture, in De Witt county. Appellant had never seen the cattle until they were collected for Thomas & Friar, which seems to have been the day previous to the alleged theft. On the morning of the alleged theft, appellant and a negro undertook to carry the cattle between the points designated. The witnesses describe the day as one of the worst they had ever seen,—raining in torrents; the whole country flooded with water; creeks and rivers all overflowing their banks. About three miles from the starting point the cattle were forced to swim an overflowed creek, and, when those of the cattle which first swam across were escaping in the brush and timber on the opposite side of the creek, some of them were still on the side from which the others started. The negro, after putting the last of the cattle in the creek, swam over and gathered up those seeking to escape,—in fact, rounded up the entire bunch. While this was being done, appellant was on the opposite side of the creek, in trouble with his horse, which had fallen in the mud and water, and he was trying to get him up. While appellant was thus engaged, the negro had succeeded in gathering the cattle together, and was trying to hold them. Appellant finally crossed the creek, and joined the negro, and moved the cattle on in the direction of the Wofford ranch. The negro testified that at this point there were some loose cattle in the timbered bottom, and some of these ran through the herd. It was near this point where the alleged stolen cow was kept and milked by the alleged special owner, Waldrup. About 10 or 11 miles from this point appellant and the negro put the cattle in Lynch's small pasture, and went to a house near by and secured dinner. A mile or so before reaching this point, one head of cattle gave out and lay down. The negro was discharged at his request at this point, and two boys, who are mentioned in the application for continuance, were employed and assisted in driving the cattle thence to the Wofford pasture. The cow alluded to as being left behind was brought up and placed in the herd. Lynch testified that he saw another one of the cattle belonging to this herd left behind, and called appellant's attention to it; that appellant returned in the direction of the cow, but did not get it, and it remained there and was in his pasture at the time he testified. He further testified that appellant then had 27 head of cattle. This being true, it would

establish the fact that appellant had lost 1 head. When appellant reached the Wofford pasture, a few miles further on, he had 28 head,—the alleged stolen cow said to be one of them. Appellant was unaware that he had the stolen cow until called to his attention a few days subsequent to placing the cattle in Wofford's pasture. His theory was, if he drove the cow at all, it must have gotten into the herd at the place where the cattle scattered through the bottom after swimming the creek. The state seemed to be uncertain as to its theories, and introduced evidence to show that appellant had lost two head of cattle, one on the east side of the creek and the other at the point designated by Lynch, some 11 or 12 miles from the creek, and on the west side. It is a settled fact from this record, however, that appellant lost one head; and it is also settled that the parties who sold the cattle to Thomas & Friar were unable to identify either one of the two animals mentioned as being those sold by them to Thomas & Friar, and which were driven by appellant. Appellant had never seen the cattle before. The only evidence relied upon by the state to show theft by appellant was the fact that the alleged stolen cow was found in the Wofford pasture, the inference being that appellant put it there at the time he placed the herd spoken of in said pasture. The only party besides appellant with the herd at the creek was the negro employé, and he knew nothing of it, and assisted in driving the cattle as far as the Lynch pasture. If the cow was in the herd at that point, neither of the Lynches knew of it. If they did, they failed to testify to that fact. To say the least of it, they were not unwilling witnesses for the state. Now, the question sharply put is, when and where did appellant get this cow, and what is the proof as to taking, under the statement above? It is evident that, in order to draw a conclusion of guilt, we must assume the taking from the fact of possession; for there is not a particle of direct proof in the record from any witness who saw appellant take the animal. The trial court specially recognized this by giving a charge on reasonable account of recent possession of stolen property. Where the original taking is to be inferred from the fact of subsequent possession of alleged stolen property, it is a case of circumstantial evidence. Appellant excepted to the failure of the court to give this in charge to the jury. This error alone demands a reversal of the judgment.

The charge of the court in reference to reasonable account given by appellant of his possession is also erroneous, and has been condemned by the decisions of this court as being upon the weight of the evidence. *Wheeler v. State*, 34 Tex. Cr. R. 350, 30 S. W. 918.

It is not necessary to discuss the error assigned in regard to the refusal of the con-

tinuance, as the witnesses may be in attendance upon another trial; and, if not, the matter will be presented in different form and under different circumstances. But, as presented here, it should have been granted, and it was error to refuse it.

There is also an erroneous charge, which we desire to call to the attention of the trial court. The indictment contained three counts, one of which alleged the possession of the property in Waldrup, who was holding the same for R. W. Griffith, the real owner, and ownership in said Griffith. This count is in proper form, and alone was submitted under the charge for the consideration of the jury. Under this count the evidence must show the possession in Waldrup, and the real ownership in said Griffith. This the proof showed beyond question. The court charged the jury that, in order to convict, they must believe that Griffith was the owner, or had the actual care, control, and management, of the animal charged to have been stolen. The charge should have been that, in order to convict, Waldrup must have the actual care, control, and management as special owner, with the real ownership in Griffith, otherwise, there would have been a variance between the allegations and the proof, and the accused would be convicted upon a charge not set out in the indictment or preferred by the grand jury.

While the state's witness Kutcha was being examined, the district attorney was permitted to prove by him that in the court house in Victoria, on the day preceding the trial of this case, he stated to the district attorney and counsel for the stock association that the Gosh cow, in the Bishop pasture, was one of the cows sold to Thomas & Friar, and one of the cows delivered to defendant for Thomas & Friar. The state had failed to prove by this witness, he refusing to testify that the Gosh cow was one of the cows sold Thomas & Friar and delivered to appellant to be driven to the Wofford pasture. This was a very important fact, because, if the Gosh cow was one of those delivered to appellant at Inez, then it is more than probable that she escaped from appellant at or before reaching the creek; the alleged stolen animal being taken, if at all, after passing this creek. Under what rule of evidence this testimony was admitted, we do not understand. The judgment is reversed, and the cause remanded.

GARRETT v. STATE.

(Court of Criminal Appeals of Texas. Feb. 21, 1901.)

LARCENY OF CATTLE — OWNERSHIP — EVIDENCE — RECORDED BRAND — CLERK'S CERTIFICATE — SUFFICIENCY — CONFLICTING BRANDS — EXPLANATION — INSTRUCTIONS.

1. In a prosecution for theft of a cow, a county clerk's certificate admitted in evidence stated that on a specified date the alleged owner, naming him, had the following brand recorded

in his office, then giving the brand. *Held*, that the certificate was sufficient to render it admissible as evidence of the recorded brand.

2. Where, in a prosecution for theft of a cow, a proper certificate of the brand of the alleged owner was admitted in evidence, other testimony to reconcile and explain the conflict between the brand certified to and that actually placed on the cow claimed as stolen was then admissible to show how she came to be thus branded.

3. In a prosecution for the theft of a cow, there was proof that G. was the special owner in control of the cattle for the party from whom she was stolen. The evidence showed a conflict between the latter's brand as recorded and the actual brand on the cow claimed as stolen. On the question of ownership the court instructed that a recorded brand is evidence thereof on animals on which it is placed, and that the recorded brand was to be considered, with the circumstances in evidence, and then, if the jury believed that the animals in question were at the time of the alleged offense the property of G. as owner or special owner, ownership was sufficiently proved. *Held* error, since it was enough to leave the question to the jury without calling attention to any particular part of the testimony, and, moreover, the jury might have felt authorized therefrom to regard the actual brand on the cow as proof of ownership, whereas it was merely a mark of identification.

Henderson, J., dissenting.

Appeal from district court, Cottle county; S. I. Newton, Judge.


Jim Garrett was convicted of theft, and he appeals. Reversed.

Dalton & Britain and Montgomery & Hughes, for appellant. D. E. Simmons, Acting Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of theft of cattle, and his punishment assessed at confinement in the penitentiary for a term of two years, and he prosecutes this appeal.

On the trial the state offered the following paper in evidence, to wit:

"The State of Texas, County of Jack. Be it remembered that on the 13th day of February, 1882, J. S. Robertson, of Jack Co., Texas, had his mark and brand recorded in the clerk's office of said county, as follows, to wit:

Mark.	Brand.	Location of Brand.
	(L)	Left Side and Hip.

—To certify which I hereunto sign my name and affix my official seal, this the 20th day of July, 1900. C. M. Whipp, County Clerk, Jack Co., Texas."

This was offered for the purpose of showing ownership of the cattle alleged to be stolen in J. S. Robertson. Other proof in the case shows that Mon Garrison was the special owner in control of the cattle for said Robertson. "Defendant objected to this, because the evidence for the state all showed that the animal claimed to have been stolen was not branded with said Robertson's brand, but was branded (L). (1) All the witnesses who describe the brand on the alleged stolen animal describe it as (L). (2) Because it was

not a copy of any brand of cattle, and because the same failed to show the date of record of the same. (3) Because the same upon its face is not a certified copy of any record of the county clerk's office of Jack county, but a mere certificate of said clerk as to facts, and therefore not admissible in evidence."

In the opinion of the writer, the certificate attached was not sufficient to authorize the introduction of the record brand of Robertson. The certificate merely states as a fact that, on the 14th day of February, J. S. Robertson had the following brand recorded in the clerk's office of Jack county, then gives the brand; whereas, the certificate should have shown that the brand as given was a copy of the brand of said J. S. Robertson as it appeared from the books for recording brands in said Jack county. Article 2306. Rev. Civ. St.; *Howard v. Russell*, 75 Tex. 171, 12 S. W. 525; *Fisher v. Ullman*, 3 Tex. Civ. App. 322, 22 S. W. 523; 1 Greenl. Ev. § 485, 498, and notes. A majority of the court, however, believe that the certificate was sufficient to render the paper admissible, and so hold. The certificate of the brand being admissible in evidence, then other testimony to reconcile and explain the conflict between the brand in the purported certificate and that actually placed on the animal was admissible; that is, it was admissible to show how the particular brand on the alleged stolen animal came to be placed there instead of the recorded brand. *Harwell v. State*, 22 Tex. App. 251, 2 S. W. 606.

The court gave the following instruction to the jury: "Upon the question of ownership, you are instructed that a recorded mark and brand is evidence of ownership of the animals upon which it is placed. The state has introduced a certified copy of the record of the (L) brand and mark in evidence, which you may take into consideration, together with all the facts and circumstances in evidence before you, if any, and then, if you believe beyond a reasonable doubt that the animals in question were at the time of the alleged offense the property of Mon Garrison, as owner or special owner, then the allegation of ownership is sufficiently proven." This was objected to by appellant on the ground that the same was upon the weight of the testimony, and was calculated to impress the jury that, in the court's opinion, the allegation of ownership had been proven, and it further assumed that the alleged stolen animal was branded with said (L). If said testimony was admissible (and the court so held), then it was enough to leave the jury to determine the ownership from all the evidence in the case, without calling the jury's special attention to any particular part of the testimony. The brand, evidently, which was shown to have been placed on the animal, was not the brand as shown by the purported record, but a different brand; and, being a different brand, could only be used, as

any other flesh mark, for the identification of the animal, and could not be used as evidence of ownership, under the statute with reference to recorded brands, and, under the charge as given, the jury might have felt authorized to regard the brand in some way as proof of ownership. We would observe here, lest there be some misapprehension, that, while the evidence was admissible with reference to the owner's recorded brand and the brand which the testimony tended to show was on the animal, all this testimony was admissible, not for the purpose of showing ownership under a recorded brand, because the brand as shown on the animal was not the recorded brand of the prosecutor, but same could be used as any other flesh mark, for the purpose of establishing the identity of the animal, and thus aiding, as a circumstance, in establishing the ownership of the same. To illustrate, if A., a merchant, had lost a brown coat, with A.'s distinctive price mark thereon, out of his stock by theft, and B. was subsequently, recently thereafter, found in possession of a coat of the same color and character, this would be some evidence of identity, and so tend to establish ownership. If, in addition to this, the price mark of A. was found on the coat, and it was shown that no other person in that community used such a price mark, these would be strong circumstances identifying the coat as the one stolen from A. While there is no statute, as in the case of the brand of cattle, making the price mark evidence of ownership, still these facts, with other circumstances, might constitute plenary proof of identity, and thus establish ownership in A. And so, in this instance, the brand constituting a distinctive and peculiar flesh mark, together with the color of the cow lost being of the same color and character as that found in the possession of appellant, these, with other circumstances, might serve to identify the animal as the one alleged to have been stolen, and thus establish the ownership. However, as stated before, we do not believe the court should have referred to the brand as was done in the charge given. If it was referred to at all, the jury should have been instructed that the brand on the alleged stolen animal, being different from the recorded brand of the owner, did not constitute evidence of ownership, and they could only look to the same as any other flesh mark which might serve to identify the animal. The judgment is accordingly reversed, and the cause remanded.

KENNARD v. STATE.

(Court of Criminal Appeals of Texas. Feb. 21, 1901.)

CRIMINAL LAW—MOTION IN ARREST OF JUDGMENT—SELECTION OF JURIES—DISCRIMINATION AGAINST NEGROES—MURDER IN SECOND DEGREE—EVIDENCE.

1. A suggestion, on a motion in arrest, that negroes had been discriminated against in the

selection of grand and petit juries, comes too late.

2. There was evidence showing that, on the night prior to that on which defendant killed deceased, there had been trouble between them, and, on the morning preceding the killing, defendant threatened to take the life of deceased, stating that, if the latter adhered to his acts and statements of the previous night, he (defendant) would be in the county jail before 12 o'clock that day. That night he armed himself, went to the place of the difficulty, awaited the coming of deceased, and when he came brought up the matter. Thereupon a conflict ensued, in which deceased was shot and killed. Held, that a conviction of murder in the second degree would not be reversed, though there was evidence which strongly tended to reduce the killing to manslaughter.

Appeal from district court, Grimes county; J. M. Smither, Judge.

William Kennard was convicted of murder, and he appeals. Affirmed.

D. E. Simmons, Acting Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of murder in the second degree, and his punishment assessed at seven years' confinement in the penitentiary.

The record is before us without bill of exceptions. Subsequent to the conviction, appellant suggested in arrest of judgment that negroes had been discriminated against in the selection of grand and petit juries in Grimes county, where the killing and the conviction occurred. This should have been presented before, and not subsequent to, the trial. *Garnett v. State* (Tyler Term, 1900), 60 S. W. 765, and authorities there cited. It is therefore unnecessary to review the matters presented in the motion in arrest of judgment. In passing, we would say that the evidence on the motion in arrest of judgment does not support the contention. At prior terms of the court covered by the testimony negroes had been impaneled upon grand and petit juries.

In motion for new trial appellant contends that the evidence is insufficient to support the conviction. There is evidence which strongly tends to reduce the killing to manslaughter, but the evidence as well justifies the conclusion of the jury that appellant was guilty of murder, and we cannot reverse because the jury saw proper to adopt the latter instead of the former theory. There had been trouble between the parties at a social gathering the night prior to the killing. On the morning of and preceding the killing appellant threatened to take the life of deceased, stating, if deceased adhered to his acts and statement on the previous night, that he (appellant) would be in the county jail before 12 o'clock that day. He armed himself, went to the place of the difficulty, and awaited the coming of deceased, and when he came brought up the matter. A conflict ensued, in which appellant shot and killed deceased. If appellant went to the point designated to execute his threat, and

brought on the difficulty which terminated in death, he certainly would be guilty of at least murder in the second degree. This theory is strongly supported by the testimony. It is not necessary to state the evidence bearing upon manslaughter. The judgment is affirmed.

FRAZIER v. WACO BLDG. ASS'N.¹
(Court of Civil Appeals of Texas. March 6, 1901.)

TRESPASS TO TRY TITLE—ISSUES AND PROOF—VARIANCE—DESCRIPTION IN SHERIFF'S DEED—LATENT AMBIGUITY—PAROL EVIDENCE—ADMISSIBILITY—NEW TRIAL—GROUNDS—WAIVER.

1. The abstract of title filed by plaintiff in an action of trespass to try title stated that he relied on "a copy of an execution," while the instrument read in evidence was a copy of an alias execution. *Held*, that there was no variance.

2. Parol evidence is admissible to explain or remove a latent ambiguity in the description of land conveyed by a sheriff's deed.

3. The description of land given in a petition in trespass to try title contained an additional description, but did not tend to vary the description stated in the instruments of title relied on. *Held*, that there was no variance between the pleadings and proof.

4. Parties claiming title as against a judgment debtor under a sheriff's deed are not required to connect him with the sovereignty of the soil, in order to recover judgment against him in an action of trespass to try title.

5. That a building association has no right to sue, because it has not paid its franchise tax, is not ground for a new trial, unless the objection is raised before judgment; and, if raised for the first time on motion for a new trial, it is properly disregarded.

Appeal from district court, McLennan county; Marshall Surratt, Judge.

Action by the Waco Building Association against James C. Frazier. From a judgment for plaintiff, defendant appeals. Affirmed.

Jas. I. Moore, for appellant. L. W. Campbell, for appellee.

FISHER, C. J. The appellee, Waco Building Association, which was the plaintiff below, filed its suit in the usual form of trespass to try title against appellant and several other defendants on the 29th day of June, 1899, and on November 24, 1899, filed its first amended original petition, pleading specially its title to the land in controversy, on which trial was had, and in which appellee alleged: That it was a corporation duly incorporated under the laws of the state of Texas, with its office and place of business in Waco, McLennan county, Tex. That on the 14th day of May, 1897, it recovered a judgment in cause No. 5,726 in the Nineteenth district court of McLennan county, Tex., against James C. Frazier and other defendants in said suit, for a large sum of money, which judgment was still unsatisfied and unpaid. That on May 15th it caused an abstract of said judgment to be made out, filed, recorded, and indexed in the judgment

records of McLennan county, Tex., alleging and claiming a judgment lien on the land sued for. That afterwards, on July 5, 1897, it caused to be issued on said judgment an alias execution, which alias execution was delivered to the sheriff of McLennan county, Tex., and by him on same day was levied upon a number of pieces of real estate; among others being the following, which was levied upon as the property of the defendant James C. Frazier: "Lots Nos. one (1), two (2), three (3), four (4), and five (5) in block No. seven (7), situated in East Waco, McLennan county, Texas, on the northwest side of Elm street, in what is known as 'Renick's Addition to the City of Waco,' and sometimes called the 'Railroad Addition to the City of Waco.'" That, pursuant to said levy, sale was made of said lots, and the same were bid in by appellee, and deed executed to it therefor, which deed was dated October 4, 1897, and acknowledged November 5, 1897, and was duly recorded in the deed records of McLennan county, Tex. That on November 10, 1897, it caused to be issued on said judgment another alias execution, which was on November 24, 1897, levied upon the same property described above. That the reasonable rental value of said property was \$100 per month, and that appellant had been receiving the rents since the date of its deed,—and referred to and made a part of its amended petition the abstract of title previously filed in the cause, and prayed for judgment for the restitution of the premises sued for, and for rents and costs. And, in the event it should be held not to be entitled to restitution of the premises, it prayed for foreclosure of its judgment and execution lien, and for general relief. On the trial of the cause, appellee relied entirely upon its title, and abandoned its prayer for foreclosure of its judgment and execution lien. The defendants other than Frazier disclaimed all interest in the premises sued for, and were allowed judgment against appellee for their costs, and do not, therefore, join in this appeal. Defendant James C. Frazier on February 1, 1900, filed his first amended original answer; setting up (1) general demurrer; (2) plea of not guilty; and (3) set up and claimed the premises sued for as his homestead, alleging his former occupancy of the premises as a homestead with his family, that he claimed the same as a homestead, that he had no other homestead then, that he had never procured any other homestead, that he never left the premises sued for with the intention of abandoning them as a homestead, and that he had never abandoned said premises, and that he still claimed the same as a homestead,—and prayed for a decree of court declaring the premises sued for to be his homestead, and to be exempt from sale under the judgment of appellee, and that the sale heretofore made of the premises be set aside, and the deed made to appellee be canceled and annulled, and the cloud upon

¹ Writ of error denied by supreme court.

appellant's title cast by said sale and deed be removed. On the issues thus formed, on May 28, 1900, the cause went to trial before a jury, and resulted in a verdict and judgment for appellee for the land sued for, under a peremptory charge of the court.

We find the following facts: (1) Plaintiff introduced and read in evidence a certified copy of a judgment of the Nineteenth district court of McLennan county, Texas, rendered on the 14th day of May, 1897, in cause No. 5,726, entitled, "Waco Building Association v. Jas. I. Moore et al."; the other defendants in said cause being Thomas Moore, John Moore, T. P. Moore, Luke Moore, Bart Moore, and defendant James C. Frazier; said judgment being against the defendants Jas. I. Moore, Thos. Moore, T. P. Moore, Luke Moore, Bart Moore, and J. C. Frazier for the sum of \$17,002.72, and against James I. Moore, John Moore, Tom P. Moore, Luke Moore, Bart Moore, and James C. Frazier for \$14,610.18, and against James I. Moore, John Moore, T. P. Moore, Luke Moore, and Bart Moore for \$3,979.52; all said sums bearing interest from date at 6 per cent. per annum, which judgment is recorded in volume U, on pages 289 et seq.,—one of the minute books of said Nineteenth district court. (2) An alias execution based on said judgment, dated July 5, 1897, issued by the clerk of this court, with the return of the sheriff indorsed thereon, showing it came to his hands on the 5th day of July, 1897, and was on same day levied upon certain property described in said return. Among the list of the property thus set out and described is the following, which said return shows to have been levied upon as the property of defendant James C. Frazier, to wit: "Lots 1, 2, 3, 4, and 5 in block 7 of the plat of East Waco, situated on the N. W. side of Elm street in said East Waco, McLennan county, Texas;" said alias execution being further indorsed, showing the property above described to have been advertised according to law for the time and in the manner required for such sales, and the sale of the same at the court-house door in Waco, McLennan county, Tex., on Tuesday, the 4th day of October, 1897, when the same was struck off to the Waco Building Association, the plaintiff in this cause, for the sum of \$1,900; and said alias execution was returned so indorsed and unsatisfied as to the remainder due thereon; said return being signed, "J. W. Baker, Sheriff McLennan County, Texas, by J. H. Lockwood, Deputy." (3) An affidavit of L. W. Campbell, attorney for plaintiff, settling up the loss of the original deed made to plaintiff by J. W. Baker, sheriff of McLennan county, Tex., dated October 4, 1897; said affidavit being dated December 1, 1899 and filed among the papers of this cause on the 2d day of December, 1899. (4) An abstract of the judgment of the Nineteenth district court of McLennan county, Texas, in cause No. 5,726, styled, "Waco

Building Association v. James I. Moore et al.," being the judgment first introduced in evidence by the plaintiff in this cause; showing same to have been filed with the clerk of the county court of McLennan county, Tex., on the 15th day of May, 1897, and recorded and indexed in the judgment records of said county on same date, in volume 5, on pages 28 and 29 of said record. (5) Certified copy of deed from J. W. Baker, sheriff of McLennan county, Tex., to plaintiff, dated October 4, 1897, and filed for record in the clerk's office of McLennan county, Tex., on the 6th day of November, 1897, and recorded in volume 119, on page 394,—one of the deed records of McLennan county, Texas,—which deed purported to convey to plaintiffs the following described property, as the property of the defendant James C. Frazier, to wit: "Lots 1, 2, 3, 4, and 5 in block 7 on the plat of East Waco, situated on the N. W. side of Elm street in said East Waco, in McLennan county, Texas." We also find that the appellant, James C. Frazier, was at the time of the levy of the writ of execution and the sale thereunder the owner of lots 1, 2, 3, 4, and 5 in block 7 on the plat of East Waco, which block was situated on the northwest side of Elm street, as shown by the plat and map of East Waco; and we find from the evidence of the appellant, Frazier, in connection with the description given in the instruments above set out, that the above-described property is the property in controversy, and was the property levied upon and sold and conveyed by the sheriff's deed. We also find that the property was not at the time the homestead of appellant, Frazier, but his homestead was, at the time of the levy and sale, situated in Bosque county, Tex.

There is no merit in appellant's first assignment of error, which is as follows: "The court erred in permitting plaintiff to introduce and read in evidence the certified copy of the alias execution in the case of the Waco Building Association v. James I. Moore et al., because the instrument offered in evidence is not described in the abstract of title filed by plaintiff in this cause, in this: the abstract refers to a certified copy of an execution, etc., while the instrument read in evidence is a certified copy of an alias execution, and not an original execution." There is no variance between the instrument described in the abstract of title and that offered in evidence. The abstract of title calls for a copy of an execution. The instrument offered in evidence which was objected to is a copy of an alias execution. The abstract did not state that the plaintiff relied upon an original execution, but used the expression "copy of an execution." An alias execution is undoubtedly an execution, although it may not have been the first that was issued.

The appellant objected to the evidence of title offered by appellee because the property was not sufficiently described in the return indorsed upon the execution and in the sher-

iff's deed, and, in this connection, contends that the parol evidence of the appellant, Frazier, elicited by appellee upon his cross-examination, was not admissible for the purpose of aiding the description or of identifying the land in controversy. The description given in the return of the officer indorsed upon the execution and in the deed executed by him is not so uncertain that it could not be given application. It describes and conveys lots 1, 2, 3, 4, and 5 in block 7 of East Waco, situated on the northwest side of Elm street in East Waco, in McLennan county, Texas. This may be a good description; but it is contended by appellant that it is uncertain, for the reason that the plat of East Waco shows that there are other blocks and lots of the same number in East Waco in a northwest direction from Elm street, but there is no block No. 7 on the northwest side of Elm street. The block called for in the description given must lie along the side of Elm street. The testimony of Frazier upon his direct examination is to the effect that the map of East Waco shows that there are other blocks in a northwest direction from Elm street; but there are none but block 7, which he owned and claimed, situated on the side of Elm street. This witness, in effect, upon cross-examination, testified that the land described in the instruments of title offered by the plaintiff was the lots in controversy, and they were the only lots that he owned on the northwest side of Elm street in East Waco. This portion of his evidence was objected to by the appellant. If there is ambiguity in the description, it is not patent, but arises only when the attempt is made to apply it to the lots in controversy. An ambiguity of this character—in other words, one that is latent—can, as in transactions between individuals, be explained or removed by extrinsic evidence. But there are decisions to the effect that a resort to such evidence is not permissible to aid a description in a sheriff's deed. There never have been any solid reasons given why such a distinction should have ever been recognized; and—wisely, we think—the tendency of the recent decisions of the supreme court of this state is to ignore any such distinction, and to recognize the right to invoke the aid of parol evidence in order to identify the land described. *Wilson v. Smith*, 50 Tex. 365; *Hermann v. Likens*, 90 Tex. 448, 39 S. W. 282; *Pierson v. Sanger*, 96 Tex. 163, 53 S. W. 1012.

In disposing of the third assignment of error, it is only necessary to state that we do not think there was any variance between the description of the land described in the plaintiff's petition and that in the instruments of title upon which it relied. The description given in the petition, complained of, was simply an additional description, but did not tend to vary that stated in the instruments of title offered by the plaintiff.

We do not understand the law to be as

contended for in appellant's fourth assignment of error. The appellee was not required to extend its title back beyond Frazier, the judgment debtor, and connect him with the sovereignty of the soil.

The court was correct in the peremptory instruction given to return a verdict in favor of the appellee. The evidence, beyond controversy, clearly shows that the appellant had no homestead interest in the property in controversy, but his homestead was at the time of the levy and sale, and for many years prior thereto, in Bosque county, Tex.; and, as to the question of description, there was really no issue of fact raised concerning it. The description given in the instruments relied upon by the plaintiff, together with the only parol evidence bearing upon that question in the record (that is, the testimony of the appellant himself), clearly and unmistakably establishes the fact that the lots described were those that were conveyed by the sheriff's deed to the appellee.

There was no error in the court's overruling the amended motion for a new trial on the grounds claimed in appellant's eighth assignment of error. The right of the appellee to bring and maintain the suit because it had not paid its franchise tax should have been raised before judgment, and came too late when first presented by the motion for a new trial. Further, we are also of the opinion that the subsequent payment of the tax related back and revived whatever rights the appellant had at the time the suit was instituted. We find no error in the record, and the judgment is affirmed. Affirmed.

LEE v. BRITISH & AMERICAN MORTG. CO.

(Court of Civil Appeals of Texas. March 6, 1901.)

HOMESTEAD—MORTGAGE—FORECLOSURE—RES JUDICATA—RIGHTS OF PURCHASER.

1. A judgment sustaining defendant's plea of limitations in an action on notes, with a foreclosure of a trust deed given to secure payment thereof, does not deprive plaintiff of any rights he may have to foreclose the deed under the power of sale, since such judgment merely declares that the remedy sought in the action does not exist.

2. A surviving husband having power to create a valid lien on his interest in the homestead by a deed of trust, a purchaser under such deed will acquire all the rights of the husband, including the right to the use and possession thereof.

3. The provision of Const. art. 16, § 52, that in a controversy between the heirs and the surviving husband or wife the homestead cannot be partitioned during the life of the survivor, has no application when a third party asserts rights in the homestead as a purchaser under a valid deed of trust executed by the husband after his wife's death.

Appeal from district court, Brown county; J. O. Woodward, Judge.

Action by the British & American Mortgage Company against W. J. Lee. From a judgment for part of the relief demanded,

both parties appeal. Affirmed in part, and reversed in part.

G. N. Harrison, for plaintiff. T. C. Wilkinson, for defendant.

FISHER, C. J. On May 7, 1900, appellee filed its second amended original petition, upon which trial was had. It alleged substantially that on February 11, 1890, appellant executed and delivered to Albert R. Shattuck, trustee, a certain deed of trust upon the tracts of land in controversy in this suit, for the purpose of securing the payment of certain indebtedness evidenced by notes due Albert L. Richardson, and which notes on October 14, 1892, became the property of appellee; that, default having been made in the payment of said indebtedness, the substitute trustee on May 2, 1899, sold said land under the power given in said deed of trust, at which sale appellee became the purchaser, and received a deed to same from said trustee; that about the — day of May, 1899, appellant entered upon said lands and ejected appellee therefrom, and still unlawfully withholds the same from appellee, converting the rents, profits, revenues, etc. Appellee prayed for judgment for the title to and possession of said lands. Appellant filed his first amended original answer on December 7, 1897, in which, among other things, he claimed homestead rights in the 160-acre tract. On the same day the interveners, Clara Pearl Lee and Emma Cuma Lee, filed their third amended answer, in which they allege, among other things, that they are the children of appellant, W. J. Lee, and, as the heirs of their mother, who was dead at the time of the execution of said deed of trust, are the owners in fee simple of one-half of the property in controversy, same being the community property of said W. J. Lee and wife. Appellee filed its third supplemental petition on May 7, 1900, in which it denied the allegations contained in the pleadings of appellant and interveners, pleaded abandonment of homestead, if any, and alleged, among other things, that said 160-acre tract of land was incumbered by a valid lien fixed upon it before it acquired its homestead character, and that the money obtained by virtue of said deed of trust was intended to be used and was used in paying off and discharging said lien, and that therefore appellee was subrogated to the rights of said original lienholder. On July 17, 1900, the appellant, W. J. Lee, filed his first amended supplemental answer in reply to plaintiff's said second amended original petition, which supplemental answer consisted of a general denial and the following special plea, viz.: "That on the 4th day of November, A. D. 1892, the plaintiff herein, who claimed to be the owner of the land in controversy by conveyance from one Albert L. Richardson, instituted suit in this court against this defendant in the ordinary

form of trespass to try title for the recovery of said land; that on the trial of said cause at the December term, 1894, of this court, judgment was rendered against the plaintiff; that plaintiff obtained a new trial at said December term of court, and by his second supplemental petition, filed May 24, 1895, for the first time declared upon the note and deed of trust described in plaintiff's said second amended original petition, and asked a judgment upon said note and a foreclosure of the lien contained in said deed of trust in the event the court held it had no title to the land in controversy; that at a subsequent term of this court this defendant excepted to the setting up of said cause of action by supplemental petition, which exception was by the court sustained; that thereupon the plaintiff, by first amended original petition, filed December 6, 1897, by one count of said petition sought the recovery of said land in the form of trespass to try title, and by a second count declared upon said note and deed of trust, and prayed that, in the event it was refused the recovery of said land, it have judgment on said note and a foreclosure of said deed of trust, etc.; that at the January term, 1899, of this court, this defendant excepted to said second count of plaintiff's said first amended original petition, in which it sought a recovery upon said note with a foreclosure of said deed of trust upon the ground that said cause of action was barred by the statute of four years' limitation, which exception was by the court sustained, and said cause was continued till the next term of court; that afterwards, to wit, on the 22d day of May, 1899, this plaintiff, claiming to be the owner and holder of said note and deed of trust, acting through one O. R. Sholars, substitute trustee, sold said property at public outcry under the power contained in said deed of trust, and at the sale became the purchaser of said property, and received a deed to same from said O. R. Sholars; that at the time of said sale under said deed of trust, at which the plaintiff herein became the purchaser as aforesaid, this suit was still pending in this court and undisposed of, the judgment sustaining said exception on account of the bar of the statute of limitations was in full force; and that this plaintiff is now relying solely upon said deed received from O. R. Sholars, trustee as aforesaid, for a recovery of said land, as is shown by its said second amended original petition. Wherefore this defendant says that the plaintiff, having elected to sue upon said note and ask a foreclosure of said mortgage or deed of trust, and said issue having been decided against it, and said remedy having been exhausted, was thereupon and is now estopped and debarred from relying upon any title or alleged rights derived by a sale of the property in controversy under the power contained in said deed of trust, and of this he prays judgment of the court." On July 17, 1900, plaintiff filed

its fourth supplemental petition, containing a general demurrer to defendant's said first supplemental answer, set out above, and a general denial. The court sustained said general demurrer, to which action the defendant, W. J. Lee, then and there excepted. The court, in a trial on the merits, gave judgment for the plaintiff for the 320-acre tract of land in controversy, and for one-half of the 160-acre tract,—the other half thereof being adjudged to the interveners as the community interest of their mother,—and also provided that no writ of possession should issue for the one-half of said 160-acre tract so recovered by plaintiff, and that there should be no partition of same, so long as the defendant, W. J. Lee, should occupy it as a homestead. The court also gave judgment for the defendant, W. J. Lee, for the sum of \$223, rents and damages, and for the interveners for the sum of \$175, rents and damages; and adjudged that they pay one-half of all costs incurred in this cause prior to the 22d day of May, 1899.

The case comes to this court on the findings of fact and conclusions of law of the trial court, which are as follows:

"(1) I find that on the date alleged in plaintiff's third amended original petition, upon which this case was tried, the defendant, W. J. Lee, to secure the sum of \$800, principal, evidenced by his promissory note and certain coupon notes for installments of interest, all that day executed by him to Albert L. Richardson for the sum of \$800 then loaned to him by said Richardson, executed his deed of trust conveying the two tracts of land described in plaintiff's said petition to Albert R. Shattuck as trustee for said Richardson. (2) I find that said deed of trust contained power of sale, with right to appoint substitute trustee as alleged by plaintiff, and, in short, that it contained all the powers, terms, and provisions which plaintiff alleges it to have contained. (3) I find that at the time he executed said deed of trust and notes said W. J. Lee was a widower with two minor children, the interveners in this case; his wife having died November 9, 1881. (4) I find that said deed of trust was not executed to secure a community debt of defendant and his deceased wife, but that the debt so secured was contracted by him after his wife's death. (5) I find that the 160 acres of land was at the time the deed of trust was executed the homestead of W. J. Lee and interveners, although they were not living upon it as such,—the interveners then being of tender years, and both being girls living with defendant's mother,—but that it was the intention of defendant to have them reside with him and to remove them upon said 160 acres as soon as their ages would permit, but that said 160 acres was rented at the time said deed of trust was executed. (6) I find that plaintiffs were charged with notice of the homestead character of said 160-acre tract, and of interveners' title to $\frac{1}{2}$ of same,

by the recitals contained in the patent issued by the state to said W. J. Lee for the same, which patent showed said tract to be a homestead donation. (7) But I find that the 320 acres was not any of it used by defendant in connection with his homestead, and that it lay about a mile away from said 160-acre tract; was not improved nor inclosed; that defendant had other lands equally as available for homestead purposes as any part of said 320 acres; and that said Richardson and his trustee took said deed of trust and paid said money without any notice in law or in fact of any homestead claim to any part of said 320-acre tract. (8) I find that the allegations in plaintiff's said petition as to the default of defendant in paying said notes, the refusal of said Shattuck to act, the appointment of O. R. Sholars substitute trustee, the assignment and conveyance to plaintiff by said Richardson of said notes and all rights had by him under and by virtue of said deed of trust, the ratification by plaintiff of the appointment of said Sholars as substitute trustee, the sale by said Sholars, as such substitute trustee, of said two tracts of land under the power contained in said deed of trust in manner and form as alleged by plaintiff, and the purchase by plaintiff at said sale, and, in short, all the allegations in plaintiff's said petition relating to the facts aforesaid and the proceedings and sale under said deed of trust, are true. (9) I find that, if any of the community funds of W. J. Lee and the mother of interveners was used in the purchase of said 320-acre tract of land, neither said Richardson nor Shattuck had or was charged with any notice of that fact; that the legal title to said 320 acres vested in defendant by purchase long after his wife's death, the deed by which it was conveyed to him bearing date the 9th day of February, 1884; and that said Richardson and his said trustee took said deed of trust and paid the money loaned thereon in good faith, and without any notice that community funds had been expended in its purchase, or that interveners had or claimed any right to it. But I find that not more than \$55 of community funds were expended in its purchase, and that the whole consideration was \$205. (10) I find that the legal title to said 160-acre tract of land was in W. J. Lee, and that he acquired the same after the death of his wife; the patent to him bearing date February 11, 1886. But I find that he actually settled upon said land in 1879, and filed upon said tract on the 11th day of February, 1890, during the lifetime of his wife, the mother of interveners, and that they continued to reside upon the same as homestead to the time of her death, and that after her death he continued to reside there until he completed the three-years occupancy and obtained a patent. (11) I find that one of the interveners has ceased to be a member of her father's family, but that the other one, who is now above 20 years of age, resides

with her father and constitutes a member of his family. (13) I find that defendant has never abandoned or intended to abandon said homestead, but that he was forcibly and wrongfully ejected from the same and from said 320-acre tract by plaintiff on the 23d day of March, 1893, and that he has ever since intended to return to and occupy it with his family as a homestead. (14) I find that, after dispossessing defendant as aforesaid, plaintiff wrongfully held possession of said land until May 22, 1899. (15) I find that the rental value of said 160-acre tract was \$50 per year, and that the rental value of said 320-acre tract aggregated \$48 for the full time for which it was wrongfully withheld from defendant. (16) I find that interveners are entitled to one-half the rents and profits on the 160-acre tract, and that defendant is entitled to the other half, and the \$48 allowed for the 320-acre tract.

"Conclusions of law: (1) I conclude, as a matter of law, upon the above findings, that the plaintiff is entitled to judgment against defendant and interveners for the title and possession of the 320-acre tract of land. (2) That plaintiff is entitled to judgment against defendant and interveners for the title to an undivided half of the 160-acre tract, but that they are not entitled to partition or to be admitted to possession of the same so long as W. J. Lee shall occupy said 160 acres as a homestead. (3) That defendant is entitled to judgment against plaintiff for \$223 damages for rents and profits, and that interveners are entitled to judgment against plaintiff for \$175 damages for rents and profits. (4) That the deed of trust through which plaintiff derails title, in so far as the same affects interveners' interest in said 160-acre tract, should be canceled, and that interveners should have judgment for their undivided half interest in said 160-acre tract."

The appellant's first assignment of error complains of the ruling of the court in sustaining a demurrer interposed by the appellee to appellant's first supplemental answer. The contention is urged that as the plaintiff had previously elected to sue upon the notes, and asked for a foreclosure of the mortgage or deed of trust, the judgment of the court as to that action in favor of appellant on his plea of limitation would estop the appellee from foreclosing the deed of trust by sale of the property according to the terms of the instrument by the trustee. In other words, having once elected to recover upon the note and to foreclose the lien, that was an election of the remedy that appellee would pursue, and was tantamount to a waiver of all other rights it might have under the deed of trust. The doctrine contended for by the appellant, in our opinion, is not applicable to this case. This is not a case in which the appellee had two remedies, which by the application of either he could accomplish the same result; for by the lapse of time, and the interposition of the defense of limitation in-

terposed by the appellant to the original action, the remedy in that particular did not, in legal effect, exist. The effect of the judgment sustaining appellant's plea of limitation was to declare that as to the remedy then invoked by the plaintiff he had no cause of action; that, in view of the bar of the statute, the courts would not extend relief to him in the manner in which in that particular suit it was sought. But the effect would not be to deprive him of other rights that he might have to foreclose his deed of trust independent of any action upon the part of the court. *Davis v. Converse* (Tex. Civ. App.) 46 S. W. 910.

We are not inclined to agree with the contention of appellant insisted upon in his second assignment of error, to the effect that the court erred in so much of the judgment as decreed one-half the costs against the appellant Lee and the interveners.

Appellee has a cross assignment of error to the effect that the court erred in that part of its judgment wherein it was decreed that the plaintiff was not entitled to partition and to be admitted to possession of the 160-acre tract so long as the defendant, Lee, should occupy it as a homestead. The deed of trust under which the lien in this case was foreclosed was executed by appellant, Lee, after the death of his wife, and when he was a single man. He was at the time occupying the property with his daughters, the interveners, as his homestead. The decree of the court protected the interveners in their one-half interest in the 160 acres in controversy, but denied the right of partition and possession of the appellee so long as the appellant, Lee, should occupy the premises as a homestead. As said in *Hall v. Fields*, 81 Tex. 558, 17 S. W. 82, "the children have no homestead rights, as such, in the home of either their father or their mother," and further to the effect that their homestead right, if any, must be asserted by a guardian, if minors, properly appointed by the court. The findings of fact upon this subject do not show that the interveners are entitled to any homestead interest in the 160 acres. It is said in *Lacy v. Rollins*, 74 Tex. 566, 12 S. W. 314, and subsequent cases, that the surviving husband can create a valid incumbrance and lien upon his interest in the homestead. The appellant having executed the deed of trust for this purpose, a purchaser under it would acquire whatever right or interest the appellant had in the property at the time the instrument was executed, and the sale by virtue of it. By virtue of article 16, § 52, of the constitution, in a controversy between the heirs and the surviving husband or wife the homestead during the lifetime of the latter could not be partitioned; but in *Ford v. Sims* (Tex. Sup.) 57 S. W. 20, that provision of the constitution and the statutes made in pursuance of it are held to apply only to controversies between the heirs and the surviving husband or wife, and have no application

when a third party, a creditor, asserts a right in the homestead property by virtue of a title acquired from the survivor. The trial court in support of its judgment evidently relied upon an expression contained in the opinion in the case of *Harle v. Richards*, 78 Tex. 80, 14 S. W. 257. We are not prepared to say that that case is directly in point upon the question involved here, but, if it could be held that such is its effect, we doubt its correctness. If the surviving husband has the power by deed of trust to create a valid lien on his interest in the homestead, in the absence of some statute to the contrary, we see no reason why a purchaser under that deed of trust would not acquire all the rights as against the husband that would exist in a case where the latter had by deed directly conveyed the property to the purchaser. If Lee in this instance had by deed conveyed his interest in the property to appellee, the latter clearly would have been entitled to possession, and could, in a proper action, have recovered. A sale by the trustee under the deed of trust in pursuance of its terms should be given the same effect. Lee, by the terms of that instrument, made the trustee his agent, and empowered him to sell; and when, in the pursuit of the agency, this power was accomplished, the deed and conveyance executed would have the same effect in law as if executed by Lee, and would carry with it all of the uses and rights of ownership to the property conveyed, which, as one of its incidents, includes use and possession. Therefore we think that appellee is correct in its contention upon this question, and that the court should have decreed a writ of possession in favor of appellee as against the appellant, Lee, so far as his interest in the 160 acres is concerned, and that the court should have taken the proper steps as requested, and as provided by law, to partition this portion of the land in controversy between the appellee and interveners.

In disposing of appellee's second cross assignment of error, it is only necessary to state that we agree with it in its contention that the interveners were only entitled to the sum of \$154.16, and we think that the calculation made by appellee as to this amount is practically correct.

In accordance with the disposition that we have made of the question raised by appellee's first cross assignment of error, the appellant is not entitled to any damages or rents arising from appellee's possession of the 160-acre tract. The judgment in appellant's favor in the sum of \$48 for rent of the 320-acre tract is correct. The judgment of the court is affirmed so far as it decrees title in appellee, and is reversed, with instructions to render its judgment so as to decree appellee a writ of possession for the interest of appellant in the 160-acre tract, and to take such steps towards partitioning the same as is provided by law, and to render judgment on the issues of damages and rents in controversy in

accordance with the opinion of this court. Affirmed in part, and reversed, with instructions, in part.

GEORGE et al. v. RYON.

(Court of Civil Appeals of Texas. March 1, 1901.)

MORTGAGES—VENDOR'S LIEN—HOMESTEAD—INTENTION TO FARM HOMESTEAD.

1. Where a suit was brought to establish a note secured by a trust deed of land as a claim against the deceased maker's estate, and the widow answered that the land was a homestead, and asked for the removal of the lien as a cloud on her title, notwithstanding that plaintiffs had not sought to establish their lien they were entitled to resist the claim of homestead.

2. Const. art. 16, § 51, declares that a homestead in a city, town, or village shall consist of a lot or lots used for the purpose of a home, and a homestead not in a town or city of a certain quantity of land, in one or more parcels. *Held*, that where a householder lived with his family on lots owned by him in a town, and without the town lines he owned a parcel of land, the fact that he cultivated it as a farm, and made his living from the same procuring therefrom his firewood and all the vegetables used by the family, and that his cows were pastured on it, did not entitle him to claim the land as a homestead.

3. The intention of the householder and his wife to move on the farm when they were able to build thereon was not sufficient to impress the farm with the character of a homestead.

4. Where suit was brought to establish a note as a claim against a decedent's estate, and on appeal to the court of civil appeals the judgment of the district court in favor of plaintiffs for the amount of their note and interest and attorney's fees was affirmed, on motion for rehearing, the appellees' request that the court file conclusions of fact and law would be granted.

5. Deceased executed a note payable one year after date, with interest, and 10 per cent. of the amount additional as attorney's fees if placed in the hands of an attorney for collection. The note was transferred to plaintiffs, it having indorsed thereon two renewals in proper form. On the death of deceased, administration was granted on his estate, and the note placed in the hands of attorneys for collection, duly verified as a claim against his estate, presented to the administratrix for allowance, rejected by her, and suit thereon seasonably brought. The note was given for money loaned deceased to pay a judgment against him, and was wholly due and unpaid; and there was no evidence as to whether or not the judgment was satisfied, or was transferred to remain as collateral security in the hands of the holder of the note. *Held*, that in an action on the note the verdict of the jury could not have been otherwise than in favor of plaintiffs for the amount of their claim against the estate.

6. Where a suit was brought to establish a note as a claim against the estate of the maker, the note having been secured by a trust deed on land, and duly verified as a claim against the estate, it was not necessary to make the heirs parties, even though plaintiffs had sought to establish their lien.

7. Where a suit was brought to establish a note as a claim against the estate of a deceased maker, the note having been given to raise money for the payment of a judgment against the maker, it was not necessary for the holders to show that the judgment had not been paid; there being no evidence that the payees of the note had any connection therewith, or that it was kept on foot as security for the note.

On motion for rehearing. Motion granted in part.

For former opinion, see 59 S. W. 825.

GARRETT, C. J. Pending the motion for a rehearing in this case we certified to the supreme court for decision the question of whether or not the district court had jurisdiction to determine the existence of a lien on land belonging to an estate in a suit upon a rejected claim. The answers of the supreme court reversed our decision of the question. See opinion of supreme court, delivered January 24, 1901. 60 S. W. 427, 1 Tex. Ct. Rep. 416. Hence it becomes necessary for this court to consider the appellants' assignment of error attacking the finding of the jury that the land upon which the appellants had the deed of trust was the homestead of V. M. Ryon and her husband at the time J. W. Ryon executed the deed of trust. This question was pretermitted on the former hearing, as not necessary to a decision of the case. The appellants did not invoke the action of the district court to establish their lien upon the land, but the appellee did invoke it to remove the lien as a cloud upon her homestead right; and, as held by the supreme court, "the lien was an incident of the debt, and therefore so closely connected with the action to establish the debt as to make it proper for the court to pass upon its validity, whether such action was invoked by the plaintiff or defendant," and, although the appellants did not seek to have a lien established on the land, yet in defense to the cross action of the appellee they are entitled to resist her claim of homestead, by which she seeks to defeat the same. As they have not waived, they may yet assert, it.

The evidence shows that J. W. Ryon and the appellee were married in 1874, and lived together as man and wife until the death of Ryon, which occurred on January 4, 1900. J. W. Ryon resided with his family on lots owned by him in the town of Richmond, which is situated entirely on the west side of the Brazos river, in Ft. Bend county. Richmond has about 1,500 inhabitants, and is laid out in lots and blocks. Across the river, on the east side, and entirely outside of the town, lies the land upon which the lien is claimed. Not only the river, but other lots lie between the lots upon which Ryon and his family lived and the tract of land in controversy. Ryon was a farmer, and in person farmed a part of the land, and other parts were worked by tenants and laborers. He made his living on the farm, and all the vegetables used by the family were raised thereon. He procured his firewood from it, and his cows were pastured on it, and were daily brought back and forth to and from the house in town where he and his family were living. This was the state of facts continuously from 1885 up to his death, and was at the date of the execution of the deed of trust. The land has never been occupied as a residence by J. W. Ryon

or the appellee, or any of the family. The appellee testified that it was their intention when they bought the land to make it their home whenever they got able to build on it, but had never been able to do so, and none of the family had ever lived on said land, but had continuously lived on the property in the town of Richmond, which was owned by Ryon at the time of the execution of the deed of trust; that she never considered either of the two places in town where the family had resided her home, and always intended to move to the farm and make it their home as soon as they were able to build a suitable dwelling house thereon.

The constitution provides that the homestead in a city, town, or village shall consist of lot or lots used for the purposes of a home, or as a place to exercise the calling or business of a family; and the homestead not in the town or city of not more than 200 acres of land, in one or more parcels, with the improvements thereon. Const. art. 16, § 51. The lots in the town of Richmond were the residence of the family, and were used for the purposes of a home. The land in the county, across the river, was used in connection with the home for the support of the family, but the two are clearly distinguishable as urban and rural. Ordinarily there can be no blending of urban and rural property so as to make it one as a homestead. *Iken v. Olenick*, 42 Tex. 195. The fact that the farm contributed to the support of the family did not make it a part of the homestead. *Evans v. Womack*, 48 Tex. 230. The intention of Ryon and his wife, or either of them, to move onto the farm when they got able to build, was not sufficient to impress it with the character of homestead. *Cameron v. Gebhard*, 85 Tex. 610, 22 S. W. 1033. It was an indefinite intention, and not accompanied by any act that would indicate the carrying out thereof. Ryon and his wife continued to live, as they had lived for many years, in a residence in town, upon lots owned by them, using the farm as contributing to the support of the family. The evidence is not sufficient to support the verdict of the jury that the farm tract of land upon which Ryon gave the deed of trust was the homestead. It is, therefore, set aside, and the judgment of the court heretofore rendered will be set aside in so far as it reverses the judgment of the district court, overruling the demurrer that it was without jurisdiction to try the question of the validity of the deed of trust as a lien upon the land; and so much of the judgment of the court below as adjudges the land not to be subject to the payment of the appellants' claim is reversed, and the cause is remanded for another trial upon the question of homestead, and that the appellants may, if they see proper, have their claim for a lien upon the land adjudicated.

The appellees have requested the court to file conclusions of fact and law. As the judgment of the court below in favor of the appellants for the amount of their note and in-

terest and attorney's fees is affirmed by this court, and the supreme court has jurisdiction to grant a writ of error to this court, the motion is granted.

On September 4, 1888, J. W. Ryon executed a promissory note, payable to the order of J. H. P. Davis, manager of the Ryon Land & Pasture Company, for the sum of \$1,228.25, one year after date, with interest at the rate of 10 per cent. per annum, and 10 per cent. of the amount additional as attorney's fees if placed in the hands of an attorney for collection. The note was secured by a deed of trust of even date, signed by J. W. Ryon alone, upon the 179 acres of land in controversy. It was duly transferred to the appellants. It has indorsed thereon two renewals, in proper form, dated, respectively, December 1, 1893, and November 11, 1899. Ryon died January 4, 1900, and administration was granted upon his estate to the appellee. The note was placed in the hands of Peareson & Wharton, attorneys at law, for collection, and was duly verified as a claim against the estate of J. W. Ryon, deceased, and presented to the appellee, as administratrix of the estate of J. W. Ryon, for allowance, and was rejected by her, and suit thereon was seasonably brought. The note was given for money loaned to J. W. Ryon to pay a judgment against him, and it remained wholly due and unpaid. There is no evidence as to whether or not the judgment was satisfied, or was transferred and remained as a collateral security in the hands of the holder of the note. The verdict of the jury could not have been otherwise than in favor of the appellants for the amount of their claim against the estate.

It was not necessary to make the heirs of J. W. Ryon parties to the suit for the establishment of the claim against the estate, even if the appellants had sought to establish a lien; nor was it necessary for the holders of the note to show that the judgment had not been subsequently paid, there being no evidence that the payee of the note had any connection therewith, or that it was kept on foot as security for the note, or of any facts that would make such proof necessary. However, there is no cross appeal by the appellee from the judgment establishing the claim. In so far as our judgment is modified as above indicated, the rehearing is granted; otherwise, it is overruled.

LYNCH v. MUNSON.

(Court of Civil Appeals of Texas. Feb. 28, 1901.)

ATTORNEY AND CLIENT—APPEAL AND ERROR—FILING OF BRIEFS—CONTINGENT FEE—DISMISSAL OF ACTION—NATURE OF ACTION—BURDEN OF PROOF—EVIDENCE—IMPROPER CONTINUANCE.

1. Under a statute and court rule requiring an appellant to file his briefs in the trial court five days before the record is filed in the court of civil appeals, an appeal wherein the briefs were filed by an appellant in the trial court on June 26th, and the record was not filed in the

court of civil appeals until August 27th,—the term of the court of appeals having expired on July 1st, and the next term not commencing until October,—was properly taken, as the purpose of the rule, being to give the appellee time and opportunity to prepare and file his briefs in reply, was not violated.

2. Where plaintiff, an attorney, under an assignment of a one-half interest in the prospective recovery had brought an action for defendant against the latter's guardian and the sureties on the guardian's bond to recover the value of land claimed to have been improperly sold, and the proceeds misapplied, an action against defendant for compromising the claim without notice to plaintiff is an action for damages; and hence the plaintiff must prove the damages he sustained by such compromise, which includes proof that the claim, if reduced to judgment, would have been collectible.

3. Where plaintiff, an attorney, under an assignment of a one-half interest in the prospective recovery, had brought an action for defendant against the latter's guardian and the sureties on the guardian's bond to recover the value of land claimed to have been improperly sold and the proceeds misapplied, in an action against defendant for compromising the case receipts purporting to have been executed by defendant's father, as his guardian, in a foreign state, wherein they resided, were properly excluded; there being no proof of their execution, and no proof that the father was guardian at the time.

4. Where the pleadings in a case brought in 1900 showed that a ward was 14 years old in 1886, when a guardian was appointed for him for the sole purpose of selling realty, it was error to hold that the guardianship had not been closed, though no record of such termination appeared.

5. Where an application for a continuance disclosed a right to the same, and the facts adduced on the trial showed the materiality of the absent evidence, it was error for the court to refuse to grant it.

On motion for a rehearing. Motion granted. For former opinion, see 59 S. W. 603.

GILL, J. Prior to the submission of this cause, appellee filed a motion to strike out appellant's briefs, because (1) no brief was filed in the lower court until August 27, 1900, whereas the record was filed in this court on the 26th day of June, 1900; (2) the briefs are not prepared as required by the rules; and (3) the assignments of error are not signed either by appellant or his counsel. This motion was duly considered and overruled prior to the submission of the cause, but no mention was made of it in our written opinion. In disposing of the motion, we were controlled by the following facts: The transcript was filed in this court on June 26, 1900. The last term of this court expired by operation of law on July 1, 1900. The following term began the first Monday in October of that year. It thus appeared that, as shown by the motion, appellee had from August 27th until the submission of the cause in which to prepare and file his briefs. The purpose of the statute and rule requiring the appellant to file his briefs in the trial court five days before the record is filed in this court is to give the appellee time and opportunity to prepare and file his briefs in reply. Where the purpose of the rule has been accomplished, an appeal will not be

dismissed because appellant's briefs have not been filed within the time. *Railway Co. v. Holden*, 93 Tex. 211, 54 S. W. 751. Appellee was chargeable with notice of the construction placed upon the statute and rules by the supreme court, and should have prepared and filed his briefs within the ample time which elapsed between the filing of appellant's briefs and the submission of the cause. The assignments of error contained in the record appear to be duly signed by appellant's attorney. But, if this were not true, the objection would not be valid under the rule now in force. *Association v. Newman*, 86 Tex. 380, 25 S. W. 11. The objections to the manner in which appellant's brief is prepared are not without merit, but we are of opinion that we ought not to ignore the first, second, third, and fourth assignments.

Appellee has filed an able and exhaustive motion for rehearing, which we have read with interest, and considered with great care. Our conclusion reached in disposing of the assignment of error first noticed in the main opinion is vigorously assailed. Appellee contends that, in seeking to hold appellant responsible for what he denominates his "contingent fee," he was required to do nothing more than establish the execution of the contract between him and appellant, the institution of the suit in pursuance thereof, and the dismissal by his client without his consent. He insists that this would have entitled him to judgment for half the gross amount sued for in the suit thus brought. In support of this contention he cites *Hill v. Cunningham*, 25 Tex. 31. In that case an attorney at law had been employed by defendant to conduct certain litigation for a fee certain, and an additional sum certain if the suit was successful. The defendant compromised the litigation, and refused to pay the attorney the part of the fee contingent on its successful termination, on the ground of failure of consideration. The attorney was shown to have performed practically all the services necessary to bring the litigation to a final close, and was prevented by his client from securing a final adjudication. The attorney assigned the contract, and defendant was sued by the assignee. The court held that the full sum promised in the contract could be recovered, and the fact that the litigation was not successfully terminated could not be pleaded by defendant as a bar to the action, as he by his own act had prevented such a possibility. In the case cited the contingent sum promised was a sum certain on the happening of a named event, and the defendant incurred a personal liability therefor. In the case at bar Lynch incurred no personal liability by his contract with his attorney, Munson. There was no promise on his part to pay any sum. His contract with Munson amounted to no more than an assignment of a half interest in his cause of action. *Railway Co. v. Miller* (Tex. Civ. App.) 53 S. W. 709. Had the defend-

ants in the first suit had legal notice of the assignment, Munson had such an interest in the cause of action as could have been prosecuted to final judgment, to the extent of his interest, notwithstanding the compromise. In *Railway Co. v. Miller*, supra, this exact question was decided. The wrong, if any was done by Lynch to Munson by the compromise, was the destruction of his right to prosecute the claim to the extent of his interest. It follows, then, that the suit of Munson against Lynch was not upon debt, for a specific and ascertained sum, nor upon the contract, for a promise to pay a sum equal to half the amount realized by that suit, but for damages equal to half the value of the claim of Lynch against the guardian and his bondsmen. Lynch cannot plead failure of consideration, for by his own act he has put it beyond the power of Munson to perform further services therein. Nor can Munson recover on the theory of personal liability on the contract of assignment, for it contained no promise to pay. It was admissible in evidence to establish the transfer of half the cause of action, the consideration of the assignment being the services of Munson. Having performed this function, its office was at an end. It was of no value in ascertaining the amount of damage suffered. To permit it to be used for such a purpose would, it seems to us, be both absurd and unjust. To uphold appellee's contention would be to establish a rule in this state which, applied generally, would result in consequences shocking to all sense of right, and violative of every wise rule prescribed for the ascertainment of damages, and the just compensation of those who may suffer by the fault of another. In suits for damages for personal injuries, in this state, the attorney bringing the suit is usually assigned an interest in the cause of action. In such suits the damages are not infrequently laid in the petition at a sum greatly in excess of what may possibly be recovered. Would any court hold that a plaintiff who compromised such a suit before the attorney had opportunity to bring legal notice of the assignment to the defendant would be inevitably liable to his attorney for the extent of his interest, as measured by the gross sum prayed for? Would the client in such a case be estopped to show that he in fact had no cause of action, or was damaged only in a small sum? We find the case of *Hill v. Cunningham*, supra, cited in *Bank v. Eustis*, 8 Tex. Civ. App. 357, 28 S. W. 227, and in that case it was held that the broad rule laid down in *Hill v. Cunningham* had its limitations. The bank was therefore permitted to show, as against its attorney, Eustis, that nothing would have been recovered in the compromised suit, and that the attorney was not damaged at all. It was also held in that case, following *Hill v. Cunningham*, in another portion of the opinion, that even under a contract similar to the one in ques-

tion the attorney would not be permitted to prosecute the original suit at all events, and over his client's protest; but the client, if he saw the contest was hopeless, could forbid further proceedings, and thus avoid being involved in liability for useless costs. The difficulty, however, is that in pursuing such an inquiry in a suit between an attorney and client the court is, in a sense, compelled to try a "moot case,"—a suit without a plaintiff and without a defendant. It is impossible to say what defenses would have been urged by the defendants in the compromised cause. It also presents the anomaly of trying two suits in one, in which the liability of persons not parties to the suit on trial is in question. However, it is not without its analogy in the books. If an attorney, by reason of his negligence or want of attention, loses a suit for his client, he is liable for the damages resulting, and this necessarily involves an inquiry as to what would have been recovered had he given the matter the requisite attention. 3 Am. & Eng. Enc. Law, p. 379; *Fox v. Jones* (Tex. App.) 14 S. W. 1007.

If an administrator brings loss to the estate by failure to use diligence in collecting claims, and is sued therefor, the value of the claims must be shown. We think it is better for the courts to enter upon the uncertain inquiry, than to confess a helplessness to right a palpable wrong. In *Bank v. Eustis*, supra, the case of *Swinerton v. Monterey Co.*, 76 Cal. 114, 18 Pac. 135, is cited as supporting the rule announced. Since the suit in question is for damages for the destruction of such right as the attorney acquired by the assignment, we are of opinion that it devolved upon him to show the value of the claim. This, in the nature of things, rendered it necessary to show the solvency of the parties against whom the claim was made. The rule might be different had the claim been a note or some contract for a liquidated sum, but in claims of the nature sued on, where the damages were uncertain and unliquidated, the amount claimed in the petition is not prima facie the measure of damages. It may be observed, also, that in such cases the client submits the facts to the attorney; and the matter of liability, the prospect of recovery, and the advisability of embarking in the litigation, are left largely, if not entirely, to the judgment and discretion of the attorney. We think, therefore, that the burden was upon appellee to show that the defendants in the original cause were solvent; that is to say, it devolved upon him to show the extent to which he had been damaged. In some jurisdictions the remedy of the attorney in such a case is held to be upon quantum meruit for the value of his services up to the time of the compromise, but in those states contracts such as the one under consideration are held not to be assignments of an interest in the cause of action. Since the decision in *Railway Co. v. Miller*,

supra, the rule in this state must necessarily be different. In the case at bar the attorney, for a valuable consideration, has acquired an interest in the cause of action. If his client has compromised the case without his consent, and before he bound the defendants therein by notice of the assignment, he has suffered a wrong at the hands of his client; for which he is entitled to compensation. His suit against his client is for damages, just as the client's suit against the attorney is for damages, when he has suffered by the negligence of the attorney. In a suit of the character last named, the client, to be entitled to recover, must show that his suit was intrusted to the attorney, that he failed to realize anything out of the litigation, that this failure was due to the culpable neglect of the attorney, and that but for such negligence a recovery could or would have been had. 3 Am. & Eng. Enc. Law (2d Ed.) p. 392. In *Staples' Ex'rs v. Staples*, 85 Va. 76, 7 S. E. 199, it is held that the client has the burden of showing that such a claim was against solvent parties. See, also, *Nisbet v. Lawson*, 1 Ga. 275. In *Collier v. Pulliam*, 13 Lea, 114, the cases holding the contrary doctrine are discussed and distinguished, and it is distinctly held that in suits against attorneys for negligent failure to make collections the burden is upon plaintiff to allege and prove his damage; citing *Bruce v. Baxter*, 7 Lea, 477. In *Brodie v. Watkins*, 33 Ark. 545, it is held that the attorney who sues for a wrongful discharge by his client may recover the damages he has suffered for the breach of the contract. In the case at bar the client, having assigned to the attorney an interest in the cause of action in consideration of his services, and having authorized him to prosecute the suit in their joint interest, was impliedly bound to do nothing to the detriment of his attorney's interest in the claim. In view of the cases cited above,—and we think they announce the correct rule,—it logically follows that a suit by an attorney for a breach of this implied duty, from which he has suffered injury, is a suit for damages, and that, in establishing his right to recover, the burden is upon him to show damage and its extent, as in any other suit for damages. This necessarily includes proof that the claim, if reduced to judgment, would have been collectible. We think it is clear. If the client discovered that he had no cause of action, or that the suit would involve him in costs out of proportion to the possible recovery, or that in equity and good conscience he ought not to press the suit, he could withdraw from the litigation to the extent of his interest, and leave the attorney to press the suit to judgment in his own behalf. In doing so, however, he should be careful not to defeat his attorney's rights. In this connection we call attention to the fact that it was neither alleged nor shown that the defendants in the original suit had no notice of the attorney's rights under the contract, or that

by the dismissal he was deprived of his right to proceed against the defendants notwithstanding the dismissal. A complete defense to the suit at bar would be proof that the proceeds of the sale of the land had been turned over by the Texas guardian to the ward's guardian in North Carolina, in pursuance of an order of the court in which the guardianship was pending in this state. No such order was shown, and none of the probate orders appear in full in the statement of facts; but the order of the court authorizing the sale is admitted to have been made in response to an application for sale, a copy of which is appended as an exhibit to plaintiff's petition in this cause. It appears from that application that the purpose of the sale was to remit the proceeds to North Carolina, where the ward then resided, and the application contained the averment that the ward's needs for education and maintenance required it. There was no proof of a fraudulent sale, and the order of the court conclusively adjudged the necessity thereof. As stated in the main opinion, the evidence of the pending guardianship in North Carolina was excluded for technical reasons. The receipt for the funds, purporting to have been executed by the father of the ward as his guardian in the other state, was properly excluded because there was no proof of its execution, and no proof that the father was guardian at the time. It would have been no bar to the original suit to show that the money had been sent to the father, in the absence of an order therefor, and in the absence of proof that he was in fact guardian in the other state.

Certain inaccuracies in the main opinion are pointed out by the motion, which were due to statements in appellant's brief, and which on closer inspection are found not to be fully sustained by the record. Most of these are immaterial, in view of the disposition of this motion, and need not be corrected in detail. But the holding upon which we reversed and rendered the judgment is of importance. We found that the guardianship in this state had not been closed. This is technically true. The age of the ward at the date of the original suit is not disclosed by the statement of facts, nor is his present age made to appear. But by a careful inspection of the voluminous pleadings, we have found that he is admitted to have been 14 years old in 1886, when the guardian sold the land; and as that seems to have been the sole purpose of the guardianship, and as the ward has long since reached his majority, it may be assumed that the Texas guardianship was in fact closed, and we were in error in holding that this was shown not to be true. These inaccuracies were due to the condition of the record, which is most confusing and unsatisfactory, and to the failure of appellee to file briefs, which it is clear would have been of material assistance to the court in getting a correct comprehension of the facts

so necessary in reaching an accurate conclusion.

We are of opinion that the trial court also erred in overruling the motion of appellant for continuance. It was a first application. The grounds stated disclosed a right to a continuance, and the facts adduced upon the trial, instead of rendering the error harmless, disclosed the materiality of the absent testimony.

For the error in our finding as to the status of the guardianship, the motion for rehearing is granted, in so far as to set aside our judgment reversing the judgment of the court below, and rendering in favor of appellant. We are of opinion that in the present state of the record the judgment of the trial court should be reversed and the cause remanded, and it is so ordered. Reversed and remanded.

EVANS v. JOHNSON et al.

(Court of Civil Appeals of Texas. Feb. 9, 1901.)

MARRIAGE LICENSE — WRONGFUL ISSUE — MINOR—CONSENT OF PARENTS—ACTION BY PARENTS—INSTRUCTIONS—ESTOPPEL.

1. Under Rev. St. 1896, art. 2957, prohibiting the marriage of a female under the age of 14 years, and declaring that no clerk shall issue a license for the marriage of a female under 18 years of age without the consent of her parents, in an action by a father against a clerk for the issuance of a marriage license authorizing the marriage of his 13 year old daughter, a charge that if the plaintiff consented to the marriage, or the clerk had no notice of her age or the plaintiff's want of consent, the jury should find for defendant was erroneous, since it relieved the clerk from his duty to ascertain whether he was authorized to issue a license.

2. Rev. St. 1896, art. 2957, forbids the marriage of a female under the age of 14 years, and declares that no clerk shall issue a license authorizing the marriage of a female under 18 without the consent of her parents. *Held*, that where a father used language to his minor daughter warranting her statement to the clerk that there was no objection to the issue of the license so far as her father's consent was concerned, the father was estopped from saying his consent was not given, and from recovering from the clerk for illegal issuance of the license.

Appeal from district court, Delta county; Howard Templeton, Judge.

Action by J. M. Evans against S. T. Johnson and others. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

L. L. Wood, for appellant. Holmes & Sharp and James Patteson, for appellees.

RAINEY, C. J. Appellant, J. M. Evans, instituted this suit against J. M. Johnson, the county clerk of Delta county, Tex., and sureties upon his official bond, to recover damages for the illegal issuance of a marriage license authorizing the marriage of appellant's minor daughter, aged 13 years and 5 months, to one J. V. Brewer, a male aged 18 years, by virtue of which license they were married on the same day of the issuance thereof. Upon the trial, judgment was

rendered for defendant, and plaintiff appealed.

Appellant's first assignment complains of the following charge of the court: "If the plaintiff consented to the marriage of his daughter, or if said deputy clerk did not have notice, either actual or constructive, as these terms are defined above, of the real age of plaintiff's daughter, or plaintiff's want of consent to her marriage, then, in either event, you should find for defendants, because such charge made plaintiff's right to recover depend upon the deputy clerk having notice of the nonconsent of the plaintiff." The license was issued by the deputy clerk, and the definitions of actual and constructive notice referred to in said charge were the usual and ordinary legal definitions of actual and constructive notice. We are of the opinion that the charge given is subject to the objections urged by the appellant. The statute prohibits marriage of females under the age of 14 years, and in such case the clerk is not authorized to issue a marriage license. It also provides that "no clerk shall issue a license without the consent of the parents or guardians of the parties applying, unless the parties so applying shall be in the case of the male twenty-one years of age, and in the female eighteen years of age." Rev. St. 1895, art. 2957. When application is made to the clerk for a marriage license, it is his duty to ascertain whether or not in such case he is authorized under the law to issue it. In case he issues a license when not authorized by law so to do, whether his use of diligence to ascertain the true facts before issuing the same will release him from liability we do not deem it necessary to here determine. Under the charge the clerk was relieved from any effort to ascertain the true condition of the parties desiring to marry, and the effect of such a rule would virtually render nugatory the right given to the parent by the statute to control their minor daughters in relation to their marriage; for, by the very nature of things, the clerk cannot have notice, except in few instances, of the disabilities under which parties labor who seek marriage license.

While, under the circumstances of this case, the clerk was not authorized to issue the license even with the consent of the parent,—the female being under the age of 14,—still we are of the opinion that the plaintiff is estopped from recovering, and under the facts no other judgment could have been properly rendered. The evidence shows that on the day the license was issued and the day of the marriage the plaintiff ascertained that his daughter was contemplating such step, and mentioned the matter to her, and stated: "I told her that she was too young to marry. I told her that, if she was 18 years old, then I would not care. I told her that, if ever she intended to marry J. V. Brewer, to go and marry him that day. I

am going to Paris to-day, and, if I do not change my mind, I will have the same published, and after to-day you can't get license." This language was calculated to make her believe that she had permission to marry that day, and authorized the statement to the clerk that there was no legal objection to her marriage, as far as the consent of her father was concerned. While, possibly, a different construction might be placed upon his language, yet we think it sufficient to estop him from now saying that his consent was not given, and prevents a recovery by him. The judgment is therefore affirmed.

HARTFORD FIRE INS. CO. v. RANSOM et al.

(Court of Civil Appeals of Texas. Feb. 16, 1901.)

INSURANCE — POLICY PROVISION — BREACH — WAIVER—TRANSFER OF TITLE— APPEAL—JUDGMENT.

1. Where a policy provided that it should be void if any change should take place in the interest, title, or possession of the subject of insurance, other than by the death of the insured, and the property was legally sold in partition, and thereafter sold again, these facts showed a change in the title, within the terms of the policy, and constituted a complete defense to an action thereon.

2. An insurance company could not be said to have waived the breach of a provision in a policy that it should be void on any change of the title to the property insured by reason of its agent's knowledge of a certain intended transfer, when there was another transfer of title of which the company had no notice whatever.

3. Where the facts in a certain case were undisputed, and the questions of law determined on appeal in favor of the defendant, the court, on appeal, would render judgment for the defendant.

Appeal from Navarro county court; J. F. Stout, Judge.

Action by S. M. Ransom and others against the Hartford Fire Insurance Company. From a judgment in favor of plaintiffs, defendant appeals. Reversed.

Alexander & Thompson, for appellant.
Blackmon & Turner, for appellees.

TEMPLETON, J. This suit was brought by the appellees, as the heirs of Mrs. F. R. Ransom, to recover of appellant the sum of \$400, the amount of a policy of insurance issued by it on May 2, 1890, to Mrs. Ransom, insuring her for the term of three years against loss by fire on a dwelling house owned by her. The house was destroyed by fire on May 27, 1900. On a trial by the court without a jury appellees had judgment for the amount of the policy, and the company has appealed.

One of the provisions of the policy reads as follows: "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the interest of the insured in the property be not truly stated in the policy, or if the interest of the insured in the property be other than

sole and unconditional ownership, or if any change, other than by the death of the insured, take place in the interest, title, or possession of the subject of insurance (except change of occupants without increase of hazard), whether by legal process or judgment, or by voluntary act of the insured, or otherwise, or if this policy be assigned before a loss." Mrs. Ransom died on May 23, 1899. In March, 1900, a suit was instituted between her heirs in the district court of Navarro county to partition her estate, including the property insured. A judgment of partition was entered in said suit, and commissioners were appointed to make partition. The commissioners reported that the insured property was incapable of partition, and the report was approved. Thereupon a commissioner was appointed to sell the property, and on May 1, 1900, he sold the same to John O. Shook for \$500, one-third cash and two-thirds on credit, notes being taken for the deferred payments, and the vendor's lien being retained to secure the notes. The sale was reported and approved, and deed duly made to the purchaser, on May 7, 1900. All these proceedings were regular and legal. On May 23, 1900, Shook sold the property to one Simonds. Appellant pleaded said provision of the policy and the facts above stated, and insists upon same as a complete defense to the action on the policy.

The position of appellant is well taken. The facts show a change in the interest and title in the property insured, within the terms of the policy. *Northern Assur. Co. v. City Sav. Bank* (Tex. Civ. App.) 45 S. W. 737; *Association v. Flournoy*, 84 Tex. 632, 19 S. W. 783. The condition of the policy quoted above provides that any change in the interest or title in the property insured, other than by the death of the insured, should render the policy void, and not merely that any change in the title or interest of the assured, except by her death, should render it void. A contract of insurance is a personal contract. In this case the contract was between appellant and Mrs. Ransom. But by the terms of the policy, on the death of Mrs. Ransom, it became a contract between appellant and her heirs. They succeeded to her rights under the policy, and were bound by the contract made by her to the effect that any change in the interest or title to the property insured should annul the contract. The change occurred, and for that reason the appellees cannot recover.

The appellees contend, however, that there was a waiver of the breach of said provision of the policy. On this issue it was shown that appellant's agent who acted for the company in issuing the policy had knowledge of Mrs. Ransom's death; that he knew of the pendency of the suit for partition, and of the fact that the property was to be sold in order to effect a partition. This knowledge does not seem to have come to the agent in the course of his agency, but appears to have

been acquired by him in casual conversations not in any way relating to the subject of the insurance on said property. He was never notified of any of the facts by the appellees, or by any one who is shown to have had authority to act for them in respect to the said insurance. He was not asked to transfer the policy, or to take any action whatever with reference to it. It may be seriously doubted if, under the circumstances, the company would be affected by his knowledge of the facts aforesaid. But, be this as it may, it is shown that the company did not, either through its said agent or otherwise, have notice of the sales to Shook and Simonds. Even if the knowledge of the agent that a sale was to be made should be imputed to the company, and it should be held that the company thereby assented to the sale to Shook,—a proposition we do not admit to be correct,—it cannot be held that assent to such sale carried with it an implied assent to any sale Shook might thereafter make. There is not the slightest circumstance in the record to show knowledge by the company of the sale by Shook to Simonds, or assent by it to such sale. The company is, therefore, not estopped from asserting the change effected in the title and interest in the property insured by the sale to Simonds, and, the loss occurring after the purchase by Simonds, the policy became void. The judgment will be reversed, and, as the facts are agreed to and are undisputed, judgment will be here rendered for appellant. It is so ordered.

ANDERSON et al. v. NEIGHBORS.¹

(Court of Civil Appeals of Texas. Feb. 6, 1901.)

PUBLIC LAND—PURCHASE—RIGHTS OF MARRIED WOMEN—OBJECTION—RIGHTS OF SUBSEQUENT LESSEE.

1. A certified question whether a married woman, who had purchased school land from the state, and had occupied it for five years as a homestead, and made valuable improvements, had lost her right to the land by certain acts, was answered by the supreme court in the negative. *Held*, that the contention, on a motion for a rehearing in the court of civil appeals, that a married woman could not acquire school land, because she was not a "person," within the contemplation of the statute authorizing the sale of such lands to "any person," cannot be sustained, since the holding of the supreme court that defendant had not lost her right to the land necessarily implied that she had the right to acquire it.

2. Where defendant, a married woman, had purchased school land from the state, and the commissioner of the general land office endeavored to uphold the sale, and canceled a subsequent lease of it to plaintiff, and there was no objection on the part of the state to defendant's capacity to purchase, plaintiff cannot raise the objection that defendant had no right to acquire the land because she was a married woman.

Appeal from district court, Pecos county; J. M. Goggin, Judge.

Action by E. B. Neighbors against J. H. Anderson and others. From a judgment in favor of plaintiff, defendants appealed, and a

¹ Writ of error denied by supreme court.

certified question to the supreme court (59 S. W. 543) was answered in favor of defendants, and the judgment reversed. Plaintiff filed a motion for a rehearing. Motion denied.

B. C. Thomas and Sanford & Douglas, for appellants. Walter Gillis, for appellee.

FLY, J. In answer to a certified question in this case, the supreme court has rendered an opinion that determines the issues in favor of appellants. Reference is made to that opinion for our conclusion of facts and the law applicable to the case. Following that opinion, the judgment of the district court is reversed, and judgment here rendered in favor of appellants.

On Motion for Rehearing.

(March 6, 1901.)

In the statement made by this court in certifying the question to the supreme court, it was distinctly stated that "Mrs. Anderson, a married woman, applied for and purchased from the land commissioner the land in controversy, and made the payment required of her at the time, and gave the written obligation for the balance." It was also stated that "Mrs. Anderson and her husband have been in possession of the land since her purchase, in 1895, and they have made valuable improvements on the land, and have occupied it as a homestead up to the time of the trial." With these facts before the court, it was answered "that Mrs. Anderson's right to the land had not been lost under the circumstances stated in this case, and that the lease contract, executed after the written request made by her, conferred no right upon the lessee." That the contract of purchase was made by a married woman was clearly before the supreme court, and we cannot for a moment conceive that the court would have answered that Mrs. Anderson had not lost her rights to the land if she had no right to lose. In the case of *Pitts v. Elsler*, 87 Tex. 347, 28 S. W. 518, it was said: "In this state the right of a married woman to acquire and hold property, real and personal, either by gift, devise, descent, or purchase, is as absolute as that of her husband. She may, with his consent, mortgage her real estate to secure his debts, or she might give her personal property to him or any other person. If she contract to buy on a credit and execute a note for the price, she may or may not, as she may elect, proceed with the contract, and the person contracting with her cannot refuse to carry out the agreement because she is a married woman." There is but one ground upon which the contract made with Mrs. Anderson can be declared void, and that is that she is not a "person" in the contemplation of the statute, and that the law expressed in the *Pitts-Elsler* Case does not apply to a contract with the state, as was held as to minors in the case of *Walker*

v. Rogan, 93 Tex. 248, 54 S. W. 1018. Much that is said in that case in regard to minors it would seem might apply with equal force to married women, but the opinion does not in terms extend it so as to include married women, and it may be presumed, from the answer to our question, that they will not be so included.

Independent of the expressions in the *Walker-Rogan* Case, we would experience no difficulty in holding that when the state, through its duly-accredited agents, has entered into a contract with a married woman, it would occupy the position of an individual contracting with her, and could not refuse to carry out the agreement because she is a married woman. We do not believe that the doctrine of the *Walker-Rogan* Case should be extended to a married woman, but that it must be held, as in *Elsler v. Pitts*, that "in this state the right of a married woman to acquire and hold property, real and personal, either by gift, devise, descent, or purchase, is as absolute as that of her husband." If that be the law of Texas, the legislature must have had the married woman in contemplation when it used the broad term "any person," and never intended to exclude her from the right to acquire a home out of the public lands for herself and her children.

The facts in this case establish that, five years before the time of trial, Mrs. Anderson had purchased the land in controversy from the state of Texas, and had made all payments required by law, giving her obligation for the unpaid purchase money, that she was in possession of the land when her application was made, and, together with her husband, has ever since made it her home, expending money upon it, and improving it. The state is satisfied with the sale to her, and not only is not attempting to repudiate it, but, on the other hand, through its commissioner of the general land office, has endeavored to uphold it. Appellant, to whom the state has refused to lease the land, alone seeks to avoid the contract between the state and its vendee, because she is a married woman. *Weatherford v. McFadden*, 21 Tex. Civ. App. 260, 51 S. W. 548. Believing that, in answering that Mrs. Anderson had not lost her right to the land, the supreme court must have intended to hold that she had a right to the land, and believing that a married woman is included in the broad term "any person," the motion for rehearing is overruled.

GILL v. FIRST NAT. BANK.

(Court of Civil Appeals of Texas. Jan. 5, 1901.)

NOTES—BONA FIDE PURCHASER—DEFENSES—DEPOSITIONS—INTERROGATORIES—OBJECTIONS—TIME FOR OBJECTION—INSTRUCTION.

1. Objection to interrogatories as leading, made on the trial of the cause, was too late, and should have been made in writing before trial.

2. Where, in an action on a note, plaintiff's uncontradicted evidence showed that it purchased the note for value, before maturity, without notice of any defenses thereto, it was not error to refuse to charge that the burden was on plaintiff to show that it was a bona fide holder for value.

Appeal from district court, Dallas county; Richard Morgan, Judge.

Action by the First National Bank against J. W. Gill. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Henry & Henry, for appellant. T. L. Camp, for appellee.

Statement.

RAINEY, C. J. This suit was instituted by appellee against the appellant to recover on three certain promissory notes executed by appellant to one Jesse Harris, and transferred by said Harris to appellee. The petition of appellee alleged that it was a bona fide owner and holder of said notes, having obtained same for a valuable consideration, before maturity, in due course of business. Appellant answered by general demurrer and general denial, and specially by a sworn plea: First, failure of consideration; second, that said notes had been obtained from him by said Harris by fraudulent representations; third, that the appellee had knowledge of said fraud; and, fourth, that appellee and Harris were partners, and had entered into a fraudulent scheme by which the appellee was to be the apparent owner of the notes, and was to institute this suit to avoid the defenses the appellant had against the said Harris. Appellee replied to said answer by supplemental petition, duly sworn to, denying any partnership existing as alleged; that it purchased said notes from said Harris before maturity, for a valuable consideration, in due course of trade, and, in effect, that it had no notice of the equities claimed by the appellant. Upon the trial, judgment was rendered for appellee upon said notes according to their tenor and effect.

Conclusions of Fact.

J. W. Gill, appellant, executed the notes sued on, the consideration being certain horses which Jesse Harris sold to said Gill. At the time of said sale said Harris represented to said Gill that said horses were of the purest strain of Clydesdale, and that same were eligible to registration in the Clydesdale Association of America; that said representations were false, and that said Gill purchased said horses on the faith thereof, and was influenced thereby to execute said notes. Said horses were not Clydesdale, and had no good blood of any kind, and the consideration for said notes had failed. The evidence further shows that the appellee purchased said notes before maturity, for a valuable consideration, in the due course of trade, and without notice of the equities claimed by the appellant.

Conclusions of Law.

The first, second, third, and fourth assignments of error complain of the court in overruling the objection of defendant to certain interrogatories directed to and answers of G. K. Webb, who testified for plaintiff by deposition. We are of the opinion that the objections urged against said evidence are not tenable, and said assignments are overruled.

The second and third assignments of error show that the grounds of objection to the introduction of the evidence therein complained of were that said interrogatories were leading, and said objections were made upon the trial of the cause. Such objections go to the manner and form of taking, and should be made in writing, before the trial begins. Said depositions having been filed one day before the trial, the objection, being made upon the trial, comes too late.

The sixth assignment of error complains of the court in refusing a special charge asked by the defendant to the effect that the burden of proof was upon plaintiff to show that it was a bona fide holder of the notes sued upon for a valuable consideration. We are of opinion that the court did not err in this particular. The evidence introduced by plaintiff, which is not contradicted, shows that plaintiff purchased the notes in due course of trade, before maturity, for a valuable consideration, and without any notice of the defenses urged by the appellant. Under this state of facts there was no necessity of the giving of such charge. The judgment is affirmed.

HOUSTON & T. C. R. CO. v. BYRD.¹

(Court of Civil Appeals of Texas. Jan. 31, 1901.)

RAILROADS—INJURIES AT CROSSING—NEGLIGENCE—EVIDENCE—PROXIMATE CAUSE—SUFFICIENCY—CONTRIBUTORY NEGLIGENCE—PLEADING—NECESSITY—REQUESTED INSTRUCTIONS.

1. The driver of plaintiff's carriage went down a street crossed by a railroad track with a switch track close beside it on either side. On the nearest switch there were cars with a space of 30 feet between them for the street, which cars, together with trees and houses along the track, and defendant's flag house at the crossing, obstructed the view of an approaching engine from the left, on the other switch track, which gave no signals, until they had driven onto the track. They had looked and listened for the cars, and there was no flagman present to warn them. The horse, which was gentle and under perfect control, was going at an ordinary trot when they drove onto the track, without checking his speed, while plaintiff and her companion were laughing and talking. The driver, on seeing the engine, and being unable to turn around, pulled as far to the right as possible, and in doing so, while watching the engine, ran the buggy against a switch stand, and upset it, throwing plaintiff out and injuring her. Held, that the proximate cause of plaintiff's injury was the negligence of defendant's employes in approaching the cross-

¹ Rehearing denied, and writ of error denied by supreme court.

ing without warning, and without having a flagman at his usual station.

2. The evidence was sufficient to sustain a finding that neither plaintiff nor the driver was guilty of such contributory negligence as would defeat plaintiff's recovery, though a preponderance of the evidence might establish the fact that the buggy might have been stopped after the engine was discovered, and the accident thereby prevented, and yet the jury be justified in finding that an ordinarily prudent man would have done as the driver did.

3. Whether or not plaintiff acted prudently or imprudently in her effort to escape the threatened danger would not affect her right to recover, she having been placed in the position of danger by the negligence of defendant's employes.

4. Whether or not there was contributory negligence in not stopping the horse after the engine was seen could not be determined, where it was not alleged in the answer.

5. Where, in an action against a railroad company for injuries, special instructions requested by defendant, in so far as they contained a correct application of the law to the facts in the case, were covered by the main charge or other charges given at defendant's request, it was not error to refuse them.

Appeal from district court, Harris county; John G. Tod, Judge.

Action for injuries by Annie L. Byrd against the Houston & Texas Central Railroad Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Baker, Botts, Baker & Lovett and Frank Andrews, for appellant. O. T. Holt, for appellee.

PLEASANTS, J. Appellee brought this suit to recover damages for injuries to her person alleged to have been caused by the negligence of appellant and its employes in the operation of one of appellant's engines on its railroad track across Silver street, in the city of Houston. The facts in this case are substantially identical with the facts in the case of Railroad Co. v. Pereira (Tex. Civ. App.) 45 S. W. 767, and briefly stated as follows:

On the evening of April 26, 1896, in company with Eugene Pereira and wife, appellee was riding along Silver street, in a one-seated vehicle drawn by one horse. Pereira was situated on the right side of the seat, driving the horse, his wife was in the middle, and the appellee on the left side of the seat. Shortly after the party started on their drive the horse began to lope, and traveled alternately in a lope and in a walk. When they reached Silver street, down which they turned, the horse was in a walk, and they continued to travel at that gait until they had crossed Washington street, which is two blocks from appellant's railroad tracks. After crossing Washington street the horse again began to lope, and continued at that gait until the accident occurred. At the point of the accident Silver street, which runs north and south or nearly so, is intersected by Railroad street, which crosses it at right angles. Appellant has three tracks along Railroad street and across Silver street. Appellee

and her companions approached the crossing from the south. From Washington street to the crossing on Railroad street Silver street is perfectly straight, and the crossing is in plain view from any point on Silver street between Washington street and said crossing. Silver street is 30 feet in width. On the occasion in question appellant had placed a row of box cars on its south track on Railroad street on either side of Silver street. These cars were close together, so that a person traveling along Silver street could not see between them, and were placed right up to the street line on either side of Silver street, so that the space between the two rows of cars was not more than 30 feet. Near the west line of Silver street, and between the north and middle tracks on Railroad street, appellant had constructed a flag house, which to some extent obstructed the view of a person approaching the crossing from the south of a train approaching said crossing from the west on said north track. There were also trees near the crossing, which to some extent obstructed the view of persons approaching from the south. Appellee and her companions all looked and listened as they approached the crossing, and saw no engine or moving train of any kind, and heard none, and saw no flagman about the crossing. They were all laughing and talking when they drove upon the track, and did not check the speed of the horse at all. When they got on the track the driver, Mr. Pereira, saw an engine backing down on the north track to the crossing. There were cattle guards on the side of Silver street, and he could not turn around, and thus avoid the approaching engine, and he pulled to the right as far as he could, and in doing so, while looking at the engine, he ran the vehicle against a switch stand, and upset it, and plaintiff was thrown out, and received the injuries for which she claims damages in this suit. The evidence is conflicting as to whether or not the engine struck the vehicle, and as to how far it went into Silver street before it was stopped; but it is certain that all of the tender, which was from 18 to 20 feet long, was in Silver street when the engine stopped. The engine was moving at a rate of three or four miles an hour when it backed into Silver street. No flagman was present at the crossing, and the whistle was not blown nor the bell rung, nor any warning given of the approach of the engine. It was not the intention of those in charge of the engine to cross Silver street, but only to back far enough into the street to allow the switch, a short distance west of the street, to be thrown, so that the engine could take the middle or main track, and then proceed west down Railroad street. The horse driven by appellee and her companions was a gentle animal, easily managed, and the driver testified that he was under perfect control at the time he saw the engine, and could have been brought to a stop in 10 or 15 feet. If

the horse had been going in a walk when the party first saw the train, he could have been stopped with safety to the vehicle and its occupants in a few feet. The speed at which the horse was going is not definitely fixed by the testimony, but is shown to have not been faster than an ordinary trot, and there is no evidence to sustain the contention that the horse was going at a reckless or unusual speed. The distance between the middle and north track in Silver street is 22 feet. The testimony is conflicting as to how far the engine was from the vehicle when it was first seen by the appellee and the driver,—appellee says 15 or 20 feet, and the driver estimates the distance at about 25 feet. The testimony offered by the defendant shows that the cattle guards on the north track, where said track crosses the west line of Silver street, is 54 feet from a point on the north rail of the middle track in the center of Silver street, and the driver of the vehicle testifies that he was just driving onto the middle track, near the center of Silver street, when he first saw the engine, which at that time was just west of the cattle guard, on the north track. Appellee and her companions knew that cars were frequently switched on Railroad street across Silver street, that the main track of appellant crossed said street, and that all of their tracks on said street were used a great deal.

We find, from these facts, that the employees of appellant were guilty of negligence in approaching the street crossing with the engine without giving the warning required by law, and without having a flagman at his usual station to give warnings of the approach of the engine to persons traveling along the street, and that such negligence was the proximate cause of the injury to appellee. We are also of opinion that the evidence is sufficient to sustain the finding of the jury that neither appellee nor the driver of the vehicle in which she was riding was guilty of such contributory negligence as would defeat appellee's right to recover. It may be true that the preponderance of the evidence establishes the fact that the vehicle in which appellee was riding might have been stopped after the engine was discovered, and the accident thus prevented, and yet the jury would be justified in finding that under the circumstances an ordinarily prudent man would have done as Pereira did in this case. He had been placed in a position of peril by the negligence of appellant's employees, and had little or no time to deliberate as to what was the best course to pursue to extricate himself and those with him from such peril, and from all the surroundings, as disclosed by the testimony, it might reasonably have appeared to a person of ordinary prudence that the surest way to avoid the danger of a collision with the engine which was approaching from the left was to do just what Pereira did,—turn to the right, and try to cross the track before the

engine could reach him. Under the rule announced in the case of *Railroad Co. v. Neff* (Tex. Sup.) 28 S. W. 283, it matters not whether appellee acted prudently or imprudently in her effort to escape the threatened danger, if that danger was brought about by the negligence of the appellant. The only contributory negligence pleaded by appellant was the act of appellee in allowing, or rather in acquiescing, in the rapid driving of the vehicle when approaching and going upon the railroad crossing, and the answer does not allege any contributory negligence in the failure to stop the horse after the approaching engine had been discovered. The issue of contributory negligence, in not stopping the horse after the engine was seen, not being raised by the pleading, is not properly in the case, and need not be further discussed. In the case of *Railroad Co. v. Pereira*, supra, which was a suit for damages for injuries received in this accident, and in which the testimony as to rate of speed and the circumstances under which Pereira and appellee drove upon the railroad crossing is substantially identical with the testimony in this case, this court held, in an opinion by Judge Williams, that the evidence was sufficient to support the verdict of the jury against the plea of contributory negligence, and, without further discussing the matter, we refer to the opinion in that case as containing a full and clear statement of the reasons for our holding that the evidence in this case is sufficient to support the verdict of the jury on the issue of contributory negligence.

The charge of the court fully and fairly submitted to the jury every phase of the case raised by the pleadings and evidence, and there was no error in the refusal of the court to submit the various special charges requested by appellant, and set out in the several assignments of error presented and urged in appellant's brief. It would serve no useful purpose to discuss said assignments in detail. In so far as said charges contained a correct application of the law to the facts of this case, they were covered in the main charge of the court or the charges given at the request of appellant, and should not have been repeated. We find no error in the judgment of the court below, and it is in all things affirmed. Affirmed.

MUDGETT v. TEXAS TOBACCO GROWING & MFG. CO.¹

(Court of Civil Appeals of Texas. Jan. 17, 1901.)

**MASTER AND SERVANT—DISCHARGE—WAIVER
—INSTRUCTIONS—EVIDENCE—LIENS FOR
WAGES—PLEADING—GENERALITY.**

1. An instruction, in a suit against an employer for wages, that if the jury found that, by a certain contract of hire, the employer re-

¹ Rehearing denied.

served the right to discharge the employé, and that the employer did so discharge him, they need go no further, but should return a verdict for the defendant, was improper, in the absence of evidence that the employer reserved an absolute right to discharge the employé.

2. An instruction, in a suit against an employer for wages, that, if the jury found that by the contract of hire the employer reserved the right to discharge the employé, and that the employer did discharge him, they should find for the defendant, was improper, as practically charging that the employer could discharge the employé, before the expiration of his term, without cause.

3. An instruction, in a suit against an employer for wages, that if the jury found that, by a certain contract of hire, the employer reserved the right to discharge the employé, and did discharge him, they should find for the defendant, and that, so far as the question of wages and expenses incurred after the alleged discharge was concerned, the acts of the board of directors were binding on the corporation employing the plaintiff, was improper, as ignoring the evidence that the discharge was waived, and not insisted on.

4. Under *Sayles' Civ. St. 1897, art. 3339a*, giving a lien to a servant for wages, one hired to raise a tobacco crop had no lien for "expenses" incurred in raising the same.

5. Under *Sayles' Civ. St. art. 3339a*, giving to a servant a lien for wages, one hired for a year, wages payable monthly, was not required to fix a separate lien for the wages falling due each month.

6. Where the answer to a suit to recover for services set up generally a discharge for unsatisfactory work, and the plaintiff excepted thereto, some specific default should have been alleged to permit proof of default or malfeasance on the servant's part.

Appeal from Washington county court; E. P. Curry, Judge.

Action by George E. Mudgett against the Texas Tobacco Growing & Manufacturing Company. From a judgment for the plaintiff for less than the amount demanded, plaintiff appeals. Reversed.

Henderson & Henderson, for appellant. Beauregard Bryan and Campbell & Pennington, for appellee.

GILL, J. The appellant instituted this suit to recover of appellee, a corporation, a certain sum alleged to be due him as wages for the year 1899 on a contract of hire, and for expenses incurred in raising a crop of tobacco on defendant's farm during that year. He alleged that appellee engaged him to manage the farm for the year at a salary of \$45 per month, the appellee to pay all the necessary expenses of running the farm. He further alleged that he performed his part of the contract, and raised a crop of tobacco; that appellee owes him \$425 on his salary, and \$244.10 for necessary expenses incurred by him in raising the crop; and he asserts a lien upon the crop raised to secure the payment of the sums demanded, and seeks a foreclosure. Appellee company admitted the contract as alleged, except that it reserved the right to discharge appellant from its service whenever his services proved unsatisfactory; that prior to July 15, 1899, it became dissatisfied with the manner in which

he was performing his work, and on July 15th discharged him. Appellee admitted that the sum of \$15.20 was due appellant on his salary up to that date, and paid said amount into the registry of the court. Appellant alleged, by supplemental petition, that the crop of tobacco raised by him, and on which he asserted a lien, had since the institution of this suit been taken from his possession by writ of sequestration issued at the suit of appellee. A trial by jury resulted in a verdict and judgment for appellant for \$15.20, the amount tendered by appellee. The case is here on appeal by Mudgett, the plaintiff below.

The uncontradicted evidence established that appellee was a corporation incorporated for the purpose of raising and manufacturing tobacco in Texas, and that on the — day of January, 1899, appellant was employed by it for the term of one year, at the salary alleged, to manage the farm of appellee, and to superintend the raising of a crop of tobacco thereon, the appellee to furnish the means, provisions, etc., and to pay all necessary expenses. The salary of appellant was payable monthly. Under this contract, appellant planted a little over 10 acres of tobacco, and superintended its cultivation, up to the 15th day of July of said year, when appellee, in pursuance of an order of its board of directors, discharged appellant, and directed him to pursue the enterprise no further, and to incur no further expense. It was appellee's purpose also to abandon the enterprise on account of the destructive effect of the flood occurring at that time. Appellant consulted a lawyer, and, upon his advice, refused to abandon the crop, but continued its cultivation, retaining possession of the farm, teams, and implements of appellee, and upon his own responsibility incurred an additional expense of \$244.10, which was necessary to the proper cultivation and harvesting of the tobacco crop which the appellee had directed him to abandon. It does not appear that appellee made any effort to dispossess appellant of the farm, teams, and utensils, but suffered him to remain thereon, and continue the cultivation of the crop. The result of appellant's efforts and expenditures was 3,615 pounds of tobacco, of the alleged value of 20 cents per pound. This the appellee sequestered as its own, after the institution of this suit, which was brought on January 30, 1900. It does not appear for what reason nor upon what ground appellee sued for the possession of the tobacco, as the evidence offered upon that issue was rejected on objection of the appellee. Whether in making the contract with appellant the right was reserved to discharge him if his services were unsatisfactory was a matter of dispute, the evidence upon the issue being conflicting. Appellant brought his suit in the form of an action for wages for services performed under a contract of hire, with the additional allegation

that he had incurred certain necessary expenses in the cultivation of the crop for which he was entitled to be reimbursed. That he was in fact discharged by appellee on July 15, 1899, is not questioned, and it is equally beyond dispute that the services thereafter performed, and the expenses thereafter incurred, were performed and incurred after actual notice that appellee had discharged him, and directed him to pursue the enterprise no further, and to incur no further expense. Both parties seem to treat the original agreement as a contract of hire at a stipulated salary per month. Whether appellant had any discretion as to the expenses to be incurred, and whether he was originally authorized to incur them at discretion, as the agent and upon the responsibility of appellee, does not clearly appear.

Under the contract of hire, what were the respective rights of the parties under the facts as they appear of record? If appellant were rightfully and finally discharged, there was no breach, and he can recover nothing under the contract. But, even under appellee's contention as to the terms of the contract, the right to discharge could not be exercised arbitrarily. Appellant must have been in some way derelict in the discharge of his duty in order to authorize his dismissal. *Railway Co. v. Greenwood*, 2 Tex. Civ. App. 76, 21 S. W. 559.

Conceding, however, the correctness of his contention that he was wrongfully discharged, what rights accrued to appellant and what was his remedy? Clearly, not a suit upon the contract; for that had been breached, and his remedy was either an action for damages for its breach, or to treat the contract as rescinded and sue for his wages already earned and due. The action for the breach of contract is not for wages, but for damages. The policy and purpose of the law in such a case is to compensate the servant for the damages suffered as a proximate result of the breach. *Wood, Mast. & S. § 125*. Under this principle, the discharged servant cannot sit supinely until the expiration of his term of hire, and then sue and recover his wages for the entire time. He must discharge the duty imposed by law in every case of suffered damage. That is to say, he must exercise reasonable care to find other employment, and the measure of his damages is the difference between the sum earned by him in the exercise of reasonable care and the sum he would have received but for the breach complained of. The burden, however, is upon defendant to show, as in other cases, that by the exercise of care and effort he could have reduced the consequent damage. *Meade v. Rutledge*, 11 Tex. 44; *Lichtenstein v. Brooks* (Tex. Sup.) 12 S. W. 976. He may sue at once for the breach, but in such case the judgment will be a bar to any further suit; or he may wait until the end of the term, and sue, in which event his damages

have become certain, and he may recover his full loss, but in no event more than the contract price.

Under these rules of law, and bearing in mind the form in which the suit was brought, it is clear that no recovery could be had unless the facts showed either that there was no discharge, and the contract had been performed by appellant, or else that, notwithstanding the discharge, appellee, by its subsequent acts, was estopped to insist upon the discharge, having permitted him to retain possession of the farm, teams, utensils, etc., and to proceed with the cultivation of the crop; the appellee subsequently asserting a right to the fruits of his labor. *O'Connor v. Van Homme*, Dall. Dig. 429. Appellant refused to accede to the discharge, and has brought his suit for labor performed under the contract of hire, and, as there are circumstances tending to sustain the view that appellee did not in fact insist upon the discharge, we will dispose of the errors assigned with reference to this theory of the case.

The only assignments necessary to be noticed in this connection are the two complaining of the charge of the court affecting appellee's right to discharge appellant. One section of the charge complained of is as follows: "But if the jury believe that a contract was made by and between Mudgett, and * * * that it was agreed and understood that defendant reserved the right to discharge said Mudgett, and you further believe that defendant, acting by its directors, at its meeting of July 15, 1899, discharged said Mudgett, you need not inquire further, but should return a verdict for defendant, * * * so far as the question of wages and expenses from July 15th to January 1st is concerned; for you are instructed that the defendant is managed by its board of directors, and its acts are binding." Another section of the charge, involving the same error, is complained of in assignment No. 10. These charges were erroneous and misleading, not only because there was no evidence that appellee reserved the absolute right to discharge appellant, but also because it was practically an instruction that defendant could discharge without cause, and ignored the evidence tending to show that the act of discharge was waived, and not thereafter insisted on. It also instructed the jury that the act of the directors was absolute. For this error the cause must be reversed.

Plaintiff did not sue for a breach of contract, but upon a contract alleged to have been performed, and can recover, if at all, only upon that hypothesis. The errors in the charge complained of were misleading upon this issue.

It being true that, if the facts should establish that he was rightfully and finally discharged, appellant could recover nothing upon the contract beyond what had been earned, the inquiry arises, what right would accrue

to the parties growing out of their conduct subsequent to the termination of the contract relation? If the facts do not show that appellee, by permitting appellant to continue the management and cultivation of the farm, thereby waived the right to dismiss him, and was bound by the terms of the original contract, then appellant, by electing to use and retain possession of the farm and utensils of appellee, might be responsible to appellee for the rental value of their use from July 15th to the end of the year, but in such event would be entitled to the fruit of his labor. Under such a state of facts, he would be in the attitude of a tenant at will of the appellee, in which case the appellee, having, without protest, permitted him to expend his force and substance in raising a crop thereon, cannot be allowed to assert an absolute claim to the crop thus raised. Or else, in a suit properly brought, he can recover upon a quantum meruit, on the theory that notwithstanding his discharge appellee accepted his services, and the benefit of expenses incurred by him, and cannot claim the fruits without compensating him for his outlay. That is to say, though he might have been discharged for good cause, yet if thereafter the appellee accepted his services, and acquiesced in his outlay, he would not be without his remedy, though the contract relation no longer existed. The nature of his remedy, as has been indicated, would depend on the relation which in fact thereafter existed between him and his former employer,—a fact question to be determined by the trial court.

If, then, in a suit for breach of the contract of hire, it should be shown that he was wrongfully discharged, he could recover the sum of \$15.20 due on July 15, 1899, and his damages, subject to reduction in amount in case it should appear that he had profited by the crop which he raised after his discharge, and subject to further reduction, should it be shown that a reasonably prudent person would have sought and procured other employment, and thereby earned more than appellee did in electing to raise the crop on the farm in question. Or if he ought to recover on a quantum meruit for the services performed after July 15, 1899, the measure of his damages for the breach would be the difference between the contract wages per month from July 15th and what he should be allowed on quantum meruit. But as under this state of facts he worked for the same master subsequent to the breach, and the master accepted his services, the measure of his damages would necessarily be fixed by the contract price; for the master would be placed in the attitude of having acquiesced in that method of minimizing the damages resulting from the breach. The questions thus presented by the anomalous state of facts have been noticed thus at length in view of

another trial. The case would present few difficulties but for the confusing fact that after the supposed breach appellant did not seek employment elsewhere, but continued to work for the same master.

To recapitulate: If appellant wishes to avail himself of the contract, and it has been breached by a wrongful discharge, he must sue for damages for its breach. If it has been breached, and he, by undertaking to raise a crop on his own responsibility, has treated the contract as rescinded, his rights must grow out of the new relation thus created by his acts. If ground existed for his discharge, and the company ordered his discharge, but by its subsequent acts condoned his dereliction, and waived the discharge, he can recover on the original contract for services performed thereunder, and, if the sums expended by him for necessary expenses were expended under such circumstances as would bind the company by its acquiescence, he can recover for them.

Appellant complains that the trial court erred in holding that the statute gives no lien for expenses incurred in raising the crop in question. We think the ruling of the court correct, under the contract as alleged and proved. Sayles' Civ. St. 1897, art. 3339a, gives a lien only for the wages of the servant, and, as has been seen, the contract declared on was only a contract for hire. We are also of opinion that appellant can claim his lien only in case he sustains his allegation that the sum sued for is due him under the original contract, continued in force by defendant's failure to insist on the discharge. The statute does not authorize a lien for damages for breach of a contract for hire. Appellee's contention that under a contract of hire for a year, wages payable monthly, the statute requires the laborer to fix his lien for the wages falling due each month, is not sound. Such a construction does violence to the spirit and evident purpose of the statute. By the fifth assignment, appellant complains of the refusal of the trial court to sustain his exception to that part of appellee's answer which seeks to justify the discharge on the ground that his work was unsatisfactory. As has been seen, such a right cannot be exercised arbitrarily, and some sufficient reason should have been alleged. That part of the petition being specially excepted to, some specific default should have been alleged in order to admit proof of default or malfeasance on appellant's part. Believing that we have, in a general way, sufficiently indicated the rules of law which should govern the trial court under appropriate pleadings on another trial, we do not deem it necessary to notice the other assignments in detail. They present no reversible error. For the errors indicated, the judgment is reversed, and the cause remanded. Reversed and remanded.

YARNELL v. BURNETT.¹

(Court of Civil Appeals of Texas. Jan. 17, 1901.)

APPEAL—DISMISSAL—DEFENDANTS IN ERROR—ADVERSE PARTIES—CITATION.

1. Where judgment was rendered against the maker of a vendor's lien note for the amount of the note, foreclosing the lien against him and his grantee, who had assumed the payment of the note, a petition in error by the grantee, which did not make the maker of the note a party, will be dismissed, under Rev. St. art. 1391, requiring a petition in error to state the names of the parties adversely interested, since his interest was adverse to the grantee, in that, if the latter should defeat the lien, the maker would be liable for the entire money judgment.

2. Under Rev. St. art. 1393, declaring that, on the filing of a petition in error, citation must issue for the defendant in error, failure to serve a defendant in error with a citation is ground for the dismissal of the writ.

Error from district court, Harris county; William H. Wilson, Judge.

Suit by John H. Burnett against Leon J. Yarnell and another. From a judgment in favor of plaintiff, defendant Yarnell brings error. Petition dismissed.

F. F. & E. T. Chew, for plaintiff in error.
J. R. Burnett, for defendant in error.

GARRETT, J. Burnett sued the defendant in error and one L. A. Dowdell to recover upon a promissory note executed by Dowdell for land, and to foreclose a vendor's lien. Dowdell had conveyed the land to Yarnell by a deed which recited as the consideration the assumption of the note by the latter. Judgment was sought against both defendants for the amount of the note, with foreclosure of a vendor's lien upon the land. Yarnell pleaded defenses against the validity of the lien and his liability for the note. Upon trial, judgment was rendered against Dowdell for the amount of the note, and against both of them foreclosing the lien. Dowdell abides by the judgment. Yarnell made a motion for a new trial, which was overruled. He filed a statement of facts in due time, and has sought to bring the case before this court by writ of error for revision. To that end he filed with the clerk of the district court a petition for writ of error, in which he set out the judgment, and asked for citation to J. H. Burnett only, and at the same time filed an affidavit in forma pauperis in lieu of bond made before the county judge of Harris county. Citation was issued to J. H. Burnett alone, and he alone was served therewith. Dowdell was not made a party to the proceeding, and for that reason the defendant in error has moved to dismiss. The motion to dismiss the writ of error must be sustained. Dowdell's interest in the judgment is adverse to that of the plaintiff in error, because if the latter defeats the lien on the land he must pay the entire money judgment. *Grant v. Collins*, 5 Tex. Civ. App. 45, 23 S. W. 994. The petition for a writ of error should state the names and residences of the

parties adversely interested. Rev. St. art. 1391. And citation in error must issue to them. Id. art. 1393. Even if Dowdell had been included in the petition, and citation had issued to him, the failure to have him served with citation would have been ground for dismissal. *Thomas v. Thomas*, 57 Tex. 518. Dismissed.

PENNYBACKER et al. v. HAZLEWOOD et al.

(Court of Civil Appeals of Texas. Feb. 9, 1901.)

EVIDENCE—DECEDENT'S CONTRACT—SECONDARY EVIDENCE—COUNTY COURT—JURISDICTION—RECONVENTION.

1. Under Sayles' Civ. St. art. 2302, providing that in an action by or against heirs of a decedent neither party shall be allowed to testify against the other as to any transaction with the decedent, testimony by the defendant as to the making of a contract with the decedent, upon which he is sued by the heirs, is inadmissible.

2. At a former trial certain writings, which were the property of the defendant, were introduced in evidence, and withdrawn under an agreement between the attorneys to withdraw all written evidence. The writings were lost. Testimony by one of the defendant's attorneys was given to account for the absence of the original writings, and copies introduced in evidence. *Held*, that testimony by the attorney is insufficient foundation for the introduction of secondary evidence of the writings, since they were the property of the defendant, and he should be called to account for their absence.

3. Evidence that at a former trial a material fact which a witness claims to have testified to was not spoken of by him is admissible.

4. In a suit in the county court on a contract for \$272 defendant pleaded in reconvention for \$1,255. *Held*, that the court was without jurisdiction, under Const. art. 5, § 16, denying it jurisdiction in a civil cause where the matter in controversy exceeds \$1,000.

Appeal from Delta county court; W. S. Banister, Judge.

Action by P. V. Pennybacker and others against L. B. Hazlewood and others. From a judgment in favor of defendants, plaintiffs appeal. Reversed.

D. H. Lane and James Patteson, for appellants. R. R. Hazlewood, for appellees.

BOOKHOUT, J. The appellants, as the heirs of G. M. Pennybacker, deceased, instituted this suit in the county court of Delta county against L. B. Hazlewood to recover the balance due on a contract alleged to have been executed by L. B. Hazlewood on January 1, 1893, whereby he had promised to pay to G. M. Pennybacker the sum of \$200 per year for the term of five years as rent for the G. M. Pennybacker farm on North Sulphur, in Delta county, Tex. It was further alleged that by the terms of said lease contract L. B. Hazlewood agreed to keep the place in good repair, and, if possible, exterminate the Johnson grass then growing on said farm, and that he took possession of said farm under said contract, and paid the rents therefor, with the exception of a balance of

¹ Rehearing denied.

\$72 for the year 1896, and \$200, the rent of 1897. It was alleged that it was possible to have exterminated the Johnson grass with reasonable care, and that defendant L. B. Hazlewood failed to do so, whereby plaintiffs were damaged \$600. Plaintiffs also allege that in October, 1897, defendant R. R. Hazlewood, for value, executed a written contract to plaintiffs, whereby he promised to pay any judgment they might obtain against L. B. Hazlewood upon any claim which they might have against him. Plaintiffs prayed for judgment for \$272 rent and \$600 damages. Defendants answered by general denial and special pleas. They admitted that L. B. Hazlewood did enter into a contract for the renting of the Pennybacker farm, dated January 1, 1893, but pleaded that the said lease contract was not actually executed until about April 7, 1893, and that about April 7, 1893, G. M. Pennybacker, in writing, authorized the defendant L. B. Hazlewood to make such improvements on the G. M. Pennybacker farm as he deemed to be the best interests of said farm, and by another instrument in writing, bearing same date, he agreed to pay said Hazlewood for such improvements, and, in the event they were not paid for during the terms of lease, the said L. B. Hazlewood might hold possession of said farm until the improvements were paid for; that by reason of said contract he made improvements on said farm by clearing and putting in cultivation portions of the same, and in ditching and building fence, amounting in the aggregate to the value of \$1,235, which was due him on January 1, 1898, with the exception of \$272, which he, the said L. B. Hazlewood, owed to said Pennybacker for rent, leaving a balance due of \$963. It was alleged that the two instruments executed April 7, 1893, and the lease contract, dated January 1, 1893, were all made at the same time, and formed one contract; that after the death of G. M. Pennybacker plaintiffs knew that defendant Hazlewood was making such improvements, and expected pay therefor, and that with knowledge of the facts they encouraged him to continue to make such improvements, and assured him he would be paid therefor; that the improvements increased the value of the farm \$8,000. The case was tried on the 23d day of November, 1899, and resulted in a verdict and judgment in favor of defendant L. B. Hazlewood for the sum of \$600, from which judgment plaintiffs appeal to this court.

The first and second assignments of error complain of the action of the court in admitting the testimony of defendant L. B. Hazlewood over their objection, wherein he testified: "That he rented from G. M. Pennybacker, for the sum of \$200 per year, for the years 1891-1892, the Pennybacker farm on North Sulphur, and the same included the G. M. Pennybacker land and the R. J. Pennybacker land; and that in 1893 he rented the same land from G. M. Pennybacker for the

term of five years, and executed the contract sued on by plaintiff, and agreed to pay \$200 each year rent for same." This testimony was objected to because it was concerning a transaction had between the said Hazlewood and G. M. Pennybacker, deceased, and plaintiffs sue as the heirs of G. M. Pennybacker; therefore the testimony is prohibited by the statute of this state. G. M. Pennybacker died in December, 1893, and the plaintiffs are his heirs, and sue as such. The testimony objected to comes clearly within the terms of the statute, and was, therefore, inadmissible. *Sayles' Civ. St. art. 2302; Parks v. Caudle, 58 Tex. 216.* A material question involved in the case was whether the R. J. Pennybacker land was included in the lease between G. M. Pennybacker and L. B. Hazlewood. It was contended by plaintiffs that the R. J. Pennybacker land was not included in said lease. The testimony objected to that the lease included this land was material, and ought not to have been admitted.

The third assignment of error complains of the ruling of the court in admitting what purported to be copies of a power of attorney and letters, each dated April 7, 1893, and each purporting to be signed by G. M. Pennybacker. The objection to this testimony was that the originals are the best evidence, and that their absence had not been accounted for, and no proper predicate had been made for the introduction of secondary evidence. The only evidence accounting for the absence of the original power of attorney and contract was the testimony of one of the appellees, R. R. Hazlewood, that he had the originals in court at a former trial of the cause; that he and D. H. Lane, one of the attorneys for appellants, agreed that each party should withdraw their written evidence from the papers of the case, and that he (Hazlewood) intended to withdraw the originals, and carry them home with him to Sherman, but did not do so, and that he had no recollection of ever having seen them since the former trial of the case. Appellees further proved by the clerk of the court that he had searched the papers in the cause for the original power of attorney and letters; that he had also looked among all the papers in his office, and at every place he thought they ought to be found, but that he could not find them, and that he had no recollection of having seen them since they were introduced in evidence on the former trial of the cause. This evidence we think insufficient to authorize the introduction of secondary evidence of the contents of the instrument. In discussing this question, Mr. Greenleaf, in his work on Evidence, says: "If it [the instrument] belongs to the custody of certain persons, or is proved or may be presumed to have been in their possession, they must, in general, be called and sworn to account for it." *Greenl. Ev. (16th Ed.) § 563b.* Under the agreement made on the former trial, the custody of the instruments belonged to the defendant L. B.

Hazlewood and his attorneys, yet he was not called to testify as to their loss, and but one of his attorneys testified.

Appellants complain of the admission of testimony on behalf of appellees to the effect that on a former trial of the case the plaintiffs did not contend that the lease did not include the R. J. Pennybacker land. Julien Pennybacker, one of plaintiffs, was a witness for plaintiffs, and on cross-examination was asked by defendants whether he claimed on the former trial that the R. J. Pennybacker land was not included in the lease. He answered that he did speak of it on the former trial. The defendants then introduced evidence over plaintiffs' objection that no such claim was made. In this there was no error.

The record discloses a fundamental error which has not been assigned, but which, we think, we are compelled to notice. The plea in reconvention sets up a claim for clearing in 1893 40 acres of land, of the reasonable value of \$480, and building one mile of fence, of the value of \$65, and one mile of ditching, of the value of \$50; and in 1895 making one-half mile of ditching, of the value of \$25, and one mile of fencing, of the value of \$65; and in the winter and spring of 1896 cleared and put in cultivation 26 acres of heavily timbered land; and in the winter of 1896 he cleared and put in cultivation 14 acres of land, of the value of \$480; and in the spring of 1896 made one-half mile of ditching, of the value of \$25, and built one mile of fence, of the value of \$65,—making a total value of \$1,255, which was due defendant L. B. Hazlewood January 1, 1896, with the exception of \$272, which the said L. B. Hazlewood owed said G. M. Pennybacker for rent; leaving the balance of \$983 due said Hazlewood. The amount in controversy in this plea exceeds \$1,000, and the fact that the plaintiffs' debt for \$272 was admitted and placed as a credit on the amount set up in the plea of reconvention did not have the effect of conferring jurisdiction on the county court of the matters set forth in the plea. *Gimbel v. Gomprecht*, 89 Tex. 497, 35 S. W. 470; *Brigman v. Aultman, Miller & Co.* (Tex. Civ. App.) 55 S. W. 509; *Cain v. Culbreath* (Tex. Civ. App.) 85 S. W. 809. In the case of *Gimbel v. Gomprecht*, supra, the very question suggested by the pleading in this case was passed upon by our supreme court, and it was held that the county court was without jurisdiction over the plea in reconvention. For the errors indicated, the judgment is reversed, and the cause remanded.

MORGAN et al. v. MOWLES.

(Court of Civil Appeals of Texas. Feb. 6, 1901.)

PUBLIC LANDS—SURVEYS—LANDS GRANTED—EJECTMENT—EVIDENCE—CONFLICT IN CALLS—RECOVERY—MARKS—PRESUMPTION.

1. A survey of plaintiff's land called for the well-established corner of another survey, and did not indicate that the north line extended beyond that corner. At the time of the survey it was accepted that that corner marked the west-

ern boundary of another survey adjacent to plaintiff on the east, which the owner occupied, but it was later discovered that the true boundary of such survey was a considerable distance further east. The line from the corner to plaintiff's south line marking his eastern boundary was well established by the marks and calls for distances, but the survey called for the western boundary of the adjacent survey. *Held*, that plaintiff's eastern boundary did not extend to the western boundary of such survey.

2. Where plaintiff, in a suit to recover land, only established a conflict between a call for a well-established corner of an older survey and one for the established line of another survey, he is not entitled to recover, since the calls are of equal dignity.

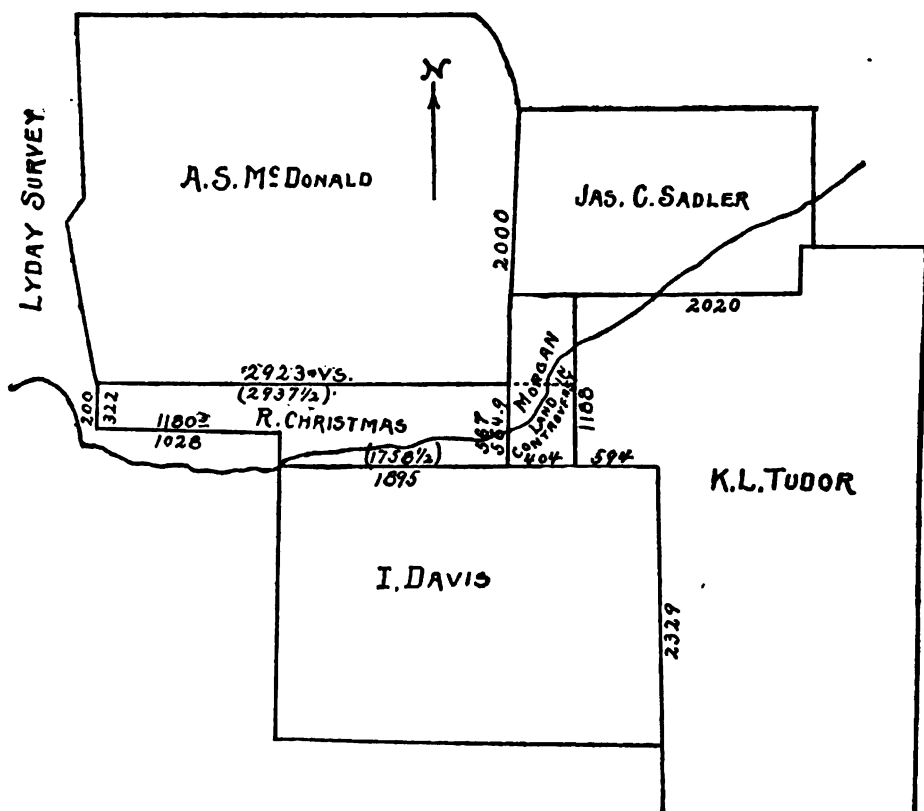
3. Where marks on a line of a survey were not quite as old as those on the surrounding older surveys, but there was evidence that the marks were not as old as those on other lines of the same survey, no presumption exists that such line was not run by the original surveyor of the tract, but by the patentee thereof, after the original survey.

Appeal from district court, Lamar county; E. S. Chambers, Judge.

Suit by W. M. Mowles against Andrew Morgan and others. From a judgment in favor of plaintiff, defendants appeal. Reversed.

Allen & Dohoney, for appellants. W. M. Mowles, for appellee.

FLY, J. This suit was instituted by appellee to recover certain land from appellants. The cause was tried by the court, and judgment rendered in favor of appellee. The only question involved is as to the proper location of the east boundary line of the R. Christmas survey, appellee claiming that it is about 405 varas east of the location given to it by appellants. In March, 1872, a patent was granted by the state to the R. Christmas tract of land, described as follows: "Beginning at the S. W. corner of Abner S. McDonald survey of $\frac{1}{4}$ league, and at a corner of the Jacob Lyday survey, from which a hickory marked 'ASM' bears S. 4 varas, a R. O. mkd. 'XX' brs. N. 7 varas; thence S. 200 varas, with J. Lyday's S. E. line, to his corner, a post, from which a B. D. mkd. 'WTX' brs. S., 28 degrees W., 4 varas, a slippery elm mkd. 'X' bears N., 70 degrees E., 1 vrs.; thence east 1,028 varas, to the N. E. corner of the Lyday survey, a hickory, 'JL,' from which a hickory mkd. 'XX' bears S., 4 W., 4 varas; thence S. 167 varas, a stake, Isaiah Davis' N. W. corner, from which an ash mkd. 'IDX' bears N., 83 degrees E., 6 varas, a hickory mkd. 'XX' bears N., 2 W., 7 varas; thence east 1,895 varas, on Davis' N. line, a stake, K. L. Tudor's S. W. corner, from which an ash mkd. 'ID' bears N., 83 W., 5 varas, a hickory mkd. 'XX' bears N., 36 degrees W., 5 varas; thence N., 367 varas, with Tudor's W. line, to a stake, the S. E. corner of said McDonald survey, from which a P. O. mkd. 'ASM' bears S., 84 degrees W., 4 varas; thence W. 2,923 varas, to the beginning." The following plat will give a clear conception of the subject of controversy.



In 1898 appellants obtained a patent to 80 acres of land lying between the McDonald and Christmas surveys and the Tudor survey, and the south half of that land is in controversy, the issue being as to whether the land was a part of the Christmas survey. The uncontroverted evidence establishes the location of the southeast corner of the McDonald survey, which is called for in the field notes of the Christmas survey, at a point about 405 varas west of the K. L. Tudor west line, which is also called for in the field notes. The north line of the Christmas survey is well marked and established as far as the McDonald southeast corner, but there is nothing that indicates that a line was continued east of the McDonald corner. On the other hand, it was clearly established that it was generally accepted at the time of the survey of the Christmas tract that the Tudor west line was identical with the east line of the McDonald tract, and, after the land was patented to the assignee of Christmas, Tudor exercised control over the land in controversy, and it was not until after his death that it was discovered that the Tudor west line was 405 varas further east than had been supposed. The call for distance of the north line of the Christmas survey does not even reach the southeast corner of the McDonald survey, and fails to reach the true west line of the

Tudor tract by over 400 varas. The line from the northeast corner of the McDonald survey to the I. Davis survey is well marked. The marks testified to by the witness along all the lines of the Christmas survey, and at the McDonald southeast corner, would tend to prove that the original surveyor of the tract went upon the ground, and actually surveyed the lines, and marked them as called for in the patent, and, if there had been no proof on the subject, the presumption must be indulged that an actual survey was made. *Maddox v. Fenner*, 79 Tex. 291, 15 S. W. 237; *Gerald v. Freeman*, 68 Tex. 204, 4 S. W. 256; *Smith v. Boone*, 84 Tex. 528, 19 S. W. 702.

The object in the application of the calls of a survey is to discover the footsteps of the surveyor, and, when they are found and identified, all classes of calls must yield to them. *Stafford v. King*, 30 Tex. 257; *Fulton v. Frandolig*, 63 Tex. 330; *Ayers v. Lancaster*, 64 Tex. 312.

Appellee sought by his suit to extend the Christmas survey beyond its calls for course and distance, and the burden rested on him to show that the surveyor made the north and south lines go over 400 varas further than the southeast corner of the McDonald survey. *Phillips v. Ayres*, 45 Tex. 601; *Williams v. Winslow*, 84 Tex. 371, 19 S. W. 513. In proof of the fact that the land was in-

cluded in the Christmas survey, nothing is depended upon except a call for the west line of the Tudor survey, and it is urged that the well-marked corners on the McDonald and Davis surveys, and the well-marked line of the Christmas survey, and the acts of the parties concerned in recognition of those corners and lines, must be set aside, and the calls for distance extended 400 varas, in deference to a call for the line of an older survey. We are of the opinion, however, that there is no rule of law sanctioning such action, where all the facts tend to show that there was no intention upon the part of the surveyor to include the land in controversy in the survey. He placed the lines and corners where he wished them, his only mistake being in the call for the west line of the Tudor survey.

The marks on the line running north from the Davis line to the southeast corner of the McDonald tract were shown to be not quite as old as those on the surrounding older surveys, but there is no testimony, as stated by appellee in his brief, that the marks on that line did not appear to be as old as the marks on the other lines of the Christmas survey. There is no fact upon which to base a presumption that the line between the Davis survey and the southeast corner of the McDonald survey was not run by the original surveyor of the Christmas survey, nor, as contended by appellee, that it was made by the patentee of the land some time after the original survey. The call for the well-established corner of an older survey is of equal dignity with a call for the established line of another survey, and, in a case where the plaintiff shows no ground for a recovery except a conflict in the two calls, we do not think he is entitled to recover; and when the testimony goes further, and strongly tends to establish the footsteps of the original surveyor at corners and along lines antagonistic to the call for the boundary line of the old survey, there can be no doubt that the defendants should recover. Because the evidence fails to sustain the judgment of the district court, it is reversed, and judgment is here rendered in favor of appellants.

REED v. CORY.

(Court of Civil Appeals of Texas. Feb. 16, 1901.)

BILLS AND NOTES—PAYMENT—PLEADING—
FRAUD—DEMURRER—INSTRUCTIONS—
APPLICATION OF PAYMENTS.

1. Where, in a suit on a note, defendant pleaded fraud, payment, and want of consideration, but failed to allege the facts relied on to support such defenses, such failure did not render the plea insufficient to raise the issues presented thereby, in the absence of demurrer.

2. Where defendant sued as maker of a renewal note, contending that it was procured by fraud, and that the first one had been paid, while plaintiff stated to him that it had not been paid, and plaintiff had been paid a sum

which was within a few dollars of the amount of the note and all other claims against defendant, a judgment against defendant for the full amount of the note was erroneous.

3. Where the evidence was conflicting as to whether it had been agreed between plaintiff and defendant that a sum paid by defendant should be applied on a note or on a general account, it was error for the court, in an action on the note, to charge that the money received by plaintiff became his property; such charge being calculated to induce the jury to believe that plaintiff was not bound to apply the money in the manner agreed on.

4. Where, in a suit on a note, it appeared that plaintiff also had a running account with the maker, who gave him an order on another for a sum due the maker for goods sold, which order recited that it was given to secure plaintiff in any sum defendant might be owing him on a certain transaction or on general account, the money so received should be applied on the account, and not on the note, in the absence of evidence of an express agreement to the contrary.

Appeal from Rockwall county court; N. C. Edwards, Special Judge.

Action by J. F. Cory against Robert Reed. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Wade & Wade, for appellant. L. D. Stroud and T. B. Ridgell, for appellee.

TEMPLETON, J. On April 6, 1898, the appellant bought a span of mules from one Frazier, and in consideration therefor gave to Frazier his note for \$100, with appellee and J. S. Vernon as sureties; the note being due on October 1, 1898, and bearing 10 per cent. interest from date, and providing for the payment of 10 per cent. as attorney's fees in case of suit. At the same time appellant gave to appellee a note similar in all respects—except that he was the sole maker—to the note above described, and also executed and delivered to appellee a mortgage on the mules to secure the payment of the note. The note and mortgage to appellee were given to protect him as surety on the note to Frazier. Prior to this time appellant made a contract to clear some land for appellee, by the terms of which one-half the wood taken from the land was to belong to each party. Appellant contracted with Abernathy Bros. to deliver to them the wood at \$2 per cord, and appellee was to pay him \$1.12½ per cord for hauling appellee's part of the wood. Appellant delivered 58 cords of wood to Abernathy Bros., 37½ cords of which came off the land of appellee, and 20½ cords of which were acquired by appellant from other sources. About March 25, 1898, appellant gave to appellee an order on Abernathy Bros. for all sums that might become due him on his contract with them, and appellee about October 1, 1898, collected from Abernathy Bros. the \$116 owing by them for the 58 cords of wood delivered by appellant. Appellee credited appellant on his books with the \$116, but actually used \$105 thereof in paying the Frazier note. The order above mentioned was given by appellant to secure appellee in any sum appellant might be owing him on

the wood transaction or on general account. The record does not disclose the state of accounts between the parties, except as shown above. Appellee testified that he had tried, and failed, to get appellant to a settlement of their accounts. On December 21, 1898, appellant gave to appellee his note for \$105, due January 10, 1899, with 10 per cent. interest from date, and providing for 10 per cent. attorney's fees in case of suit, and at the same time gave a mortgage on the mules to secure the note. It was stated in the mortgage that it was given in extension of the former note and mortgage given to appellee. Appellant testified that appellee told him that he had been compelled to pay the Frazier note, and that he demanded of appellant that he give the new note and mortgage to cover such payment. He further testified that he told appellee that it was his understanding that appellee had received enough money from Abernathy Bros. to pay the note, but that appellee denied that he had done so. Appellee controverted the truth of this testimony as to his alleged statements to appellant concerning the payment of the Frazier note. The note given in December having fallen due, and default being made in its payment, appellee sued in the justice's court to recover the amount due on the note, with a foreclosure of the mortgage lien. He obtained a judgment in that court, and on appeal to the county court a like result was reached, and appellant has appealed to this court.

Appellee's action was a straight suit on the note and for foreclosure. Appellant pleaded a general denial, and further pleaded, under oath, that the note was obtained through fraud and deceit; that it was given in lieu of a note that had been fully paid; that when the note sued on was given he did not know that the first note had been paid; that he was induced to give the second note by the fraudulent acts, conduct, and declarations of appellant; and that the consideration therefor had wholly failed. The facts constituting the alleged fraud, payment, and want of consideration were not stated in the plea; but no exception was urged to the plea, nor was any replication filed thereto. In the absence of demurrer, we think that the plea was sufficient to raise the issues therein presented. The evidence is uncontroverted that the first note to appellee was given to indemnify him against loss by reason of his suretyship on the Frazier note, that he paid the Frazier note out of the sum received by him from Abernathy Bros. on account of wood delivered to them by appellant, and that the note sued on was given in lieu of the first note. The only interest that appellee is shown to have had in the wood was a one-half interest in the 37½ cords taken from his land, at \$2 per cord, less \$1.12½ per cord due appellant for hauling, making the sum of \$16.41. The amount received was \$116, and the amount paid on the Frazier note was

\$105, leaving a balance of \$11. So, under the evidence as it appears in the record, appellee has received enough to satisfy his interest in the wood, and within \$5.41 of enough to pay the Frazier note; yet he has recovered judgment for the full amount of the note given to secure him against the Frazier note. Such a result is so manifestly unjust that it cannot be permitted to stand. It is true that if the accounts between appellant and appellee were unsettled when appellee received the money from Abernathy Bros., and appellant was then indebted to him on account, appellee could have credited the sum so received on his account against appellant, unless he had agreed with appellant that the wood money should be first applied to the payment of the Frazier note, in which event it should be so applied. The evidence was conflicting as to whether there was such agreement, but there is no question that the wood money was to be applied to the note if not necessary to settle an account owing by appellant to appellee. As it does not appear from the transcript before us that appellant, when appellee received the \$116 from Abernathy Bros., was indebted to appellee, except in the sum of \$105 paid on the Frazier note, and the sum of \$16.41, appellee's interest in the wood, it cannot be said that the note sued on has not been satisfied, at least in part. There are a number of questions presented concerning charges given and refused, but we deem it unnecessary to consider them in detail. We will say, however, that we think it was error for the court to charge the jury, as was done, to the effect that the money received by appellee from Abernathy Bros. became his property. While, in some sense, the money so received became his property, still he was bound in law to apply the money to the purposes for which the order was given, and in accordance with the agreements between the parties. As given, the charge was calculated to cause the jury to believe that appellee was not bound to so apply the money, and was therefore misleading. Should the accounts between the parties be put in issue on another trial, and should it be shown that appellant was owing appellee anything on account, then the wood money, to the extent of appellant's interest therein, should be applied to the satisfaction of the account, and the balance, if any, as a credit on the note sued on, unless there was an agreement that the money should be applied to the payment of the note instead of on the account, in which event it should be applied on the note. As it seems that appellant had given to appellee an order on Abernathy Bros. for the wood money, to secure appellee's account against him, appellant could not thereafter change the application of the money without the consent of appellee. These propositions should be given in charge to the jury on another trial. The judgment is reversed, and the cause remanded.

ERWIN v. ERWIN.

(Court of Civil Appeals of Texas. Feb. 20, 1901.)

**WILLS—EXECUTORS—APPEAL WITHOUT BOND
—DISMISSAL—PERSONAL INTEREST—
NOTICE OF APPEAL.**

1. Under a statute authorizing an executor to appeal without bond unless the appeal concerns him personally, an executrix appealing from an order setting aside certain land to the testator's widow as a homestead was not personally concerned, within the meaning of the statute, though she was the sole devisee and legatee, since the statute means that the appeal may be without bond unless it is taken in the interest of the executor personally, and not in the interest of the estate.

2. Where an executrix gave notice of an appeal from a certain order, and perfected the same, the fact that the creditors of the estate also gave notice of appeal, but filed no bond, was no reason for dismissing the executrix's appeal.

Appeal from district court, Atascosa county; M. F. Lowe, Judge.

Application by Florence Erwin to have a certain tract of land set aside from her husband's estate as her homestead. From a judgment of the district court dismissing an appeal from a probate order setting aside such land, L. A. Erwin, executrix, appeals. Reversed.

S. B. Easley and Jas. A. Waltom, for appellant. W. O. Reed and J. F. Onion, for appellee.

JAMES, C. J. The cause came before the district court on appeal from an order of the county court in the estate of J. A. Erwin, deceased, setting aside a certain 200-acre tract to Florence Erwin, his widow, as a homestead. Erwin left a will making his mother, Mrs. L. A. Erwin, sole devisee and executrix. She qualified, and various claims were filed and approved against the estate. It appears that in the county court the executrix, and also the creditors, or certain of them, opposed the setting aside of this land to the widow; and both she and the creditors gave notice of appeal, but the latter filed no bond for appeal. The executrix removed the case by appeal to the district court, without giving any bond. Upon motion the district judge dismissed the appeal because no appeal bond had been given. The following was the testimony taken on the motion: "(1) That J. A. Erwin died, leaving a will, which had been duly probated in the county or probate court of Atascosa county, Texas, and that he, in said will, devised and bequeathed all his property to his mother, Mrs. L. A. Erwin, and also left her sole executrix of his estate, without bond. (2) That the inventory of said estate shows said entire estate to be valued at \$1,838.20. That the debts proven against said estate, and allowed as claims against estate by executrix, amount to the sum of \$1,242.10, exclusive of interest. That a part of the real estate, to wit, lots 109, 110, 117, and 118, is incum-

bered by deed of trust lien for \$372.80, besides interest. That Mrs. L. A. Erwin has a claim against the estate, proven up, amounting to \$226.95. (3) It was admitted that the will of J. A. Erwin, introduced in evidence, was as follows, to wit: 'The State of Texas, County of Atascosa. In the name of God, amen: I, Jas. A. Erwin, being of sound mind and disposing memory, do hereby make and declare this my last will and testament. First. After my death I desire that all my just debts be paid. Second. After the payment of all my just debts, I give and bequeath to my mother, L. A. Erwin, the remainder of my property, of all kinds whatsoever. Third. I also hereby appoint my mother, L. A. Erwin, sole executrix of my will, and direct that no bond be required of her as said executrix, and that she have the power to dispose of the property as she sees fit. Witness my hand this 25th day of November, 1896. [Signed] Jas. A. Erwin.' (4) It was admitted on the trial of said motion that the will of Jas. A. Erwin was on the 8th day of March, A. D. 1900, legally presented and probated before the probate judge of Atascosa county, Texas, and that Mrs. L. A. Erwin duly and legally qualified as sole executrix under said will, and the executrix and legatees of said estate, without bond, as prescribed by said will."

The judge erred in dismissing the appeal. Our view of the statute which allows an administrator or executor to appeal without bond unless the appeal personally concern him is that it means that he must be personally concerned, and that the estate must not be concerned in the appeal. The argument here is that as the executrix was the sole devisee and legatee, and as the value of the property appeared to exceed the debts, she had a substantial interest in the residue, and therefore she was personally concerned. We have examined the cases relied on by appellee, and in every instance the judgment appealed from was in favor of the estate, and the interest and concern of the estate was to have it stand unappealed from; and therefore in all such cases the administrator, and not the estate, was concerned in the appeal. The appeal could only be referred to his interest. These cases are Peabody v. Marks, 25 Tex. 22; Bills v. Scott, 49 Tex. 430. See, also, Hicks v. Oliver (Tex. Civ. App.) 26 S. W. 641. It seems to us that if the rule insisted on by appellee should prevail, viz. to ascertain in connection with appeals in estate cases whether or not the executor or administrator appealing has some personal interest involved in the subject of the appeal, a case could hardly be conceived where he could appeal without giving bond. No heir, creditor, devisee, or legatee acting in such a capacity could ordinarily do so. In fact, where the administrator is a stranger he has some interest, in the form of commissions, affected by the appeal. A bond might not be required of the executor

when there are no unpaid creditors, and he is entitled to the entire estate, for in such case the appeal would concern him and him alone. But here there were unsatisfied debts, and under the law it was a part of the duty of the executrix to administer the assets to pay these claims. In defending the property of the estate against adverse claimants, she was performing duties as executrix, and representing the estate. If she conceived she had just cause for resisting the claim, it was her duty as executrix to appeal; and although she may have had some incidental or ulterior personal interest, as devisee or otherwise, the appeal, to use the language of *Huddleston v. Kempner*, 87 Tex. 373, 28 S. W. 936, concerned her official acts, and she was not required to give bond. To hold otherwise would be to say that, as a rule, an administrator or executor who is also an heir, devisee, legatee, or creditor (and the statute prefers these in granting letters) could fully perform his duties to heirs and creditors only by appealing at his own peril and expense. The statute was enacted to avoid such consequences to the administrator, and such embarrassments to the effective administration of estates.

A point is also made by appellee in the fact the creditors, although they gave notice of appeal, did not give any bond. When the executrix gave notice of appeal, intending to perfect it, as she did, there was no occasion for the creditors to give bond. Her appeal as executrix was necessarily in their interest, and inured to their benefit. The judgment is reversed, and judgment here rendered overruling the motion to dismiss, and remanding the cause to the district court.

FIFE et al. v. NETHERLANDS FIRE INS. CO. et al.

(Court of Civil Appeals of Texas. Feb. 13, 1901.)

GARNISHMENT — ATTORNEY'S FEES — WITHDRAWAL FROM SUIT — ESTOPPEL — WRIT OF ERROR — PURPOSE OF DELAY — DAMAGES ON AFFIRMANCE.

1. Where plaintiffs obtained judgment in a justice court against a garnishee who was obliged to appeal to the county court, and plaintiffs induced a trustee in bankruptcy for the principal defendant to intervene in the suit if plaintiffs would agree to pay the costs, it was proper, on rendering judgment for the garnishee in the county court, to allow him his attorney's fees, though plaintiffs confessed that they had no cause of action and withdrew from the case the morning of the trial.

2. The fact that \$1,000 in defendant's schedule in bankruptcy had been set apart to him as exempt, on his oath that it was from insurance on loss of his household goods by fire, did not estop him from maintaining in a subsequent action, in which the insurance company was garnished, that \$200 of the \$1,000 still remained in the hands of the insurance company, since the \$200 not paid at the time of defendant's schedule was held in trust for him by the company.

3. Where a writ of error was sued out to delay payment of the judgment, the court, on af-

firmance of the judgment, will award damages for the delay.

Error from county court, Dallas county; Kenneth Foree, Judge.

Action by Fife & Miller against J. N. Dazey, as principal defendant, and the Netherlands Fire Insurance Company, as garnishee, in which Harry McGowan intervened as trustee in bankruptcy for J. N. Dazey. From a judgment of the county court in favor of defendants on appeal from a justice court, plaintiffs and the trustee, McGowan, bring error. Affirmed.

O. N. Brown and U. F. Short, for plaintiffs in error. Baker & Rhea, for defendants in error.

FLY, J. Fife & Miller, hereinafter styled "plaintiffs," instituted suit in a justice's court for \$92.50 against J. N. Dazey, and a writ of garnishment was obtained and served upon the insurance company. The garnishee filed an answer admitting its indebtedness in the sum of \$1,000 to Dazey on account of the destruction by fire of household goods belonging to Dazey which were insured by garnishee. In the justice's court plaintiffs recovered judgment against Dazey and the garnishee. An appeal was perfected to the county court, and a short time thereafter Dazey filed his petition for bankruptcy, and was adjudicated a bankrupt. The plaintiffs were scheduled among the creditors, and the amount of the judgment placed among the liabilities. The petition in bankruptcy was filed in June, 1899, and on October 2d thereafter Dazey was discharged in bankruptcy. After the cause had reached the county court the garnishee filed an amended answer, alleging that Dazey was a married man when the policy was issued, and that the household goods insured were exempt under the law from forced sale. Dazey in his answer claimed the insurance money as being exempt. In his schedule of property filed in bankruptcy he reported that he had \$1,000 in cash, which had come to him as insurance on exempt property, and the trustee had reported it as exempt, and his report was adopted. The trustee, Harry McGowan, intervened in the suit, and asked that he be adjudged the insurance money. The plaintiffs admitted in open court that the lien on the money which they had acquired by the garnishment proceedings had been annulled by the bankruptcy proceedings. Judgment was rendered in favor of J. N. Dazey for the amount of insurance money remaining in the hands of the insurance company, amounting to \$200; that the costs, including \$30 attorney's fees for the garnishee, be taxed against plaintiffs; and that the trustee pay all costs incurred by his intervention. Plaintiffs and the trustee, McGowan, perfected this appeal.

The plaintiffs, Fife & Miller, present but one ground upon which they ask a reversal, and that is the allowance of the attorney's fee in favor of garnishee. Their only ob-

jection to the allowance of the attorney's fee is that they confessed that they had no case, and there had been an agreement between the garnishee and Dazey that the latter should pay the attorney's fee. Plaintiffs had not only claimed a judgment in the justice's court against the garnishee, but had obtained it, and it was compelled to appeal to the county court to obtain redress. They could not escape paying for an attorney's services by admitting at a late hour in the proceedings in the county court that they had no cause of action. The expense had been incurred. The testimony established, also, that they brought the trustee into the suit without his knowledge or consent, and forced that litigation on the garnishee. It was on the morning of the trial that McGowan consented to the use of his name as intervener on the condition that plaintiffs paid all the costs, and the court properly included the attorney's fee as part of the costs.

McGowan claims that the judgment should be reversed because "the court erred in permitting the defendant J. N. Dazey to testify, over the objection of the intervener, that the sum of money in possession of the garnishee, the Netherlands Fire Insurance Company, was a part of \$1,000 due upon a policy of insurance which had been issued by said garnishee company to the defendant Dazey upon a lot of household goods which had been destroyed by fire, and which said goods were in use by the defendant Dazey and his family at the time said policy was issued and at the time of the fire, in consequence of which the garnishee became indebted to defendant Dazey in the sum of \$1,000, and that only \$800 of said sum had been paid to said Dazey, because the said sum of \$1,000 in cash had been set apart to said J. N. Dazey by the report of the trustee in the case, 'In the Matter of J. N. Dazey, No. 94, in the United States district court for the Northern district of Texas,' and the said J. N. Dazey should not be allowed, and is estopped, to contradict the statement contained in said schedule and report, to the effect that \$1,000 in cash had been set apart to him, and show that at the time said report was made he did not have the whole of said sum of \$1,000 in cash, but had only \$800 thereof, and that the balance, \$200, was still in the hands of garnishee." There is no merit in the assignment. Dazey swore that he had \$1,000 in cash, and he did have it; \$800 having been paid to him, and the other \$200 being held in trust for him by the insurance company to abide the result of the suit. In his schedule Dazey had stated that the \$1,000 was from a policy of insurance on household goods, and there was no attempt to show that he had but one policy, and Dazey swore that he had no other. We have proceeded on the theory that the trustee was authorized to sue for the property of the bankrupt after his discharge, but we do not hold that he had such authority.

Defendant in error Dazey suggests to this
61 S.W.—11

court that this writ of error was sued out for delay, and prays for an affirmance, with 10 per cent. damages. It is apparent from the record that the courts are being used for the purpose alone of delaying the payment of the money to J. N. Dazey, and the judgment will be affirmed, with 10 per cent. damages on the \$200 decreed to Dazey by the judgment.

BLACKFORD et al. v. RYAN et al.

(Court of Civil Appeals of Texas. Jan. 12, 1901.)

LIENS—LIVERYMAN—CHATTEL MORTGAGE—PRIORITY.

Under Rev. St. art. 3319, giving a liveryman a lien on a horse boarded with him, such lien is inferior to the lien of a prior duly registered mortgage on the horse, where the horse is placed in the stable by the mortgagor without the knowledge or consent of the mortgagee, since the mortgagor, though in possession, is not the agent of the mortgagee, and cannot sell or encumber the property to the detriment of the mortgagee without his consent, and the liveryman, when he voluntarily boards the horse, must look to the person leaving the animal, and his lien is only on the interest of such person.

Appeal from Grayson county court; J. W. Finley, Special Judge.

Action by G. L. Blackford and another against F. A. Ryan and others. From a judgment for defendants, plaintiffs appeal. Affirmed.

Moseley & Smith, for appellants. J. F. Holt, for appellees.

TEMPLETON, J. One of the questions presented in this case is whether the liveryman's lien conferred by article 3319, Rev. St., is superior to the lien of a prior mortgage which has been duly registered, when the mortgaged property has been placed with the liveryman by the mortgagor without the knowledge or consent of the mortgagee. The authorities bearing upon this question are conflicting. We believe that the true rule is stated by Mr. Jones in his work on Liens (section 691), where he says: "A chattel mortgage on a horse is superior to a subsequent lien of a stable keeper, when the horse is placed in the stable by the mortgagor, after the making of the mortgage, without the knowledge or consent of the mortgagee. It is not to be supposed that a statute giving a lien for the keeping of animals was intended to violate fundamental rights of property, by enabling the possessor to create a lien without the consent of the mortgagee, when the person in possession could confer no rights as against the mortgagee by a sale of the animals. The keeper of animals intrusted to him by the mortgagor undoubtedly acquires a lien as against the mortgagor, but it is a lien only upon such interest in them as the mortgagor had at the time, and not a lien as against the mortgagee, between whom and the keeper of the animals there is no privity of contract."

The mortgagor, though in possession, is in no sense the mortgagee's agent; nor does he sustain to the mortgagee any relations which authorize him to contract any liability on his behalf. The statute cannot be construed to authorize the mortgagor to subject the mortgagee's interest to a lien without his knowledge or consent, as security for a liability of the mortgagor, unless such construction clearly appears from the language of the statute to be unavoidable." It may be contended that as the keeping of the animal is for the benefit of the mortgagee, in that it tends to preserve his security, his lien should be deferred to that of the liveryman. If the mortgagor has a right to create the statutory lien by placing the animal in a stable to be fed and cared for, and such lien is superior to the lien of the mortgagee, then he may legally mortgage the animal to secure feed and attention, and the second mortgagee would be entitled to priority over the first. It cannot be seriously insisted that the mortgagor would have such authority. He is not the agent of the mortgagee, and therefore has no power to bind the mortgagee by his acts. The liveryman is under no obligation to receive and care for animals tendered to him, and when he voluntarily does so he must look to the person leaving the animal with him for compensation, and his lien on the animal is limited to the interest of such person. In *Stott v. Scott*, 68 Tex. 302, 4 S. W. 494, the owner of a horse loaned it to another, who, without authority of the owner, placed it in a stable. It was held that the liveryman acquired no lien. The effect of that decision is that the owner or mortgagee of an animal is not liable to a liveryman for keeping and caring for it unless it is left with him by the authority of such owner or mortgagee, and that the liveryman has no lien on the animal as against them. We conclude that the trial court did not err in holding that the mortgage lien of the appellee Forbes was superior to the liveryman's lien of the appellant Blackford. We have thought it proper to discuss this question, because it does not appear to have been directly decided in this state. Other questions are presented, but we deem it unnecessary to discuss them. We find no error in the judgment, and it is affirmed.

QUATTLEBAUM et al. v. TRIPLETT.

(Supreme Court of Arkansas. Feb. 16, 1901.)

EXECUTORS AND ADMINISTRATORS — MINOR CHILDREN OF DECEASED PERSON — PERSONAL PROPERTY — EXEMPTIONS — RIGHTS OF ADULT CHILDREN.

Sand. & H. Dig. § 3, provides that when any person dies, leaving a widow or children, and the personal estate of such person does not exceed \$800, the widow or children may retain \$300 out of such personal property; and section 4 declares that when any person shall die, leaving children, but no widow, the court shall appoint appraisers for the vestment of such property, as provided by section 3. *Held*, that where deceased left three children, but no widow, and two of the children were of age,

and deceased's estate was worth less than \$800, only the minor child was entitled to the exemption of \$300, since the word "children" must be construed to mean minor children.

Appeal from circuit court, Jefferson county; Antonio B. Grace, Judge.

Petition by S. Galligan, then guardian of Walter A. Rainey, a minor, to have \$300 set aside for the education and support of his ward. The petition was resisted by Lee M. Quattlebaum, administrator of W. D. Rainey, deceased, and by Wilsie Rainey Quattlebaum, a daughter of deceased. From an order denying a new trial, and from a judgment of the circuit court on appeal from the probate court in favor of plaintiff, defendants appeal. Affirmed.

This suit arose in the probate court of Jefferson county on the petition of S. Galligan, then guardian of Walter A. Rainey, a minor son of W. D. Rainey, deceased, to have vested in said minor \$300 of the personal property of deceased; the petition alleging the personal estate to be of less value than \$800, and that no widow survived, but that deceased, Rainey, left as heirs said minor and Wilsie Rainey, who has intermarried with Lee M. Quattlebaum, and her brother Wright H. Rainey, both of whom were of full age; the prayer of the petition being that the court appoint appraisers of the personal estate, etc., and that the court then make an order vesting in Galligan, as guardian of said minor, the sum of \$300, or personal property of that value, for the support and education of said minor. Lee M. Quattlebaum, as administrator of the estate of W. D. Rainey, deceased, and Wilsie Rainey Quattlebaum, a daughter of W. D. Rainey, deceased (who in the petition is called Sallie W.), resisted the prayer of the petition on the ground that said deceased left surviving him three children, who, under the law, were entitled to share and share alike in said personal estate. The probate court at the hearing held that the personal estate was of less value than \$800, and that the administrator, Quattlebaum, pay over to the guardian of the minor the sum of \$300. From this order the administrator, Quattlebaum, and Wilsie Rainey Quattlebaum appealed. In the circuit court the cause was tried by the court, sitting as a jury, who entered substantially the same judgment as the probate court. The cause was tried upon an agreed statement of facts; that is, that the petition filed by Galligan, guardian, be accepted as the facts, and also that Lee M. Quattlebaum is the administrator of W. D. Rainey, deceased. At the hearing appellants prayed the court to declare the law as follows: (1) That under the law all of the children of W. D. Rainey, deceased, are entitled to an equal share of his estate; that is, to share and share alike therein. (2) That the word "children," as set out in sections 3 and 4 of Sandels & Hill's Digest of the Statute Laws of Arkansas, means the issue

or heirs of the body of the father or mother, regardless of age. (8) In this case, Wilsie Rainey Quattlebaum, being a daughter and one of the children of W. D. Rainey, deceased, is entitled, under the law, to share in the personal estate set out in the petition equally with said minor, Walter A. Rainey, and said Wright H. Rainey. (4) That the prayer of the petition is refused. The court refused to declare the law as above requested, and appellants at the time excepted. Thereupon the court found the facts to be as set out in petition, and that Sallie W. and Wilsie Rainey Quattlebaum are one and the same person, and declared the law to be that petitioner, as guardian of Walter A. Rainey, is entitled to have set apart out of the personal estate of Rainey, deceased, \$300 for support, maintenance, and education of said ward. To this declaration of the law appellants at the time excepted. The court then directed the entry of the judgment set forth in the transcript. Appellants filed a motion for a new trial, which was by the court overruled, and appellants excepted.

The question presented for adjudication is whether the word "children," used in sections 3, 4, Sand. & H. Dig., shall be construed to mean minor children, or whether it includes the children of the parents, regardless of age. The sections referred to are as follows:

"Sec. 3. When any person shall die leaving a widow and children or widow or children, and it shall be made to appear to the court that the personal estate of such deceased person does not exceed in value the sum of three hundred dollars, the court shall make an order vesting such personal property absolutely in the widow and children, or widow or children, as the case may be; and in all cases where the personal estate does not exceed in value the sum of eight hundred dollars, the widow or children, as the case may be, may retain the amount of three hundred dollars out of such personal property at cash price.

"Sec. 4. When any person shall die, leaving children but no widow, the court shall, upon application made to him for said children, appoint appraisers and cause to be made appraisement of the personal property of the estate for the purpose of the vestment of such property, as provided by section 3."

These sections were enacted in 1887 (see Acts 1887, p. 207), and the last section of the act provides "that all acts and parts of acts in conflict with the provisions of this act be and the same are hereby repealed," etc.

The act approved April, 1885, reads as follows:

"Section 1. When any man shall die leaving minor children and no widow and his estate shall not be above the value of three hundred dollars (\$300.00) his entire estate shall vest in his minor children for their

support and education, and the probate court shall not be required to appoint an administrator on such estate: provided, further, that such minor children shall be entitled to retain the sum of three hundred dollars (\$300.00) out of such estate, regardless of the valuation of said estate for their support and education; and it shall be the duty of the probate court to order said sum of three hundred dollars (\$300.00) paid over for the benefit of said minor children." Acts 1885, p. 192.

Austin & Taylor, for appellants. White & Altheimer, for appellee.

HUGHES, J. (after stating the facts). It would be an unwarranted belief that the legislature intended by the act of 1887 to give the property or effects of a decedent to his adult children, leaving nothing for the creditors. The language of the act indicates that it was intended for the protection of minor children, in this: "Sec. 4. When any person shall die leaving children, but no widow, the court shall upon application made to him for said children appoint appraisers and cause to be made appraisement of the personal property for the purpose of the vestment of such property, as provided by section 1." If the intention of the act was that the property was to be vested in adults, why would the legislature have provided that, upon an application made to him for the children, the judge might make the order for the appraisement, which seems to indicate that the application to be made was for those not competent to make it for themselves? It is an indication that the general assembly in the use of the word "children" meant minor children. It seems evident that this legislation was intended to protect the widow and helpless children of a deceased father. "There is a distinction to be drawn in the use of the word 'child' in statutes passed for the protection of children and its use in the law of descents and distribution. In the former case 'child' means a person of tender years, without regard to parentage, while, in the law of wills and intestacy, age has nothing to do with the question, and parentage everything." Rap. & L. Law Dict. 204. We are of the opinion that the judgment of the circuit court is correct, and it is therefore affirmed.

ST. LOUIS, I. M. & S. RY. CO. v. LEWIS.
(Supreme Court of Arkansas. Feb. 16, 1901.)

RAILROADS—STOP AT STATION—FAILURE OF PASSENGER TO ALIGHT—EJECTION BEYOND STATION—LIABILITY OF COMPANY—DUTY TO TAKE BACK TO STATION.

1. Sand. & H. Dig. § 6172, forbids railroad companies to eject passengers for refusal to pay fare at places other than stations. Plaintiff was ejected from defendant's train, a quarter of a mile beyond her designated station, be-

cause of her failure to alight at the station after an ample stop had been made. *Held*, that it was error to charge that defendant was liable for putting plaintiff off at a place other than a station, since the statute applies only to the ejection of passengers for the nonpayment of fares.

2. In an action for putting plaintiff off a quarter of a mile beyond her destination, an instruction that, if defendant caused plaintiff to leave the train at a place other than a station, the jury should find for plaintiff, though the train stopped at the station a sufficient time to permit plaintiff to leave the train, was erroneous, since, in case of her failure to alight when she had an opportunity to do so, defendant would have a right to put her off without taking her back to the station.

Appeal from circuit court, Faulkner county; George M. Chapline, Judge.

Action by Theresa Lewis against the St. Louis, Iron Mountain & Southern Railway Company. From a judgment in favor of plaintiff, defendant appeals. Reversed.

This action was brought by Theresa Lewis against the St. Louis, Iron Mountain & Southern Railway Company. Plaintiff alleged in her complaint that she was, on the 9th day of June, 1898, a passenger on one of defendant's trains, which was going from Little Rock to Palarm, a station on its road; that on the arrival of the train at Palarm the defendant wrongfully and negligently failed to permit her to get off, but carried her past the station for a distance of one-half mile, and there wrongfully, forcibly, and violently ejected her; that the place where she was put off was not a regular station or stopping place; that in putting her off the conductor was rude, coarse, rough, and oppressive; that he laid his hands forcibly upon her, and pushed and threw her from the train, to her great injury; that she was "greatly mortified and humiliated, greatly hurt in body, greatly agonized in mind, and was forced, on a hot and sultry day, to walk and carry her baggage back to the station of Palarm"; and she asked for judgment for \$3,000.

The defendant answered, and denied all the allegations made in the complaint.

The issues joined were tried by a jury. In the trial the plaintiff testified, substantially, as follows: On the morning of June 9, 1898, a hot, clear summer day, she with her daughter, a girl about 11 years old, several bundles, and two valises, boarded defendant's train at Little Rock for the station of Palarm, 28 miles away. In due time the train arrived at Palarm, but failed to stop, and she failed to get off. The bell cord was pulled by some one, and the train stopped about a quarter of a mile from the station. The conductor came to her, and asked why she did not get off, and she replied that he did not give her time. The conductor then said, "Get off." She asked if they were going back to the station with her. He said, "No; get off here." He then caught her roughly, and said, "Get off right here."

He placed his hands on her shoulder, and hurt her. She was shocked and humiliated. She walked to the door, and alighted at a place "just like it was at the depot." She walked to the depot, and from there to the Arkansas river, a distance of three-quarters of a mile, and from there she was taken home in a buggy. She was compelled to stop to rest three or four times on her way to the river. When she reached home she went to bed, "and was laid up for a week or more."

Many witnesses testified that the train stopped at Palarm a sufficient length of time for plaintiff and other passengers to get off, and there was evidence adduced tending to show that she was not mistreated, insulted, or injured by any one on the train.

Among many instructions given, the court instructed the jury, over the objections of the defendant, as follows:

"If you believe from the evidence that plaintiff entered the passenger train of defendant at Little Rock, and paid her fare to Palarm, a station on defendant's line of railroad, then defendant could not put plaintiff off the train at a place other than a station where passengers are accustomed to get on and off trains of defendant; and, if defendant caused plaintiff to leave the train at a place other than the station where passengers are accustomed to get on and off defendant's trains, then you will find for plaintiff, no matter whether the train was stopped at the station a sufficient time to have permitted plaintiff to have left the train or not.

"If you find for the plaintiff, then you will assess her damages at such sum as will fairly compensate her for all injury received by her, for physical pain and suffering, and for any insult or rudeness that may have been offered to her by the conductor or other agent of the defendant. And if you further find that defendant did not stop its train at a standstill at the station to permit plaintiff to leave the car in safety, and she was carried past the station, and compelled to leave the car, at a place other than the station, then, in fixing the amount of damages, you may take into consideration also the lacerated feelings and wounded sensibilities and shock of mind that plaintiff may have suffered, if you find from the evidence she suffered any therefrom.

"And the court cannot instruct you in dollars and cents as to the amount of damages, if you should find for the plaintiff, but the amount is left to the fair determination of the jury."

The jury returned a verdict in favor of the plaintiff for \$400, and the defendant appealed.

Oscar L. Miles and Dodge & Johnson, for appellant. J. H. Harrod and Sam Frauenthal, for appellee.

BATTLE, J. In telling the jury that, if the appellant paid her fare to Palarm, the "defendant could not put her off the train at a place other than a station where passengers are accustomed to get on and off trains of defendant," the circuit court committed an error. It is only in cases where a passenger refuses to pay fare the statutes require a railroad company to put him off the train at a usual stopping place. Sand. & H. Dig. § 6172. Beyond this the common-law right to put him off, without reference to stations, is left unimpaired. *Hobbs v. Railway Co.*, 49 Ark. 357, 5 S. W. 586. In this case the passenger (appellee) was not put off because she had failed to pay fare. She paid her fare, and was put off a short distance beyond her destination, because she failed to get off at that place. She did not want to travel further, but asked if she could not be taken back to Palarm. There was no demand for additional fare and refusal to pay it.

The latter part of the instruction, in which the court told the jury that, "if defendant caused plaintiff to leave the train at a place other than the station where passengers are accustomed to get on and off defendant's trains, then you will find for plaintiff, no matter whether the train was stopped at the station a sufficient time to have permitted plaintiff to have left the train or not," is also erroneous. If the train was stopped at the station of Palarm a sufficient length of time for appellee to get off, and she failed to do so, then the appellant was guilty of no wrong in stopping where it did, and in a respectful manner causing her to leave the train. In doing so, it was in the exercise of its right, and was not liable for damages. It was not bound to take her back to the station of Palarm for the purpose of giving her another opportunity to leave the train. For the purpose of avoiding collisions, and of orderly and regular transportation, and of serving the public to the best advantage, trains should run on schedule time. The conveying passengers back to stations at which they should have left the train and failed to get off may, in some instances, defeat this purpose, and lead to disastrous consequences. A rule or regulation requiring railroad companies to do so would not only be unjust, but would be unwise, and against the interest of the public.

Much is said in appellant's brief about the right to recover damages on account of mental anguish, distress, or suffering which was not the result of a physical injury. The court has expressed its opinion upon this subject in *Peay v. Telegraph Co.*, 64 Ark. 533, 43 S. W. 965, 39 L. R. A. 463; *Railroad Co. v. Deloney*, 65 Ark. 177, 45 S. W. 351; and *Railway Co. v. Anderson*, 67 Ark. 123, 129, 53 S. W. 673. We deem it unnecessary to add to what we have already said.

Reversed, and remanded for a new trial.

LANGE v. BURKE.

(Supreme Court of Arkansas. Feb. 16, 1901.)

CORPORATIONS—INSOLVENCY—CLAIMS—PREFERENCES.

Where two men own the majority of the stock of each of two corporations, one man being president of both, and the corporations being organized in different states and for different purposes, and accounts are kept of the dealings between them as of dealings with other parties, they should be considered separate corporations; and, on the insolvency of both, the payment of the claim of the creditor corporation should not be postponed till after the other creditors of the debtor corporation are paid.

Appeal from chancery court, Phillips county; Edward D. Robertson, Judge.

Action by Bethold Lange, trustee of the Standard Eagle Box & Lumber Company, against R. C. Burke, receiver of the Kaiser Lumber Company. From a judgment postponing the payment of his claim till after all other creditors of the Kaiser Company are paid, plaintiff appeals. Reversed.

J. C. Hawthorne, for appellant. John J. & E. C. Homor, for appellee.

BATTLE, J. On the 5th day of February, 1897, the United States One-Stave Barrel Company and three other corporations filed a complaint in the Phillips circuit court against the Kaiser Lumber Company, which, for convenience, we shall call the "Lumber Company." They alleged that the defendant is a corporation organized and doing business under the laws of the state of Arkansas; that it was largely indebted to each of them, and was on the 27th of January, 1897, insolvent,—a part of its commercial paper having gone to protest, and it having conveyed all its property to a trustee to secure a large indebtedness alleged to be owing to the Standard Eagle Box & Lumber Company. They asked that the affairs of the defendant be closed up; that a receiver be appointed to take charge of its property; and that its creditors be required to present their claims to the receiver within 90 days, or be barred from participating in its assets; and that its property be sold to pay its debts.

On the 8th of February, 1897, R. C. Burke was appointed such receiver. On the 10th of April, 1897, Bethold Lange, as trustee for the creditors of the Standard Eagle Box & Lumber Company, a corporation organized under the laws of Missouri, which for convenience we will call the "Box Company," filed a petition in the proceeding instituted by the plaintiffs, and alleged that the defendant was indebted to him, as such trustee, in various sums, amounting in the aggregate to the sum of \$57,067.72, and asked for judgment in his favor as such trustee for said indebtedness, and that the receiver be required to pay the same out of the assets of the defendant, or such a proportionate part as may be paid to other creditors. On the same

day he presented his claim to the receiver, who referred it to the court.

After hearing the evidence adduced by all parties, the court found that the lumber company was a branch of the box company, and was incorporated as the Kaiser Lumber Company for convenience only; that the former was indebted to the latter in the sum of \$53,508.83; and that the latter was not entitled to recover anything until the creditors of the former are paid, and postponed its collection until that time; and the trustee appealed.

The appellant complains of the action of the circuit court because it found that the lumber company was a branch of the box company, and postponed the payment of his claim until all the other creditors of the lumber company are paid. Is this complaint well founded?

The two companies are separate corporations. One was organized under the laws of Missouri, and the other under the laws of Arkansas. The box company was created some time before the lumber company was organized. They were organized for different purposes,—one for the manufacture of lumber, and the other for another purpose, not clearly shown by the evidence.

In 1894 the box company decided to make an effort to lease a certain mill at Helena, in this state, and saw its own cottonwood, gum, oak, and cypress lumber, and thereby save a large amount of money. Its president and treasurer were appointed a committee to negotiate with the owner and ascertain what terms could be made. The president, A. J. Kaiser, and the Consolidated Box Company of Kansas City, succeeded in obtaining an option to purchase the mill of the Schulte Lumber Company, at Helena, Ark., and the action of the president was approved by the board of directors of his company. The option was permitted to expire without a purchase. Subsequently Kaiser, the president, and C. W. Ohrndorf, the treasurer, of the box company, consummated a trade whereby their company became the purchaser of the mill of the Schulte Lumber Company at Helena. They went to the office of the attorney of the vendor to have the property sold transferred to the box company, and also to secure the payment of the notes evidencing the deferred payments; the sale having been partly on a credit. When they reached there they stated to the attorney the terms of the trade, and he decided that it would be best to vest the title in a representative of the box company, and that he could afterwards transfer it to the company. This was done because the box company was a foreign corporation, and because, if the title was in it, there would be delay and difficulty in obtaining a mortgage securing the deferred payments. The result of the advice of the attorney was, the title to the property was vested in Kaiser, and the box company advanced to him \$2,000 to make the cash pay-

ment, and Kaiser was charged by the box company with this amount. The Kaiser Lumber Company was then organized under the laws of this state, and the property was transferred to it, and the \$2,000 were charged against it.

At the time the lumber company was organized, R. J. Kaiser, C. W. Ohrndorf, E. L. Lange, and Charles Schulte were its shareholders; and R. J. Kaiser, C. W. Ohrndorf, L. K. Lay, Gus Gunlach, and Louis Schilling were the stockholders of the box company. R. J. Kaiser, C. W. Ohrndorf, and E. L. Lange constituted the board of directors of the former company; and R. J. Kaiser, C. W. Ohrndorf, and L. K. Lay composed the directors of the latter; and Kaiser was president of both. Ohrndorf and Kaiser owned a majority of the stock in each of the two companies.

The box company never claimed the mill Kaiser purchased of the Schulte Lumber Company. By agreement nearly all the lumber manufactured by the lumber company was shipped to and taken by the box company, and paid for by it according to the market value thereof. On the 25th of August, 1896, the former was indebted to the latter in a large sum of money on account of advances made on lumber. On that day the latter instructed its president, Kaiser, "to go to Helena, Ark., and have about 3,000,000 feet of lumber marked and set aside for" its use, and to cause "the same to be shipped in at the rate of from two to four cars per day until enough lumber" was "shipped to liquidate all indebtedness." On the 10th of October following, the former executed to the latter its notes for the larger portion of its indebtedness. From the organization of the lumber company, and so long as the box company thereafter continued in business, the two companies kept accounts of their dealings with each other as separate and distinct organizations; and they continued to deal with each other as separate organizations until the former became indebted to the latter in the sum of \$53,508.83, as found by the circuit court.

Insolvency was the end of the business career of both companies. On the 27th of January, 1897, the box company conveyed all its property to the appellant in trust to secure its creditors; and, on the 5th of February following, creditors of the lumber company instituted proceedings against it for the winding up of its affairs, and on the 8th of the same month a receiver was appointed to take possession of its assets. The controversy in this proceeding is between these representatives of the creditors of the two corporations. The trustee presented his claim against the estate in the hands of the receiver, and was denied the right to participate in the assets of the lumber company to the detriment of its other creditors.

The receiver contends that the box company and lumber company are in truth and

in fact one and the same being, the latter being the offspring of the former, organized in this state for the benefit of the parent company, and that the mill at Helena was owned by the former, was purchased for its benefit, and whatever was owing for advances by the former to the latter was an indebtedness due to itself from itself, and that it would therefore be inequitable to apply the assets in his hands to the payment of this debt until other creditors of the lumber company are satisfied.

If the contention of the receiver be correct, the action at bar is without foundation. It was based upon the theory that the lumber company was an independent organization, and that the mill purchased at Helena was its property. If the contention is true, the assets held by the lumber company are the property of the box company, and the latter is liable to the alleged creditors of the former for their claims.

In supporting his contention the receiver lays much stress upon the fact that the two corporations were practically under the control of the same persons; Kaiser and Ohrndorf being directors and officers, and the owners of the large majority of the stock, in each company. But this fact does not prove that the two companies were in fact one corporation, and that the trustee, the appellant, was not a creditor of the lumber company. A corporation is an artificial being, separate and distinct from its agents, officers, and stockholders. Its dealings with another corporation, although it may be composed in part of persons who own the majority of the stock in each company, and may be managed by the same officers, if they be in good faith and free from fraud, stand upon the same basis, and affect it and the other corporation in the same manner and to the same extent, they would if each had been composed of different stockholders and controlled by different officers. In such cases, however, the utmost good faith as to the minority of the stockholders is required. The owner of such majority cannot, as director or otherwise, lawfully manage the affairs of one of the corporations in the interest of the other to the detriment of the former, because in their control and management of the corporations, in respect to the minority of each company, they stand in much the same attitude that the directors maintain to all the stockholders; and they are required to exercise the same good faith as to creditors as is required of stockholders of a corporation dealing with another in which they have no stock. *Farmers' Loan & Trust Co. v. New York & N. R. Co.*, 150 N. Y. 410, 430, 44 N. E. 1043, 34 L. R. A. 76; 2 Cook, Corp. (4th Ed.) § 662.

In the case before us the evidence shows that the two companies were independent organizations, that they dealt with each other as such, and that the mill at Helena never was claimed by any party other than the

lumber company after its organization. It fails to show that the lumber company was managed in the interest of the box company, but does show that both companies became insolvent about the same time. It shows that the box company purchased the product of the lumber company, and paid for it its market value. If either company was managed for the benefit of the other, the result shows that it was the box company; for their business relations closed with the lumber company largely indebted to the box company for advances made on lumber to be manufactured.

As evidence to show that the lumber company was managed for the benefit of the box company, the receiver in this case says that Kaiser reported to the box company that the mill at Helena was working well, and would soon ship lumber daily. This was natural and right. At that time the lumber company was indebted to the box company and the latter company intended to purchase its lumber from the former. He also says that the books of the former company were actually kept in St. Louis, and that, too, by a bookkeeper one-half of whose salary was paid by the latter. If so, he was furnished with the information by the former company which enabled him to do so, and he rendered the latter service at the same time. He further says that the account upon which the transactions between the two companies were recorded by the former company, was headed, "Standard Eagle Box Company—Kaiser Lumber Company." This proves nothing. The account following shows that they were dealing with each other as separate companies.

After a careful consideration of all the evidence, our conclusion is that so much of the decree of the court below as postpones the payment of appellant's claim until all other claims are paid should be reversed, and that he should be allowed to participate proportionately with other creditors of the lumber company in the distribution of its assets; and it is so ordered.

TURMAN v. SANFORD.

(Supreme Court of Arkansas. Feb. 16, 1901.)

MORTGAGES — INTEREST SUBSEQUENTLY ACQUIRED—STATUTES—RECORDING MORTGAGE—NOTICE TO OWNER.

1. G. mortgaged property to which he had no title, but subsequently became the mortgagee of the property by a mortgage from T., who was the owner. G.'s mortgage was foreclosed, and S. purchased the premises at the foreclosure sale, and received the sheriff's deed thereto. Held, in ejectment by S. against T., that as a mortgagee's interest is not real estate, but a personal asset, the interest acquired by G. by the mortgage from T. did not inure to the benefit of S. under Sand. & H. Dig. § 699, providing that if any person shall convey any real estate, and shall not have the legal estate in such lands, but shall afterwards acquire the same, such after-acquired estate, legal or equitable, shall immediately pass to the grantee.

2. Where a mortgagor incumbered real estate to which he did not have any title, but subsequently became the mortgagee of the property by a mortgage from the owner, the record of the first mortgage did not operate as notice of the existence of the same to the owner of the premises, as he was not holding the premises under the first mortgage, and hence a satisfaction of the second mortgage operated to defeat whatever interest passed to the first mortgagee, under Sand. & H. Dig. § 699, prescribing that if any one makes a conveyance of real estate, not having the legal title, but afterwards acquires the same, such after-acquired estate, legal or equitable, shall immediately pass to the grantee.

Bunn, C. J., dissenting.

Appeal from circuit court, Scott county; John B. McCaleb, Judge.

Ejectment by Thomas N. Sanford against William B. Turman. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Hill & Brizzolara, for appellant. H. O. Mechem and F. A. Youmans, for appellee.

RIDDICK, J. William B. Turman was on the 28th day of August, 1882, the owner of the tract of land in controversy. On that day J. C. Gilbreath, without having any title, mortgaged it to A. D. Peace. Afterwards, on the 11th day of August, 1884, Turman conveyed the same land to Gilbreath, and received back from Gilbreath a bond for title. The conveyance from Turman to Gilbreath, though in the form of an absolute deed, was in fact a mortgage, and was afterwards so declared in a litigation between Turman and the administrator of Gilbreath. Afterwards Peace brought suit and foreclosed his mortgage against Gilbreath, Turman not being a party to the action. At the foreclosure sale Thomas N. Sanford purchased the land. The sale was confirmed, and a deed made to Sanford. Afterwards, in a litigation between Turman and the administrator of Gilbreath, it was adjudged that the mortgage from Turman to Gilbreath was satisfied, and the land declared to belong to Turman. Sanford was not a party to this litigation, and afterwards brought this action of ejectment to recover the land from Turman. The circuit court held that the conveyance of Turman to Gilbreath inured to the benefit of Peace, the mortgagee of Gilbreath, and that Sanford by his purchase at the foreclosure sale became the owner and entitled to the possession of the land. Judgment was therefore entered in his favor for the recovery of the land, from which judgment Turman appealed.

The questions presented by this appeal are: Did the mortgage from Turman to Gilbreath inure to the benefit of Gilbreath's mortgagee, Peace? And did Sanford, by purchasing at the Peace foreclosure sale, succeed to the rights of Peace, and become entitled to the possession of the land. The statute upon which Sanford bases his right to recover is as follows: "If any person shall convey any real estate by deed purporting to convey the same in fee simple absolute or any less es-

tate and shall not at the time of such conveyance have the legal estate in such lands, but shall afterwards acquire the same, the legal or equitable estate afterwards acquired shall immediately pass to the grantee and such conveyance shall be as valid as if such legal or equitable estate had been in the grantor at the time of the conveyance." Sand. & H. Dig. § 699. Under this statute, if Gilbreath had, subsequent to the execution of his mortgage to Peace, acquired title in his own right to the land mortgaged, it would, by virtue of the statute, have inured to the benefit of his mortgagee. *Kline v. Ragland*, 47 Ark. 111, 14 S. W. 474. But he only secured a mortgage upon it; for, though the deed obtained from Turman was absolute in form, it is admitted that it was executed to secure a debt, and was in law a mortgage, and must be treated as such. And there is room for doubt whether the interest in mortgaged land acquired by the mortgagee by virtue of the mortgage before foreclosure is such an estate as will, by the statute, pass to a grantee to whom he has conveyed the land prior to his mortgage. For the mortgagee before the foreclosure is neither at law nor in equity the real owner of the land. The legal title, it is true, passes to him by the mortgage, but he holds it for the protection of his debt, and for that purpose only. If he takes possession before foreclosure he must account to the mortgagor for rents and profits, and so soon as his debt is paid his rights in the land cease. He has before foreclosure no such estate in the land as can be attached for his debts, or levied upon and sold under execution. If he dies, his widow has no right of dower in it as real estate. His interest as mortgagee does not descend to his heir, but passes to his personal representative as personal assets. On the other hand, all the usual incidents of ownership belong to the mortgagor in possession of the mortgaged land before foreclosure. His interest therein can be attached for his debts, or levied upon and sold under execution. He can maintain an action of ejectment for the land against a stranger, and the mortgage cannot be set up as a defense. In case of death, his interest therein passes not to his administrator, as personalty, but descends as real estate to his heir, and his widow is entitled to dower in it as in other real property. Thus, while for the purpose of protecting the mortgage debt, the mortgagee, as between himself and the mortgagor, is considered the owner of the land, for other purposes and between other parties not holding under the mortgage the mortgagor is the owner. The interest of the mortgagor is considered and treated as real estate, while that of the mortgagee is only a personal asset. *Terry v. Rosell*, 32 Ark. 478; *Mills v. Shepard*, 30 Conn. 98; 1 Jones, Mortg. (5th Ed.) §§ 11, 15, 664, 698, 699, 703; 3 Pom. Eq. Jur. §§ 1186, 1187. There are other objections to the contention that the interest of a mortgagee will pass un-

der this statute. The statute only purports to pass real estate, but, if only the legal title in the mortgagee passed, it would be worthless; for the legal title can be used by the mortgagee only to collect his debt, and without the debt it would avail nothing. On the other hand, if we adopt the contention that the statute operates as an assignment of the mortgage debt as well, the effect might be to pass something of more value than the land; for lands are sometimes mortgaged for more than their value, and in such a case, if the mortgagee is solvent, the debt is of more value than the land mortgaged.

For these reasons, we feel inclined to the opinion that Gilbreath by the mortgage from Turman did not acquire such an estate as would pass under this statute to his mortgagee, Peace. But, conceding that the interest he acquired as mortgagee from Turman did pass by the statute, it would still be liable to be defeated by the payment of the debt from Turman to Gilbreath. If Peace wished to prevent this, and to subject the interest acquired by Gilbreath under the Turman mortgage to his debt, he should, before payment was made, have given Turman notice of his claim, and in his proceedings to foreclose should have made Turman a party, and set out in his complaint this after-acquired mortgage of Gilbreath, and asked to have it subjected to his claim. But he did not do this. He neither gave notice to Turman of his claim, nor made him a party to his foreclosure suit. Turman paid off his debt to Gilbreath, and there is nothing in the record to show that he had any notice either of the mortgage to Peace, or of the claim against his land based on that mortgage, until after he had discharged his debt to Gilbreath. The record of the mortgage from Gilbreath to Peace was not notice to Turman; for he was not holding under Gilbreath, and there was no reason why he should search the records to discover conveyances made by Gilbreath. It is sometimes said that the record of a deed is notice to all the world, but it is more accurate to say that it is notice only to those claiming title under the same grantor. They are the persons for whose benefit the registration is required, and whose duty it is to take notice of it, such as subsequent purchasers and mortgagees dealing with the title in the line of which the recorded deed stands. *Maul v. Rider*, 59 Pa. St. 107, 171; 2 Devl. Deeds (2d Ed.) §§ 712, 713. The record is not notice to outside parties having no connection with the title of which the recorded deed is a part, and the record of the Peace mortgage was not notice to Turman; for, as before stated, he does not hold under Gilbreath, and there is nothing else in the record to show that he had notice. Under these circumstances, a payment by Turman of his debt to Gilbreath, secured by the mortgage, left no beneficial interest in Gilbreath for the statute to act upon. The statute in reference to the grantor's after-acquir-

ed title was enacted to prevent fraud and effect justice, but under the circumstances here it would be neither right nor just to compel Turman to pay his mortgage debt a second time, to one who had given him no notice of his claim until after the payment of the debt.

For these reasons, we think the plaintiff, under the facts stated in the record, cannot recover. The judgment is therefore reversed, and the cause remanded for new trial.

BUNN, C. J., dissents.

ST. LOUIS, I. M. & S. RY. CO. v. STEWART.

(Supreme Court of Arkansas. Feb. 16, 1901.)

CARRIERS—INJURIES TO PASSENGERS—RUNNING AT HIGH SPEED—NEGLIGENCE—EVIDENCE—SUFFICIENT CONSTRUCTION OF FOREIGN STATUTES—PAROL EVIDENCE—NOT ADMISSIBLE—IMPROPER—NOT REVERSIBLE ERROR.

1. In an action for injuries received in a railway accident caused by defendant's engine striking a cow at a highway crossing in a small village, it was not error for the court to refuse to instruct in regard to maintaining gates or keeping a watchman at such crossing, since the statutory immunity from keeping a watch at the crossing did not relieve the company from the exercise of reasonable care.

2. Plaintiff, a postal clerk, was injured while in the performance of his duties on defendant's road by the engine and mail car being derailed by striking a cow at a highway crossing in a small village. The train, being late, was running 50 or 60 miles an hour, greatly in excess of the schedule time, which was 33 miles an hour, at a place where the track ran down grade through a cut from 6 to 8 feet deep, and where it made two sharp curves just before reaching the crossing. It was dark, and, on account of the curve, an object could not be seen more than 100 feet ahead. The engineer was experienced, and was familiar with this part of the road, and knew of the proximity of the crossing. *Held* sufficient to support a finding of the jury that defendant was negligent in running the train at such a rate of speed at the place of the accident, so as to support a verdict for plaintiff.

3. In an action for injuries received in a railroad accident in Missouri, after having proven the statute law of Missouri in regard to cattle guards, it was not error for the trial court to refuse to permit a witness to testify as to the construction placed on said statute by the supreme court of that state; the best evidence being the reported decision of the court.

4. In an action for injuries received in a railroad accident, evidence that the railway company had settled with another passenger injured in the same accident, though improperly admitted, was not reversible error, where there was evidence establishing the defendant's negligence.

Appeal from circuit court, Nevada county; Joel D. Conway, Judge.

Action by Henry H. Stewart against the St. Louis, Iron Mountain & Southern Railway Company. From a judgment in favor of the plaintiff, the defendant appeals. Affirmed.

Dodge & Johnson, for appellant. Scott & Jones, for appellee.

BUNN, C. J. The appellee, Henry H. Stewart, was in the employ of the United States government as a postal clerk, and in the performance of his duties as such was a passenger in the mail coach of defendant's passenger train on the 5th of February, 1898, going north from Texarkana to St. Louis; and when the train reached the little town of Hematite, about 35 or 40 miles south of St. Louis, the train was wrecked, and the appellee was injured by receiving a cut an inch long and to the bone on the left side of the head, a contusion on the left thigh; wherefrom he suffered from nervous shock, and was unable to perform his customary duties for 20 or 30 days, thus losing \$100, and paid out for medical attendance \$13, and some other small amounts. The circumstances of the wreck were substantially as follows, viz.: The train was running at the rate of 50 or 60 miles an hour, greatly in excess of the schedule time, which was 33 miles an hour, it being some minutes behind time, and the trainmen in charge were endeavoring to make up the time. It was about 6 o'clock a. m., which was, at that season of the year, dark. For the distance of 1,000 or 1,200 feet before reaching the street or public crossing at Hematite there were curves in the railroad track, forming the letter "S" (that is, two curves), and the track was in a cut from 6 to 8 feet deep (about 6 feet deep towards the highway crossing and up to it). The engine struck a passing cow on the highway, and was thus thrown from the track, as were the tender and several of the coaches following, among them the mail coach in which the appellee was traveling and was at his usual work at the time. The mail coach was turned over on its side, and the appellee was thus injured. It is in evidence that one occupying the engineer's place could see a cow only a short distance ahead, owing to the curves and the depth of the cut. It was also shown that in the nighttime, when the headlight had to be depended on, on account of the curvature of the roadbed, and the consequent diversion of the rays of the headlight from the track, a cow could not be seen further than 100 feet in front of the engine. The railroad bed, the cattle guards on either side the highway, and the wire fences leading therefrom, and the train, with its running gear and appliances, were all in perfect condition. Both the engineer and fireman were instantly killed. The statutes of Missouri regarding cattle guards and track fencing, as affects this case, are not materially different from the laws of this state.

The main question in the case is, were the employes of defendant guilty of negligence in operating the train at the time of the injury complained of? All the statutory signals had been given, and the stock signals required by the regulations of the company had also been given. But was all this sufficient under the circumstances of this case? There was no apparent necessity to keep a

watchman or guard at this crossing. Hematite is but a very small village, and it may be admitted, for the sake of the argument, that the crossing was little different from such a crossing in the country. But this immunity from keeping a watch at the crossing does not relieve a railroad company from the exercise of such care as it reasonably can to prevent occurrences such as this one is shown to have been. Therefore there was no necessity for an instruction on the subject of gates and watchmen. It was shown that both the engineer and firemen were experienced in their stations, and the engineer especially was regarded as one of the finest engineers on the road. Both were acquainted with this part and all parts of the road, as they had been employed for some time in running on these trains. Was it prudent, or in the exercise of due care, for this engineer, with his knowledge of the surroundings, to run his train at this particular point at the rate of 50 or 60 miles per hour, when only required by the schedule to run 33 miles per hour? The necessity of making up lost time is never so great as that of preserving human life; and, even when the making up lost time approaches necessity itself, the necessary increase of speed should be on parts of a road where a strict lookout will be reasonably effective in preventing injuries, or at least the probability of injury, to persons and property. From the evidence, the portion of the track involved was peculiarly trying to trainmen, and some things which would have greatly aided them in the successful running of the train on other portions of the track were absent at this place,—a straight track, and perfectly level grade, or grade that would insure a quicker stoppage of the train than on a down grade, as this was. It appears to us—as it evidently did to the jury—that, without having to resort to anything that would have rendered the service of the road to the public less effective, or to the company less remunerative, a far less rate of speed would have been the proper thing in this instance. At the time of the collision the train was running at a rate of nearly a mile a minute. To run the 100 feet, which was the greatest distance the engineer could have observed the cow, required little more than a second of time. A strict lookout, as required by law, and the application of the most effective means known to slow up or stop the train, could not possibly avail anything. No effective alarm could have been given in that moment of time. These things should have been taken into account by the engineer.

On the subject of the degree of care necessary under such circumstances the court gave, at the instance of the plaintiff, instruction No. 6, and, at the instance of the defendant, instructions Nos. 8 and 12, which, taken together, or even separately, fairly define what is the law applicable, as held by this court in all its decisions on the subject.

Railroad Co. v. Miles, 40 Ark. 298; *Railway Co. v. Timmons*, 51 Ark. 459, 11 S. W. 690; *Railway Co. v. Sweet*, 57 Ark. 287, 21 S. W. 537; *Id.*, 60 Ark. 550, 31 S. W. 571; *George v. Railway Co.*, 34 Ark. 613. These instructions, in their order, are as follows: For the plaintiff, No. 6: "Railroad companies, in the carriage of passengers, are required to use the utmost care and foresight, and are held responsible for the slightest negligence. The first and most important duty incumbent on them is to provide for the safety of their passengers. To this end they are required to provide all things necessary to their security reasonably consistent with their business, and appropriate the means of conveyance employed by them, and to exercise the highest degree of practicable care, diligence, and skill in the operation of their trains." For the defendant, No. 8: "The court instructs the jury that, while the law demands the utmost care for the safety of passengers, it does not require railroad companies to exercise all the care, skill, and diligence of which the human mind can conceive, nor such as will free the transportation of passengers from all possible perils. The plaintiff in this case necessarily took upon himself all the usual and ordinary perils of travel; and if they find from the evidence that defendant had exercised all the care, skill, and diligence required by law, as defined in these instructions, and that, nevertheless, the accident occurred, the defendant would not be responsible therefor, and your verdict should be for defendant." And No. 12: "The care required by railroad carriers has been defined to be the highest practicable care which capable and faithful railroad men would exercise in similar circumstances." It was objected by the defendant that, having proven what was the statute law of Missouri on the subject of cattle guards and fencing, and the liability and immunity therein declared, the court refused to permit the witness Ewing to testify as to the construction put upon said statute by the supreme court of that state. We see no error in this refusal. The best evidence of what the supreme court of Missouri has said on the subject is the report of its decisions, which are easily accessible, even admitting this is a matter of proof at all.

In the course of the examination of witnesses, one witness, who we infer had been injured in the same wreck, or claimed to be, was asked if the railroad had settled with him; to which he answered in the affirmative. To the asking of and the answer to the question the defendant objected, but the court overruled its objection. There was error in this, but, in view of the particular point at issue, and the proof sustaining the plaintiff's contention,—negligence,—and for other reasons, the error is not a reversible error.

There is some question as to the amount of damages. Further than the loss of wa-

ges by the loss of time, the medical bill, etc., this court has no certain evidence in the case. Pain and suffering, as elements of damage, are uncertain quantities, both for the jury and the court. We will not disturb the verdict in this particular case. Affirmed.

STATE v. LAYTON.

(Supreme Court of Missouri, Division No. 2.
Feb. 12, 1901.)

ALUM BAKING POWDERS—PROHIBITORY SALE —CONSTITUTIONAL LAW.

Act May 11, 1899, prohibiting the sale of alum baking powders, as unhealthy, is within the police power; the articles not being so universally conceded to be wholesome and innocuous that judicial notice may be taken thereof.

Appeal from St. Louis court of criminal correction; Willis H. Clark, Judge.

Whitney Layton was convicted of a violation of Act May 11, 1899, prohibiting the sale of articles for use in the preparation of bread containing alum and other substances, and appeals. Affirmed.

Sedden & Blair, Stanley Stoner, and Winston & Meagher, for appellant. Edward C. Crow, Atty. Gen., Sam B. Jeffries, Asst. Atty. Gen., and Stewart, Cunningham & Elliot, for the State.

GANTT, J. On the 30th day of August, 1899, the assistant prosecuting attorney of the St. Louis court of criminal correction lodged in the St. Louis court of criminal correction the following information against Whitney Layton, of said city: "Richard Johnson, assistant prosecuting attorney of the St. Louis court of criminal correction, now here in court, on behalf of the state of Missouri information makes as follows: That Whitney Layton, in the city of St. Louis, on the 28th day of August, 1899, then and there doing business in this state, did unlawfully manufacture, sell, and offer to sell a certain compound and preparation, to wit, Layton's Health-Food Baking Powder, which said compound and preparation was so manufactured and sold for the purpose of being used, and was intended by said Layton to be used, in the preparation of food, in which said compound and preparation so manufactured and sold there was alum. Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state. Richard M. Johnson, Asst. Pros. Atty. of the St. Louis Court of Crim. Correction." The defendant was arrested, and entered his plea of not guilty. A jury was waived, and the cause tried to the court. At the trial the state's representative filed and read in evidence the following stipulation: "State of Missouri v. Whitney Layton. For the purpose only of the trial of this cause, and at said trial, the defendant, Whitney Layton, for a stipulation covering a part of the facts in the above-entitled case, admits that in the city of St. Louis, Missouri, on the 28th

day of August, 1899, he, the defendant, then and there doing business in the state of Missouri, did manufacture, sell, and offer to sell to J. M. Houston Grocer Company, then doing business at said city, a certain compound and preparation, to wit, one case containing two dozen one-pound cans of baking powder, known and designated as 'Layton's Health-Food Baking Powder,' which said compound and preparation, so manufactured, sold, and offered for sale by him for the purpose of its being used, was intended by defendant and by said J. M. Houston Grocer Company to be used, in the preparation of food. Defendant further admits that in said compound and preparation so manufactured, sold, and offered to be sold by him there was alum, and that the fact that the same contained alum was then well known to defendant. And it is further agreed and stipulated that at the trial of this case either party may offer any other evidence not inconsistent with the above facts which he may deem material, relevant, and competent in the case, subject to objection by the other party to its materiality, relevancy, or competency. Stewart, Cunningham & Elliot, with H. A. Glover, Jr., Prosecuting Attorney, for Plaintiff. Sedden & Blair, Stanley Stoner, Attorneys for Defendant." The prosecution then rested.

The defendant then offered evidence tending to establish the following facts: Baking powders have been in use for more than 50 years. They are intended to furnish to the people a simple, cheap, efficient, and wholesome leavening agent in the cooking of food, as a substitute for yeast, which is a very slow and more expensive leavening agent, and one which requires considerable intelligence in the cook to use successfully. All baking powders furnish this leavening agent in the form of carbon dioxide (carbonic acid gas), which is given off from the baking powder in preparing and cooking food. This gas, being liberated in the dough, forms bubbles, which take permanent form in the baked bread, thus making it light and porous. All baking powders, in their essential features, are the same. They all supply this leavening agent (dioxide of carbon) by freeing it from bicarbonate of soda. They differ in the nonessential manner in which this carbon dioxide is released from the bicarbonate of soda. There are three classes of baking powders known to commerce, viz. the cream of tartar baking powders, the phosphate baking powders, and the alum baking powders. The cream of tartar powders are composed of bicarbonate of soda and cream of tartar (bitartrate of potassium), mixed with starch as a filler. The soda and cream of tartar are combined in such proportions that when they are united together in the presence of water, in the process of cooking, they react upon each other, and free the carbon dioxide, which leavens the bread. The resulting product left in the bread after cooking is Rochelle salts, a purg-

ative agent. In the phosphate powders the active agent is the phosphate of calcium, which unites with the bicarbonate of soda and liberates the dioxide of carbon, the leavening agent. The alum powders, as they do not differ from the cream of tartar powders in the main essential features of a baking powder, to wit, the liberation of the carbon dioxide from bicarbonate of sodium, but merely in the nonessential mode of liberating the gas, do not differ from each other essentially. In the phosphate alum powders, phosphate of calcium is used to aid in liberating from the bicarbonate of soda the gas, the leavening agent, the essential thing. The straight alum baking powders are composed of bicarbonate of soda and a double sulphate salt of sodium and aluminum, which technically is not alum at all, but is popularly called "soda alum," with starch as a filler or carrier. The alum and the bicarbonate of soda are mixed in such proportions, that in the cooking process the carbon dioxide is released as a leavening agent, as in the case of the cream of tartar baking powders. The resulting products are sulphate of sodium and hydroxide (hydrate) of aluminum. The evidence of defendant tended to show that none of the products left in the food cooked with alum baking powders are at all injurious to the human system. The evidence shows that the trade in alum baking powders, as a trade, has given entire satisfaction to the people. Alum baking powders are nearly as standard an article as flour or sugar. They are to be found upon the shelves of every grocery store, not only in Missouri, but in the United States. They were first introduced about 1870. In spite of the fiercest competition and most hostile rivalry upon the part of manufacturers of cream of tartar powders, who, the evidence shows, have used every effort to prejudice the mind of the public by every manner of advertisements and representations, the trade rapidly expanded, until it has now reached vast proportions. The evidence tended to show that alum baking powder sold in the United States last year amounted to not fewer than 120,000,000 pounds, and involved an enormous expenditure in the manufacture and distribution. The defendant's evidence also tended to show that not only was the particular case of baking powder, known as "Layton's Health Food," for the sale of which he was prosecuted, but also all alum baking powders in general, were, and always have been, healthful and wholesome adjuncts in the preparation of human food. The evidence tends to show: That no one had ever either heard of or had known of a single case where the health of a single human being had been injured, or had been supposed to have been injured, by the use of alum baking powder in the preparation of food, and that the trade in alum baking powders, as a trade, prior to the passage of this law, was an honest and lawful business in

a generally harmless and useful preparation, used as an adjunct in the cooking of food. The manufacturers and sellers of both such powders—cream of tartar and alum—have been engaged in competition with each other in furnishing to the people, from bicarbonate of soda, a leavening agent for cooking bread, cake, etc. They differ only in the nonessential manner of freeing the gas. That the trade in cream of tartar powders has been practically monopolized by the Royal Baking-Powder Company, which controls the cream of tartar market. To all of this evidence counsel for the state objected when it was offered, on the ground that in view of the stipulation made between the parties, which was read by the state in making its case, all evidence which might be offered by the defendant in his defense would be irrelevant and immaterial. The court at the time of the objection announced that it would not then rule upon the objection, but would hear the evidence, subject to such objection, and would at the end of the case announce its ruling, and, if it concluded the objection was well taken, would rule out all of such evidence. On the other hand, the state, in rebuttal, offered much evidence by distinguished chemists and physicians that alum, in the quantities usually used in the preparation of baking powders, was and is injurious to the health; that while it assists in liberating the carbonic acid gas, and thus makes the bread light, there is a residuum of alumina left in the bread, which is solvable, and enters into the system, and acts as an astringent, and is deleterious; that there was a general prejudice in the minds of the public against alum powders; that, while the sale of alum powders was very enormous, people generally were not advised that they were purchasing alum powders. After all the evidence was in, the court sustained the objection of the state, and excluded all defendant's evidence, as irrelevant and immaterial to the issue in the case, to which the defendant duly excepted at the time. Every item of the evidence offered by defendant was avowedly introduced for the purpose of showing that the statute under which defendant was prosecuted was unconstitutional and void, which contention the court overruled, and found defendant guilty.

The statute which defendant is charged to have violated is the act of May 11, 1899, and is as follows:

"An act to prevent the use of unhealthy chemicals or substances in the preparation or manufacture of any article used or to be used in the preparation of food.

"Be it enacted by the general assembly of the state of Missouri, as follows:

"Section 1. That it shall be unlawful for any person or corporation doing business in this state to manufacture, sell, or offer to sell, any article, compound or preparation,

for the purpose of being used, or which is intended to be used, in the preparation of food, in which article, compound or preparation, there is any arsenic, calomel, bismuth, ammonia or alum.

"Sec. 2. Any person or corporation violating the provisions of this act shall be deemed guilty of a misdemeanor and shall, upon conviction, be fined not less than one hundred dollars, which shall be paid into and become a part of the road fund of the county in which such fine is collected.

"Approved May 11th, 1899. Takes effect August 22d, 1899." Acts 1899, p. 170.

The defendant asked various declarations of law to the effect that the legislature could not arbitrarily declare his business unlawful, which were refused, and he saved his exceptions, and in due time filed his motions for new trial and in arrest, which were likewise overruled.

As already indicated in the statement of the case, the one great question upon this record is the constitutionality of the act of May 11, 1899, making it a misdemeanor in this state "for any person or corporation doing business in this state to manufacture, sell, or offer to sell, any article, compound or preparation, for the purpose of being used, or which is intended to be used, in the preparation of food, in which article, compound or preparation there is any * * * alum." The act was obviously aimed at what are known as "alum baking powders." While the act also condemns the use of arsenic, calomel, bismuth, and ammonia in baking powders, there is not the slightest evidence that either of these poisons or substances is ever used in the preparation of baking powders in the ordinary trade by reputable dealers and merchants, whereas the evidence which the court heard, but finally excluded in making up its verdict and judgment, disclosed that alum is, and has been for more than a quarter of a century, an ingredient in the preparation of baking powders; that baking powders containing alum in some degree are used to an enormous extent; that not less than 120,000,000 pounds of such powders have been sold in the United States in the year next preceding the filing of the information in this case. The defendant is a manufacturer of a baking powder known as "Layton's Health-Food Baking Powder," and after the act of May 11, 1899, if valid, went into effect, sold a case of said baking powder in the city of St. Louis. The constitutionality of the act is assailed on two grounds: First, that it violates section 28, art. 4, of the constitution of Missouri; second, that it conflicts with sections 4 and 30 of article 2 of the constitution of Missouri.

It is a trite saying that, when the courts are called upon to decide that an act of the legislature violates the organic law, they start with every presumption in favor of the validity of the statute. This much we owe to a co-ordinate branch of the government, upon which the people, in the constitution, have conferred

the lawmaking power. The right and power of the courts, under our peculiar form of government, to declare a solemn and formal act of the legislature invalid, arise not out of any supposed or assumed superiority of the judicial department over that of the legislative branch of the government, but is founded upon the fact that the constitution is the organic law which defines the limitations of all branches of the government, and is the supreme law, by which the acts of all branches of the government must be tested, and in the very nature of things the judiciary must, in performing its functions, determine whether the legislative enactment is in harmony with the supreme law. Proceeding a step further, it must be conceded that the validity of the act in question must be referable to what we denominate the "police power of the state," and that the legislature is clearly the department of the government which is authorized to exercise the police power. Under forms of government where limitations upon executive and legislative powers do not exist, there is no restriction upon this necessary function of government, but under our federal and state governments limitations are to be found in our written constitutions. Said the supreme court of the United States in *Mugler v. Kansas*, 123 U. S., loc. cit. 661, 8 Sup. Ct. 297, 31 L. Ed. 210: "It does not follow that every statute enacted ostensibly for the promotion of these ends is to be accepted as a legitimate exertion of the police powers of the state. There are, of necessity, limits beyond which legislation cannot rightfully go. While every possible presumption is to be indulged in favor of the validity of a statute (*Sinking-Fund Cases*, 99 U. S. 700-718, 25 L. Ed. 496), the courts must obey the constitution, rather than the lawmaking department of government, and must, upon their own responsibility, determine whether in any particular case these limits have been passed. 'To what purpose,' it was said in *Marbury v. Madison*, 1 Cranch, 187-176, 2 L. Ed. 60, 73, 'are powers limited, and to what purpose is that limitation committed to writing, if these limits may at any time be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished if these limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation.' The courts are not bound by mere forms, nor are they to be led by mere pretenses. They are at liberty—indeed, are under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety has no real or substantial relation to these objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the constitution." Accepting this statement of the rights and

duties of the respective departments, we are brought to the contention of the parties to this record.

The defendant insists that the compound prepared by himself and other manufacturers as and for a baking powder is a perfectly healthful article, that had been in general, indeed universal, use in this state and throughout the United States for 30 years; that these so-called alum baking powders have proven acceptable as a common household article, as a most useful adjunct to the cooking process; that during all that time not a single instance had occurred in which a single person had been rendered sick or suffered in health from their use; that they had become so acceptable to the bakers and housewives of the land that their production and sale amounted to 120,000,000 pounds in a single year; that no more objection could be urged against their use as being deleterious than can be and has been urged by vegetarians against the use of meat, or by certain persons against the common table salt or the use of wheat bread, and that it is no more liable to adulteration than flour or sugar. He urges that to strike down this great industry, in view of its recognized harmlessness, is an arbitrary and unwarranted attempt to exercise the police power of the legislature. On the other hand, the state insists that section 4 of our bill of rights, which provides "that all constitutional government is intended to promote the general welfare of the people; that all persons have a natural right to life, liberty and the enjoyment of the gains of their own industry; that to give security to these things is the principal office of government, and that when government does not confer this security it fails of its chief design"; and section 30 of the bill of rights, which ordains "that no person shall be deprived of life, liberty or property, without due process of law,"—are not infringed by this act; that "the constitution does not guaranty or give to any person the right to manufacture or sell any chemical or substance which the legislature has declared to be unhealthy and has forbidden." The state's counsel further insist that the judgment of the criminal court is in conformity with the decision of this court in *State v. Addington*, 77 Mo. 110, which case, they insist, involved every essential feature of the case at bar.

In *State v. Addington*, supra, the defendant was prosecuted under the statute of this state of March 24, 1881, entitled "An act to prevent the manufacture and sale of oleaginous substances or compounds of the same in imitation of the pure dairy products." Acts 1881, p. 120. In sustaining that statute this court stated concisely the ground upon which it rests, as follows: "The central idea of the statute before us seems very manifest. It was, in our opinion, the prevention of facilities for selling or manufacturing a spurious article of butter, resembling the genuine

article so closely in its external appearance as to render it easy to deceive purchasers into buying that which they would not buy but for the deception. The history of legislation on this subject, as well as the phraseology of the act itself, very strongly tends to confirm this view. If this was the purpose of that enactment, we discover nothing in its provisions which enables us to say that the legislature exceeded the power confided to that department of the government; and, unless we can say this, we cannot hold the act as being anything less than valid." Commenting upon this decision, Tiedeman, in his work on *Limitations of Police Power* (page 296), says: "But the only valid objection to its sale is the close resemblance to genuine butter, and the consequent opportunity for the perpetration of fraud. And this was the sole ground upon which the constitutionality of the law was sustained by the supreme court of Missouri." In *State v. Bockstruck*, 136 Mo. 356, 38 S. W. 317, *State v. Addington*, supra, was reviewed by the same judge who wrote it, and as confirming the view taken of that case by Tiedeman. We quote: "We consider that the state has the same right to forbid and punish the manufacture of counterfeit butter that it has to forbid and punish the manufacture of counterfeit coin. The like view was taken by us of the validity of the act of 1881 in relation to the manufacture or sale of imitation butter (*State v. Addington*, 77 Mo. 110), though the latter act contained no such provisions as are contained in section 8 of the present act [Acts 1895, p. 27]." It will be observed that the court dwells in both cases upon the fact that in both acts "the evident object and dominating idea was to prevent the manufacture or sale of a spurious article of butter," and upon this ground we still have no hesitancy in holding that such legislation is clearly valid.

Such, also, was the ruling in *People v. Arensberg*, 105 N. Y. 123, 11 N. E. 277, in which the act was entitled "An act to prevent deception in the sale of dairy products," and it was forbidden to sell any article "in imitation or semblance or designed to take the place of natural butter." In *People v. Marx*, 99 N. Y. 377, 2 N. E. 20, the court of appeals held an act of the legislature invalid which made the manufacture out of any oleaginous substance or compound, other than that produced from unadulterated milk and cream, any article designed to take the place of butter, etc. Judge Rapallo, in the course of the opinion, after stating that the evidence disclosed that oleomargarine was a perfectly healthful and pure article of food, says: "One of the learned judges who delivered opinions at the general term endeavored to sustain the act on the ground that it was intended to prohibit the sale of any artificial compound as genuine butter or cheese made from unadulterated milk or cream; that it was the design to deceive which the law rendered criminal. If that were a correct interpre-

tation of the act, we should concur with the learned judge in his conclusion as to its validity, but we could not concur in his further view that such an offense was charged in the indictment or proved on the trial. The prohibition is not of the manufacture or sale of an article designed as an imitation of dairy butter or cheese, or intended to be passed off as such, but of an article designed to take the place of dairy butter or cheese. Simulation of butter is not the act prohibited." Again the court says: "It appears to us quite clear that the object and effect of the enactment were not to supplement existing provisions against fraud and deception by means of imitations of dairy butter, but to take a further and bolder step, and, by absolutely prohibiting the manufacture or sale of any article which could be used as a substitute for it, however openly and fairly the character of the substitute might be avowed and published, to drive the substituted article from the market, and protect those engaged in the manufacture of dairy products against the competition of cheaper substances capable of being applied to the same uses as articles of food." The court then asks the question: "Who will have the temerity to say that these constitutional principles are not violated by an enactment which absolutely prohibits an important branch of industry for the sole reason that it competes with another, and may reduce the price of an article of food for the human race?" The court held that statute unconstitutional. Judge Dillon, in his admirable work on *Municipal Corporations* (4th Ed., § 141, p. 211), in a note to the text, says: "We cannot refrain from expressing our full concurrence in the views and conclusions of the court of appeals of New York in *People v. Marx*. * * * The Pennsylvania act of 1885, under which Powell was convicted (*Powell v. Com.*, 114 Pa. St. 265, 7 Atl. 913, and affirmed in 127 U. S. 678, 8 Sup. Ct. 902, 1257, 32 L. Ed. 253), makes the manufacture and sale of oleomargarine, though open and unconcealed, a crime. We cannot but express our regret that the constitution of any of the states or that of the United States admits of a construction that it is competent for a state legislature to suppress, instead of regulating, under fine and imprisonment, the business of manufacturing and selling a harmless and even wholesome article, if the legislature chooses to affirm, contrary to the fact, that the public health or public policy requires such suppression. The record of the conviction of Powell for selling without any deception a healthful and nutritious article of food makes one's blood tingle." At first blush the decisions in the *Marx* and *Addington* Cases may appear to collide, but upon a closer view it will be seen that the court of appeals distinctly assents to the doctrine upon which Judge Sharswood announces the *Addington* Case rests; for, speaking of the effort to sustain the New York statute on the ground

"that it was intended to prohibit the sale of any artificial compound as genuine butter or cheese made from unadulterated milk or cream; that it was that design to deceive which the law rendered criminal,"—Judge Rapallo says: "If that were a correct interpretation of the act, we should concur as to its validity." As the oleomargarine act considered in the Addington Case prohibited imitation butter, and as this court held it was valid because it shut the door against the design to perpetrate fraud, the great underlying principle of both cases was the same, though the two courts might differ as to the meaning of the words of the two acts.

Does the act of May 11th, making it penal to use alum in the preparation of baking powders, bring it within the reason of State v. Addington? In the Addington Case there was a recognized standard for the article which the legislature intended to protect against fraudulent imitation, to wit, natural butter made from pure dairy products or unadulterated milk; and, in accordance with our decision in that case, we held that statutes enacted to prevent the imposition of a deception upon others are clearly valid. *Cook v. State*, 110 Ala. 40, 20 South. 360; *Stolz v. Thompson*, 44 Minn. 271, 46 N. W. 410; *State v. Marshall*, 64 N. H. 549, 15 Atl. 210, 1 L. R. A. 51; *Waterbury v. Newton*, 50 N. J. Law, 534, 14 Atl. 604; *Com. v. Huntley*, 156 Mass. 236, 30 N. E. 1127, 15 L. R. A. 839; *State v. Horgan*, 55 Minn. 183, 56 N. W. 638. But the question raised on this record, while a kindred one, is, we conceive, different. It seems to us that, in the nature of things, there is a wide difference between legislation prohibiting or regulating the manufacture and sale of an article which is manufactured with a design to imitate a standard or superior article, and pass it off on the public, which cannot readily detect the imposition, for something different from what it is, and the manufacture and sale of an article which in truth and fact is admitted to be innocuous and healthful and in general use, and about which there is neither secrecy, nor imitation of another article of conceded purity and wholesomeness. The Addington and similar cases settle the constitutionality of the former, but do not reach the latter. As the case at bar does not fall within the reasoning and purview of the Addington Case, that case does not reach the difficulty here. The statute upon which this prosecution is based is not based upon the idea of imitation of one article by another. No baking powder is recognized as the standard, as is butter from unadulterated milk in the oleomargarine statute. Here the statute must be upheld, if at all, upon the right of the legislature to make all needful laws to preserve the public health. The right of the state to protect the health, morals, and safety of its people by regulations that do not interfere with the execution of the powers of the general government, or violate rights

secured by the constitution of the United States, is now recognized by all courts in this country. It is peculiarly a legislative function. While it is true that there are limits, under our system, to this power, we must start with the presumption in favor of the act. While we do not accede to the proposition that the legislature can arbitrarily declare any article of food in general use, and concededly wholesome and innocuous, to be unhealthy, and its production and sale a crime, and would have no hesitancy in declaring such an act void when the act, on its face, disclosed its arbitrary and unreasonable character, or where, as in the *Marx Case*, 99 N. Y. 377, 2 N. E. 29, when such an act is challenged on such ground, it is admitted by the state that the prohibited article is innocuous and beneficial in itself, and is not made in imitation of another, or with a view to deceive the public, but is made and vend- ed without secrecy and without imitation of any other, and the only purpose of the law is to prevent competition, still we find ourselves confronted in this case with a state of facts essentially different from that presented to the court in the *Marx Case*. While defendant offered much evidence to show that alum baking powders were a useful and harmless preparation, there is no gainsaying the fact that the state offered much pertinent testimony to the contrary. That there has long existed a strong prejudice against the use of alum in the making of bread, must be conceded. Whether the prejudice is well founded is another matter. As early as the thirty-seventh year of the reign of George the Third the British parliament absolutely prohibited the use of alum in the making of bread. St. 37 Geo. III. c. 98, § 21. And, irrespective of the statute, it was held indictable to use it in large quantities. *Rex v. Dixon*, 4 Camp. 12. Such seems still to be the statute law of England. Bread Act 1836; 1 Chit. Eng. St. tit. "Bread" and "Adulteration of Foods." Several states of our Union, while not going to the extreme of our general assembly, have statutes passed with a view to the protection of the public against these alum powders, by requiring that the cans in which they are sold shall give notice that they contain alum; and these acts have been sustained as fairly within the police power of the state. This court, in view of this sharp conflict of testimony as to the noxious or innocuous character of alum baking powders, cannot take judicial notice that these powders are a perfectly innocuous preparation. Under these circumstances, then, are we to hold that the court of criminal correction erred in not passing upon the question of fact tendered to him, and, having found the fact, in not deciding the law constitutional or unconstitutional, accordingly as it appeared to him to be harmful and deleterious, or harmless and innocuous? "If so," as was said in *People v. Glippery*, 101 N. Y. 634, 4 N. E. 107, affirming 37 Hun, 324,

by the court of appeals of New York (the same court which decided *People v. Marx*, 99 N. Y. 377, 2 N. E. 29), "the court must charge the jury in each case that, if they find milk below that standard is unwholesome, then the statute is constitutional; if they find it to be wholesome, then the statute is unconstitutional. Evidently a constitutional question cannot be settled, or, rather, unsettled, in that way. The constitutionality would vary with the varying judgments of juries." Substitute alum baking powders for milk, and we have the rule applicable to this case. Long before the decision of the court of appeals in that case, however, Judge Leonard, of this court, in *State v. Rich*, 20 Mo. 396, had said: "If, whenever any act done under the authority of the law came in question collaterally, the constitutionality of the law could be contested, then the trial of the main issue must necessarily be delayed until the preliminary fact upon which the validity of the contested legislative act depended should be first tried and determined, upon testimony which, being different in different cases, might involve the absurdity of deciding the law constitutional one day and unconstitutional the next." And he held the evidence inadmissible. What, then, is the test when the constitutionality of an act of the legislature is assailed as invading the right of the citizen to use his faculties in the production of an article for sale for food or drink? We answer that, if it be an article so universally conceded to be wholesome and innoxious that the court may take judicial notice of it, the legislature, under the constitution, has no right to absolutely prohibit it; but, if there is a dispute as to the fact of its wholesomeness for food or drink, then the legislature can either regulate or prohibit it. The constitutionality of the law is not to be determined upon the question of fact in each case, but the courts determine for themselves upon the fundamental principles of our constitution, which vests the legislative power in the general assembly, and the rule of construction, adopted by our courts, "that an act of the legislature is not to be declared void unless the violation of the constitution is so manifest as to leave no room for reasonable doubt." *Com. v. Smith*, 4 Bin. 117; *Cooley*, Const. Lim. (6th Ed.) 216; *State v. Nelson* (Ohio Sup.) 39 N. E. 22. The cases abound, in the greatest courts, state and federal, in which this limitation has been set upon their own authority by the greatest judges who have illumined our jurisprudence. *Ogden v. Saunders*, 13 Wheat. 213, 6 L. Ed. 606; *Sinking-Fund Cases*, 99 U. S. 700, 25 L. Ed. 496; *In re Wellington*, 16 Pick. 87; *Perry v. Keene*, 56 N. H. 514. In this last case *Ladd, J.*, said: "Certainly it is not for this court to shrink from the discharge of a constitutional duty; but, at the same time, it is not for this branch of the government to set an example of encroachment upon the province of the others. It is only the enunciation of a rule

that is now elementary in the American states to say that, before we can declare this law unconstitutional, we must be fully satisfied—satisfied beyond a reasonable doubt—that the purpose for which the tax is authorized is private, and not public." Keeping in view this cardinal principle for our guidance, how can we say, in view of the contradictory evidence as to the effect on the health of bread made with alum baking powders, that the legislature, beyond a reasonable doubt, transcended its constitutional right in prohibiting the use of alum in bread? We are not authorized to do so. It may be argued with great force that a statute similar to the Minnesota statute would be sufficient for the protection of purchasers who have a prejudice against these powders. It may be that, in the small quantities now used in these alum powders generally, it cannot be shown that any particular person has ever lost his health from their use. But that the legislature deemed their use deleterious cannot be denied, and there is no such conclusive evidence to the contrary as to justify this court in holding that this act, intended for the benefit of the public health, is void. The mere wisdom or unwisdom of the act is not for us to decide. The judgment must be, and is, affirmed.

SHERWOOD, P. J., and BURGESS, J., concur.

CHANCE v. JENNINGS et al.

(Supreme Court of Missouri, Division No. 1.
Feb. 12, 1901.)

EQUITY—PLEADING—PETITION—AMENDMENT—CONFORMING TO PROOF—EXCEPTIONS—TIME TAKEN—DEED—MORTGAGE—EVIDENCE—SUFFICIENT—ESTOPPEL IN PAIS—NOT PLEADED—LACHES—FINDING—CONVEYANCE—DEFAUDING CREDITORS—HOMESTEAD.

1. In a proceeding in equity to have a deed absolute on its face declared a mortgage, it was not error for the court to allow complainant to amend his petition to conform to the facts as proved, before the entry of the final decree, where no new cause of action was stated by such amendment.

2. Where complainant was allowed to amend his petition before the entry of the decree to conform to the facts proved, and no exception was made by defendants at the time, nor any assignment of such amendment as error on the motion for a new trial, such amendment cannot be urged as error in the appellate court for the first time, since an exception must not only be taken to the alleged error at the time, but must also be urged in a motion for a new trial, and made part of the record by the bill of exceptions.

3. Plaintiff executed to the defendant a note for the amount defendant had paid to relieve plaintiff's property from two trust deeds, and, for the purpose of securing the same, plaintiff gave defendant a warranty deed of his homestead. At the same time defendant executed a quitclaim deed to the premises, and signed, with the plaintiff, a memorandum on the back of the note that, on the payment of the note, the plaintiff should receive the quitclaim deed, but, if default was made in the payment of the debt or interest, the defendant should cancel the debt and treat the conveyance as absolute.

late. The defendant had demanded a warranty deed as security to avoid the expense of foreclosing a mortgage in case of default. Plaintiff continued to occupy the premises, which were worth considerable more than the amount of the note, without paying rent, until ousted by an innocent purchaser of the property. The interest when due was paid, and on maturity the amount of the principal was tendered in payment, which was refused. *Held* sufficient evidence, in a proceeding in equity to have the deed declared a mortgage, to support a finding that the deed, though absolute on its face, was a mortgage.

4. Where plaintiff had executed a warranty deed absolute on its face as security for a three-year note, with the defeasance indorsed thereon, and had paid interest, without objection, to a transferee of the note, such facts not having been pleaded or set up in defense in the lower court, the defendant, in a proceeding to declare the deed a mortgage, could not urge for the first time in the appellate court that plaintiff, by such payment of interest, was estopped from enforcing the contract on the note, since an estoppel in pais is an affirmative defense, and must be pleaded.

5. Plaintiff executed a warranty deed absolute on its face as security for a three-year note, on which the defeasance contract was indorsed. Defendant, six months later, conveyed the property, and transferred the note to his brother, without plaintiff's knowledge, who discovered the fact when the annual interest became due. Plaintiff paid the interest to such grantee, and, by the acts of the original grantee, was led to believe that the contract would be carried out by such transferee. Plaintiff continued in possession of the property without paying rent until ousted by an innocent purchaser of the property. A month before the maturity of the note, plaintiff tendered the principal, with interest to maturity, and demanded a performance of the contract. On refusal to accept the money tendered, this action to have the deed declared a mortgage was brought. *Held*, that the plaintiff was not precluded from invoking the aid of equity by his failure to bring the action as soon as the transfer of the note and property was discovered, since by the defendant's acts he was induced to believe the contract would be performed.

6. On an issue whether a deed absolute on its face, given to secure a note, was executed for the purpose of defrauding the grantor's other creditors, a finding of the trial court that the deed was not executed for such purpose, there being evidence to support it, will not be set aside by the appellate court.

7. Where a deed of a homestead, absolute on its face, was given as security for a note, with the agreement that on payment of the note the property was to be deeded back, the contention, in a proceeding to have the deed declared a mortgage, that the deed was executed for the purpose of defrauding the grantor's creditors, is without merit, since a homestead is not subject to the claims of general creditors.

Appeal from circuit court, Boone county; John A. Hockaday, Judge.

Bill by E. B. Chance against W. W. Jennings and another. From a decree in favor of the complainant, the defendants appeal. *Affirmed*.

Fry & Clay and H. S. Booth, for appellants. J. H. Cupp and Turner & Hinton, for respondent.

ROBINSON, J. This is a proceeding in equity brought by the former owner of certain real estate in Boone county against W. W. and S. J. Jennings, the general object and

nature of which is to have a deed absolute on its face declared a mortgage, and to obtain a reconveyance of a part of the property included therein, and to recover the excess in value, above the debt, of a part of the property which had been conveyed away by the grantee. The statement made by the counsel for the plaintiff seems to be full, clear, and impartial, and we therefore adopt the following portion thereof: "The petition alleged, in substance, that on the 16th day of February, 1894, the plaintiff executed and delivered to the defendant W. W. Jennings his certain promissory note of that date for the sum of \$937, due in three years, with eight per cent. interest from date, and that at the same time, for the purpose of securing said note, he conveyed a forty-acre tract of land to said defendant by deed of general warranty, and also transferred to him a title bond under which he held a twenty-acre tract, and that contemporaneously therewith a written memorandum was indorsed on the back of the note providing that the plaintiff should have a reconveyance of the property upon payment of the debt and interest at or before maturity; that thereafter the defendant W. W. Jennings, without plaintiff's knowledge or consent, conveyed the forty-acre tract, which was worth largely more than the debt, to the defendant S. J. Jennings, and that thereafter, in 1896, S. J. Jennings wrongfully conveyed said tract to an innocent purchaser; that plaintiff had paid the annual interest on said note as the same became due, and before the maturity thereof caused the full amount of the note and interest to maturity to be tendered to the defendant W. W. Jennings, who refused to accept the same. The plaintiff, by his bill, which was filed before maturity of this note, offered to pay whatever the court might find due thereon, and this offer was renewed in open court at the trial. The answer of the defendant W. W. Jennings, which is rather out of the ordinary, consisted: (1) Of a general denial; (2) of an allegation to the effect that the plaintiff had conveyed the property in controversy to him 'for the purpose and with the view of paying to him a note due him of \$937, due three years after date, with all interest due thereon,' but that such conveyance was made on the plaintiff's part for the purpose of defrauding his other creditors; (3) of an admission that defendant had signed the following memorandum on the back of the note: 'Should E. B. Chance pay this note on or before due, and keep the annual interest paid each year, he shall be entitled to deed herewith; but if he fails to pay the annual interest when due, or pay entire note, said Jennings or his legal representatives may cancel deed and this note, and declare the conveyance void and of no force,'—coupled with an averment that such memorandum was insufficient under the statute of frauds. The answer of the defendant S. J. Jennings was a general denial. The evidence showed

that the plaintiff had owned the forty-acre tract for some ten or twelve years, during all of which time he had occupied it with his family as a homestead, and had planted on it quite a large orchard, which gave it its chief value. He also held a title bond to a twenty-acre tract adjoining, which he had purchased in 1891 from the Rollins executors, on which he had made one payment of \$25. This twenty-acre tract was unimproved land, and its value did not exceed the amount of the Rollins debt, but the forty-acre tract was well improved, and the court found its value to be \$1,500. These two tracts constituted all of the real estate owned by the plaintiff, and in fact substantially all of his property of any description. The forty-acre tract was incumbered by a first deed of trust in favor of the Lombard Investment Company, for some \$350, by a second deed of trust in favor of Dr. A. Wallace for some \$200, and by a mechanic's lien for some \$30 or \$35. In addition to these, the plaintiff owed between \$105 and \$110 as the balance of the purchase price on the twenty-acre tract, and an unsecured debt of about \$200 to the defendant W. W. Jennings. The holders of the two deeds of trust were pressing the plaintiff for payment, and, shortly before the conveyance in controversy was made, had caused the trustee to advertise the forty-acre tract for sale. After making several attempts to raise the money, the plaintiff applied to W. W. Jennings, who, in order to get his own debt secured, agreed to take up all the lien debts against the two tracts. These four debts and interest, together with the debt to Jennings, amounted to \$937. To carry out the arrangement, the plaintiff, on the 16th day of February, 1894, executed and delivered to the defendant his promissory note for that amount, due three years after date, and the latter paid off the two mortgages and mechanic's lien, and partially satisfied the vendor's lien on the twenty-acre tract. At the same time the note was given, the plaintiff, for the purpose of securing it, conveyed to the defendant his forty-acre homestead tract by deed of general warranty, and also transferred to him the title bond to the twenty-acre tract. Jennings required the plaintiff to give an absolute deed instead of a deed of trust, so as to avoid the trouble and expense of a foreclosure sale in case of default, which he seems to have regarded as a practical certainty. As a part of the same transaction, the defendant signed and acknowledged a quitclaim deed reconveying the property to the plaintiff, and this was placed in an envelope along with the note on which had been placed a memorandum signed by both parties, proving that upon payment of the note the plaintiff should receive the quitclaim deed, but, if default was made in the payment of the debt or interest, the defendant W. W. Jennings should have the right to cancel the debt, and treat the conveyance as absolute. It was agreed between the parties at the time that the quit-

claim deed should be placed in the bank until the plaintiff either redeemed or made default, and that until default was made that he should retain possession of the premises. On the 24th of September, 1894, the defendant conveyed the forty-acre tract to his brother S. J. Jennings, by deed of general warranty, and at the same time indorsed the note over to him. This conveyance was made without consulting the plaintiff, and it is not claimed that he had any knowledge of it until some time afterwards. When the first year's interest was about to fall due, the plaintiff went to W. W. Jennings to pay it, and was then informed that S. J. Jennings held the note, and that the interest should be paid to him. S. J. Jennings made some objection about receiving the interest, but finally did so. There was also some hitch about the second year's interest, which S. J. Jennings finally received a day or so after it was due. About a month after the receipt of the second year's interest, S. J. Jennings conveyed the land to Joseph Eckley, an innocent purchaser, and he evicted the plaintiff under a judgment in ejectment in October, 1896. About the 1st of January, 1897, the plaintiff tendered the full amount of the note and interest to maturity to W. W. Jennings, who declined to receive it, and thereupon this action was begun. The circuit court found all the issues for plaintiff, and gave judgment against W. W. Jennings for \$556.20, being the difference between the amount of the debt and the value of the forty-acre tract, and decreed a reconveyance of the twenty-acre tract, and a cancellation of the note for \$937.31 given by plaintiff to W. W. Jennings on February 16, 1894. From that judgment, defendants have appealed." After the evidence was closed, plaintiff was permitted by the court to amend the petition so as to conform to the facts proven touching the manner of the transfer to defendant W. W. Jennings of the 20-acre tract. The propriety of allowing such amendment is challenged by counsel for appellants, on the ground that the amended petition changes the cause of action with respect to defendants' liabilities as to the 20-acre tract, against which the defendants had no opportunity to be heard.

There was no error in permitting plaintiff, before the entry of the final decree, to amend his petition so as to conform to the proof as to the transfer of the 20-acre tract, especially when, as here, such amendment in no wise changes the cause of action. *Welday v. Jones*, 79 Mo. 173; *Insurance Co. v. Smith*, 117 Mo. 261, 22 S. W. 623.

Moreover, this objection comes too late. No such matter was complained of in the circuit court, either in the motion for a new trial or otherwise, and therefore cannot for the first time be raised here. In order to give this court a right to review rulings which are merely matters of exception, the exception must not only be taken at the time, but they must again be brought forward in a

motion for a new trial as grounds therefor, and be made matters of record by bill of exceptions. *Childs v. Railroad Co.*, 117 Mo. 414, 23 S. W. 373; *Nichols v. Stevens*, 123 Mo. 96, 25 S. W. 578, 27 S. W. 618. In this state the doctrine is well settled that a conveyance, though absolute in form, if intended at the time of its execution as a security for a debt, may be deemed by a court of equity as a mortgage, and the grantor permitted to redeem. Nor is it absolutely essential in all cases, in order to satisfy the requirements of the statute of frauds, that a written defeasance should have been entered into between the parties; for if there is a denial of the trust character of the conveyance by the grantee, as in this case, equity will treat such denial as a fraud on his part, and thus hold him as firmly to the verbal defeasance as though it had been a formal written one.

The effect to be given to conveyances of the character of the one in question has frequently been before this court. *Wilson v. Drumrite*, 21 Mo. 325, in many of its essential features, is similar to the present case. There an accounting was ordered for the value of the land sold, and a reconveyance of the residue decreed. "The only difficulty," said Leonard, J., who wrote the opinion in that case, "is the ascertaining of the character of the transaction. When it is once ascertained to be a mortgage, all the consequences of account, redemption, and the like follow, notwithstanding any stipulation to the contrary." In the more recent case of *Bobb v. Wolff*, 148 Mo. 335, 49 S. W. 996, it was said: "While the courts have applied many tests to disclose the true nature of the transaction, whether an absolute deed or a mortgage, the true test and essential requisite has been the continued existence of a debt from the grantor to the grantee in the deed. If there was no debt, the instrument cannot be a mortgage, whatever else it may be; but, if the investigation develops an existing indebtedness by the grantor to the grantee, evidenced by bond or note or like agreement not discharged by the conveyance, the courts have with great unanimity construed the deed to be only a mortgage." In *Book v. Beasley*, 138 Mo. 455, 40 S. W. 101, this language is used: "So, also, if the conveyance is given in consideration of a previous debt due by the grantor to the grantee, and the debt still remains so that the grantee may enforce it against the grantor, the conveyance will be held a mortgage." Many other cases to the same effect might be instanced, but, as the above authorities are so particularly applicable to this case, they must control its determination. Tested by the principles and illustrations of those cases, the trial court was amply warranted in finding that the deed in question, though absolute in form, was simply intended, at the time of its execution, as a security for a debt.

▲ careful reading of the evidence shows

that this conveyance of plaintiff's homestead originated in an effort on the part of plaintiff to raise the necessary funds with which to liquidate certain mortgage and other lien indebtedness then existing against it, together with an unsecured debt due defendant W. W. Jennings; that plaintiff also owed about \$105 on account of the purchase price of the 20-acre tract; and that, in the aggregate, his indebtedness that defendant agreed to assume and pay off amounted to \$937.30; and that the land conveyed to defendant W. W. Jennings to secure him on account of said debts and assumptions was worth about \$1,500. As above suggested, the holders of the original indebtedness were vigorously urging plaintiff for settlement at that time. Indeed, the 40-acre homestead tract had actually been advertised for sale under one of the prior mortgages against it, just a short time before the execution of the conveyance in question. After several ineffectual efforts to borrow the money elsewhere, plaintiff applied to defendant W. W. Jennings, who, it seems, with a view of getting his own debt secured, finally agreed to pay all the lien indebtedness against both of plaintiff's tracts of land, amounting, as before stated (including defendant's then debt), to the sum of \$937.30. It also appears that, in consummating this arrangement, plaintiff executed and delivered to W. W. Jennings his negotiable promissory note for the last-named sum, due in three years after the date thereof, and in order to secure the payment of said note, plaintiff made an absolute deed to the 40-acre tract, and assigned to Jennings his bond for a deed to the twenty-acre tract; that the conveyance, at defendant's request, was made absolute, instead of a mortgage, to avoid the expense of a foreclosure proceeding in the event plaintiff would be unable to comply with his part of the agreement; that plaintiff was to remain in possession of the premises until default in the payment of the note by him should be made; that he did actually remain in possession of the property until ousted in November, 1896, under ejectment proceedings instituted by Joseph Eckler, who, it seems, was an innocent purchaser of the 40-acre tract, having acquired same by successive conveyances from W. W. & S. J. Jennings; that at the same time, and contemporaneous with the making of the deed by plaintiff, the defendant W. W. Jennings signed and acknowledged a quitclaim deed reconveying the 40-acre tract to plaintiff for the recited consideration of \$937.31, which, together with the note, was inclosed in an envelope, and on the back of the note was written the memorandum above mentioned, signed by both plaintiff and W. W. Jennings, providing, in substance, that upon payment of the note and interest said quitclaim should be delivered to the plaintiff, but in the event that default was made in the payment of the note, or an installment of interest thereon, as it became due, the said W. W. Jennings

should have the right to cancel the debt, and declare an absolute forfeiture of the conveyance; that all the papers should be deposited and remain in the bank until plaintiff should redeem, or until he should fail to meet the interest or principal payment. The defendant W. W. Jennings paid off the original mortgage and other lien indebtedness against plaintiff's forty-acre tract, and part of the balance due on the purchase price of the 20-acre tract, according to his agreement with plaintiff, but failed to deposit or leave in the bank the quitclaim deed and note, with the memorandum on the back thereof. In September, 1884, W. W. Jennings, by warranty deed, conveyed to his brother S. J. Jennings the 40-acre tract in controversy, and at the same time delivered to him the quitclaim deed, and indorsed and turned over to him the notes of plaintiff. Afterwards, on the said — day of March, 1896, said S. J. Jennings sold and conveyed the 40-acre tract to Joseph Eckley, an innocent purchaser, who, it seems, knew nothing of the outstanding agreement between the plaintiff and defendants.

In view of plaintiff's urgent needs to save his home from being sacrificed at a forced sale under the first deed of trust he had put upon it, the remarkable provision of the contemporaneous contract entered into between plaintiff and W. W. Jennings at the time plaintiff made to Jennings the deed to the 40-acre tract, the great inadequacy of the price, and the fact that plaintiff continued to pay interest on the note, and was allowed to remain in possession of the land after the conveyance without paying rent, all tend to place the matter in the clearest possible light, and support the contention of the plaintiff that the original transaction between plaintiff and the defendant W. W. Jennings had its inception in an effort to secure a loan to pay certain indebtedness then pressing plaintiff, and that the conveyance in question was really intended as a mortgage, and not to operate as an absolute deed. It will thus be seen, without reviewing the evidence more in detail, that our view of the evidence accords with the finding of the circuit court.

But the defendants insist that, inasmuch as plaintiff paid interest without objection on his note after it had been assigned to S. J. Jennings, he is estopped from now asserting his right under the redemption contract indorsed on the note. To this insistence of defendants it will suffice to say, without further comment, that an estoppel in pais is an affirmative defense, and must be specifically pleaded by the party seeking its protection. No such defense having been interposed in the court below, the defendants, for that reason, will be precluded from invoking it here. *Throckmorton v. Pence*, 121 Mo. 50, 25 S. W. 843; *Avery v. Railroad Co.*, 118 Mo. 561, 21 S. W. 90.

It is also insisted by defendants that the

plaintiff had slept on his rights so long before bringing suit as to induce defendants to believe that they were released from the contract, and for his laches in that regard equity should now refuse the relief asked. The record fails to show any unnecessary delay on the part of plaintiff in the matter of the institution of his suit against defendants. His note had not before that time matured. The interest on same was being received without objection as same fell due. He had remained in the undisturbed possession of the property (as he was to do, under his contract with W. W. Jennings, until he should default in his payments) up to October or November, 1896, when he was ousted by Eckley, an innocent purchaser of the land, and all along up to that time had been induced to believe that S. J. Jennings (after the land and note had been turned over to him) would carry out in good faith the contract as originally made with the defendant W. W. Jennings. We are unable to discover wherein the cases cited by counsel for defendants, of which *Schradski v. Albright*, 93 Mo. 42, 5 S. W. 807, is a type, justify the application of the doctrine of laches to this controversy. Those cases present and were decided upon an altogether different state of facts. There the party seeking to redeem from a deed of trust, properly made and executed, had failed for more than six years to assert his rights to equitable relief, and during all that time paid no taxes, gave no attention to the property, and asserted no claim whatever thereto, but actually encouraged others to buy same at its full value, and stood by and saw the purchaser make extensive improvements and repairs thereon. The want of analogy between this case and that is most apparent. Nothing of that kind appears in this case. If it be said that plaintiff's action accrued and might have been maintained in 1894, as soon as he learned that W. W. Jennings had conveyed the land to his brother S. J. Jennings, the answer to that is he was induced to believe by defendants' acts and words that, notwithstanding W. W. Jennings had parted with his title to the land, his contract would be carried out by S. J. Jennings, until October, 1896, when Eckley, an innocent purchaser of the land from S. J. Jennings, began proceedings for the possession of same.

Defendants' remaining contention is that the whole transaction originated in an attempt on the part of plaintiff to defraud his unsecured creditors, and for that reason a court of equity will not lend its aid to enforce the fraudulent transaction, but leave the plaintiff where he has voluntarily placed himself. The trial court, with the witnesses in person before it, heard the evidence touching the alleged fraud, and found that the transaction was not so tainted, but, on the contrary, had its inception in an honest endeavor to secure the defendant W. W. Jennings on account of an old indebtedness then due to him by plaintiff, and for the assumj

tion and payment by defendant W. W. Jennings of certain outstanding mortgages and other lien indebtedness against the 40-acre tract in question, then pressing plaintiff for payment. Even in equity cases, where the evidence is all oral, the finding of the chancellor will largely be deferred to by this court, unless it is apparent that manifest error has been made. The evidence, though conflicting in some respects, amply justifies the conclusion reached by the court below. Moreover, as already seen, the 40-acre tract conveyed was plaintiff's homestead, and in no way subject to the claims of his general creditors. In *Davis v. Land*, 88 Mo. 486, this court said: "No fraud upon creditors can be perpetrated by any disposition the debtor may see proper to make of his homestead. It is beyond their reach, both at law and in equity, and there can be no fraudulent disposition of such property." The rule announced and applied in *Rinehart v. Long*, 95 Mo. 396, 8 S. W. 559, and other cases to the same effect, cited by defendants, is wholly without application to a case like this; for here the creditor has no concern whatever with the homestead. Such property cannot be subject to the payment of his debt, and, as to his creditors, there can be no fraud in the disposition of the homestead. *Bank v. Guthrey*, 127 Mo. 189, 29 S. W. 1004. These conclusions result in the affirmance of the judgment of the trial court; and it is so ordered. All concur.

RICHARDSON v. COLE et al.

(Supreme Court of Missouri, Division No. 2.
Feb. 26, 1901.)

ESTATE ASSIGNED BY AGREEMENT—ACTION BY ADMINISTRATOR BARRED—PROBATE COURT ORDER—COLLATERAL ATTACK.

1. Where an intestate left personalty and no debts, and the heirs (all being of age) by a written agreement assigned their interests to one of their number, who took possession of the property, the public administrator, who obtained letters on the estate 12 years later, could not recover the property from such heir.

2. In an action by the public administrator to recover personalty paid to one of the heirs under a written agreement of all the heirs, who were of age, assigning their interests to such heir, the defense that there were no debts, and that the personalty had been rightfully assigned to defendant, was not a collateral attack on the order of the probate court directing the plaintiff to take charge of the estate.

Appeal from St. Louis circuit court; James E. Withrow, Judge.

Action by William C. Richardson, as administrator of the estate of Lillie Kate Fagin, deceased, against Nathan Cole and another, to recover property received by them as heirs of said deceased under a written agreement of all the heirs; no administration having been had. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

Jas. A. Henderson and R. S. MacDonald, for appellant. Judson & Taussig, for respondents.

BURGESS, J. On May 13, 1884, Lillie Kate Fagin died intestate and unmarried, the owner of personal property consisting of cash, notes, and bonds of the face value of \$9,342.17, and the bonds in litigation, of the face value of \$7,897, which had theretofore been placed by her father, Aaron W. Fagin, now deceased, in the hands of the defendant Nathan Cole, who had married her sister, to hold and invest for her. After the death of Lillie Kate Fagin, all of her heirs at law, except her father, Aaron W. Fagin (all being of age), by an instrument in writing of date July 18, 1884, agreed to and did transfer to Rachel G. Metcalfe, a sister of Lillie, and one of the defendants in this suit, all their right, title, and interest in and to the estate of said Lillie, and by said instrument directed the defendant, Nathan Cole, as agent and trustee of said Lillie, to pay over to said Rachel Metcalfe any and all moneys of the deceased, and to transfer to her any and all property of the deceased which he held for her, taking her receipt therefor. This instrument was executed by all the heirs at law of Lillie, except her father, Aaron W. Fagin; but it was executed with his knowledge and consent, and at his instance. The defendant Nathan Cole, acting under the authority of said instrument in writing, did on or about the 23d day of September, 1884, transfer and deliver to said defendant Rachel G. Metcalfe all the notes, cash, bonds, and choses in action then in his possession as the agent or trustee for said Lillie. On March 28, 1896, nearly 12 years after the death of said Lillie Kate Fagin and this distribution, William C. Richardson, the public administrator of the city of St. Louis, took out letters of administration upon the estate of Lillie Kate Fagin. As such administrator he instituted suit against the defendant Nathan Cole and the defendant Rachel G. Metcalfe to recover from them the personal estate belonging at her death to Lillie Kate Fagin. The defendants, besides pleading the statute of limitations of five years, set up in their separate answers the foregoing facts as a defense to plaintiff's petition. To this answer plaintiff demurred. This demurrer was overruled, and, plaintiff refusing to plead further, judgment was entered for the defendants. Plaintiff appeals.

It may be conceded at the outset that the legal title to personal property of a deceased person is in the administrator, who holds it in trust for heirs and legatees, and that he alone can sue for and recover the assets of such deceased person. But the mere legal title passes to the administrator. The equitable descends to the heirs or legatees, who are entitled to distribution. The defense interposed here is an equitable one, and sets up that there were no debts against the deceased, and that by agreement between those entitled to the property it had been transferred to one of their number, the defendant Rachel G. Metcalfe; and the effect of the

Jemurrer is to admit these defenses to be true. But plaintiff contends that the defenses pleaded afford no barrier to the administrator's right of recovery, either at law or in equity. In support of this position, Bartlett v. Hyde, 3 Mo. 490; Naylor's Adm'r v. Moffatt, 29 Mo. 126; Smith v. Denny, 37 Mo. 20; McPike v. McPike, 111 Mo. 216, 20 S. W. 12; and Green v. Tittman, 124 Mo. 372, 27 S. W. 391,—are relied upon. But these decisions go no further than has already been conceded; that is, that the administrator is, under ordinary circumstances, entitled to the possession of the personal property of the deceased, and that his right to sue for such possession is exclusive of all others. The law does not require the doing of a useless and unnecessary thing, and this would be the result in this case if plaintiff's position be sustained, and defendants compelled to pay him the value of the assets belonging to Lillie Kate Fagin, deceased, when no part of it is needed for the payment of debts, in order that he may, in turn, pay it back to the defendant Metcalfe, who owns the interest of all the other heirs. In the case of McCracken v. McCashin, 50 Mo. App. 35, Robert H. McCracken died intestate, possessed of personal property, and leaving several heirs who were of age, but no debts. The heirs made distribution among themselves of all the property. Afterwards, at the instance of one of the heirs, the probate court, after giving notice to those first entitled to administer, upon their refusal ordered the public administrator to take charge of the estate. A motion was made by the plaintiffs in the probate court to set aside this order for the reason that distribution had been made, and that there were no debts. The motion was overruled, and upon appeal to the circuit court the motion was sustained, and the administrator appealed. It is held, when there are no creditors, and the heirs are of age, an administrator would be a mere naked trustee, and it would seem idle, as well as a waste of the estate, to go through the form of administration against the will of the heirs, as evidenced by their settlement and distribution of the property among themselves, which all the parties would be estopped from disputing if the adjustment was made without fraud or imposition. In Walworth v. Abel, 52 Pa. St. 370, it is said: "While the mere legal title passes to the administrator, the equitable descends upon the parties entitled to distribution. If there be no creditors, the heirs have a complete equity in the property; and, if they choose, instead of taking letters of administration, to distribute it by arrangement made and executed among themselves, where is the principle which forbids it? The parties to such an arrangement, executed, would be forever equitably estopped from disturbing it, as amongst themselves, upon the most familiar principles of justice. * * *

If there be no creditors in this case, the re-

covery of the value of the cattle would be only for the purpose of distribution among the heirs; but this they have done themselves by an appropriation of the value already, and thus is accomplished what cannot be done over again without breaking up the arrangement, and without manifest injustice to the defendant." To the same effect is Weaver v. Roth, 105 Pa. St. 408. In the case of Needham v. Gillette, 39 Mich. 574, the following language is used: "Where there are no creditors, and the heirs of age, an administrator would be a mere naked trustee; and it would seem idle, as well as waste of the estate, to go through the form and expense of administration against the will of the heirs, as evidenced by their settlement and distribution of the property among themselves. When, under such circumstances, a settlement and domestic distribution is made without fraud or mistake, there is no necessity for administration." So, in Woodhouse v. Phelps, 51 Conn. 521, it was held that while it is true, as a general proposition, that the title to personal property vests in an executor or administrator, yet he is a mere trustee for creditors and for heirs or legatees; and where the property is not wanted for the payment of debts, and is rightfully in the possession of the persons who have the equitable title to it, the naked title of the executor or administrator is not sufficient in equity against such equitable and rightful possession. The same rule is announced, in more emphatic terms, if possible, in the case of Lewis v. Lyons, 13 Ill. 117, in which it is held that an administrator has the legal title to the personal estate of his decedent, as trustee for the payment of debts, but after they are paid the residue of such estate belongs to the heirs; that a court of equity is not bound at all times to enforce a strict legal right, and will not require an heir to pay over money to an administrator when such administrator has no debt to pay, nor any use to make of it connected with the estate, merely that he may retain it for his own benefit, or be paid his costs and commissions. In fact, our attention has not been called to an authority to the contrary.

But plaintiff insists that the defense is simply a collateral attack upon the order and judgment of the probate court directing him, as public administrator, to take charge of the estate, which, if true, the facts pleaded as such defense afford no defense to this action, for the validity of that order cannot be questioned in this action. Riley's Adm'r v. McCord's Adm'r, 24 Mo. 265; Naylor's Adm'r v. Moffatt, 29 Mo. 126; Green v. Tittman, 124 Mo. 372, 27 S. W. 391. But we are unable to assent to this contention. Upon the contrary, the question simply is as to the right of the administrator to the possession of property to which he is only entitled for the payment of debts against the estate, and for distribution among the heirs of decease-

where there are no debts; and distribution of the property was made more than 10 years before the institution of this suit among the heirs by common consent, who were of age and competent to do so. We know of no principle of law which forbids such a distribution by the heirs under such circumstances; and if it would not be a mockery of justice for a court of equity to require the defendants to pay over to plaintiff, when there are no debts against the estate to pay, and no legitimate use for it in his capacity as administrator, merely for the purpose of allowing him to obtain it and use it, and then pay it back to them, less his costs and commissions, it is difficult to say what would.

For these considerations, the demurrer to the answer was properly overruled, and, as plaintiff declined to plead further, the judgment rendered for defendants thereon should be affirmed. It is so ordered.

SHERWOOD, P. J., and GANTT, J., concur.

STATE v. MAGGARD.

(Supreme Court of Missouri, Division No. 2.
Feb. 26, 1901.)

GRAND LARCENY—GOODS IN DIFFERENT LOCATIONS—THEFT AT DIFFERENT TIMES—MEASURE OF VALUE—ACTUAL WORTH—MARKET VALUE.

1. Several parties put their teams in a wagon yard over night, and one of them left his overcoat, harness, and some sacks of corn in his wagon, and another placed his personal effects in the barn loft, and the others in various places around the yard; but the property left in any one place was not worth \$30. *Held*, that a party could not be convicted of grand larceny for stealing the property of different owners so located.

2. On a charge of grand larceny all the evidence as to the worth of the property alleged to have been stolen was as to its actual value. The defendant offered an instruction that the value of the property was not its worth to the owner, but its value in the open market. *Held*, that the instruction was properly modified by striking out the words "in the open market."

Appeal from circuit court, Texas county; L. B. Woodside, Judge.

Lon Maggard was convicted of grand larceny, and he appeals. Reversed.

Clark Dooley and Orchard & Saye, for appellant. Edward C. Crow, Atty. Gen., and Sam B. Jeffries, Asst. Atty. Gen., for the State.

BURGESS, J. At the May term, 1900, of the circuit court of Texas county, the defendant, John W. Farrow, and Charles Smith were jointly indicted for grand larceny, which was alleged to have been committed on the 23d day of March, 1900, in that county. On the 16th day of July, 1900, being the May adjourned term of said court, on motion of defendants named in the indictment a severance was granted, and upon the 18th day of July next thereafter the defendant Maggard, having

been put upon his trial, was convicted of grand larceny as charged, and his punishment fixed at two years' imprisonment in the penitentiary. From the judgment and sentence he appeals.

The property alleged to have been stolen consisted of overcoats, gloves, grain sacks, and various other goods and chattels belonging to five different persons, viz. E. E. Buck, Sidney Purcell, S. R. Townley, George Schoonover, Fred Brackett, and Henry Smith, all of whom lived in Texas county. The day before the goods were stolen, they went to Cabool, a station on the Kansas City, Ft. Scott & Memphis Railroad, in said county, for the purpose of getting some corn that was being shipped to them at that place. When they got there, they drove into a lot, called by one of the witnesses a "wagon yard," unhitched their teams, and remained until the following day, when they discovered that certain of their property had been stolen. Buck's property, or at least a part of it, to wit, a collar and bridle, and his sacks and corn, had been taken by him from his wagon, and piled up in a shed. Purcell's property was in his wagon, Smith's in Keltley's shed loft in the wagon yard, and the property of Brackett, Townley, and Schoonover in different places in the wagon yard. When they discovered that their property had been stolen, a warrant was secured for the arrest of defendant, John W. Farrow, and Charles Smith, who were followed a few miles in the country, overtaken, and the property found in their possession, and taken from them, and they put under arrest. After the officer had placed them under arrest, and returned to Cabool with them, the defendant escaped, and was not apprehended again for several days thereafter, when he was found at Springfield, Mo. It is claimed by defendant that under the evidence he could only have been convicted of petit larceny, for the reason that the property of the different owners was located in different places at the time it was stolen, and each taking a separate and distinct offense, and, as the value of the property taken from any one place did not amount in value to as much as \$30, he could not be convicted of grand larceny. The stealing of different articles of property belonging to different persons at different times constitutes different offenses, but where the stealing of different articles of property is at the same time and place, so that the transaction is the same, it is but one offense, although the property stolen may belong to different persons. In *Lorton v. State*, 7 Mo. 55, it is said: "The stealing of several articles of property at the same time and place undoubtedly constitutes but one offense against the laws, and the circumstance of several ownerships cannot increase or mitigate the nature of the offense." *Wilson v. State*, 45 Tex. 76; *State v. Morphin*, 37 Mo. 373. The same rule is announced in *Nichols v. Com.*, 78 Ky. 180. But, where property belongs to different persons, and is located at different places, as in the case at

bar, each asportation with intent to steal constitutes a different offense, although the thefts may all have been committed in rapid succession, and in pursuance of a formed design to steal. In this case it was impossible, in consequence of the different locations of the property, that it could all have been taken at the same time, and, as the property stolen from any one place was not of the value of \$30 or more, there was no evidence authorizing an instruction for grand larceny.

Defendant asked the court to instruct the jury as follows: "(9) The court instructs the jury that in arriving at the value of the property charged to have been stolen you are not to be governed by the value of the property to the owner, but you will be governed by what the evidence shows said property to have been actually worth on the open market." The court refused the instruction as asked, struck out the words at the conclusion of the instruction, "on the open market," then gave it as amended, over the objection and exception of defendant. It is insisted that the action of the court in this regard was error, and that the standard of value was not what the property was worth to its owners, but what it would have brought in open market. As a general rule, the market value of goods stolen, or that for which similar goods are, at the time and place of the theft commonly, in the markets, bought and sold, is the standard of value. But where things stolen have no marketable value,—for instance, a secondhand coffin (*State v. Doepke*, 68 Mo. 208), or secondhand clothing (*Pratt v. State*, 35 Ohio St. 514; *Printz v. People*, 42 Mich. 144, 3 N. W. 306) or brood sows (*State v. Walker*, 119 Mo. 467, 24 S. W. 1011),—the owner may testify to the actual value of the property regardless of any market value for it. In the case at bar there was no evidence that any of the articles described in the indictment had a marketable value, but all of the evidence was directed to their actual value; hence no error was committed in amending the instruction, and in giving it as amended. *State v. Walker*, supra. There was no evidence to authorize it. The indictment is in the usual form, and free from substantial objection. For the error of the court indicated, the judgment is reversed, and the cause remanded.

SHERWOOD, P. J., and GANTT, J., concur.

TALIAFERRO v. EVANS et al.

(Supreme Court of Missouri, Division No. 2.
Feb. 26, 1901.)

FRAUDULENT CONVEYANCES—HUSBAND AND WIFE—ACTION—EVIDENCE—ADMISSIONS—ADMISSIBILITY—NEW TRIAL—REVIEW—AFFIRMANCE.

1. Where, in an action by creditors of a husband to set aside a deed of his land to his wife as fraudulent and without consideration, there was evidence that defendant had said that the making of the deed rendered him insolvent, and

that he would not pay anything, because he had nothing to pay with, it was error to exclude such admission, since defendant's insolvency was an important factor in passing on the character of the deed to his wife.

2. Where, in an action to set aside a deed of land from husband to wife as fraudulent and without consideration, the evidence is conflicting, an order granting a new trial after a judgment for defendants will be affirmed, since the appellate court will defer to the finding of the chancellor, where it appears correct, and the evidence is conflicting.

Appeal from circuit court, Ralls county; R. F. Roy, Judge.

Action by R. P. Taliaferro against Thomas W. Evans and others. From an order setting aside a judgment in favor of defendants and granting a new trial, defendants appeal. Affirmed.

Geo. W. Whitecotton and William Christian, for appellants. J. O. Allison and J. D. Hostetter, for respondent.

BURGESS, J. This is an appeal by defendants from an order of the circuit court setting aside its judgment, which was in favor of defendants, and granting plaintiff a new trial. The purpose of the action is to have set aside as fraudulent a certain conveyance of 200 acres of land in Ralls county, Mo., of the alleged value of \$5,000, made by the defendant Thomas W. Evans to his wife, Catharine Evans, dated March 2, 1894, and to subject the same to the payment of certain judgments, amounting in the aggregate to about \$3,000, which were rendered in favor of plaintiff and against the said Thomas W. Evans, by the circuit court of said county, on the 21st day of March, 1895. The debts embraced in the judgments were contracted at different times from September 17, 1889, to March 19, 1892, and were for money loaned by plaintiff to the sons and son-in-law of defendants, for the payment of which the defendant Thomas W. Evans was surety. The borrowers were all insolvent at the times the money was loaned, and have been ever since, and the loans were made upon the credit of Thomas W. Evans, he being then the apparent owner of 210 acres of land in Ralls county, of the value of about \$5,000. Plaintiff testified that when said Evans came with one of his sons to procure one of the loans, he assured him that his land was unincumbered; that he was perfectly good, and did not owe anything; and that plaintiff was taking no chances in loaning the money to them. By the transfer of the 200 acres of land Thomas W. Evans was rendered insolvent, and the petition alleges that the land was conveyed by him to his wife for the purpose of defrauding his creditors, particularly the plaintiff, and that she had knowledge of such fraudulent design, and participated therein, and that said conveyance was without consideration, and voluntary. Defendants answered separately. Catharine Evans, in her separate answer, admitted the execution of the deed of date March 2, 1894, b

her husband, conveying to her the 200 acres in controversy, but averred that the same was based on a \$4,000 consideration. She further alleged in her answer that she owned a slave named "Bettie" in 1860, and that the 200-acre tract in controversy was purchased by her husband from William Ely and Alexander Allison, and that her slave was taken by Ely at \$1,000 in part payment of the purchase price, and that her husband gave her his note for \$1,000, bearing 10 per cent. compound interest, as a consideration for said slave so used by him in the part payment of the purchase price of said land, and that said note contained a stipulation that it should be paid in land. She also averred that her husband promised, in 1865, to convey or cause to be conveyed to her the land in controversy in settlement of said note, but that by a mistake of the scrivener the executors of Alexander Allison, deceased (who held the legal title to the land at the time of his death), conveyed the same by an erroneous description to her husband, instead of to her. She further averred that plaintiff's judgment debts were security debts, and that she had no knowledge of said indebtedness from her husband to plaintiff until about March 2, 1894, the date of the deed under attack. She further averred that she and her husband had been in possession of the land from the date of the purchase, in 1860, to the present time, and that in 1889 and 1890 she had spent about \$800 in improving the houses, fences, etc. Thomas W. Evans, in his separate answer, admits the recovery of the judgment for debt as alleged, and the execution of the deed to his wife, and avers the truth of the statements in the separate answer of his wife, and that he is the head of a family, and said land is his homestead, and has been ever since its purchase in 1860. The reply to the separate answer was a general denial of new matter therein contained and a plea of the statute of limitations to said note.

The evidence shows that Thomas W. Evans acquired title to 215 acres, which includes the 200 acres in controversy, by deeds dated in 1866, and which were placed on record at that time. It is also in evidence that defendant Catharine Evans knew at the time that the title had been placed in her husband. While the description contained in the deeds made in 1866, by which Thomas W. Evans acquired title, varies from the description contained in the deed to his wife, made March 2, 1894, yet it is not shown by the evidence which description is the correct one, and it is undisputed that the land intended to be conveyed by the deeds made to Thomas W. Evans in 1866 and the deed made by him to his wife in 1894 was the same tract, the farm on which they lived. While defendant Catharine Evans sets up in her answer that she had no knowledge that her husband was indebted to the plaintiff until about March, 1894, when she procured the deed to be made

to her, yet the evidence clearly shows that she knew at the time the money was being borrowed of the fact that her husband was signing her son's and son-in-law's notes as surety to plaintiff; but she claims that she thought her boys were able to pay the notes off. She met plaintiff in Vandalia, where he lives, in 1892, and, on being introduced to him, remarked interrogatively, "Is this the gentleman we owe all this money to?" The plaintiff sought to prove by his own testimony that all the makers of the notes held by him except Thomas W. Evans were insolvent at the time the various amounts were borrowed from him, and that he knew of their insolvency and of Thomas W. Evans' solvency, and loaned the amounts on the latter's credit alone; but, upon objection being made by defendants, the court excluded such proffered testimony. The \$1,000 note, after being exhibited in court, was lost. It was, however, in the possession of Thomas W. Evans when he took it to an attorney to ascertain whether "it was any account or not," shortly prior to the making of the deed to his wife. The slave Bettie was sold to William Ely, but the evidence shows that Alexander Allison sold the 215 acres (which includes the 200 acres in controversy) to defendant Thomas W. Evans, as his executors, Charles Rice and Dudley Butler, conveyed said land to Thomas W. Evans by deeds executed in 1866, after the death of Alexander Allison; and in one of the deeds, conveying 174 acres, it is recited that said Alexander Allison had, on July 10, 1861, contracted in writing to sell and convey to said Thomas W. Evans the land therein described. It would seem, however, that Thomas W. Evans owned the tract in controversy at two different times. He claims to have first purchased 240 or 300 acres of raw prairie land (including the 200 acres in controversy) at \$1.25 per acre in 1851 or 1852, and that he traded this tract to Alexander Allison for his (Thomas W. Evans') father's old farm in Pike county; that he received the negro girl Bettie and his father's old farm in Pike county in exchange for his Ralls county land, which includes the 200 acres in controversy; that in a few years thereafter he sold his Pike county land, and repurchased the Ralls county land (including the 200 acres in controversy) from William Ely and Alexander Allison. Their version further is that the slave Bettie was turned over to Ely at \$1,000 as part payment on the repurchase of said Ralls county land, including the 200 acres in controversy; but the record shows affirmatively that the Ralls county land, including the 200-acre tract in controversy, was owned by Alexander Allison alone at the time of such repurchase, and that the contract for such repurchase was made by Thomas W. Evans with Alexander Allison alone, and not with Allison and Ely. Thomas W. Evans would not, or was unable to, say how much the Ralls county land cost on its repurchase, or what portion of the pur-

chase price he paid. Although he admitted that it cost more than \$1,000, he claimed that he had nothing with which to pay. The record adduced in evidence showed that he acquired title to his father's old place in Pike county by deed from his father, Joseph Evans (and not from Alexander Allison), dated January 25, 1857, while the bill of sale to Bettie is dated June 2, 1856; and he is further shown to have received various sums in the sales of certain other lands from 1857 to 1868, amounting to over \$6,000, and also to have received about \$1,200 in 1860 from his father's estate.

The rule is that the granting of a new trial rests peculiarly within the discretion of the trial court (*Bank v. Armstrong*, 92 Mo. 205, 4 S. W. 720; *McCullough v. Insurance Co.*, 113 Mo. 608, 21 S. W. 207), and in order to a reversal of its ruling in sustaining the motion in this case, it devolves upon the defendants to show that they have been prejudiced thereby. One of the grounds assigned for error in the motion for a new trial is the action of the court in "excluding legal and competent evidence offered by plaintiff." This assignment is leveled at the ruling of the court in refusing to permit plaintiffs to prove that in a conversation that defendant Thomas W. Evans had with one Mrs. Lizzie Pollard in October or November, 1894, he stated to her that he was then insolvent, and that he would not pay anything; that he had nothing to pay with; and that he was rendered insolvent by the making of the deed in question to his wife. His insolvency was an important factor in passing upon the character of the deed from him to his wife, for, if he had sufficient property left to pay all his debts after this conveyance, it could not be assailed by his creditors upon the ground of fraud. Upon the other hand, if he was rendered insolvent by this conveyance, if it was voluntary, and without consideration, it was fraudulent as to his creditors; or, if for a valuable consideration, but with a fraudulent intent, and to cover it from them, and his wife knew it, and participated in such purpose, it was fraudulent and invalid as against them; and there could have been no better way of proving his insolvency than by his own admissions or statements to that effect. He being one of the defendants, and one of the parties to the conveyance, his admissions that he was insolvent, and had no property, were admissible in evidence as against himself, although made after the execution of the deed from him to his wife.

Another of the grounds assigned in the motion for a new trial is that the finding was "against the weight of the evidence." In all suits in equity where the witnesses testify orally this court defers somewhat to the finding of the trial court. *Erskine v. Loewenstein*, 82 Mo. 309; *Chouteau v. Allen*, 70 Mo. 336; *Springer v. Kleinsorge*, 83 Mo. 159; *Berry v. Hartzell*, 91 Mo. 138, 3 S. W.

582; *Bushong v. Taylor*, 82 Mo. 666; *Mathias v. O'Neill*, 94 Mo. 520, 6 S. W. 253. As said by Sherwood, J., in speaking for the court in *Benne v. Schnecko*, 100 Mo. 250, 13 S. W. 82: "But by such remarks we are not to be understood as meaning that we are concluded by the finding of facts by the court below. Far from it. Such remarks do not mean that we have abdicated our supervisory control over questions of fact in equity causes. They only mean that when there is conflict of testimony, or where the testimony is evenly balanced, and the finding of the chancellor appears to be correct, then we will so far defer to his finding as to sanction it by our affirmance; 'that and nothing more.'" The same rule was announced in *McElroy v. Maxwell*, 101 Mo. 508, 14 S. W. 1; *Milling Co. v. Burns*, 144 Mo. 192, 45 S. W. 1074. The evidence was somewhat conflicting, and, without knowing upon what ground the court set its finding aside and granted a new trial, we think its ruling was justified upon either of the grounds herein suggested, and, in the absence of anything to the contrary, it must be presumed that it was upon one or both of those grounds. Its ruling must, therefore, be affirmed.

SHERWOOD, P. J., and GANTT, J., concur.

STATE v. ADAIR.

(Supreme Court of Missouri, Division No. 2.
Feb. 26, 1901.)

ROBBERY — CRIMINAL LAW — REASONABLE DOUBT—ACCUSED AS WITNESS—CREDIBILITY OF WITNESS.

1. An unlawful and felonious assault with intent to deprive the person assaulted of his property, made without any honest claim to the property, and the unlawful taking of property from him by force and violence and against his will, constitutes the crime of robbery in the first degree.

2. It is not error to instruct, in a prosecution for robbery, that the defendant is a competent witness in his own behalf, but that his interest in the result of the case may be considered in determining his credibility.

3. It is not error to instruct, in a prosecution for robbery, that a reasonable doubt sufficient to warrant an acquittal must be a substantial doubt of defendant's guilt with a view to all the evidence, and not a mere possibility of the defendant's innocence.

4. It is not error to instruct, in a prosecution for robbery, that, if there is any evidence which raises a reasonable doubt as to the presence of the defendant at the time and place where the crime is charged to have been committed, he must be acquitted.

5. It is not error to instruct, in a prosecution for robbery, that the jury are the sole judges of the credibility of the witnesses and the value of their testimony, but that in determining the credit to be given a witness his conduct on the stand, interest in the result of the trial, feeling towards the accused or the injured person, the improbability of his statements, his opportunity for observation and knowledge, and his inclination to speak truthfully, should be considered in connection with all the other facts given in evidence.

6. It is not error to instruct, in a criminal case, that, if the jury concludes that a witness has testified falsely to a material fact, his entire testimony may be disregarded.

7. Where there is sufficient evidence to convict the defendant in a prosecution for robbery, the question of the credibility of the evidence affirming or denying his presence when the crime occurred is for the jury.

Appeal from criminal court, Jackson county; John W. Wofford, Judge.

James Adair was convicted of robbery in the first degree, and he appeals. Affirmed.

Jas. M. Chaney, Jr., for appellant. The Attorney General and Sam B. Jeffries, for the State.

SHERWOOD, P. J. The verdict of the jury found defendant guilty of robbery in the first degree, and assessed his punishment at five years in the penitentiary. The instructions given by the court were as follows: No. 1: "The court instructs the jury that if they find and believe from the evidence that the defendant, James Adair, at the county of Jackson and state of Missouri, at any time within three years next before the 17th day of April, 1900, did unlawfully and feloniously make an assault upon the witness, Bessie Proctor, and did by force and violence to her person, in her presence, and against her will, and without any honest claim to the same, with the felonious intent to deprive the owner of her property therein, and convert the same to his own use, unlawfully and feloniously take from the witness, Bessie Proctor, any of the property mentioned in the indictment, of any value whatever, the property of the witness, Bessie Proctor, you will find the defendant guilty of robbery in the first degree, and assess his punishment at imprisonment in the state penitentiary for any time not less than five years. 'Feloniously,' as used in these instructions, means wickedly, and against the admonition of the law; unlawfully." No. 2: "The court instructs the jury that the defendant is a competent witness in this case, and you must consider his testimony in arriving at your verdict; but in determining what weight and credibility you will give to his testimony in making up your verdict you may take into consideration, as affecting his credibility, his interest in the result of the case, and that he is the accused party on trial, testifying in his own behalf." No. 3: "The court instructs the jury that before they can convict the defendant they must be satisfied of his guilt beyond a reasonable doubt. Such doubt, to authorize an acquittal upon reasonable doubt, must be a substantial doubt of the defendant's guilt, with a view to all the evidence in the case, and not a mere possibility of the defendant's innocence." No. 4: "The court instructs the jury that, if there is any evidence before you that raises in your minds a reasonable doubt as to the presence of the defendant at the

time and place where the crime is charged to have been committed, you will acquit the defendant." No. 5: "The jury are the sole judges of the credibility of the witnesses, and of the weight and value to be given to their testimony. In determining as to the credit you will give to a witness, and the weight and value you will attach to a witness' testimony, you should take into consideration the conduct and appearance of the witness upon the stand, the interest of the witness, if any, in the result of the trial, the motives actuating the witness in testifying, the witness' relation to or feeling for or against the defendant or the alleged injured party, the probability or improbability of the witness' statements, the opportunity the witness had to observe and to be informed as to matters respecting which such witness gives testimony, and the inclination of the witness to speak truthfully, or otherwise as to matters within the knowledge of such witness. All these matters being taken into account with all the other facts and circumstances given in evidence, it is your province to give to each witness such credit, and the testimony of each witness such value and weight, as you deem proper. If, upon a consideration of all the evidence, you conclude that any witness has sworn willfully false as to any material matter involved in the trial, you may reject or treat as untrue the whole or any part of such witness' testimony."

There was sufficient evidence in the case to convict defendant, and it belonged exclusively to the jury to say whether they would believe the evidence given on behalf of the state, which went to show defendant present where the crime occurred, or that on the part of defendant, which went to show him absent from the scene of the robbery, at the time of its perpetration. The third instruction has frequently been given in form and substance in prior cases in this court, and we reaffirm its correctness. *State v. Nueslein*, 25 Mo. 111; *State v. Blunt*, 91 Mo. 503, 4 S. W. 394; *State v. Bobbst*, 131 Mo., loc. cit. 339, 32 S. W. 1149; *State v. Robinson*, 117 Mo., loc. cit. 661, 23 S. W. 1066; *State v. Sacre*, 141 Mo. 64, 41 S. W. 905; *State v. Knock*, 142 Mo., loc. cit. 524, 44 S. W. 235; *State v. Holloway*, 156 Mo., loc. cit. 227, 228, 56 S. W. 734. And the same may be said of instruction No. 4 which the court gave, touching the presence of the defendant at the scene and time the crime took place. This, being all that was necessary to cover the case, rendered unnecessary the giving of defendant's first instruction, on the correctness of which it is, therefore, wholly useless to pass. The other instructions are formulated after the fashion of others that have often received our indorsement. Finding no reversible error in the record, judgment affirmed. All concur.

WILSON et al. v. JOHNSON et al.
(Supreme Court of Missouri, Division No. 2.
Feb. 26, 1901.)

**HOMESTEAD—WIDOW—ADMEASUREMENT—
VALUATION—VESTED ESTATE.**

Under Rev. St. 1899, § 5489, providing that if any head of a family shall die, leaving a widow, his homestead, to the value of \$1,500, shall pass to such widow, and shall continue for her benefit until her death, an estate for life in the homestead becomes vested in the widow upon the death of the husband, so that she is entitled to have the homestead admeasured on the basis of the value of the lands at the time of the husband's death, and not their value at the time of admeasurement.

Appeal from circuit court, Dekalb county.

Action by Maggie Wilson and others against Mary Johnson and others. From an order overruling a motion to reject the report of commissioners appointed to admeasure homestead, and an order overruling a motion in arrest of judgment, plaintiffs appeal. Affirmed.

This is a suit by one of the adult heirs at law of Cornelius Johnson, deceased, late of Dekalb county, Mo., against his widow and other heirs, for the assignment of the homestead and dower of the widow, Mrs. Mary Johnson, and the minor children, and for a partition of the remainder of said estate. The lands consist of 95 acres in Dekalb county, the homestead of Cornelius Johnson at the time of his death. The petition is in the usual form. The answer admitted the heirship and the title to the land, and consents to the admeasurement of the dower and homestead, but avers that at the time of the death of Cornelius Johnson the dwelling house, barns, outbuildings, and fences on said tract had become and were so dilapidated that they were practically useless for a home; that prior to his death said Cornelius Johnson had laid the foundation and commenced the erection of a new dwelling house; that it was unfinished and incomplete; that the widow, in order to utilize said place as a homestead for herself and the minor children, was compelled to and did in good faith expend her own means to the amount of \$1,000 in finishing said dwelling house, barns, and fences; that at the time of the death of said Cornelius said lands, owing to their neglected condition, were of little value, and the said 80 acres not worth more than \$1,500, but by reason of the expenditures of the widow, Mrs. Mary Johnson, and the rapid increase of lands in that vicinity since, the value of said lands is now largely in excess of the \$1,500, and it would be impossible for commissioners appointed by the court to admeasure and mark out the homestead that vested in said widow and children as of the date of the death of said Cornelius Johnson; and they prayed the court to hear proofs, and ascertain the value of said lands per acre at the date of the death of Cornelius Johnson, and that the commissioners be directed to take the value so found by

the court as their guide in assigning the homestead to said widow and children. On the trial the court heard the evidence as to the condition and value of the lands at the time of the death of Cornelius Johnson, and made its findings: "That Cornelius Johnson died seised and possessed of the following lands, to wit, the S. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$, section 2, and 15 acres off the north side of the S. W. $\frac{1}{4}$ of S. W. $\frac{1}{4}$ of section 12, all in township 59, range 30, Dekalb county, Mo.; the north line of said 15 acres being the north boundary line of said quarter section, and the south boundary line being parallel with said north boundary line,—leaving his widow, said Mary Johnson, and the plaintiff Maggie Wilson, and the defendants Arvilla Beckworth, Ida Searcy, Maud Havitt, Alonzo Johnson, Clarence Johnson, and John Johnson his only heirs at law. That at the time of his death the said Cornelius Johnson occupied all of said land as his homestead. That the dwelling house, barn, and outbuildings standing and being upon said lands were suffered to and had become at the time of his death so decayed and dilapidated that they were practically valueless and useless for the purposes for which they were designed. That at the time of his said death the said Cornelius Johnson had laid the foundation of, and was about the preparation to build, a new dwelling upon said land. That after his death the said Mary Johnson, in order to enjoy her homestead estate on said land, was compelled to and did in good faith, with moneys that came to her from her father's estate, build said house and outbuildings, and repair the barn on said land to that extent. That practically all of said buildings were placed there with her means. That at the date of the death of said Cornelius Johnson said lands were of no greater value than \$2,000, to wit, of the value of \$21.05 per acre, by reason of the dilapidation of said buildings; and since said date, by reason of the expenditures of said moneys by the said Mary, and rapid appreciation of the value of said lands in the vicinity, said lands now largely exceed said value, and it would now be impossible for the commissioners appointed by this court to admeasure and set off to defendants Mary Johnson, Alonzo Johnson, and Clarence Johnson the homestead estate that vested in them at the death of said Cornelius without the aid of this court. That said John E. Johnson has, by deed, since the death of his father, conveyed his interest and estate in said land to the plaintiff Maggie Wilson. That said Mary Johnson is the owner during her natural life of a homestead in said land, of the value of \$1,500 at the value per acre as ascertained and declared by this court, and the defendants Alonzo Johnson and Clarence Johnson have a similar estate therein until they attain the age of 21 years. That the plaintiff Maggie Wilson is the owner of two undivided one-sevenths and the defendants

Arvilla Beckworth, Ida Searcy, and Maud Havitt are each the owner of one undivided one-seventh of said lands, subject to said homestead as aforesaid. It is therefore ordered and adjudged by the court that Finley McClure, W. B. Taylor, and John H. Keats be, and are hereby, appointed commissioners to make partition and set off to said Mary Johnson, Alonzo Johnson, and Clarence Johnson a homestead of the value of \$1,500, at the value per acre as ascertained, fixed, and declared by the court, and in setting off said homestead they will disregard the value of improvements and present values of said land; that they will partition and divide the remainder of said lands among and between the plaintiff Maggie Wilson and the defendants Arvilla Beckworth, Ida Searcy, Maud Havitt, Alonzo Johnson, and Clarence Johnson according to their respective rights and interests as ascertained and declared by the court, if the same is susceptible of division without great prejudice to the owners thereof; and that they make full report to the next term of the court." At the next term the commissioners made their report that, in obedience to the decree of the court, they set off to the widow and minor children $71\frac{1}{4}$ acres of said land by specific metes and bounds. Thereupon plaintiffs moved the court for new commissioners, and for a modification of the decree so as to have the homestead valued as of the present value of said lands and the improvements thereon, and also moved the court to reject the report of the commissioners. These motions the court overruled, and plaintiffs excepted. Plaintiffs then moved the court to set aside its judgment confirming said report on the ground principally that the court erred in hearing testimony and ruling that the commissioners should set off the homestead according to the value as of the time of the death of Cornelius Johnson, the intestate. After a motion in arrest was overruled, plaintiffs appealed to this court.

Hamilton & Dudley, for appellants. Kendall B. Randolph, for respondents.

GANTT, J. (after stating the facts). 1. From the foregoing abstract of the record it will be observed that the only question presented is, of what date shall the commissioners appointed to admeasure a homestead to a widow and minor children estimate same? Shall they estimate the value of the lands as of the date of the death of the ancestor, or as of the date when they admeasure it? The answer must be made in view of our homestead statute. Cornelius Johnson died in 1891, and the statute then in force must govern. It was the act of 1875, known in the Revision of 1889 as "Section 5439," and is as follows: "If any such housekeeper or head of a family shall die leaving a widow or any minor children, his homestead to the value aforesaid [to wit, \$1,500] shall pass to and

vest in such widow or children, or if there be both, to such widow and children, and shall continue for their benefit without being subject to the payment of the debts of the deceased unless legally charged thereon in his lifetime, until the youngest child shall attain its legal majority, and until the death of such widow, and such homestead shall upon the death of such housekeeper or head of a family be limited to that period." In *Riddick v. Walsh*, 15 Mo. 537, Judge Scott said, "Every estate within our knowledge has been administered upon the supposition that the law existing at the time of the dissolution of the contract by death regulates the right of the widow." Prior to the act of 1875 it was ruled in *Skouten v. Wood*, 57 Mo. 380, and cases following that, that, when the husband died seised of a homestead in fee, the wife took the homestead in fee simple; and in *Register v. Hensley*, 70 Mo. 189, where the husband died seised of a homestead prior to the act of 1875, but the wife's election and renunciation of her husband's will was not made until after the act of 1875 took effect, still she was entitled to her homestead under the law in force when her husband died. Under the terms of the act of 1875, in force when Cornelius Johnson died, the homestead estate passed to and vested in his widow for her life and his minor children until they reached their majority. In *West v. McMullen*, 112 Mo. 405, 20 S. W. 628, we held that an estate for life, and not a mere right of occupancy, vested in the wife on the death of her husband; and so it was ruled in *Hufschmidt v. Gross*, 112 Mo. 657, 20 S. W. 679. While it is a continuance of the estate of the husband, continual residence on the land is not essential to the estate. Counsel for plaintiff takes the position that, until the widow's homestead is assigned to her, she has no estate. He bases this contention on the execution law, which requires the exemption to be set out, and then the balance can be sold. Section 3624, Rev. St. 1899. In other words, they claim that the homestead is not an estate, not a right, but a privilege restricted by statute in quantity and value. We cannot agree to this statement of the law. As already said, the settled construction is that it is an estate, and that it passes and vests in the widow and children at the instant the husband dies, subject only to be admeasured. But even while held in a larger tract, and unallotted, the wife can sell and convey it, and her purchaser will stand in her shoes. *Weatherford v. King*, 119 Mo. 51, 24 S. W. 772; *Colvin v. Hauenstein*, 110 Mo. 579, 19 S. W. 948. This right to sell and convey is incident to an estate, not a mere privilege. The estate passed to and vested in Mrs. Johnson and her children when her husband died, and was not in abeyance until one of the heirs should bring partition. If it passed to her at the death of her husband, that was the time to which the statute looked when it fixed the amount she should

take, and she was entitled to have \$1,500 worth of the land assigned to her as of the value of that time; and it was by the same reasoning \$1,500 worth of the land left by her husband, and not subsequent improvements which she placed upon the lands. We think the court properly construed the law, and its judgment is affirmed. All concur.

MISSOURI COAL & MINING CO. v. LADD
et al.

(Supreme Court of Missouri, Division No. 2.
Feb. 26, 1901.)

**FOREIGN CORPORATIONS—COMPLIANCE WITH
STATUTES—RIGHT TO SUE—DOING BUSINESS
IN STATE—APPEAL.—QUESTIONS CONSID-
ERED.**

1. Where a bill of exceptions does not show the presentation and denial of a motion in arrest of judgment, the action of the court in overruling the motion will not be considered on appeal.

2. Where a demurrer to the evidence, on the ground that it shows that the plaintiff, a foreign corporation, has transacted business as a corporation without compliance with Act April 21, 1891, requiring foreign corporations to have a public office in the state, file their charters, and pay certain taxes, and hence that it is not entitled to sue, is overruled on the ground that the corporation has not been transacting business as a corporation, and no objection is taken thereto, the determination that the corporation was not transacting such business will not be reviewed on appeal.

3. Act April 21, 1891, requires foreign corporations doing business in the state to maintain a public office, and to file their articles with the secretary of state, and pay certain taxes and fees therein. A foreign corporation, organized for the purpose of mining and selling coal and manufacturing coke, had ceased its mining and manufacturing operations before the passage of the act. *Held*, that the fact that the company owned and rented its coal lands for agricultural purposes was not the transaction of business, within the meaning of the act, which would deprive the corporation, which had not complied with the act, from its right to sue in the state.

4. Where it is contended that an unauthorized item of damages for attorney's fees, which has not been paid, is included in the judgment, but no such question is presented in the instruction, and the judgment is for a gross amount in excess of such amount, and less than plaintiff's claim, the judgment will not be reversed, since it cannot be determined whether such sum was included therein, and the question should have been presented by the instruction.

Appeal from St. Louis circuit court; S. P. Spencer, Judge.

Action on an attachment bond by the Missouri Coal & Mining Company against William M. Ladd and another. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

Upton M. Young, for appellants. John H. Overall and R. H. Norton, for respondent.

BURGESS, J. This is an action upon an attachment bond executed by defendants to plaintiff in a suit in the circuit court of the United States for the Eastern division of the Eastern district of Missouri, wherein the defendant Ladd was plaintiff, and the plaintiff

in this suit was defendant. The penal sum in the bond was \$99,500, and its conditions as follows: "That whereas, William M. Ladd is about to institute a suit in the circuit court of the United States for the Eastern division of the Eastern judicial district of Missouri by attachment against Missouri Coal and Mining Company, defendant, for the sum of \$34,675.00: Now, if said plaintiff shall prosecute his action without delay, with effect, refund all sums of money that may be adjudged to be refunded to the defendant, or found to have been received by the plaintiff and not justly due him, and pay all damages that may accrue to any defendant or garnishee by reason of the judgment, or any process or proceeding in the suit, or by reason of any judgment or process herein, then this obligation to be void; otherwise, to remain in full force." The breaches of the bond assigned in the petition are the failure by Ladd to sustain his action and the abatement of the attachment. The petition then alleges that plaintiff was damaged in the sum of \$5,000 by reason of the levy of the attachment upon its property, and the further sum of \$5,500 which it was compelled to and did lay out and expend in and about the defense of said alleged action and attachment for attorney's fees, and other necessary costs and expenses, to wit:

Sedden & Blair, attorneys, St. Louis	\$3,243 10
McLaughlin & Rowe, attorneys.....	1,683 36
Geo. T. Murdock, witness, expenses to St. Louis.....	86 50
Expenses of officers of company in attendance at trial and in management of case.....	487 04
	<u>\$5,500 00</u>

To plaintiff's petition defendants filed answer, denying all allegations therein, and, by way of affirmative defense, alleging that plaintiff has no authority in law to maintain its action, because it is a foreign corporation, and has not complied with the act of the general assembly of this state entitled an "Act to require every foreign corporation doing business in this state to have a public office or place at which to transact its business, subjecting it to certain conditions and requiring it to file its articles or charter of incorporation with the secretary of state, and to pay certain taxes and fees thereon," approved April 21, 1891, in this: That plaintiff has failed and neglected to file in the office of the secretary of state of the state of Missouri a copy of its charter or articles of incorporation, or certificate of incorporation, duly certified and authenticated by the proper authority, and that the principal officer or agent of plaintiff in the state of Missouri has failed to make and forward to the secretary of state of this state a sworn statement of the proportion of the capital stock of plaintiff corporation which is represented by its property located and business to transact in this state; that plaintiff has failed to pay into the treasury of this state, on the proportion

of its capital stock represented by its property and business in Missouri, the incorporating taxes, and fees equal to those required by similar corporations formed within and under the laws of this state. To the answer plaintiff made reply, denying that said act applies to it, or that it is required to do the things required to be done by foreign corporations doing business in this state, because, as it avers, it is a corporation organized for the sole purpose of mining and selling coal, and manufacturing and selling coke, and has not since said act went into effect carried on its business in this state.

The facts, briefly stated, are that in 1893 the defendant Ladd brought suit by attachment in the circuit court of St. Louis against plaintiff for \$34,675, claiming that, under instructions of defendant in said suit (plaintiff here), he had contracted for the sale of its lands in Lincoln county, Mo., and was entitled to a commission therefor in said sum. Ladd gave an attachment bond in said suit, with his co-defendant, Johnston, as surety, which forms the basis for this action. Plaintiff is a corporation organized, and, at the time of the institution of this suit, existing, under the laws of the state of New York, the sole purpose of the corporation being "the mining and sale of coal from its said lands, and the manufacture and sale of coke." For some years prior to 1895 plaintiff mined and sold coal from said lands, but since that time it has not mined nor sold coal, nor manufactured nor sold coke. The taxes are paid upon these lands by an agent of plaintiff in Lincoln county, who also collects rents for it for such of its lands as are occupied by others.

At the instance of plaintiff, the court, without any objection on the part of defendants, declared the law to be as follows: "(1) The court declares the law to be that, under the evidence in the case, the plaintiff has not since the 21st day of April, 1891, transacted or continued any business in this state, as contemplated by an act of the general assembly of Missouri entitled 'An act to require every foreign corporation doing business in this state to have a public office or place in this state at which to transact its business, subjecting it to certain conditions, and requiring it to file its articles or charter of incorporation with the secretary of state, and to pay certain taxes and fees therein,' approved April 21, 1891, and amendments to said act." Defendants asked the court to declare the law to be as follows: "The court declares the law to be that, under the pleadings and evidence in this cause, the plaintiff is not entitled to recover;" which the court refused to do, and defendants duly excepted. Judgment was then rendered for plaintiff for \$69,500, being the amount of the penalty of the bond, and awarded execution in its favor for \$5,062.50 damages. After unavailing motion for a new trial, defendant Ladd ap-
peals.

It is claimed by defendant that, as plaintiff's replication shows that it had not complied with the law, his motion in arrest of judgment should have been sustained; but the bill of exceptions, where it should be found, falls to show that any such motion was ever filed, copied into, or passed upon, by the court below; hence no such question is presented by the record.

It is insisted that the evidence showed that plaintiff had been for many years, and was at the time of trial, doing business as a corporation through its agent in Missouri, and that it had never pretended to comply with the law; hence has no right to maintain this action. With respect to this contention, it seems unnecessary to say more than that the court settled this question adversely to this contention when it, without objection or exception, declared the law to be "that, under the evidence in the case, the plaintiff has not, since the 21st day of April, 1891, transacted or continued any business in this state as contemplated" by the act approved April 21, 1891, and refused the declaration asked by defendant in the nature of a demurrer to the evidence. If it was the purpose of defendant to rely upon this insistence, it should have objected to the declaration of law given in behalf of plaintiff, and, if overruled, saved his exception at the time; but, having failed to do so, the point must be held to have been waived.

Moreover, plaintiff's articles of incorporation which were in evidence showed that the objects for which it was formed were "the mining and sale of coal, and the manufacture of coke therefrom"; while the evidence showed that it had not mined or sold coal, nor manufactured nor sold coke, since 1885, for at least five years before the passage of the act of 1891. The fact that plaintiff has leased its lands to tenants for agricultural purposes since it ceased "the mining and sale of coal, and the manufacture of coke therefrom," "is not doing business as a corporation," within the meaning of the act, nor is it any part of the purpose for which it was incorporated. Nonresident business corporations can and do pay taxes upon and lease their lands in this state, and, when incorporated for other purposes, it has never been considered that in so doing they were transacting or continuing any business in this state other than that for which they were incorporated. It would be an unwarranted construction of the act to hold, under these circumstances, that plaintiff falls within its provisions, and that, in order to maintain this suit in regard to a matter in no way connected with the business for which it was incorporated, it should file in the office of the secretary of state a copy of its charter or articles of incorporation, or certificate of incorporation, duly certified and authenticated, etc., or to in any manner comply with the provisions of said act.

It is claimed that the court erroneously in-

cluded in its judgment \$800 which it had never paid to Judge McLaughlin. In support of this contention, our attention is called to the fact that George T. Murdock testified that, "of the \$1,500 fees charged by Judge McLaughlin, the company had already paid him \$700, and they are indebted to him for the balance of \$800, which they expect to shortly pay." But no such question was presented by instruction, and as the judgment was for a gross amount, greatly in excess of \$800, and \$438 less than plaintiff claimed, we have no means at our command by which we can determine with any kind of accuracy whether this was included in it or not, and, as it devolves upon the party who asserts error to make it manifest, in the absence of such showing the court below cannot be convicted of error. The way to have presented this question was by instruction. We are of the opinion there is no error in the judgment of the court below, and it is affirmed.

SHERWOOD, P. J., and GANTT, J., concur.

STATE v. EDMISTON.

(Supreme Court of Missouri, Division No. 2.
Feb. 26, 1901.)

BIGAMY—INDICTMENT—PROOF—INSTRUCTIONS—HARMLESS ERROR.

Rev. St. 1899, § 3140, provides that the record books of marriages, and certified copies thereof, shall be evidence in all courts. Defendant was indicted for marrying a second wife when he had a wife living by the name of S. E., and a certified copy of a marriage between defendant and S. E. was read in evidence, and undisputed. The court charged that, if the jury believed that defendant married R. B. when he had a wife living at the time, they should find defendant guilty. *Held*, that the error in the charge, in that it did not require the jury to find that the name of defendant's first wife was S. E., was rendered harmless by the undisputed proof of that fact.

Appeal from circuit court, Howell county; W. N. Evans, Judge.

E. M. Edmiston was convicted of bigamy, and he appeals. Affirmed.

Robert Tyree and W. J. Orr, for appellant. Edward C. Crow, Atty. Gen., and Sam B. Jeffries, Asst. Atty. Gen., for the State.

SHERWOOD, P. J. Bigamy, the charge; conviction, the result; punishment, two years in the penitentiary,—the verdict, sentence, and judgment.

The indictment charged the name of the first wife to be Sarah Edmiston, and is bottomed on section 2167, Rev. St. 1899. Section 3140, Id., provides that "the record books of marriages to be kept by the respective recorders, in pursuance of the provisions of law, and copies thereof, certified by the recorder under his official seal, shall be evidence in all courts." This section authorized a certified copy of the marriage of defendant to

Sarah Wallace, in Vernon county Mo., to be read in evidence, and such certified copy of the license and marriage certificate established the fact that the name of the first wife was "Sarah Edmiston."

The court instructed the jury: "If you believe and find from all the facts and circumstances in evidence, beyond a reasonable doubt, that the defendant, in Howell county, Missouri, on or about the 2d day of June, 1900, did marry Rosa Buchanan, when he (the defendant) was a married man and having a wife living at the time, then you should find the defendant guilty, and assess his punishment at imprisonment in the penitentiary not less than two or more than five years, or in county jail not less than six months, or by a fine of not less than five hundred dollars, or by both a fine of not less than one hundred dollars and imprisonment in county jail not less than three months." Objection is taken to this instruction because it does not require the jury to find that the first wife's name was Sarah Edmiston. It is doubtless true that the name "Sarah Edmiston," having been alleged in the indictment, became descriptive of the offense, and so it was necessary to prove it as laid. Whart. Proc. 985-999; 2 Whart. Cr. Law (10th Ed.) § 14, and cases cited; 1 Bish. New Cr. Proc. § 485, and cases cited; Bish. St. Crimes (2d Ed.) §§ 598, 600-602. But this proof was furnished by the recorded certificate of marriage as above set forth. There was no opposing evidence on this point, and the error in the instruction was rendered harmless, and became nonreversible error. Therefore, judgment affirmed. All concur.

STATE v. HICKS.

(Supreme Court of Missouri, Division No. 2.
Feb. 26, 1901.)

INDICTMENT—APPEAL—BILL OF EXCEPTIONS—DISMISSAL.

Where an appeal has been taken from an order sustaining a motion to quash an indictment, but no bill of exceptions is filed, the appeal will be dismissed.

Appeal from criminal court, Greene county; C. B. McAfee, Judge.

B. W. Hicks was indicted for crime. From an order sustaining a motion to quash the indictment, the state appeals. Dismissed.

Edward C. Crow, Atty. Gen., for the State. G. D. Clark and J. H. Duncan, for respondent.

SHERWOOD, J. There are no statements or briefs, etc., on either side in this case. The indictment, supposedly framed under section 1892, Rev. St. 1899, held bad, and quashed, on motion of defendant. State appeals, but there is no bill of exceptions, and so the motion to quash has not been preserved. The only repository known to the law for preserving matters of exception is by

a bill for that purpose. *State v. Wear*, 145 Mo., loc. cit. 204, 205, 46 S. W. 1099, and cases cited. Therefore, appeal dismissed. All concur.

CLARK v. THOMPSON et al.

(Supreme Court of Missouri, Division No. 2.
Feb. 26, 1901.)

MALICIOUS PROSECUTION—ATTORNEY—ASSISTING IN PRELIMINARY EXAMINATION—GOOD FAITH—LIABILITY—PROBABLE CAUSE—SUBMISSION TO JURY—INSTRUCTION—REFUSAL—EVIDENCE TO SUPPORT.

1. Plaintiff purchased cattle of G., and the next day after their delivery one of them died. In negotiating for a second lot of cattle, G. made an allowance of \$25 for the one that died. Plaintiff paid with a draft, but, after taking the cattle, stopped payment by telegram, and deposited a less sum than the agreed price to G.'s credit, which G. accepted on account. The defendant (G.'s attorney) wrote plaintiff, demanding the balance withheld, and on refusal laid the matter before the prosecuting attorney, who, on his own responsibility, brought a criminal prosecution against plaintiff, but defendant assisted in the preliminary examination, which resulted in plaintiff's discharge. *Held*, that it was proper, in an action for malicious prosecution, to direct a verdict for defendant, since he acted in good faith as G.'s attorney.

2. Where, in an action for malicious prosecution, the facts, if true, showed probable cause, it was proper to submit such question to the jury under instructions as to what constituted probable cause.

3. Where plaintiff obtained defendant's cattle by giving him a draft, on which plaintiff immediately stopped payment, and there was no evidence that a criminal prosecution against plaintiff was commenced for the purpose of collecting the debt, an instruction that, if the criminal charge was instituted for the purpose of collecting the debt, such action of itself constituted "probable cause," was properly refused.

Appeal from circuit court, Lewis county; E. R. McKee, Judge.

Action by Hugh M. Clark against B. F. Thompson and another. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

In January, 1895, defendant Graves sold the plaintiff some cattle, and plaintiff employed him to deliver them at Gosney's, near Labelle, Mo. Among the cattle was a bull, which died the next day after it reached Gosney's. On the 30th of the succeeding October plaintiff bought seven head of other cattle of defendant Graves. During the negotiations Graves priced the cattle at \$200. For the first time plaintiff made the claim that defendant owed him \$25 for the bull that died. While denying the claim, it seems that was considered, and defendant sold plaintiff the seven head for \$170, for which plaintiff gave defendant a draft on the Farmers' & Merchants' Bank of Monroe City, Mo. Graves cashed the draft that same evening at the Lewistown Savings Bank. Plaintiff drove the cattle to Gosney's, and while there told Gosney he now had a chance to get even with Graves, and was going to stop payment on the draft. He pro-

ceeded to Labelle, and wired the bank at Monroe City to stop payment of the draft, and it was dishonored, and the protest fees, amounting to \$2.50, collected of defendant. After reaching home, the plaintiff wrote to defendant he had placed \$145 in the bank subject to his draft. After consulting the banker through whom he had drawn, defendant concluded to take the \$145 on account, and it was paid. He then laid the matter of the balance before the defendant Thompson, who was a lawyer and business man. Thompson thereupon wrote plaintiff: "B. F. Thompson, Attorney at Law and Judge of Probate. Labelle, Mo., Nov. 12, 1895. H. M. Clark, Esq., Monroe City, Mo.—Dear Sir: In the matter of the purchase of the Graves cattle, will you kindly send me the \$25.00 you attempted to take out of the purchase money for the cattle, together with the protest fees made by your action, in the sum of \$2.50? We do not do business in that way in Lewis Co. If you are not fully informed as to the law applicable to such action as this, consult your Atty. at once, and greatly oblige yourself. I make it a rule in my business to give every man an opportunity to get right if he is wrong. Yours, truly, B. F. Thompson, Atty. for Graves." Receiving no reply, defendant Graves went to the prosecuting attorney of Lewis county, and stated all the facts of the transactions between himself and Clark, and the prosecuting attorney told him he would examine into the matter. Some days later he advised him that, in his opinion, Clark was guilty of obtaining the cattle by means of a trick and a deception, and prepared an affidavit for defendant to sign, and also an information based thereon. He sent the papers to Mr. Thompson, with request to have defendant Graves sign the affidavit and file the papers before the justice of the peace. This Mr. Thompson did, and a warrant was issued, plaintiff was arrested, and an examination had before the justice of the peace, and he was discharged. He has not been indicted, though several terms of court have elapsed. Defendant Graves did not sue plaintiff, because, as he testified, he was informed plaintiff was insolvent. Plaintiff insists he was solvent, but admitted all his visible property was covered with mortgages, some of which he says were in fact paid off, but the record was not satisfied. At the close of all the evidence, the court directed a verdict in favor of defendant Thompson, and after argument the jury returned a verdict for defendant Graves. Plaintiff appeals, and, as the amount of damages claimed by him in his petition exceeds \$2,500, the appeal is rightly in this court. The errors are assigned.

E. A. Dowell and R. B. Bristow, for appellant. Blair & Marchand, for respondents.

GANTT, J. (after stating the facts). 1. Plaintiff complains of the action of the circuit court in sustaining defendant Thompson's demurrer to the evidence. We think it correct.

Thompson did not advise or commence the prosecution. The prosecuting attorney, after all the evidence was laid before him, prepared both the affidavit and the information. Mr. Thompson simply assisted as counsel at the preliminary hearing. Counsel for plaintiff says, however, if we will read between the lines of the letter Thompson wrote plaintiff, we will discover that he was the instigator of the prosecution. We do well if we read all the lines that are brought to us. We see nothing unusual in the demand of Graves for the \$25 and notary's fees. Certainly plaintiff appears in a most unenviable light in the second cattle transaction with Graves. That he obtained the cattle by a false pretense can hardly be denied. When he gave the draft for \$170 he obviously intended not to pay it, as he hurried immediately to the nearest telegraph office to stop its payment. We agree with the circuit court there was no substantial evidence upon which to send the case to a jury as to defendant Thompson. He acted solely as an attorney, and we find nothing in his conduct indicating a disposition to use his office oppressively, or to avail himself of a criminal prosecution to collect the debt of his client Graves. The whole evidence shows that the prosecution was commenced and prosecuted by the prosecuting attorney upon his official responsibility.

2. The second assignment relates to the instructions on "probable cause." Counsel insist that "probable cause" is a question of law for the court, and is not to be submitted to the jury. They rely upon *Boogher v. Hough*, 90 Mo. 188, 12 S. W. 524. In that case it was said by this court: "Probable cause is a question of fact, or a mixed question of law and fact. The legal effect of the evidence offered to show the same is for the court, but the rule is, we think, well settled that the court cannot determine the question as a matter of law, unless the facts when taken as true are insufficient to make out a case." But we find that the court, in one of its instructions to the jury, defined "probable cause" in the exact words approved by this court in *Sharpe v. Johnston*, 59 Mo. 557. Counsel are clearly mistaken in saying that throughout the instructions the court nowhere told the jury what constituted probable cause. The court did not err in refusing to charge the jury that, if they believed the defendants instituted the criminal charge for the purpose of collecting a debt, such action constituted of itself "probable cause." This proposition involves a confusion of ideas. Evidence that the prosecution was commenced to enforce a civil liability is proof of the want of a probable cause, but there was no such evidence in this case. The evidence was that plaintiff obtained defendant's cattle by going through the form of giving him a draft therefor, which he intended should not be paid, and the payment of which he in fact did stop as soon as he could get to a telegraph office. Defendant Graves felt he

had been wronged, and submitted the whole matter to the prosecuting attorney, and that officer took time, and advised and commenced the prosecution. There was no evidence that the prosecution was for the purpose of collecting the debt, and it would have been error to have predicated an instruction upon such an hypothesis because there was no evidence to support it. It is not deemed necessary to set out all the instructions given and refused in this case. Upon the whole evidence, the verdict was for the right party, and will not be disturbed. Judgment affirmed. All concur.

CADEMATOPI v. GAUGER et al.

(Supreme Court of Missouri, Division No. 2.
Feb. 12, 1901.)

HUSBAND AND WIFE—WIFE'S EQUITABLE ESTATE—DEED—CONSTRUCTION—CONVEYANCE—HUSBAND'S ASSENT—ESTOPPEL—HEIRS—DISTRIBUTIVE SHARE—ACCEPTANCE—PLEADING.

1. Land was conveyed by a husband to one who conveyed it in trust for the sole use of the wife of the first grantor. The wife and the trustee conveyed the property to two of her daughters, in which deed the husband did not join. *Held*, that the wife had a separate equitable estate in the land, which she could convey without the assent of her husband, and the deed to the daughters passed the fee.

2. Where a grantee of land died intestate, and her half interest therein was sold by her administrator, plaintiff, who was one of her heirs at law, by receiving from and receipting to his administrator for his distributive share of the estate, is estopped from asserting title to the land conveyed by the administrator's deed.

3. Where the allegations in an answer amount to an estoppel, though it does not plead estoppel in so many words, it is sufficient.

Appeal from St. Louis circuit court; H. D. Wood, Judge.

Ejectment by John Cadematori against Charles G. Stifel, continued after his death against Louis F. Gauger and others, trustees under the will of deceased. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

John M. Dickson, for appellant. Kehr & Tittmann and J. M. Holmes, for respondent.

BURGESS, J. This is an action of ejectment for the possession of a lot of ground in the city of St. Louis which is known in this litigation as the "Espenschied Lot." Defendant recovered judgment in the court below, and the plaintiff appeals. The suit was originally against Charles G. Stifel, but since the appeal to this court he died, and on the 16th day of October, 1900, the suit was revived against the present defendants, Louis F. Gauger, Otto F. Stifel, and Edwin H. Conrade, trustees under the will of said Charles G. Stifel, deceased.

The petition is in the usual form in such cases. The answer, after a general denial, proceeds as follows: "Defendant says that the premises in said petition mentioned were

conveyed by James Signalgo and Margaret, his wife, by deed dated April 19, 1861, and recorded in the recorder's office in the city of St. Louis in Book 252, page 166, to Joseph Jecko, as trustee, for the sole and separate use of Paulo Cadematori, mother of plaintiff, and of her heirs; that by the terms of the said conveyance the said Jecko was authorized and empowered to convey the said premises upon the written request of the said Paulo Cadematori, with the consent of her husband, Dominic Cadematori; that thereafter, to wit, on the 4th day of September, 1880, the said Dominic Cadematori, being then a resident of the kingdom of Italy, executed and delivered to the said Paulo Cadematori a power of attorney, authorizing her, the said Paulo, to act for him, the said Dominic, in any manner that she might see fit, as his attorney in fact, in, about, and concerning all of his rights, interests, and property of every description in the United States of America, which power of attorney is duly recorded in the recorder's office of the city of St. Louis in Book 774, page 552; that thereafter, to wit, on the 30th day of January, 1886, the said Joseph Jecko, for both a good and a valuable consideration to the said Paulo Cadematori moving, at the written request of the said Paulo, and with the consent of the said Dominic Cadematori, as evidenced by their joining in the conveyances, the said Paulo in person and the said Dominic by the said Paulo as his attorney in fact, conveyed the said premises to Angela and Theresa Cadematori, daughters of the said Paulo and sisters of plaintiff, which deed is recorded in the records of the city of St. Louis in Book 775, page 485. Further answering, defendant says that, if the plaintiff has any title whatever to the premises in the petition described, he derives the same by virtue of the statute of descents and distributions from Angela Cadematori and Paulo Cadematori; that Angela Cadematori, being as aforesaid seised of an undivided one-half interest in the premises described, died unmarried, without issue, and intestate, leaving as her sole heirs two sisters and two brothers, of whom plaintiff was one; that administration was duly had upon the estate of the said Angela Cadematori, and, the personal property being insufficient for the payment of the debts allowed, the administrator was duly ordered by the St. Louis probate court to sell the real property to the said estate belonging, to wit, the undivided one-half of the premises in the petition described, for the payment of debts; that in pursuance of said order the said administrator did, on Monday, the 23d day of November, 1891, sell the said property at public vendue in accordance with the terms of said order, having first advertised the time, terms, and place of said sale by a notice published in the *Star Sayings*, a newspaper published in the city of St. Louis, Missouri, which notice was first published on the 26th day of October, 1891, and was pub-

lished once a week thereafter, the last publication being on the 16th day of November, 1891; that at said sale the said property was bought by F. F. Espenschied at and for the price and sum of twelve hundred and twenty-eight dollars and fifty cents (\$1,228.50), which sum was, to wit, on the said 23d day of November, 1891, duly paid by the said Espenschied to the said administrator, and the said sale was duly approved by the said St. Louis probate court; that all of the sum so received by the said administrator for the said premises was used by him in the payment of debts allowed against the said estate, save the sum of two hundred and eighty-four dollars (\$284.00), which sum was, upon the final settlement of said estate, distributed equally, in accordance with the orders of the probate court, between the four heirs of the said Angela Cadematori, including plaintiff, and was paid to them by the said administrator, and was received by them. Defendant further states that the said Espenschied sold and conveyed the said premises to the defendant for a consideration in excess of said sum of twelve hundred and twenty-eight dollars, and that this defendant and the said Espenschied have, since said 23d November, 1891, annually paid taxes upon the said property, to the amount of three hundred dollars. Defendant further states that, if there was any defect in the conveyance of said premises to the said Angela and Theresa Cadematori, whereby the legal title thereof failed to pass to the said Angela and Theresa, yet the said conveyance operated to transfer to the grantees therein the beneficial ownership in the said premises; and by reason of the facts hereinbefore stated plaintiff is not entitled in equity to enforce, as against defendant, his legal title, if any he has. Defendant further states that if there was any defect in the proceedings whereby said premises were sold to the said Espenschied by the administrator of said Angela Cadematori, by reason whereof said Espenschied failed to acquire the legal title to said premises, yet by reason of the premises the defendant has an equitable defense and offset to this action to the extent of the purchase money so paid the said Espenschied, together with interest thereon, and to the extent of the taxes so paid by said Espenschied and by defendant, together with interest thereon, which offset amounts in the aggregate to the sum of eighteen hundred dollars (\$1,800); and defendant prays that plaintiff be ordered to pay said amount to defendant before any judgment for the possession of said premises shall be rendered in his favor; and defendant also prays for such other and further relief as he may be entitled to in the premises."

The facts are about as follows: Dominic Cadematori, being the owner of two lots in the city of St. Louis,—the one in controversy here, known as the "Espenschied Lot," and another known as the "Crone Lot,"—conveyed

the Espenschied lot to one Signaigo, and the Crone lot to Henry N. Hart. Signaigo and Hart conveyed both lots to Jecko, as trustee of Paulo Cadematori, wife of Dominic. Paulo conveyed the Espenschied lot to her two daughters, Theresa and Angela. Theresa conveyed her half interest to Espenschied. Angela died, and her half interest was sold by her administrator under an order of the probate court, Espenschied being the purchaser. Espenschied conveyed the lot to respondent. Dominic Cadematori died before his wife, but after the execution of her deed to her two daughters. Paulo died, leaving, in addition to the two daughters to whom she had made the conveyance above referred to, three children, the plaintiff being one of them. Plaintiff brought ejectment for both the Espenschied and Crone lots, and the two cases were tried together.

In these two cases the following facts are admitted: "First. The properties in issue originally belonged to Dominic Cadematori. Second. Dominic Cadematori and Paulo, his wife, joined in conveyances of the properties, so that by mesne conveyances the title to both pieces of property became vested in Joseph Jecko, as trustee for Paulo Cadematori, wife of Dominic Cadematori; in the Stifel case the conveyance being herewith filed, and marked 'Exhibit A,' and in the Crone case the conveyance being herewith filed, and marked 'Exhibit B.' The property was conveyed by Cadematori and his wife in the Stifel lot to Signaigo, and in the Crone lot to Hy. N. Hart, who in turn conveyed both to Joseph Jecko, as trustee. Third. Dominic Cadematori, being in the kingdom of Italy, executed a power of attorney to his wife, Paulo Cadematori, which was recorded in the city of St. Louis, a certified copy of which power of attorney and the translation thereof is herewith filed, and marked 'Exhibit C.' Fourth. Paulo Cadematori and her trustee conveyed both properties to Theresa Catharine E. Cadematori, her daughter, and Angela Catharine E. Cadematori, her daughter, by a conveyance also herewith filed, and marked 'Exhibit D.' Fifth. Theresa Catharine E. Cadematori, grantee in above deed, conveyed all interest acquired by her in the properties to Fred. F. Espenschied in the Stifel lot, and to C. C. Crone in the Crone lot, which deeds are on record in the St. Louis city recorder's office. Sixth. Angela C. E. Cadematori died. Gus. V. R. Mechlin was appointed administrator of her estate, and as such administrator, upon proceedings and under the order of the probate court, sold the interest of Angela C. E. Cadematori in the properties in controversy in the Stifel lot to Fred. F. Espenschied, and in the Crone lot to C. C. Crone. The proceedings in the probate court are herewith offered in evidence, and made part of this agreement. Seventh. Fred. F. Espenschied sold and conveyed the property purchased by him at said sale to Stifel by deed recorded in the city of St. Louis.

Eighth. The proceeds of the sale made by Gus. V. R. Mechlin, administrator, were applied to the payment of the debts of the estate of Angela C. E. Cadematori, and the surplus over, on order of final distribution by said probate court, was paid over to such of the heirs of said Angela C. E. Cadematori as could be found, and amongst these there was paid to the plaintiff in this case, as distributee of said estate, the sum of \$71. Ninth. The taxes upon the respective properties have since and including the year 1891, the date of the administrator's sale, been paid by the purchasers at said sale and their grantees who went into possession of the property when they obtained their deeds; the taxes so paid upon the Stifel lot being for the year 1891, \$30.36; 1892, \$29.31½; 1893, \$29.31½; 1894, \$29.11; 1895, \$34.64½; 1896, \$34.64½; 1897, \$34.04½; and sprinkling taxes for 1891, \$8.24; 1892, \$7.61; 1893, \$6.15; 1894, \$7.09; 1895, \$4.11; 1896, \$3.63; 1897, \$3.14. The date of this deed to Espenschied being December, 1891; the Stifel lot being then and now vacant property. Tenth. No tender has ever been made by plaintiff or any one in his behalf of the amount received at the administrator's sale, or the amount paid for taxes, or any portion thereof, in case of either lot. Eleventh. The taxes paid upon the Crone lot for the same period are as follows: * * *. Twelfth. The price paid Fred. F. Espenschied by Stifel was \$——. Thirteenth. Dominic Cadematori died in Italy since the making of the deed by Paulo Cadematori's trustee to her daughters, Theresa C. E. and Angela C. E. Cadematori. He left six children, one of which said children died intestate and without issue before the making of said deed; said Dominic leaving three daughters and two sons, John B. Cadematori, plaintiff herein, and Joseph Cadematori; the three daughters being the same persons mentioned in the deed from Paulo Cadematori's trustee, and Mrs. Mary Capelli, the third daughter. Paulo Cadematori died since the making of said deed. Fourteenth. The force and effect of the above-mentioned documents are not admitted, but referred to the court as to their legal effect. Fifteenth. The consideration paid by Fred. F. Espenschied to said Gus. V. R. Mechlin, administrator, was \$1,228.50."

The deed to Jecko, trustee for Paulo Cadematori, was also offered. The habendum clause in said deed is as follows: "To have and to hold the said property or lot aforesaid, with all rights, privileges, and appurtenances thereunto belonging, to the said Joseph Jecko, in trust for the sole and only use and benefit of the said Paulo Cadematori, wife of the said Dominic Cadematori, and her heirs, forever; that the said Jecko hereby agreeing that should at any time the said Paulo Cadematori, by a request in writing, by her consent, and by and with the consent of Dominic Cadematori, should he be living, witnesser by his writing, that he will execute such de

or instruments of writing of said property as the said Paulo, by and with the consent of her said husband, shall request and direct as aforesaid, and pay all and every such sum or sums of money he shall receive for rents and profits or by way of sale."

The power of attorney from Dominic Cadematori to Paulo was also introduced, and which is as follows:

"Power of Attorney of Dominic Cadematori. Humbert I, reigning, by the grace of God and the will of the nation, king of Italy. In the year one thousand eight hundred and eighty, on the 4th day of the month of September, at the hour of seven post meridian, in San Colombano Certanoli, in the chamber of the communal office, in the parish of San Colombano, in the street of the Maggi, No. 53. Before me, Luigi Norera, a notary with a residence in the commune of San Colombano Certanoli, registered at the notarial council of the district of Chiavari, and in the presence of Francesco, son of Giambatista, deceased, a farmer, and of Rosa Romaggi, daughter of Luca, who is still living, wife of Giambatista Lavazzola, a hostess, both born, living, and domiciled at San Colombano, witnesses known as competent, appeared Dominic Cadematori, son of Giovanni, deceased, a proprietor, known by me, the notary, as born, living, and domiciled at Certanoli, in the commune of San Colombano Certanoli, province of Genoa, who voluntarily by the present act has elected and constituted, and does elect and constitute, as his attorney, both general and special, as regards what is hereinafter mentioned, Paulo Romaggi, daughter of Bartolomeo, deceased, wife of said Dominic Cadematori, born also here, but now absent, authorizing her specially as husband to any act whatsoever, she being born at Certanoli, but now residing in St. Louis, state of Missouri, United States of America, to administer and place in his name and authority all the property which he, the said constituent, has or possesses in the United States of America, and to this end to carry out such agreements, prices, and conditions as she may deem best; to transact and arrange concerning the same in any cause, litigation, or dispute; to make promises, submissions to arbitration, and amicable compositions with renunciation of appeal; to agree to liquidations and systematization of accounts, salaries, and compensations; to make division of the property, with the power of accepting or assigning causes of action with or without consideration, and to elect counsel; to exact from any person or official, public or private, whatever is due him, whether as principal, interest, rents, or otherwise, with the power of giving receipts and valid discharges; to take money in exchange, to arrange payment of debts in his name, to accept or reject whatsoever credit or gift with the benefit of law and inventory; to be present and oppose any affixing or removal of seals; to give and accept property in payment; in any cause to have recourse and make declarations at any office;

in a word, to do all and as much as this constituent could do if he were present; restricted, however, to property possessed by him in the United States of America; to rebut matter in all causes and litigations, active and passive, instituted or to be instituted before any judge, tribunal, court, magistrate, or authority; and note all the acts of said judicial cause necessary and opportune, up to the final definite decree or decrees and their full execution; to accept and deliver oaths and subpoenas; to appeal and refrain from appeal; to substitute other persons with the same or more limited powers,—this instrument, however, always remaining in effect. And I, the notary, being requested, have received this act, which I have reduced to writing by my care and hand, and which has been subscribed by the constituting party, by the above-named witnesses, and by me, the notary, which act I read to the constituent, who declares the same to be his act, in accordance with his will, in the presence of the above-named witnesses. This act is written on four sides of a sheet of stamped paper, comprising the present, which contains a few lines of signatures. [Signed] Dominic Cadematori. Lettora Francesco, Witness. Romaggi Rosa Lavazzola, Witness. Luigi Norera, Notary.

"This instrument was executed in accordance with the law of Italy.

"A copy in conformity with the original, written on a sheet of stamped paper at the request of Dominic Cadematori.

"Colombano Certanoli, September 7, 1880.

[Notarial Seal.] Luigi Norera, Notary."

The deed from Paulo to her two daughters was also introduced. The grantors in that conveyance are described as follows: " * * * By and between Joseph Jecko, of the city of St. Louis, Missouri, acting herein at the written request of said Paulo Cadematori, evidenced by her signature and seal to this instrument, Paulo Cadematori, of the city of St. Louis, and Dominic Cadematori, husband of said Paulo Cadematori, of San Colombano Certanoli, Italy, party of the first part." The deed recites a consideration of \$600. The concluding clause of the deed is as follows: "A further consideration for this deed is the natural love and affection which the said Paulo Cadematori has and bears unto the said Theresa Cadematori and Angela Catharine Cadematori, the grantees aforesaid, said grantees being the daughters of said Paulo Cadematori and said Dominic Cadematori, her husband. The signature of said Dominic Cadematori to this deed by Paulo Cadematori, his attorney in fact, by virtue of a power of attorney, recorded herewith in the office of the recorder of deeds of the city of St. Louis, witnesses that, in addition to the foregoing, that said Cadematori, by this writing, gives his full consent and approval to this conveyance."

The receipt of plaintiff for his distributive share of the estate of Angela Cadematori was also introduced.

The point is made that the deed from

Signalgo to Joseph Jecko, trustee for Paulo Cadematori, did not create a separate equitable estate in the land in her, because as is claimed, it in no sense excludes the interest of her husband in the property conveyed. This position we think untenable because the property conveyed to Joseph Jecko was by express provision in the deed to him. "To have and to hold the said property or lot aforesaid with all rights, privileges, and appurtenances thereto belonging to the said Joseph Jecko, in trust for the sole and only use and benefit of the said Paulo Cadematori, wife of said Dominic Cadematori;" thus in apt words creating in her an equitable separate estate. *Morrison v. Thistle*, 67 Mo. 596. And in determining this question it is wholly immaterial whether the deed excludes the interest of the husband of Paulo in the property conveyed or not. Nor are we able to give our assent to the assertion that this deed, in creating a separate equitable estate in Paulo Cadematori, did so with a restraint upon her rights of anticipation, unless she first obtained the written consent of her husband to any conveyance of the lot by her. It is quite clear, we think, that the deed from Paulo Cadematori and her trustee to her two daughters passed the fee of the land therein described, although the husband of Paulo did not join in the deed, as there was nothing in the deed to Jecko, her trustee, which made it necessary for him to do so; and, in the absence of such restriction, she had the same power to convey as if she had been a feme sole. This being so, the assent of her husband was unnecessary. There is nothing in the terms of that deed which makes such assent a condition precedent to the execution by her of a deed conveying the property; and, in the absence of some provision in the deed making such assent necessary to its valid execution, she was at liberty to convey it, just as if she had been a feme sole. In the case of *Turner v. Shaw*, 96 Mo. 22, 8 S. W. 897, in passing upon the power of a married woman to convey her separate equitable estate, *Sherwood, J.*, in speaking for the court, said: "But it may be urged that this deed was utterly invalid, because it was executed by the wife alone. However this may be as to mere statutory estates which require a joinder of husband and wife in order to their valid execution, it will not hold as to separate estates in equity, which the wife may charge, mortgage, or convey without let or hindrance from her husband. With regard to such property she is, in equity, a feme sole, and has the *jus disponendi*, which is the inseparable incident of ownership. By virtue of this she charges, she incumbers, or she absolutely disposes of it, or she binds it by her parol agreements, just as any other owner would. This position is sustained by abundant authority, both here and elsewhere,"—citing *Livingston v. Livingston*, 2 Johns. Ch. 537; *Whitesides v. Cannon*, 23 Mo. 457; *King v. Miftalberger*, 50 Mo. 182; *McQuie v. Peay*, 58 Mo. 56; *Clafin v. Van*

Wagoner, 82 Mo. 252; *Schafroth v. Ambs*, 46 Mo. 114; *Kimm v. Weippert*, Id. 532; *Lincoln v. Rowe*, 51 Mo. 571; *De Baum v. Van Wagoner*, 56 Mo. 347; *Gay v. Ihm*, 69 Mo. 584; 1 *Bish. Mar. Wom.* § 853; 2 *Id.* § 163; *Taylor v. Meads*, 34 *Law J.* Ch. 208. With respect to the half interest of Angela Cadematori which was purchased by *Espenschled* at the sale by the administrator of her estate, plaintiff, in receiving from and receipting to said administrator for his distributive share, is estopped from asserting title to the property conveyed by the administrator's deed. *McKeynolds v. Grubb*, 150 Mo. 353, 51 S. W. 822. While the answer does not in so many words plead estoppel, the allegations therein amount to an estoppel, which is all that is necessary. The judgment is affirmed.

SHERWOOD, P. J., and GANTT, J., concur.

STATE v. MOORE.

(Supreme Court of Missouri, Division No. 2.
Feb. 26, 1901.)

HOMICIDE — CRIMINAL LAW — CONFESSIONS — QUESTIONS FOR JURY — INSTRUCTIONS.

1. A confession procured by express or implied representations that it is the only way to protect accused from mob violence is not admissible.

2. Where the evidence is conflicting as to whether a confession was voluntary, or was procured by representations that it was the only way to save accused from mob violence, the admissibility of the confession is a question for the jury.

3. Where the evidence is conflicting as to whether a confession was voluntary, it is error to refuse to instruct as to the rules governing the admissibility of confessions.

4. A request for an erroneous instruction is sufficient to require the court to instruct as to the questions presented by such erroneous instruction.

Appeal from circuit court, Stoddard county; J. L. Fort, Judge.

Elijah L. Moore was convicted of murder, and he appeals. Reversed.

Wammack & Mosely, for appellant. The Attorney General, for the State.

SHERWOOD, J. Charged in the indictment with murdering his father, Jesse W. Moore, by shooting him with a shotgun, defendant, being put on his trial, was found guilty of that charge and sentenced to be hanged; hence this appeal. There have been neither statement, assignment of errors, nor briefs on behalf of defendant, nor has the state filed any statement or brief herein, so we have been compelled to gather the facts of the case for ourselves, and as best we could.

Jesse W. Moore was killed on the 16th of November, 1890, while sleeping in his bed in a room of his dwelling house; and the weapon used was a double-barreled shotgun belonging to him, and which was evidently but a few feet distant from the head and

face of the victim at the time the gun was discharged. It seems that this discharge occurred about 3 or 3:30 a. m. In the room where the murder occurred there were three beds,—one occupied by the father; one occupied by his son, the defendant, a boy about 19 years old; and the other by two small boys, his brothers, the younger some 7 years old. There was a hall eight feet wide between the room already mentioned and the one occupied by the wife and mother, who had with her in the bed where she slept a young child. A sister of defendant, 15 years old, also slept in the bed with her mother. The pants of Jesse W. Moore lay on the foot of the bed in which he had slept, and in one of the pockets a pocketbook containing some sixty-odd dollars in money was found undisturbed when the inquest was held. Defendant stated when a witness at the inquest, and during the day of the inquest, that the report of the gun did not awaken him or any of the rest of the family. He did not deny making this statement, nor did he attempt explanation of how he knew the discharge of the gun did not awaken any of the rest of the family. Neither the wife and mother nor the daughter and sister testified at the trial. A man named Huff had been taken from the county jail on the same night that Jesse W. Moore was killed, and hanged by a mob; and of this fact defendant became aware on the day of the inquest, on which day he was arrested. Defendant afterwards confessed to J. W. Farris, the prosecuting attorney (so Farris states), that he had murdered his father by shooting him with the shotgun while he was asleep in bed. This confession is said to have taken place on Saturday night, the 18th of November, two nights after the homicide. Speaking of the confession, and preceding and attendant on it, Farris says of defendant: "I had heard or understood that he desired to make a statement on Friday. Circuit court was in session. I was busy before the grand jury and in the court all day, and busy at nights, and I couldn't find time to go over to talk to him. I also received the same word again on Saturday from different parties,—from Sheriff Evans, as testified to, and also from Squire Mayes,—that he was liable to make a confession. I don't remember what Squire Mayes said about it, just now, but on Saturday I couldn't yet go. I was busy, and I told the sheriff that, after I got my supper and a little rest, I would come uptown after supper and have a talk with the young man. So I came to the jail somewhere about 8 o'clock, I suppose, on Saturday night. Mr. Evans went upstairs and brought Mr. Elijah L. Moore down. I think Mr. Busby and his wife, perhaps, were somewhere about the jail. Perhaps they were in the other room. And Mr. Evans came down. I had the St. Louis Republic. I spoke to Lige, and he spoke. He took a chair and sat

down. Evans and he commenced a conversation. I took no part in that conversation at all at that time. I sat there and read my paper, and listened to the conversation of the sheriff and the defendant, Elijah L. Moore. Evans talked to him some ten or fifteen minutes, I presume, and finally I dropped my paper, and perhaps I put in a few words with him about the matter; and he says to Mr. Evans, 'I want to have a private conversation with Mr. Farris,' and asked Mr. Evans to go out of the room. Lige commenced the conversation with me, and he and I talked for some little while,—ten minutes I presume, maybe 15,—about the killing of his father. I says, 'Lige, the people in your country believe that you know something about who killed your father, and,' I says, 'I believe it, too.' He at the time denied it. I asked him, then, how he could explain that he didn't hear the report of a shotgun fired off in the room in which he was sleeping. Well, I don't remember what his answer was to that. I says to Lige, 'If my wife were to be murdered to-night in the room where I was sleeping, and I didn't hear the report of the gun, and I would get up the next morning and say to my neighbors that somebody has come and murdered my wife, and I never heard the report of the gun, don't you believe that they would think that I murdered her?' Lige dropped his head; said, 'Yes; I think they would,' or something like that. Then I took the hired girl as an example. I says, 'Suppose the hired girl sleeps in another room, and was shot with a shotgun, and none hears the report, and I would go out the next morning and say that some one came there and murdered her, and I nor my wife never heard the report of the gun, like you and your family say you never heard the report of no gun; don't you think the people would think I knew all about the shooting?' He still got weaker. Well, I talked with him on a strain along that line some ten minutes or more. And finally he says, 'Mr. Farris,' he says, 'I do know something about it. I do know,' he says, 'who done the shooting.' And there were tears in his eyes about that time. 'Now,' I says, 'Lige, just tell the truth about it. The truth is all we want.' 'Well,' he say, 'my sister done it.' His 15 year old sister; called her name. I believe her name is Mary. Anyhow, he said his sister done it. I says, 'Lige, you say you didn't hear the gun fire, and you testified down there before the coroner's jury, and all of your folks did, that this gun had been missing for a period of ten days. Now, what do you say about where that gun was?' Lige says, 'Well, she had that gun hid behind the flour barrels in the kitchen.' I says, 'Lige, how many flour barrels were there in the room?' He says, 'There were four.' He says, 'My father only a few days before that' (and I believe he named himself) 'had been out to Dexter, at Jorndt's Mill, and he

had a lot of wheat deposited there, so he said, and he got four barrels of flour and brought home.' I says, 'Tell me what particular part of the room, and whereabouts, this gun was hid.' He says, 'It was hid in the corner behind the very furthest flour barrel from the eating table where we always eat.' I says, 'How did you keep the gun concealed from your father and mother?' He says, 'We throwed some old rags over it;' then he put an apron over it to keep it from being seen. 'Well,' I says, 'what time in the night, now, was it that your sister fired this shot?' He says, 'It was about three o'clock in the morning.' I says, 'Did you know she was going to fire it?' He says, 'No; I knew she was going to kill him sometime, but I didn't know when it was.' 'Now,' I says, 'Lige, was that the first time that your sister ever fired a shotgun?' He says, 'Yes,' he says, 'it was.' 'Well, now,' I says, 'Lige, that seems rather peculiar to me, that a young girl who has never fired a gun before in her life would walk in there at night and get a gun out and shoot her father.' I says, 'It seems to me that she would be afraid to shoot the gun.' Then I says to him, 'I can't believe that you told me the truth. Now, you tell it to me, Lige.' Then he dropped his head,—and tears in his eyes again,—and he says, 'No,' he says, 'my sister didn't shoot him.' He says, 'I will tell you the truth this time for sure, so help me God,' or something like that. Then he says, 'Oh, God, pity me!'—something like that. He used so much praying words, I can't tell you all he did say,—'I killed my poor old father myself.' He says, 'Oh, God! if I had it back I wouldn't have done it for ten thousand dollars.' He says, 'If I had it back I wouldn't have done it the next minute after I done it, at all, for anything on earth.' 'Now,' I says, 'Lige, you are telling me the truth this time, are you?' He says, 'Yes.' He says, 'I done it, but,' he says, 'I took the gun down myself out of the rack and gave it to my sister, and she did hide the gun behind the flour barrel, but I got the gun and done the shooting myself.' 'Well,' I says, 'Lige, when was it this gun was hid there?' He says, 'On Sunday evening, about ten days before the killing took place on Thursday morning.' I says, 'What time was it the gun was hid?' He says, 'Well, my father that Sunday evening about sundown or dusk went down to some neighbor's house — I don't know whether Mr. Manlon's, or who, somewhere close there.' He named the place, and says, 'My mother and the little children were out at the front gate picking up chips or kindling to start a fire with next morning.' He says, 'My sister was in the kitchen cooking supper.' He says, 'I went and took the gun down out of the rack where my gun and my father's gun was laying, and another gun,' I believe, 'and I took the gun, and I gave it to my sister at the kitchen door, and she took the gun and put it

back behind this flour barrel, and hid it and covered it up with these rags, as I told you.' And he says, 'The gun stayed there till the killing took place on that Thursday night.' 'Now,' I says, 'Lige, when did you aim to kill him?' He says, 'I aimed to kill him that Sunday night.' I says, 'Well, what prevented you from doing it?' He says, 'I went to sleep that night before pa came into the room, and,' he says, 'I overslept myself, and didn't wake up the next morning till he called me to go build fire and feed.' 'Well,' I says, 'why didn't you kill him some other night during the week, or before ten days expired?' 'Well,' he says, 'I aimed to. but,' he says, 'I would go to sleep and oversleep myself, and,' he says, 'some nights when I would think of it,' he says, 'my heart would just fall me.' He says, 'I couldn't get up courage enough to do it,' and then he would cry again. 'Well,' he says, 'I know it is awful bad, awful bad,' he says, 'I can't help it now.' He says, 'I hope my poor father is in heaven.' He says, 'God knows, though, he didn't treat me like I ought to have been treated.' 'Well,' I says, 'Lige, now just tell me whatever got you in the notion to want to kill your father.' 'Well,' he says, 'that my pa never did treat me right.' He says, 'I will tell you, Mr. Farris,' he says, 'I worked awful hard all my life on the farm there.' He says, 'I helped my pa to make what he has got.' He says, 'He never would buy me many clothes.' He says, 'He only bought me one suit of clothes this last summer. That was a cheap suit. I wanted a nice suit. I was big enough to go around with the girls.' He says, 'I wanted a good suit, and he wouldn't buy it for me.' He says, 'My father told me if I stayed out late at night with the girls he would lock the door, and make me sleep out doors with the dogs and hogs.' He says, 'I was getting near grown, and I wanted to stay out.' He says, 'My pa wouldn't let me go to shows, play parties,—nothing of that kind.' He says, 'I wanted to go to the show at Dexter, and he wouldn't let me go.' And then he went on and said that he and his father had a racket one day,—I think it was out about the barn,—about thirty days before this killing took place. He said he went to the house, and he told his ma then that he wished pa was dead. I says, 'Now, what did she say to you Lige? Didn't she advise you not to do anything of that kind?' 'Well,' he says, 'Ma says, "Lige, don't you know you must never do that; that you will never know what a help your father is until he is dead,"'—something of that kind. He said that he said to his ma,—says, 'Ma, we can get along better without him than we can with him, anyhow.' Then he said some time after that, or before that (I don't remember which now), that one night his pa and his ma were quarrelling or 'jowering' in the room, and that his pa picked up his shoe and threatened to throw at his ma. He says, 'I told him

he had better not do that.' He says, 'If he had hit 'her with that shoe, I would have killed him right then.' To get back to where I started again, he says that evening that he hid the gun that his pa came back, and that they all ate supper together, and, he says, this Wednesday night or Thursday morning that the shooting took place, that he was awakened by his little brother or sister or the baby (one of the smaller children) crying, who, he said, was sleeping with his mother in a room across the hall,—in the last room across the hall. He said that the baby woke him up, crying, and he said that, after the baby hushed crying, that he lay there something like a half an hour. I says, 'Now, Lige, you said it was about 3 o'clock. How do you know it was about 3 o'clock?' He says, 'Because I heard the clock strike three;' and he says, 'Then I lay there about a half an hour;' and says, 'I got up out of my bed, I went into the kitchen, and went by this flour barrel and got the gun, and came back into the room and shot him.' I says, 'How close were you to him when you fired the shot?' He says, 'I had the end of the gun,' and he measured it off on the stovepipe joints in the jail there. Mr. Evans has a stove in the jail there. He says, 'The point of the gun was about the length of one of those stovepipe joints from his head, about two feet, whatever it is.' He measured it off about the length of one of those stove joints,—stovepipe joints. And he said, after 'he shot him, that his little brothers, two of them, about seven and ten years of age, and named Hance and Charlie (I believe he said their names are), were sleeping in the same room that he and his father were in, but in a different bed; and he said that Hance, the seven year old boy, kind o' rose up in the bed and sat up in the bed, and he said that Hance said to his brother Charlie, he says, 'Charlie, where are you?' Charlie says, 'Here I am.' Then he says that the boy laid down again. Then he said he took the gun and went back into the hallway, and placed the gun up in the rack where it had always been kept. But he told me that he had discussed the fact of this gun being missing in the presence of his father and his mother two or three different times during the time it was hid that ten days till the shooting took place, and that he discussed it with his father and in the presence of his mother and sister, and that his father didn't know where the gun was. That conversation had happened, he said, but he said that he and his sister knew where it was all the time. Now, that is the story, gentlemen, that he told me on Saturday night. Then I called Mr. Evans in and —or, rather, Mr. Evans came in. I didn't call him in. He just came in himself. I says, 'Mr. Evans.' I says, 'Well, Lige has just told me all about it. Now,' I says, 'Lige, just tell the sheriff how it was.' That is just my language, gentlemen. 'Lige, just

tell the sheriff how it was.' So he commenced and told the sheriff pretty much the same thing he told me, except he didn't tell as much of it as he told me. Then the sheriff spoke to him and says, 'Well, that accounts for the flour being on the gun that we saw down there that day while we were at your father's house.' He said, 'Yes; that is how come the flour on the gun.' His sister handled it. Well, we talked after Evans came in there, I expect, fifteen minutes. I guess he was 15 minutes telling the sheriff how it happened. I let him do all the talking, except once in a while I would just ask him a certain point, to have him tell to the sheriff. He told the sheriff, though, all that happened, by me telling him to tell the sheriff how it happened. I guess he talked to the sheriff fifteen minutes, telling how it was. He talked to me an hour or more. I believe I was in the jail two hours from the time I went there till I left, because Evans talked to him awhile in the room before I talked to him when I first came down. Evans and I discussed the matter a little while then. So the next Sunday morning I was uptown, and the sheriff told me—the sheriff or Busby. I believe it was Evans—that Lige wanted to see me again. So this man Walker Martin had been killed that night, and there was some excitement here, and I couldn't go right then; but about 10 or 11 o'clock, I judge it was, I went into the jail again, and Lige was brought down again. He says, 'Mr. Farris,' he says, 'I want to take back what I said last night about my sister having anything to do with it.' He says, 'I want to take all the responsibility on myself.' I says, 'Lige, well, I am inclined to believe what you said last night about your sister hiding the gun was the truth.' He says, 'I want to take that part back.' He says: 'I killed him myself, and I am responsible for it. I don't want my sister brought in it.' Well, Mr. Evans heard that conversation, I think. I am pretty sure he did. So that was on Sunday morning. I didn't see Lige any more until about Monday at noon, and I had him brought out to my office. Mr. Walker, I believe it was, went over after him; and, when he came to my office with Mr. Walker, I believe I was along, too. I didn't go up to the jail after him, but I was along. I heard him tell Mr. Walker. He said he knew Mr. Walker. He says, 'I know you, Mr. Walker,' and shook hands with him,—talked with him very intimately; and he told him the principal facts about the killing, also, at that time. Then when they got to my office his mother and his sister were up there, and when Lige came into the office, and when he got to where they were, why, he commenced crying,—broke down; and he says that he didn't want anybody punished for it but himself; that he was guilty. His sister says to him—She says, 'Lige, what did you tell that I had anything to do with it for?'—something like

that Lige says, 'Well, I done it myself.' He commenced crying. He asked his sister and mother to pray for him; asked me to pray for him; asked Mr. Walker to pray for him. Mr. Mosely: Did he ask you to pray for him? A. He asked everybody to pray for him that was in the room. He broke down and confessed the matter to his sister and mother, without being asked, and without anybody suggesting it to him at all, too, gentlemen. I believe that is all I can think of now. I will state, this, though, gentlemen of the jury. I will state this, upon oath: That there were no inducements held out to Mr. Elijah Moore to make this confession, in my presence and hearing, by me nor by the sheriff; neither was there any threats made against him to get this confession from him, that I know of, or in my presence."

Farris also states that before Evans, the sheriff, left the room, something was said about the Huff matter, when Evans said, "Just such crimes as this," or "Just such crimes as these, is what causes mob violence," and that this was all that was said before defendant about mobs in his presence. And Farris denies that he talked to defendant about mobs, or anything of the kind, to induce him to confess. On the contrary, defendant testifies as follows: "Q. Now, after you were arrested on this charge and put in the jail of this county, you made a statement to Mr. Farris, did you not, in which you admitted that you did kill your father? A. Yes, sir. Q. Now, if you have any reasons to state to this jury why you made that statement, what caused you to do it, Lige, tell the jury the plain truth about why you did it. A. Mr. Jurymen, the reason that I acknowledged the killing of my father was through scare. Q. Just tell the jury what Mr. Farris said to you that would befall you or your family, or any person you were interested in, if you didn't confess,—just what he told you. A. Mr. Farris told me this. When he had me brought downstairs, he commenced talking, and he come on down,—he was talking. He says, 'Lige,' he says, 'I am talking to you to-night for your good.' He says, 'There is a mob on the streets, and one in your county, and, by God! I can't save you unless you do what I say.' And he says to me, he says, 'There is stronger circumstantial evidence against you than there was against Jim Henry Tettaton,' and he says, 'Where is he to-day?' He says, 'He sent off and got lawyers, way off,' and he says, 'Where is he at to-day?' He says, 'That is where you will be,' and he says, 'But, if you will do what I say, I will save your mother and your sister.' Q. Did he tell you in that conversation— First, I will ask you, Lige, where that conversation occurred. A. It was downstairs in the front room in the jail in this town. Q. Was that the conversation you had with him just before you made this confession to him? A. Yes, sir; just before. Q. Now, tell the jury what he said, if any-

thing, that would befall your mother and sister and yourself if you didn't confess to this crime, or didn't tell him about it. A. He says, 'To-night you and your mother and your sister will be hung if you don't acknowledge to this, but if you do I will save you all. I will save your mother and your sister. I will save your blood, too.' That is what Mr. Farris said to me. That is the reason that I made that. I didn't know— He was out. I was in jail. I didn't know what he knew. He was out, and I was in jail. I didn't know what to do. I thinks to myself, 'I would rather save my mother and sister's life, and save my own neck, and go on to the penitentiary, and take it all, rather than to see them die and die myself.' Now, honorable jurymen, that is the facts; that is the facts. Q. Now, as a matter of fact, at the time you made this confession to Mr. Farris you made it through fear that what he threatened would befall your mother and sister and yourself? A. Yes, sir. Q. And made it upon his promise of protection,—to save them if you would make it? A. That is it; yes, sir. Q. As a matter of fact, at the time you made this confession you were not guilty of the murder of your father? A. I was not. I never done it. Q. You may tell this jury, Mr. Moore, if you were ever at any other period in your life arrested or incarcerated in jail, charged with any crime. A. I never was. I never saw the jail until I come that night. Q. Were you ever even a witness in court, or anything of that character? A. I never was. Q. Now, Mr. Moore, you may tell the jury, if you remember, how long after you were put in jail that you were denied the privilege of seeing any person, and especially counsel that you sought to see, if such was the case. A. Well, I never was permitted to see my folks until after Mr. Farris scared me into this confession. After that they told me—Mr. Evans and him, or Mr. Evans gave orders—that anybody could come up to see me that wanted to. Q. You may state if you made any attempt or sent word or talked to any person through the grated windows of the jail, particularly Mr. Spence, in which you sought to have him come up to the jail, to the end that you might employ him as counsel in your case. A. I did. Q. If I understand you, then, you were not permitted to see him until after this confession was extorted, as you have said? A. I was not permitted to see him. Q. Now, Mr. Moore, I will get you to state to the jury if you ever at any time admitted to any person, or confessed to any person, outside of Mr. Farris, or those who were in Mr. Farris' presence at the time, that you killed your father. A. No, sir. Q. Is it not true that to all other persons you have at all times denied being connected in any way with the killing of your father? A. All except one. That was in the presence of Mr. Evans, too. Q. Mr. Evans was present at the night this confession was scared from you as you have testified to, was

he not? A. No, sir; he was in another room. Q. He was there in jail? A. Yes, sir. Q. And came back in there, and Farris had you recite it to him, did he not? A. Yes, sir. Q. Now, I will get you to state whether or not it is true that Mr. Farris stated to you about the time of this alleged confession that if you would confess he would save your blood, as you have stated, and let you go to the penitentiary, and that, if you or your folks would put a few hundred dollars in the bank for his use, that in a short time he would get you out of the penitentiary. A. He sure done that. Mr. Farris: If the court please, I would like for the stenographer to read the question. (Question read.) I object to that as being incompetent and irrelevant, in the form and manner in which it is put,—in other words, it must be before the confession, and not after. The Court: No; you testified as a witness, Mr. Farris. It may go to the jury. It goes to your feelings towards the defendant. Q. Now, Mr. Moore, there is one other question I wish to ask you. At the time Mr. Evans brought you downstairs in the room of the jail where you had this conversation with Mr. Farris that you have detailed, tell the jury what Mr. Evans said to you, if anything, before he left the room, about mob violence. A. He said something about the Huff case,—about the man Huff being taken out and mobbed. Q. Did he say that to you? A. Well, he spoke it out. I don't know. Q. It was in your presence? A. Yes, sir; in my presence. Q. Did you know that, the morning before you were put in jail, that some parties had taken a man by the name of Huff out of the jail and hanged him? A. Mr. Farris told it while I was on the stand down home."

The statement of defendant as to the means used by Farris to induce him to confess are fully supported by the testimony of Mrs. John Busby, who, acting as jailer in her husband's absence, testifies what conversation occurred on Saturday night in the jail between Farris and defendant. She says: "I was first in the kitchen, and went to the middle room. I heard Lige crying in there. Then I got up close to the door. There was a crack in the door. I looked through and could see them. I could hear what they said. Q. Tell the jury what he said. A. He says, 'Lige,' he says, 'now, I can't protect you no longer.' He says, 'By God! you have got to do something.' Q. Tell what else he said. A. He says: 'This is your last night. You have got to do whatever you are going to do to-night, or,' he says, 'your mother and sister will be hung, and you, too.' He says, 'There is now a mob in the street, and one in your county,' and, he says, 'Lige, by God! I can't protect you any longer.'"

The statement by Farris as to the confession made by defendant at his office in the presence of his mother and sister on Monday afternoon is supported by the testimony of

Walker, also deputy sheriff, testifies that defendant, on Monday afternoon, when Walker went down to the jail to take defendant over to Farris' office, had some conversation with him. Here is the conversation as brought out by questions and answers: "Q. I will get you to tell the jury if you remember of having a conversation with the defendant, Lige Moore, about the killing of his father, in the Bloomfield jail, downstairs, on or about Monday after the killing took place on Thursday morning. A. I do. Q. Just tell that jury now, Jim, what he said to you. (Objected to by the defendant because the foundation has not been laid.) Q. I will ask you if you held out any inducements to him as an officer, or promised him any reward, or put him in fear, or made threats. A. No. Q. Now, tell the jury what you said to him. A. I will tell you what I said to him at the time I went to jail after him, and took him to your office to see his mother and sister. When I brought him downstairs I informed him that his mother and sister were under arrest, charged with being implicated in the crime. He remarked, 'My Lord! I can't stand that.' He says, 'I am going to clear them and take the whole thing on my own shoulders.' He says, 'They had nothing to do with it and knew nothing of it.' He says, 'I done the deed myself.' Q. Did he go on and relate the circumstances? A. Yes. Q. Tell the jury what he said,—all about it. A. He went on and told me he did it, and how he did it,—how he come to wake up. He said that the baby waked him about 3 o'clock in the morning, crying in the other room. He said he had intended to do this two or three weeks before, but he didn't wake up at the right time, or didn't get up his courage,—something of that kind; and he said he got up and put on his clothes and walked out to the gate, looked up and down the road (he said the moon was shining bright), to see if he could see anybody passing. He said he didn't see anybody, and he went back and got the gun, and went in the room and shot his father."

It is not pretended that on Monday afternoon there was any fear of a mob when defendant confessed to Walker at the jail, nor subsequently at Farris' office, and the fact of making these confessions he does not deny. And, on defendant's own theory, all fear of his being mobbed was done away with just as soon as he made the confession to Farris.

Defendant went over in the early morning of 16th of November to inform his uncle Robert Moore of his father's death. On returning home to his father's house with his uncle, defendant told the latter how his father's gun had been missing about a week, that he didn't know who had it, and that it had been brought back the night before and put in the rack, and that he didn't know who fetched it. At the inquest, according to Squire Mayes, defendant testified that the gun had been gone about a week or 10 days, and that he had asked his father where his gun was, when he replied:

"I don't know. I reckon it is about the place somewhere." Defendant also testified that the gun was back in the rack in the morning,—that is, the morning after the shooting,—and that he found the gun there. This rack was out in the hall. Farris also testified to examining the gun of the deceased (what defendant said was his father's shotgun) on the morning of the inquest; that the right-hand barrel of that shotgun had all the appearances of having been fired within six or eight hours; that the left-hand barrel was empty, and so was the right-hand barrel; that he broke the gun, opened it up, and looked through both barrels towards the window,—towards the light; that the right-hand barrel seemed to be dirty and nasty and black, and smelt like burnt powder; that the left-hand barrel seemed to be very dusty, with a whitish dry dust inside of the barrel; that defendant testified at the inquest that he was asleep and did not know anything about the killing until he woke up the next morning, and that he heard no noise or shooting during the night; that defendant was arrested and taken to Bloomfield jail on the day of the inquest, and while on his way there stated that he knew that he was going to be arrested and charged with the crime of killing his father when he was called back on the witness stand the second time, although no one in the hack had that night accused him of the crime. Farris also testified that, before they reached Bloomfield, Farris was asked by defendant if he (defendant) could draw his father's money out of bank.

We are of opinion, after careful consideration of the evidence, that if defendant made confession to Farris, and such extrajudicial confession was made in proper circumstances, it was clearly admissible, but if made under threats, either express or implied, of mob violence in case defendant failed to confess to the crime charged, then such confession is wholly inadmissible. Whether such confession was made in proper or improper circumstances was a question for the jury, under proper instructions on the subject of confessions, and when and where admissible. The admissibility of the confession in the case at bar was the dominant question before the jury, but on this question no instructions whatever were given to the jury. An instruction (No. 6) on the subject of confessions, under the term "verbal admissions," was asked by defendant, but refused by the court. This instruction, though faulty, furnished the basis of an instruction properly drawn, and it was error to fail to give it. *State v. Clark*, 147 Mo., loc. cit. 38, 47 S. W. 886; *State v. Reed*, 154 Mo., loc. cit. 129, 55 S. W. 278, and cases cited. Speaking generally, the instructions given at the instance of the state were such as have frequently received the approval of this court. And we are of the opinion, also, that there is sufficient evidence in the record to corroborate the extrajudicial confession, conceding it to have been made free from the pressure of improper influences. And it may be that the

confession made to Walker at the jail on Monday would be admissible, if not made under the influence of a fear previously created, and which had not yet lost its force. For the error mentioned, the judgment should be reversed and the cause remanded. All concur.

KANSAS CITY & N. C. R. CO. v. SHOEMAKER.

(Supreme Court of Missouri, Division No. 2.
Feb. 26, 1901.)

RAILROADS—RIGHT OF WAY—CONDEMNATION—DAMAGES—CHARGE—REQUEST.

1. In proceedings to condemn a railroad right of way through defendant's farm, there was evidence to prove the facts on which the instructions were predicated, and the court, at defendant's request, charged that in estimating the damages the jury should consider the amount and value of the land taken, the size and shape of the two tracts into which the farm was thereby divided, the inconvenience resulting from the location of the railroad, and allow defendant such sums as will reasonably compensate him for the injury sustained. *Held*, that giving such charge was not error, where, at plaintiff's request, the court charged in detail as to matters which could not be considered, and correctly defined the term "market value."

2. Where, in proceedings to condemn a railroad right of way through a farm, the jury are correctly instructed as to the meaning of "market value," and also in detail as to the matters which may and may not be considered in estimating the compensation to be awarded, the charge is not erroneous for failure to expressly state that the damage is the difference between the market value of the farm before and after the appropriation, where no request for such instruction was made.

Appeal from circuit court, Clay county; E. J. Broadbuss, Judge.

Proceedings instituted by the Kansas City & Northern Connecting Railroad Company to condemn a right of way through the lands of Peter B. Shoemaker. From a judgment entered after trial on exceptions to the report of the commissioners, the plaintiff appeals. Affirmed.

Lathrop, Morrow, Fox & Moore and J. P. Gilmore, for appellant. Sandusky & Sandusky, for respondent.

GANTT, J. On October 14, 1897, the plaintiff railroad company instituted a condemnation proceeding in the circuit court of Clinton county to condemn a right of way about three-fourths of a mile in length, and containing 9.33 acres, through the farm of defendant, Shoemaker. Commissioners were appointed, damages assessed, and exceptions duly filed. Upon proper application, a change of venue was awarded to Clay county. At the March term, 1898, a jury trial was had, and the defendant's damages caused by the appropriation were assessed at \$2,500. This appeal is from the judgment entered upon that verdict in the Clay circuit court.

There is but one assignment of error, and that relates to the sufficiency of the first in-

struction given by the court for the defendant. In order, however, that the sufficiency of that instruction may be properly tested, we deem it proper that the whole series should be considered with it, and the evidence in substance. The plaintiff, in its abstract of the record, says: "To sustain the issues on behalf of both defendant and plaintiff, evidence was introduced tending to prove the facts upon which the instructions in each behalf were predicated, and especially evidence tending to show the value of that part of defendant's (Shoemaker's) land which was taken, and the depreciation in the value of the residue thereof, and also the value of the land before the right of way was taken, and what its value would be thereafter; there being a substantial conflict in the estimates of the witnesses on behalf of defendant and plaintiff, respectively." As indicating the theory on which defendant sought to show his damages, the following question was put to all, or nearly all, of his witnesses: "Q. Now, Mr. Jones, taking into consideration the quantity of land taken, which is agreed to be 9.33 acres, the size and shapes of the tracts into which the one tract is divided, as its market value may be affected by that division into those sizes and shapes, and the cuts and fills on that tract, and the difficulty, if any, of getting from one side to another by having to go to railroad crossing to get over from one side to the other, what, in your opinion, would be the depreciation in value of the tract on account of those inconveniences? Answer. I don't know that I fully understand the question. Question. The question is, taking into consideration all these elements that may affect the market value of the farm,—the land taken, the division of the one tract into two, the cuts and fills, the inconvenience of getting from one side to the other, and all these matters that affect the market value of the land or depreciate its value,—what, in your judgment, would be the amount of that depreciation to the entire tract? Answer. I think the value of the land, which you said was about 9½ acres,—I don't know the exact amount,—figure that at an average price, and the damages to the entire farm as a whole, I think it would run in the neighborhood of \$2,800 or \$2,850 perhaps." Other witnesses to the same question estimated the damages at a smaller sum. At the close of all the evidence, the court instructed the jury, on behalf of defendant, Shoemaker, as follows: "(1) In estimating the damages to be allowed the defendant, the jury will take into consideration the amount and value of the land taken for right of way, the size and shape of the two tracts into which the farm is divided by the location of the right of way through it, the cuts and fills, the inconvenience in getting from one part of the farm to another on account of the location of the railroad, any inconvenience in getting to water, and will allow defendant such sum as

will reasonably compensate him for the injury he has sustained by the appropriation of the right of way through the farm. (2) The jury will make their estimate of damages as of the date when the commissioners acted, on the 2d day of November, 1897. (3) In estimating the defendant's damages, the jury will take into consideration the fact that the east 160 acres of the farm is under lease expiring March 1, 1899, and that the lessee under said lease is entitled to the possession of said 160 acres until said March 1, 1899." To the giving of which instructions in behalf of defendant, Shoemaker, plaintiff at the time excepted, and still excepts. And, on behalf of plaintiff, the court instructed the jury as follows: "(1) The court instructs the jury that, under the law, the railroad company will be liable hereafter to the defendant for any damages which he may sustain by reason of destruction of property by fire which may be set or caused * * * by the trains of the railroad company in operating its line, and any such damages, if any, he ever sustains, will be the proper subject-matter of future actions; but, in determining the amount of compensation which you will allow the defendant in this action, you cannot take into consideration nor allow any sum or amount whatever on account of exposure or liability of property to damage or destruction by fire caused or set by the trains in the operation of the road. (2) The court instructs the jury that in arriving at your verdict, and in estimating the amount of damages, if any, which you will allow the defendant, you should not take into consideration as an element of damage any danger to life and limb, if any, which may arise from trains passing over the road. (3) The court instructs the jury that, when you retire to your room to consider your verdict in this case, you have no right to determine the amount of your verdict by marking down the amount estimated by each juror, and by addition ascertain the sum total, and then dividing by twelve, the number of the jury, and that all verdicts arrived at in that manner are unlawful and illegal. (4) The court instructs the jury that the phrase 'market value,' as used in these instructions, does not mean what the defendant holds the land at, nor what he asks for it, nor does it mean what the land may be worth to any particular person for any particular purpose, but said phrase does mean the fair selling value of the land in the market to be used for any of the purposes to which it is susceptible of being put, either in its present condition or any condition to which it is susceptible of being changed. (5) The court instructs the jury that in arriving at your verdict, and in estimating the amount of damages, if any, which you will allow the defendant, you should not take into consideration any damage, if any, which may arise from, or be due to, smoke or noise from trains passing over the road, or the ringing of bells or sounding of

whistles. (6) The court instructs the jury that, in arriving at your verdict and in estimating the amount of damages, if any, which you will allow the defendant, you should not take into consideration any damage, if any, which may arise from the scaring, frightening, or killing of animals while on the right of way, or the danger to person of the owner, his agents or servants, in crossing said railroad. (7) The court instructs the jury that the law requires the plaintiff railway company to fence its right of way, and to construct all necessary gates and farm crossings, and, in estimating damages, the jury will consider all necessary fences and farm crossings as actually made." Under the instructions of the court, the jury returned a verdict in favor of the defendant, Peter B. Shoemaker, assessing his damages in the sum of \$2,500.

1. As already said, the only complaint in this court is of the first instruction given for defendant. Learned counsel for plaintiff rightfully say that, "When part of a tract of land is taken in a condemnation proceeding, the measure of damages is the difference between the market value thereof before, and what its market value will be after, the appropriation"; or, as it is sometimes stated, "in estimating the damages sustained by the condemnation of property for the purposes of a street or right of way, when the whole lot has not been taken, the value of the land taken should be found, and then the increase or diminution in value of the remaining portion, or the damages, may be computed by ascertaining the difference between the value of the entire lot, with improvements, before, and the value of the premises remaining after, the condemnation." *Railway Co. v. Fowler*, 142 Mo. 670, 44 S. W. 771; *Railroad Co. v. Ridge*, 57 Mo. 601; *Railway Co. v. Waldo*, 70 Mo. 629; *Railway Co. v. George*, 145 Mo. 47, 47 S. W. 11. Nor do we understand counsel for defendant controvert this as being the true rule, but they say there is nothing in said instruction in conflict with the well-settled rule in this state. While accepting the doctrine announced in the cases above cited, and many others to the same effect, they say there is no error on the part of the circuit court in advising the jury that, in arriving at the depreciation in the remainder of the farm, they might consider certain elements and exclude others.

Thus, in reaching their conclusion as to the market value of the portion of defendant's farm which was not appropriated, "they may, in estimating the diminution in value of the part left, take into consideration the amount and value of the land taken for the right of way; the size and shape of the two tracts into which the farm is divided by the location of the road through it; the cuts and fills; the inconvenience in getting from one part of the farm to the other; any inconvenience in getting to water;" and, on the other hand, they were instructed on part of

plaintiff that, in reaching the amount of the damages, they should not consider any damage that might result from fires in the future, as such would be the subject-matter of future actions; nor should they consider the danger to life or limb from trains passing over the road; nor any damage from smoke or noise from trains passing over the road, or from ringing of bells or sounding of whistles; and the court expressly advised them what was meant by "market value." In a word, by a process of exclusion and inclusion, the jury were advised how to reach the amount of damages defendant had suffered by the appropriation of his land, both as to the part taken for right of way and the depreciation in the market value of the portion not taken.

Surely, there was no error in directing the jury what elements they might consider in reaching a diminution in the market value, as the instruction is practically a rescript of the language of this court in *Railroad Co. v. Story*, 96 Mo., loc. cit. 622, 10 S. W. 207, in which it is said: "There are numerous authorities holding that cuts and fills made by a railroad passing through a man's farm, and the inconvenience he will be subjected to by making it more difficult to reach the several portions of the land, are proper subjects for consideration in estimating the damages sustained." *Mills*, Em. Dom. §§ 166, 189. The circuit court nowhere, in any instruction given,—certainly not in this first instruction,—authorized the jury to give defendant for the cuts and fills, and the inconveniences in getting from one part of the farm to the other, caused by the road passing through it, as distinct elements of damages. It did rightfully permit and direct them that, in estimating the depreciation in the market value of the part left after the appropriation, they should consider those things which common experience and the law teaches us would diminish the market value of the farm, but only as bearing upon the question of the value as affected by the appropriation of a part, and a depreciation of the remainder by reason thereof. Not only did the instructions given have this meaning, but the whole trend of the evidence was directed to that issue, and that alone; and there was no proof of how much damage any one of the elements alone, or, for that matter, all of them together, as mere items of damage, amounted to, but the object of the questions to the witnesses was, as said by plaintiff in its statement, to show the value of that part of the same which was taken, and the depreciation in the value of the residue thereof, and of the value of the farm before the right of way was taken, and what its value would be after the appropriation of the right of way. It was the injury to the farm for which the jury were to allow the compensation, and to this end all the evidence was directed.

There was no error in the admission of the testimony, and none, as we have seen, in

the elements which the jury might consider in reaching their estimate as to the depreciation in the value of the farm.

But counsel say the court did not say the damage was the difference between the market value before, and the market value after, the appropriation. The answer is, the failure to do so was mere nondirection, not misdirection, and was not error in a civil case. If counsel desired the court to say that, in addition to what it had already said, they should have asked the instruction. Such is the rule in this court in civil cases. *Browning v. Railway Co.*, 124 Mo. 71, 27 S. W. 644; *Hickman v. City of Kansas*, 120 Mo. 110, 25 S. W. 225, 23 L. R. A. 658.

An examination of the whole record satisfies us the case was properly tried to the jury, and limited, as the evidence was, to the one issue. We cannot see how the jury could have been misled, especially as the instructions on both sides limited them to the proper elements of damage. The judgment must be and is affirmed. All concur.

YOCUM et al. v. SILER et al.

(Supreme Court of Missouri. Feb. 19, 1901.)

WILLS—ESTATE—FEE SIMPLE.

A testator bequeathed certain lands to his son absolutely, with the express reservation that, if "my son dies without legal issue, descendants of his, legitimate issue of his, said lands shall pass to" certain nieces and sisters in equal parts. When the will took effect, Rev. St. 1845, c. 32, § 2, declared that the words "heirs and assigns" were not necessary to create a fee simple. Estates tail were abolished by section 5, which provided that thereafter, where, by any conveyance or devise, the grantee should be seised of an estate which would have been held an estate tail, under St. 13 Edw. I., every such conveyance should vest only a life estate in the grantee, and on his death the remainder should go to his children; but section 6 directed that the words "dying without issue" meant issue living at the death of the ancestor named, thus preventing the creation of estates tail by implication; and section 47 of the chapter on wills (Rev. St. 1879, § 4004) declared that in all devises in which the words "heirs and assigns" are omitted, and no expressions are contained in the will whereby it shall appear that the devise was intended to convey a life estate only, and no further devise is made to take effect after the death of the devisee, it shall be understood to be the intention of the testator to devise an estate in fee simple. *Held* that, as the son had legitimate issue living at his death, he took a fee simple, in the absence of express words showing an intent to give him only a life estate.

Sherwood and Marshall, JJ., dissenting.

In banc. Appeal from circuit court, Platte county; William S. Herndon, Judge.

Action by Oscar Yocum and others against Susan Siler and others. From a judgment for defendants, plaintiffs appeal. Affirmed.

The following is the opinion in division No. 2 (SHERWOOD, J.):

"Ejectment for the N. W. $\frac{1}{4}$ of section 7, township 53, range 35, in Platte county, Mo. The answers of defendants were general de-

nials. This controversy turns on the legal meaning, force, and effect of the fifth clause of the will of George W. Yocum, the original owner of the tract, the father of William Franklin Yocum, the devisee named in the will, the father of the plaintiffs. That clause is the following: 'To my beloved son William Franklin Yocum (my natural son), I bequeath absolutely the northwest quarter of section seven of township 53 and range 35, the place I now reside on, in Platte county, Missouri, subject forever to the reservation for my burial place made in clause two of this will; and, further, with this express understanding and restriction, namely, that if my said son dies without legal issue, descendants of his, legitimate issue of his, said land shall pass to Susan Evans, wife of Joseph B. Evans, Marina Botts, wife of Thomas Botts, Elzira Botts, wife of Wm. Botts, my nieces; to Elizabeth Frame, my sister, wife of John Frame; and to George, son of my brother Stephen Yocum; and Jane Yocum, wife of Milford Yocum, deceased, my sister,—in equal parts.'

"The cause was tried at the December term, 1897, of the circuit court, on the following agreed statement of facts, which is quoted so far as material: 'It is agreed that George W. Yocum is the common source of title; that he died September, 1854, leaving a will, which was duly probated in the probate court of Platte county; that Susan Siler is in possession of one hundred acres of land in controversy, and that William S. Kenney and Lucinda Kenney, his wife, are in possession of the remaining sixty acres of land in controversy, and were at the time of the institution of this suit; * * * that William F. Yocum in his lifetime, with his wife, for a valuable consideration, by warranty deed dated September 15, 1858, conveyed all the lands in controversy to William J. Norris, which deed is recorded; that William J. Norris, by warranty deed, conveyed the same land to Samuel Alexander, which deed is recorded; that Samuel Alexander conveyed said land, by warranty deed, to Elias Siler, which deed is recorded; that Elias Siler is dead, and the defendants constitute the widow and heirs of said Elias Siler; * * * that the plaintiffs are the legitimate issue of William Franklin Yocum, and were living at the time of William F. Yocum's death, and were the only children of said William F. Yocum living at the time of his death; that he was married on the 21st day of February, 1854; that he died on the 22d day of February, 1892; and that plaintiffs at the time of the trial were, respectively, 43, 40, and 38 years of age.'

"After testimony was introduced as above by plaintiffs, and also the will of George W. Yocum, the defendants offered in evidence a deed from Samuel Alexander to Elias Siler, dated 30th day of March, 1871, purporting to convey the litigated land. Plaintiffs objected to any evidence of title derived through Wil-

liam Franklin Yocum, by deed, for the reason that William Franklin Yocum, by the terms of the will aforesaid, only had a life estate in said real estate. Objection overruled, and plaintiffs excepted. Defendants offered in evidence the will of Elias Siler, which was objected to by plaintiffs for reasons above. Objection overruled, and plaintiffs excepted. Thereupon plaintiffs moved the court to declare the law as follows: 'The court declares the law to be that, under the will of George W. Yocum, deceased, William Franklin Yocum only took a life estate in the real estate described in the will and in the petition, and that the plaintiffs are entitled to the possession of the land sued for, and judgment should be rendered for them for such possession,'—which declaration of law was refused by the court; to which ruling plaintiffs excepted. Upon this the court found in favor of defendants, and gave judgment accordingly, and from this ruling results this appeal.

'By the terms of the will, William Franklin Yocum took what would have been at common law an estate tail; but under the provisions of section 8836, Rev. St. 1889, this estate tail was converted by the statute into an estate in the first taker for his natural life only. *Thompson v. Craig*, 64 Mo. 312. In the case just cited, the provisions of the will of Philip W. Thompson were as follows: 'I give, grant, and devise, and bequeath to my said grandchild Burrell Thompson (saving the life interest above granted and devised to my wife, Penelope Thompson) all of the lands and improvements which lie,' etc.,—embracing the land in question. 'I give, grant, devise, and bequeath to my granddaughter Mary Hutson the lands of my estate situate,' etc.; describing other lands than those devised to plaintiff. 'It is my will that, in the event that either of my grandchildren above named shall die before lawful age, or before leaving a lawful heir or heirs, the property above specified, and intended to be given in this will, shall descend to and belong to the survivor of said grandchildren only, and to his or her heirs or legal representatives; and in the event of both said grandchildren, viz. Burrell Thompson and Mary Hutson, dying before marriage, or in the event of leaving no lawful issue by marriage as aforesaid, it is my will that all my estate intended in this will for them shall be sold for the use and benefit of the poor persons of Saline county, Missouri, to be expended and paid as my executor may deem advisable and just.' It was admitted that plaintiff was 21 years of age, and had a child or children living; and this, the last will of Philip W. Thompson, and the written agreement sued on were the evidence in the case. The defendant asked the court for the following declaration of law, which was refused: 'That the plaintiff in this cause has only a conditional estate in the land mentioned in the petition, and, if plaintiff shall die without leaving lawful issue, then, and in that event, the estate of the plaintiff in said land would

cease, although the court may believe from the evidence that the plaintiff has arrived at the age of majority.' The action in that case was brought by Burrell Thompson against Hugh Craig on a written agreement for \$625, which Craig promised to pay plaintiff for a certain piece of land, provided plaintiff should, in 12 months thereafter, be competent to give a good title to the land. Plaintiff alleged his competency, and that he had made and tendered defendant a deed such as was required, but defendant refused to receive it, and issue was joined on these allegations. On this state of facts, following *Farrar v. Christy's Adm'rs*, 24 Mo. 453, and *Harblison v. Swan*, 58 Mo. 147, holding the statute already referred to accomplished the stated change in the common law, it was ruled that Burrell Thompson under the will of his grandfather acquired but a life estate in the property devised to him, and that in consequence of this he could not make such a title to Craig as his agreement called for, and that his marriage and the birth of children to him did not change the character of his estate. In subsequent cases this court has followed the same construction of the statute. *Emmerson v. Hughes*, 110 Mo. 627, 19 S. W. 979; *Godman v. Simmons*, 113 Mo. 122, 20 S. W. 972; *Bone v. Tyrrell*, 113 Mo. 175, 20 S. W. 796.

'A similar view was taken in Kentucky, upon a statute like ours, where there was a devise to a young woman (unmarried at the time) and her children, and such devise was held to give her an estate for life, with remainder to her children, the court remarking: 'It has been observed that the words of the devise, abstractly and literally, import an immediate gift, not only to the devisee in being, but to those not in being. But, there being no children in esse at the time of the devise, it could not have been the intention to give an immediate estate to them, for that would be impossible. And as the words of the devise, as conceded by all the authorities, manifest a clear intent that the children shall take, the only consistent and natural construction is that the testator intended the devisee in being at the time should take a life estate, remainder to the children.' *Carr v. Estill*, 16 B. Mon. 312.

'The fifth clause of the will created an estate of contingent remainder in the children of William Franklin Yocum, which estate is said to be created, in certain circumstances, in one of two ways: 'Where the estate in remainder is limited to take effect either in a dubious and uncertain person, or upon a dubious and uncertain event.' 2 Bl. Comm. 169. The learned author of a work on descents says: 'A contingent remainder is that part of an estate in fee bestowed conditionally upon one of two or more persons, which one is not certain, the rest of which is bestowed definitely upon some other person or persons named. The part not thus definitely disposed of to some particular person or persons is provided to go to some other person

or persons of two or more named, which of the two or more is left uncertain, and is to be fixed and made certain by succeeding events. The remainder itself is certain, but the person who is to have it is uncertain until it is determined by the events named.' Bing. Desc. 125. Chancellor Kent says that the definition of a contingent remainder in 1 Rev. St. N. Y. 723, § 13, is brief and precise. 'A remainder,' says the statute, 'is contingent, whilst the person to whom, or the event upon which it is limited to take effect, remains uncertain.' 4 Kent, Comm. (14th Ed.) note. See, also, *De Lassus v. Gatewood*, 71 Mo. 371. In *Daniel v. Whartenby*, 17 Wall. 639, 21 L. Ed. 661, a case which arose in Delaware, where the rule in *Shelley's Case* is in force, a testator, James Tibbitt, devised his estate as follows: 'All the rest, residue, and remainder of my estate, both real and personal, of what kind and nature soever, I give, devise, and bequeath to my son Richard Tibbitt during his natural life, and after his death to his issue, by him lawfully begotten of his body, to such issue, their heirs and assigns, forever. In case my son Richard Tibbitt shall die without lawful issue, then, in that case, to my wife, Elizabeth Tibbitt, and my sister Sarah Heath, and my sister Rebecca Mull, during the natural life of each of them, and to the survivor of them; and, after the death of all of them, to James Whartenby, son of Thomas Whartenby, of the city of Philadelphia, to him, the said James Whartenby, his heirs and assigns, forever. In case the said James Whartenby shall die before my son Richard Tibbitt, my wife, Elizabeth, my sister Sarah Heath, and my sister Rebecca Mull, then, and in that case, * * * the rest and remainder to William Whartenby, Thomas Whartenby, and John Whartenby, children of said Thomas Whartenby, of Philadelphia, to them, and their heirs and assigns forever.' Richard Tibbitt, the first devisee, on the 14th of May, 1853, after the death of the testator, conveyed the premises to Jacob Hazel, who, on the same day, reconveyed to Richard. Richard died in April, 1863, without issue, not having married. Elizabeth Tibbitt, the widow of the testator, and his two sisters, Sarah Heath and Rebecca Mull, were living at the time of the making of the will, survived the testator, and died before the commencement of this suit. James Whartenby, the devisee in remainder and the next in succession, is still living, and is the defendant in error in this case. The plaintiffs in error claim title by virtue of a sale under a judgment and execution against Richard Tibbitt. The rule in *Shelley's Case* is in force in Delaware, and an estate tail may be barred there by such a conveyance as that by Richard to Hazel. James Whartenby brought ejectment against William Daniel for the devised premises, recovered judgment, and Daniel brought error. The question thus raised by the litigation was what estate the first taker,

Richard, took,—an estate in fee tail, or whether he took only an estate for life, with remainder in fee to the issue of his body, contingent upon the birth of such issue, and, in default of such issue, remainder for life to his widow and two sisters, with remainder over in fee after their death to James Whartenby, the defendant in error. On the one hand, it was insisted that the words, 'issue of his body by him lawfully begotten,' were words of limitation, and consequently the rule in *Shelley's Case* applied; while on the other it was asserted that those words were, in legal effect, the synonym of 'children,' and so were words of purchase. After stating and discussing the facts aforesaid, and giving divers reasons why the above rule did not apply, Mr. Justice Swayne, the spokesman of the court, said: 'We entertain no doubt that the testator intended to give a life estate only to Richard, and a fee simple to his issue, and that they should be the spring head of a new and independent stream of descents. We find nothing in the law of the case which prevents our giving effect to that intent. We hold that the rule in *Shelley's Case*, for the reasons stated, does not apply. The estate given to the children of Richard was a contingent remainder. Upon the birth of the first child, it would have vested, but subject to open and let in after-born children. The devise to Richard and his issue disposed of the entire estate. The devises over to the widow and testator's two sisters and to James Whartenby were executory devises. Upon the death of Richard, with the possibility of issue extinct, the devise to James became a remainder in fee simple, vested at once in interest, but deferred as to the period of enjoyment until the termination of the intermediate life estates.' And so the judgment recovered by Whartenby was affirmed.

"Inasmuch as the rule in *Shelley's Case* had been abolished in this state long before the present will was drafted, the case just cited and quoted from seems decisive of the case at bar, saying nothing of cases already cited and quoted from, from our own Reports, which announce in legal effect the same result.

"It is objected, however, by defendants that no express estate was given to the prospective children of William Franklin Yocum, and they took none by implication. The law appears to be well settled that a fee may pass by implication, and so may an estate for life. Chancellor Kent says: 'A fee will pass by will, by implication of law, as if there be a devise over of land after the death of the wife. The law, in that case, presumes the intention to be that the widow shall be tenant for life. So, a devise over to B. on the dying of A. before twenty-one shows an intention that if A. attains the age of twenty-one he shall have a fee, and he takes it by implication.' 4 Kent, Comm. (14th Ed.) *541. Washburn says: 'A fee may be given by implication when the estate bears such a rela-

tion to some other estate as to render such a construction a reasonable one, as, where the devise was to one after the death of the testator's wife, it was held to be a remainder in fee to him and an estate for life by implication to the wife; so, where the devise was to A. if B. died before he was twenty-one years. The estate to B. was held to be a fee by implication if he attained the age of twenty-one.' 3 Washb. Real Prop. (5th Ed.) 694, 695. And, in order that a life estate only should pass to a certain devisee, it is by no means necessary that the precise technical term usually employed for that purpose should be used. Any equivalent form of expression, which clearly indicates an intention to pass but a life estate, will accomplish the same object, and effectuate the non-technically expressed intention, which intention may be gathered from the four corners of the instrument. *Schorr v. Carter*, 120 Mo. 409, 25 S. W. 538, and cases cited; *McMillan v. Farrow*, 141 Mo. 55, 41 S. W. 890, and cases cited; *Cross v. Hock* (Mo. Sup.) 50 S. W. 786; *Walton v. Drumtra* (Mo. Sup.) 54 S. W. 237, and cases cited.

"Section 8837, Rev. St. 1889, declares that 'where a remainder in lands or tenements, goods or chattels, shall be limited, by deed or otherwise, to take effect on the death of any person without heirs, or heirs of his body, or without issue, or on failure of issue, the words "heirs" or "issue" shall be construed to mean heirs or issue living at the death of the person named as ancestor.' It has been ruled by this court that this section was evidently enacted to prevent the words 'die without issue' from being so construed as to mean an 'indefinite failure of issue,' as by some of the authorities the former words were construed to mean; that the words 'dying without issue' in that section are to be construed to mean dying without issue living at the death of the person named as ancestor or first taker; that the term 'ancestor,' as used in that section, is the devisee of the life estate, whose issue, if any, are to take the remainder in fee; and that, in case of failure of such issue, those who are to take the remainder over in fee are executory devisees. *Naylor v. Godman*, 109 Mo. 543, 19 S. W. 50, and cases cited.

"Under the foregoing authorities and statutory provisions, it is clear—First, that William Franklin Yocum took but a life estate; second, his prospective children a contingent remainder; third, the devisees to Susan Evans and others were executory devisees; and, fourth, under the ruling in *Daniel v. Whartenby*, supra, upon the birth of the first child to William Franklin Yocum, the contingent remainder became a vested remainder in such child, but opened and let in the after-born children, and, owing to the birth of such issue, the entire estate was disposed of, and left nothing for the executory devisees, but such children would, of course, be postponed in the enjoyment of the fee simple vested in them until the termination of their father's life estate. Under

these views, William Franklin Yocum had nothing he could convey but his life estate, and his children, not deriving their title from him, but from their grandfather, were not bound by his warranty. For these reasons, the judgment should be reversed, and the cause remanded, with directions to enter judgment for plaintiffs.

"MARSHALL, J., concurs in this opinion."

J. F. & R. H. Merryman, for appellants.
Jas. W. Coburn, for respondents.

GANTT, J. This in an action in ejectment by plaintiffs to recover of defendants the N. W. $\frac{1}{4}$ of section 7, township 53, range 35, said lands lying in Platte county, Mo. The judgment in the circuit court was for defendants, and plaintiffs appeal. The petition is in the usual statutory form, and the answer is a general denial. The case was tried upon the following agreed statement of facts, and the will of George W. Yocum, deceased, upon part of plaintiffs, and the evidence offered by defendants:

"Agreed Statement of Facts. It is agreed by and between the parties hereto that George W. Yocum is the common source of title, and that he died in September, 1854, leaving a will, which was duly probated in the probate court of Platte county. That Susan Siler is in possession of one hundred acres of land in controversy, and that William S. Kenney and Lucinda Kenney, his wife, are in possession of the remaining sixty acres of the land in controversy, and were at the time of the institution of this suit. That J. W. Turner is in possession, as tenant of Susan Siler, of the one hundred acres, and was at the time of the institution of this suit. It is agreed and stipulated that William F. Yocum, in his lifetime, with his wife, for a valuable consideration, by warranty deed dated September 15, 1858, conveyed all the land in controversy to William J. Norris, which deed is recorded in Deed Book O, page 170, of Platte county, Mo. And that William J. Norris, by warranty deed, conveyed the same land to Samuel Alexander, which deed is recorded in Deed Book T, page 240, of the records of Platte county, Missouri. And that Samuel Alexander conveyed said lands by warranty deed to Elias Siler, which deed is recorded in Deed Book No. 1, page 462, of Platte county, Missouri. That Elias Siler is dead, and the defendants constitute the widow and heirs of said Elias Siler, together with J. W. Turner, as tenant of Mrs. Siler, who is also in possession of the one hundred acres of land under Mrs. Siler. That it is further agreed that the plaintiffs are the legitimate issue of William Franklin Yocum, and were living at the date of William F. Yocum's death, and were the only children of said William Franklin Yocum living at the time of his death. It is admitted that William Franklin Yocum died on the 22d day of February, 1892. That the rental value of the land in controversy is

\$400 a year. That William Franklin Yocum was married the 21st day of February, 1854, and that the plaintiffs are the legitimate issue and children of such marriage. It is admitted that John W. Yocum is forty-three years of age, that Oscar M. Yocum is forty years of age, and James Yocum is thirty-eight years of age."

Plaintiffs offered in evidence the will of George W. Yocum. The only part of said will affecting this case is paragraph 5, which is as follows: "(5) To my well-beloved son William Franklin Yocum (my natural son) I bequeath absolutely the northwest quarter of section seven of township fifty-three and range thirty-five, the place I now reside on in Platte county, Missouri, subject forever to the reservation for my burial place, made in clause two of this will, and, further, with the express understanding and restriction, namely, that, if my said son dies without legal issue, descendants of his, legitimate issue of his, said lands shall pass to Susan Evans, wife of Joseph B. Evans, Marina Botts, wife of Thomas Botts, Elzira Botts, wife of William Botts, my nieces; to Elizabeth Frame, my sister, wife of John Frame; and to George, son of my brother, Stephen Yocum; and Jane Yocum, wife of Milford Yocum, deceased, my sister,—in equal parts."

Defendants offered in evidence a deed from Samuel Alexander to Elias Siler, dated 30th day of March, 1871, for all the land in controversy, duly acknowledged, and recorded in the office of the recorder of deeds of Platte county, Book 13, p. 455. Plaintiffs objected to the introduction of said deed, for the reason that it is immaterial, incompetent, and irrelevant, and because, under the terms of the will, William Franklin Yocum acquired only a life estate in the premises, and did not acquire the title in fee simple, and therefore his deed to Norris could not affect the title acquired by plaintiffs, the legitimate issue of said William F. Yocum at the time of his death, and plaintiffs object to the introduction of any evidence of title derived through said William Franklin Yocum by deed for the same reasons; which objections were overruled by the court, and exception duly taken, and the deed read in evidence. Defendants offered in evidence the will of Elias Siler, deceased, dated October 28, 1890, which was duly probated, devising said lands to Susan Siler for life, and at her death to the defendants other than Turner. Defendants objected to said will, for the reason that it was incompetent and irrelevant, and for the same reason set out in the objection to said deeds. The objections were overruled, and exceptions duly taken, and said will read in evidence.

Plaintiffs offered the following declaration of law, viz.: "The court declares the law to be that under the will of George W. Yocum, deceased, William Franklin Yocum only took a life estate in the real estate described in the will and in the petition, and that the

plaintiffs are entitled to the possession of the land sued for, and judgment should be entered for them for such possession,"—which was refused by the court, and exception duly taken.

We are called upon to construe the meaning of the fifth clause of the last will of George W. Yocum, as above set out. Did the testator intend thereby to give his son William F. Yocum a fee-simple estate in the lands mentioned in said item, and, if so, are there any unbending, rigid rules of law which will compel us to disregard such manifest purpose on his part, and hold that he only gave him a life estate? This will was executed in 1853, and probated in 1854. The statute of wills of 1845, then in force, and still the law of this state, required "all courts and others concerned in the execution of last wills to have due regard to the directions of the will, and the true intent and meaning of the testator in all matters brought before them." Rev. St. 1845, p. 1086, § 51. This is also a general canon for the construction of wills, irrespective of the statute. By the words "bequeath absolutely," he unquestionably intended to devise to his said son his whole estate in said lands. These words are ample for that purpose in a will, and it is unnecessary to cite precedents to establish that it has been often so held. It is also settled by many well-considered cases that, when the words of the will in the first instance clearly indicate a disposition in the testator to give the entire interest, use, and benefit of the estate absolutely to the donee, it will not be cut down to any less estate by subsequent or ambiguous words, inferential in their intent. *Small v. Field*, 102 Mo. 104, 14 S. W. 815; *Clarke v. Leupp*, 88 N. Y. 228; *Lamb v. Eames*, L. R. 10 Eq. Cas. 267.

The words "heirs and assigns," or "heirs and assigns forever," were not necessary to create a fee simple when this will was executed, nor when probated. Rev. St. 1845, p. 219, § 2. In *Small v. Field*, 102 Mo. 123, 14 S. W. 818, it was held by this court that, "in giving a proper and practical construction to wills, technical rules must yield to the obvious meaning of the testator, gathered from all parts of the will. * * * All other rules of construction are subordinate and auxiliary to this leading and predominant principle." It cannot be doubted, then, that if the testator had stopped with the words, "To my well beloved son William Franklin Yocum (my natural son), I bequeath absolutely the northwest quarter of section 7, township 53, range 35," the said son would have taken a fee simple absolute; but it is contended that because the testator considered that his said son might die without having any descendants of his own at his death, and desired to provide in such case that the said tract should go to certain nieces and sisters of his, thereby the estate of the son was cut down to a fee tail, and by virtue of our statute to a life estate only.

We have already adverted to the general rule that when, in the first instance, a fee simple is given by will to the donee, it will not be restricted or cut down to any less estate by subsequent or ambiguous words, inferential in their intent. Not only is this the general doctrine both in England and the states of our Union, but it was in 1853, as now, the statutory rule of this state. By section 47 of the chapter on wills (1845), it was expressly provided that "in all devises of lands, or other estate in this state, in which the word 'heirs and assigns' or 'heirs and assigns forever' are omitted, and no expressions are contained in such will whereby it shall appear that such devise was intended to convey a life estate only and no further devise be made of the devised premises to take effect after the death of the devisee to whom the same shall be given, it shall be understood that the intention of the testator thereby to devise an absolute estate in the same, and shall convey an estate in fee simple to the devisee for all such devised premises."

Did George W. Yocum devise to his son William F. Yocum "any lands" without using the words "heirs and assigns" or "heirs and assigns forever"? Most assuredly he did. Did he use any expressions whereby it appears that he only intended to give his said son a life estate "only"? Most obviously he did not. Did he, in the language of the statute, make "a further devise of the devised premises to take effect after the death of the first devisee"? We answer, he did only conditionally, and, as that contingency never happened, that clause of the will is wholly inoperative, and we must construe the writing as if those words had never been super-added, and that the testator made no further devise of the devised premises to take effect after the death of his son William F. Yocum, and, this being so, must hold that said son took a fee simple, as directed by that statute; and this, we shall see, is the construction put upon a similar statute in Great Britain.

Says Jarman, in his treatise on Wills, in his exposition of the British statute (1 Vict. c. 26, § 28), which provides "that where any real estate shall be devised to any person without words of limitation such devise shall be construed to pass the fee simple, * * * unless a contrary intention shall appear by the will," "the onus probandi under the present statute lies on those who contend for the restricted construction, and is not discharged by showing that another devise in the will contains formal words of limitation." 2 Jarm. Wills, *1135.

But the contention is that this fifth item or clause of the will of George W. Yocum created a fee tail in Wm. Franklin Yocum, which the statute of 1845 converted at once into a life estate. This necessitates an examination of the doctrine of fee tails, under the statute de donis (St. 13 Edw. I.), to which our statute of 1845 refers as determining

what was a fee tail. By the ancient common law, if a grant was made to a man and the heirs of his body, the descent of the estate was confined to the heirs so described, and could not go to his collateral heirs. So, if the grant had been made to him and the heirs male of his body, it excluded not only all the collateral heirs, but the females in the lineal line. Nor could the grantee alienate so as to defeat the succession. But, to give facility to alienations, the courts at length held that estates of such limited succession were conditional fees, and that, as soon as the grantee had issue, the condition was fulfilled, and the grantee might sell his land or forfeit it or charge it with incumbrances. To counteract this ruling of the courts, parliament passed the statute de donis. The preamble to that statute recites that "where one giveth land to another and the heirs of his body, it seemed very hard to the grantors and their heirs, that their will expressed in the grant should not be observed. Instead of which, after issue born, the grantee had power to aliene his land contrary to the mind of the giver and contrary to the form of the gift,"—and then provided "that the will of the giver according to the form in the deed of gift manifestly expressed, should be observed so that those to whom the land was given under such condition shall have no power to aliene the land so given, but it shall remain unto the issue of them to whom it was given after their death or shall revert to the donor or his heirs if issue fail." St. Westm. II. (13 Edw. I. c. 1). In this statute estates tail originated. The name was borrowed from the feudists, among whom it signified a mutilated or truncated inheritance, from which the heirs general were cut off. 2 Minor, Inst. p. 79.

Washburn defines the requisites of an estate tail as follows: "It is therefore requisite, in order to create such an estate, that in addition to the word 'heirs' there should be words of procreation, which indicate the body from which these heirs are to proceed or the person by whom begotten. A general limitation to a man and the heirs of his body is sufficient, it being immaterial of whom begotten." 1 Washb. Real Prop. (5th Ed.) 100. These are the requisites of an express grant or devise of an estate tail. It is plain the will of George W. Yocum does not create such an estate, within the above description.

But it is urged that an estate tail can be and is created by implication, and unquestionably this was true, both in England and in this country, prior to the abolition of estates tail; and, in determining when an estate tail was created by implication, we must look to the interpretation of the statute de donis by the English courts. At a very early period after the enactment of the statute de donis the question arose as to the meaning of the words "dying without issue." Did they mean a dying without issue living at

very time of the death of the first taker or ancestor named in the will or deed, or did they mean a general or indefinite failure of issue? If they meant dying without issue living at the death of the first taker, then an executory devise over was good, because it did not violate the rule against remoteness or perpetuities; but if they meant an indefinite failure of issue, i. e. a failure of issue whenever it shall happen, sooner or later, without any fixed, certain, definite period within which it must happen, it was held the executory devise over after such an indefinite failure of issue was void because the period when the contingency on which the remainder over depended must happen was too remote or uncertain, and might tie up the property for generations, and lead to a perpetuity or property perpetually unalienable, and therefore void. It was generally held by the English courts that the words meant an indefinite failure of issue, and by implication created an estate tail in the first taker or ancestor named. Such was, we think, the great weight of authority.

This conclusion was reached after a memorable struggle, and, though acquiesced in, many of the greatest judges reluctantly accepted it, and seized upon the slightest circumstance which indicated that the grantor or testator meant dying without issue at the death of the first taker, to defeat this interpretation. But in the noted cases of *Porter v. Bradley*, 3 Term R. 143, and *Sheers v. Jeffrey*, 7 Term R. 589, Lord Kenyon took a different view, and held the executory devise over to be good, relying upon *Pells v. Brown*, Cro. Jac. 590. In *Fosdick v. Cornell*, 1 Johns. 440, the words, "that, if any of the testator's sons should die without heirs male, the land should go to the survivor," came before the court for construction, and the question was whether these words created an estate tail or not, and the court held they did not, and the devise over was good; the court saying, the words "dying without children" must be taken to be children living at the death of the party, and not an indefinite failure. In *Jackson v. Blanshan*, 3 Johns. 292, Kent, C. J., held that the words "without lawful issue" meant issue living at his death. In *Moffat's Ex'rs v. Strong*, 10 Johns. 12, the words were, "if any of the sons should die without lawful issue, then his part to go to the survivors." Kent, C. J., after admitting there were contradictory opinions, came to the conclusion "that the intent of the testator, according to the settled construction of terms, was to provide for the surviving sons on the contingency of either of the sons dying leaving no issue at his death, and, the intention being consistent with the rule of law, the limitation over was good by way of executory devise." Such has been maintained to be the law since that date in New York. *Jackson v. Staats*, 11 Johns. 337.

This resumé of the doctrine has been made in order to gather the full significance of our

own statutes on the subject. In 1825 our legislature abolished estates tail in this state. The language of that act is somewhat different, though not materially, we think, from the act of 1845, which in terms also abolishes estates tail, and provides that thereafter, where, by any conveyance or devise, the grantee shall be seised of an estate which, under St. 13 Edw. I., would have been held an estate tail, every such conveyance should vest only a life estate in the grantee, and upon his death should go to his children. Rev. St. 1845, p. 219, § 5. But in the very next section of the same act it is provided: "Whenever a remainder in lands or tenements, goods or chattels, shall be limited by deed or otherwise, to take effect upon the death of any person without heirs or heirs of his body or without issue, the words 'heirs' or 'issue' shall be construed to mean heirs or issue living at the death of the person named as ancestor." These two sections, being in pari materia and standing in juxtaposition, must be construed together, and full effect given to both, if possible. The intention of the lawmaker, we think, is clear. Our lawmakers were cognizant of the struggle between the courts over these words, and of the English doctrine, followed by many American courts, construing these words to create a fee tail in the first taker or ancestor named, and they intended that the doubt as to their meaning should be removed by plain, unequivocal words. They determined, in a word, that no estate tail should be created by this ambiguous expression after that date. As said by this court, per Sherwood, J., in *Naylor v. Godman*, 109 Mo., loc. cit. 550, 19 S. W. 58: "This statute was evidently enacted to prevent having the words 'die without issue' construed to mean an 'indefinite failure of issue,' as by some authorities the former words were construed to mean." By so construing these two sections, we give full effect to both, and the decisions of this court, where the words "heirs of his body" and similar expressions have been held to create a fee tail, and also give full effect to the statute of wills, which permits a testator to devise a fee simple to his devisee, and, if he dies without issue living at his death, then to make a good executory devise over.

So that, in 1854, when this will took effect, the statute of this state required the words "dying without issue" to be construed as meaning, "heirs or issue living at the time of the death of the person named as ancestor." Section 6, c. 32, p. 220, Rev. St. 1845. These words, as used in this will, then meant, if William Franklin Yocum died without issue or descendants living at his death, the limitation to his nieces and sisters would have been a good executory devise had he died without children or descendants of his then living, but, as he had three sons living, the executory devise over of course failed, because the condition could not then happen

upon which the sisters and nieces were to take.

Let it be conceded that both the English and our own courts, in construing the statute *de donis* (13 Edw. 1.), prior to the act of 1845, *supra*, held that if in a devise to A. and his heirs, which would otherwise create a fee simple, it was afterwards provided that if A. dies without issue, or, on failure of issue, then a devise over to B. in fee, A. only took an estate tail by implication, and if he had issue the estate passed to them *ad infinitum*. Yet when it is considered that this conclusion was only reached by holding that these words "dying without issue" meant an indefinite failure of issue, and this postponed the vesting of the executory limitation so long that it violated the rule against perpetuities, and was therefore void, as our statute of 1845 gave a different meaning to these words, and directed they should be construed as meaning heirs of issue living at the time of the death of the ancestor named, no such implication can longer be raised from their use in this state. Such is the construction put upon St. 1 Vict. c. 26, § 29 (1837). In 1 Jarm. Wills, 521, it is said: "No implication of an estate tail can arise from words importing a failure of issue, in a will made or republished since the year 1837, unless an intention to use the phrase as denoting an indefinite failure of issue be very distinctly marked, as the statute (1 Vict. c. 26, § 29) provides that such words shall be held to mean a failure of issue in the lifetime or at the death of the person referred to, unless a contrary intention shall appear by the will," etc. Thus, we find that this artificial rule has been abolished, both in England and in this state, by removing the foundation upon which it rested, because experience demonstrated that it violated the natural meaning of language, and defeated, instead of subserving, the intent of the testator. The learned author (Jarman) further says (page *522, referring to the effect of St. 1 Vict. c. 26): "Under this clause, coupled with the preceding section, which makes a devise confer an estate in fee without words of inheritance, it will generally happen, in cases in which, according to the old law, the prior devisee would have been a tenant in tail by the effect of the words devising over the property on the failure of his issue, that he will under the new rule of construction take an estate in fee simple, subject to an executory devise in the event of dying without leaving issue at his death, and this, no doubt, was the effect contemplated and designed by the legislature." So, in Missouri, since the Revision of 1845, provides that where a remainder in lands shall be limited to take effect on the death of any person "without heirs" or "heirs of his body," or "without issue," the words "heirs" or "issue" shall be construed to mean heirs or issue living at the death of the person named as ancestor, the very groundwork upon which a fee tail was implied in such a grant or devise is swept away, and no reason

can exist for construing a will containing these words as creating a fee tail. But we are not left to construe that statute alone in determining what estate this will conferred upon the son William Franklin Yocum. The statute of wills, which we have already quoted and considered, was then in force, and must govern, and it provided he should take a fee simple, in the absence of express words showing an intent to give him only a life estate, and we must all agree that there are none such.

Nor is there lack of authority in this state and elsewhere to sustain this view. In *Den v. Snitcher*, 14 N. J. Law, 53, the words of the will were, "I give and bequeath to my son S. C. my home plantation," "and my will is that, if he shall die without issue" then the said plantation should be divided, and one half was given to trustees for the Society of Friends, and the other to his wife, his son Samuel, and two grandchildren, etc. At that time the act of 1784, Rev. Laws N. J., was in force, and was in the exact words of section 47 of our statute of wills of 1845, above cited. The chief justice, for the court, said: "It appears to me hardly possible that any intelligent mind, unembarrassed by technical rules and legal refinement, can entertain a doubt, upon the plain reading of this will, that the testator intended his son Samuel should have the whole plantation in fee simple in case he had issue, and that, at all events, he should be the absolute and unconditional owner of one-half of it. He did not intend to give the estate to Samuel's issue, but to Samuel, if he had issue." And it was so held. Section 47 of the chapter on wills of 1845 had been continued ever since. In 1879 it was section 4004, and it has received a liberal construction by this court. In *Cook v. Couch*, 100 Mo. 34, 13 S. W. 80, it was held that, where a fee was given in the first instance, it would take express words showing an intent to cut down the fee to a life estate. And in *Small v. Field*, 102 Mo. 123, 14 S. W. 815, it was again considered in a case in which the will gave the devisee certain property for the sole use of herself and children. It was held that the mother took a fee simple absolute. The contention was that she took as a tenant in common with her children, but, if this were not true, that she took only a life estate remainder to her children; but this court said (after quoting section 4004, Rev. St. 1879, the same as section 47, St. Wills 1845): "Under this statute, it is obvious that the absolute estate in fee granted Mrs. Kate Green could not be impaired, cut down, or qualified except by words as affirmatively strong as those which conveyed the estate to her." "Such has been the ruling upon similar statutes elsewhere,"—citing *Roseboom v. Roseboom*, 81 N. Y. 356; *Clarke v. Leupp*, 88 N. Y. 228. This language of our own court is in complete harmony with that of the lord chancellor in *Thornhill v. Hall*, 2 Clark & F. 22, in which he says the rule is without exception, in the construc-

of written instruments, "that, where one estate is given in one part of an instrument in clear and decisive terms, such estate cannot be taken away or cut down by raising a doubt upon the extent or meaning or application of a subsequent clause, or by inference therefrom, nor by any subsequent words that are not as clear and decisive of the clause giving that estate." And to the same effect will be found *Clarke v. Leupp*, 88 N. Y. 231, and *Lamb v. Eames*, L. R. 10 Eq. Cas. 267. In neither of these cases was there such a clear, positive devise of fee simple in the first instance as this will presents. The express words to cut it down to a life estate are wholly absent, and we can only destroy the fee simple of William F. Yocum by resorting to an implication of a fee tail, when the base-work of that implication had been destroyed before this will was written, and that, too, in the face of a positive enactment (the statute of wills) giving him a fee simple in the absence of express words cutting his estate down to a life estate. If, as was said in *Small v. Field*, 102 Mo. 123, 14 S. W. 815, "technical rules must yield to the obvious meaning of the testator," then it is plain that George W. Yocum intended to give his son William Franklin Yocum a fee simple absolute in the quarter section mentioned, subject only to be determined or defeated if he should die without legal descendants of his own. As he had legal issue living at his death, the condition upon which his estate might have been lessened never happened, and never could thereafter, and that estate was absolute, as his father intended. The judgment of the circuit court so holding was right, and is affirmed.

BURGESS, C. J., and ROBINSON, BRACE, and VALLANT, JJ., concur. SHERWOOD and MARSHALL, JJ., dissent in separate opinions.

MARSHALL, J. (dissenting). The question in this case is what estate vested in William Franklin Yocum by the fifth clause of the will of his father. If a fee simple absolute, then the defendants have title acquired by mesne conveyances from William Franklin Yocum during his lifetime. If less than a fee simple absolute, then the plaintiffs have title as the "legal issue, descendants," "legitimate issue" of William Franklin Yocum, who were living at the date of the death of their said father.

The said fifth clause of the will of the testator is as follows: "To my beloved son William Franklin Yocum (my natural son) I bequeath absolutely the northwest quarter of section seven of township 53, range 35, the place I now reside on in Platte county, Missouri, subject forever to the reservation for my burial place made in clause two of this will; and, further, with this express understanding and restriction, namely, that if my said son dies without legal issue, descendants of his, legitimate issue of his, said lands shall

pass to" certain nieces, nephews, and sisters of the testator. It is conceded by all that the statute then and now in force requires "all courts and others concerned in the execution of last wills to have due regard to the directions of the will, and the true intent and meaning of the testator, in all matters brought before them." Rev. St. 1845, p. 1086, § 51; Rev. St. 1890, § 8916. It is further conceded by all that the terms "legal issue," "descendants of his," "legitimate issue of his," mean his heirs living at the date of the death of the first taker, William Franklin Yocum, and that there were such issue living at that time. It is also conceded by all that estates tail are abolished in Missouri, and estates such as would have been estates tail in England are simply estates for life in the first taker, with fee-simple estates in the remainder-men, under the statutes of descent in Missouri. It is also conceded that, under the rule in *Shelley's Case*, where an estate was devised or granted to A. and his heirs, or to the heirs of his body, the heirs took by virtue of the limitation over in the will or deed, but that in such case now, in Missouri, since the abolition of the rule in *Shelley's Case*, the heirs in such a case take as purchasers, and not by limitation. But as the question now before the court is not whether the heirs take by limitation or purchase, but whether it was the intention of the testator that they should have any estate in the land whatever that their father could not cut out by deed or will, this distinction between the character of the estate the heirs took, if any, is not essentially involved in this case. The first inquiry is, what estate did their father acquire under this will? If absolute, the heirs are cut out by his deed; if less than absolute, the father could not cut them out by any act of his.

The intention of the testator must govern. No precise technical words are necessary in a will to express intention. Neither must the ascertainment of the intention be made to depend upon the prior or subsequent collocation of the clause of the will to be construed. "It is to be construed according to the intention, as gathered from the whole instrument." 2 Minor, Inst. p. 223. Stripped of technical phraseology, and with the reservation clause as to the burial place laid out of consideration, this clause would read: "To my beloved son William Franklin Yocum (my natural son) I bequeath absolutely" the land, "with this express understanding and reservation, namely, that if my said son dies without legal issue, descendants of his, legitimate issue of his, said lands shall pass to" my nephews and nieces and sisters, share and share alike. Read in this way, the first fact that is disclosed is that William Franklin Yocum was his natural son, but not his son begotten in lawful wedlock. As a natural son, he could not inherit from the testator. So a will was necessary to give him the land. The next fact disclosed is that he was a beloved son, for whom the testator wanted

to provide. How provide? To give him the land absolutely, so he could dispose of it absolutely, or do with it as he pleased? Manifestly not; for, if such had been the testator's intention, he would have stopped when he said "I bequeath absolutely." This would have accomplished all the testator wanted, if such was his intention. But he did not stop with the words, "I bequeath absolutely." On the contrary he added, "with this express understanding and restriction, namely, that if my said son dies without legal issue, descendants of his, legitimate issue of his, said land shall pass to" my nieces, nephews, and sisters. Here is an "express qualification and restriction" of the devise, limiting, modifying, and qualifying the words "bequeath absolutely," and, at any rate, making the "absolute" estate less than absolute; putting it beyond the power of the devisee to do with the estate as he saw fit. This made it possible, then, by express, plain words, as strong as the words of devise to him, for the absolute fee-simple estate to be cut down to a lesser estate. What estate did the testator thereby intend to give to his natural son? Not a fee-simple absolute, it is too plain for dispute; for, if the son died without legal issue, the estate would pass under the will from the testator to his nieces, nephews, and sisters. They would take, therefore, a contingent remainder; that is, it would be contingent so long as the son lived, for he might have legitimate issue born to him at any time during his life, and if born within 10 months and 21 days after his death. Until the expiration of such time, therefore, the estate limited to the nieces would be contingent. Upon the happening of such contingency, the estate limited to the nieces, etc., would cease. But, upon the failure of such contingency, the nieces, etc., would take a vested fee simple. In the meantime, what estate would the son have? A fee simple absolute? Clearly not, for a contingent remainder in fee cannot be limited upon a prior fee in possession. Yet, as shown, it might not be known until 10 months and 21 days after the son's death whether the contingent remainder would ripen into a fee-simple absolute in the nieces, etc., or be cut out entirely. A contingent remainder must have a precedent particular estate to rest upon. Such precedent particular estate must be an estate less than a fee. So it might have been that during all the lifetime of the son, and until after the expiration of 10 months and 21 days after his death, it could not be known whether the contingent remainder would take effect. During that time the son would have clearly had a life estate only. Therefore, until after his death, the fact could never be made certain that the son had or would have anything but a life estate. I do not understand that any one disputes this proposition.

Can it be, then, that, in the event the son died without legal issue, his estate was only a life estate, but that, if he died leaving is-

sue, life estate would be enlarged into a fee? If so, it must be that the estate devised to the son is a conditional fee; that is, an estate of a freehold nature, which will enlarge to a fee upon the happening of a condition precedent or subsequent, or, upon the failure of such condition, will remain an estate of a freehold nature during the life of the first taker, but will be less than a fee. 2 Bl. (Chitty's) marg. p. 154, says: "An estate on condition expressed in the grant itself is where an estate is granted, either in fee-simple or otherwise, with an express qualification annexed whereby the estate granted shall either commence, be enlarged, or be defeated upon the performance or breach of such qualification or condition. These conditions are therefore either precedent or subsequent." Then, after citing various examples, the author continues (marginal page 156): "In all these instances of limitations or conditions subsequent it is to be observed that so long as the condition, either express or implied, either in deed or in law, remains unbroken, the grantee may have an estate of freehold, provided the estate upon which such condition is annexed be in itself of a freehold nature, as if the original grant express either an estate of inheritance or for life, or no estate at all, which is constructively an estate for life; for, the breach of these conditions being contingent and uncertain, this uncertainty preserves the freehold, because the estate is capable to last forever, or, at least, for the life of the tenant, supposing the condition to remain unbroken." In note 3 to chapter 10, p. 122, the author says: "A particular estate may be limited, with a condition that, after the happening of a certain event, the person to whom the first estate is limited shall have a larger estate. Such a condition may be good and effectual, as well in relation to things which lie in grant as to things which lie in livery, and may be annexed as well to an estate tail, which cannot be drowned, as to an estate for life or years, which may be merged by the access of a greater estate. But such increase of an estate, by force of such a condition, ought to have four incidents: (1) There must be a particular estate as a foundation for the increase to take effect upon, which particular estate, Lord Coke held, must not be an estate at will, nor revocable nor contingent. (2) Such particular estate ought to continue in the lessee or grantee until the increase happens, or at least no alteration in privity of estate must be made by alienation of the lessee or grantee, though the alienation of the lessor or grantor will not affect the condition, and the alteration of persons by descent of the reversion to the heirs of the grantor, or his alienee, or of the particular estate to the representatives of the grantee, will not avoid the condition. Neither need such increase take place immediately upon the particular estate, but may inure as a remainder to the

donee of the particular estate, or his representatives, subsequent to an intermediate remainder to somebody else. (3) The increase must vest and take effect immediately upon the performance of the condition; for, if an estate cannot be enlarged at the very instant appointed for its enlargement, the enlargement shall never take place. (4) The particular estate and the increase ought to derive their effect from one and the same instrument, or from several deeds delivered at one and the same time. Lord Stafford's Case, 8 Coke, 149-153."

Test this devise to the son by this rule. Can it be fairly said that the testator intended to give this son an estate in the nature of a freehold, but less than a fee if he had no children, but that, if he had children, then such lesser estate was to be enlarged into a fee? If so, why, then, did he start out by saying, "I bequeath absolutely"? If this had been his intention, would he not have bequeathed the land to him for life, or without specifying any term, which would have been an estate for life by implication, under the circumstances, to be enlarged to a fee upon condition that he had children born during his life. This would have made it possible for the condition subsequent to become effective, certain, and useful to the son during his life, and would not have left it uncertain, until after he had been dead 10 months and 21 days, whether he was to have children, or whether they would be living at the date of his death. Or, limiting it to children, legitimate children or not, living at the death of the son, it would not have left it uncertain, all the whole life of the son, whether he had still only the original lesser estate or an estate enlarged into a fee. There are no apt words employed in the will creating such a conditional fee. Nor are the words used fairly susceptible of such a construction. These considerations plainly show that the testator did not intend to create a conditional fee in his son; did not attempt to vest in him a lesser estate, to be enlarged into a fee upon the happening of a condition subsequent.

What, then, was the true and real intention of the testator? The dominant idea expressed, and running through every word and phrase of the will, is to keep the land in the testator's family as long as the law gave him the right to do so. This is clear—First, from the absolute bequest to the son; second, fearing it might get out of his family if the son had no legitimate issue capable of inheriting, he created the contingent remainder to his nieces, nephews, and sisters. And he could go no further with his limitations. The testator evidently intended that the son should enjoy the property during his life, and, if he had children living at his death, they should have the fee, but, if he had no such children, the fee should go to his nearest of kin, his nieces, nephews, and sisters. He did not think it was necessary,

or did not know how, to express his intention in this plain and unequivocal way. If he had, he would have done so. But, as this was his intention, it is the duty of the courts to enforce it, even if he was not as apt in expressing that intention as he might have been.

So construed, effect is given to every word, phrase, and part of the will. Nothing is cut down. Nothing is enlarged. Nothing destroyed. No stumbling blocks of construction are encountered. Every beneficiary gets all the testator intended, and at the time and in the manner intended by him. Any other construction necessarily defeats a part of the will, and, *pro tanto*, fails to carry out the intention of the testator. Between the two constructions there should be no halting or hesitancy. One is plain and common sense; the other technical, refined, and destructive of the wishes of the testator.

For these reasons, I think William Franklin Yocum took a life estate under his father's will. The children, legal issue, descendants of his, legitimate issue of his, took the fee under the will from the testator at the death of the life tenant, and the contingent remainder to the nieces, nephews, and sisters of the testator failed because the contingency upon which they were to have the fee never occurred. The deed from William Franklin Yocum to the defendants' grantors therefore conveyed only a life estate, which terminated with the life of the grantor. Thereupon, for the first time, the children (the plaintiffs) became entitled to the fee. In my opinion, the judgment of the circuit court was for the wrong party, and should be reversed.

Ex parte LUCAS.

(Supreme Court of Missouri. Feb. 19, 1901.)
HABEAS CORPUS—CONSTITUTIONAL LAW—
SPECIAL LEGISLATION—BARBERS—
REGULATION—LICENSE.

1. Rev. St. 1899, § 5037, providing that the members of the board of examiners for barbers shall each receive a compensation of \$3 per day for his services and necessary traveling expenses, which shall be paid out of any money in the hands of the treasurer of the board, is not in conflict with Const. art. 4, § 43, providing that the general assembly shall have no power to divert any revenue received by the state, or to permit money to be drawn from the treasury, except in pursuance of regular appropriations made by law, since the money authorized to be collected under the act is not state revenue.

2. Rev. St. 1899, § 5035, creates a board of examiners for barbers, and provides that the governor shall appoint one member each from those recommended by the State Barbers' Protective Association, the Boss Barbers' Protective Association, and the Journeyman Barbers' Union. *Held*, that a person arrested on complaint of such board for pursuing the occupation of a barber without license cannot object that such method of appointing the board is unconstitutional because it limits the governor's privilege of appointment to persons recommended by the unions specified, since the governor alone can make that objection.

3. Such restriction of the governor's power of selection is authorized by Const. art. 14, § 9, providing that the appointment of all officers not otherwise directed by the constitution shall be made in such manner as may be prescribed by law, since the constitution does not prescribe how such board shall be appointed.

4. Acts 1899, p. 44, approved May 5, 1899 (Rev. St. 1899, c. 78), creates a board of examiners for barbers, and makes it unlawful for any barber in a city of 50,000 inhabitants to pursue the occupation of a barber unless he procures a license from such board "within 90 days after the approval of the act." Const. art. 4, § 36, provides that, except in the case of a declared emergency and appropriations, no law shall take effect until 90 days after the adjournment of the session at which it was enacted. The general assembly adjourned May 22d. *Held*, that the term "within 90 days after the approval of the act" must be considered a technical term, having a peculiar and appropriate meaning in law, and understood under the constitution to mean 90 days after the act can and does constitutionally take effect; hence the act is not objectionable as limiting the time for acquiring a license to a period which expired before the act took effect so that a board could be appointed under it.

5. Acts 1899, p. 44 (Rev. St. 1899, c. 78), regulating the occupation of barbers, in section 1, provides that the provisions of the law shall not apply to barbers in any city, town, or village containing less than 50,000 inhabitants. *Held*, that the act is not unconstitutional, as special legislation, since there are already several cities to which it applies, and it is a continuing act, which will apply to all other cities attaining the specified population, and the necessity for regulating the occupation of a barber is greater in a large than in a small city.

6. Where a person is arrested for violating the provisions of Rev. St. 1899, c. 78, which declares it unlawful to follow the occupation of a barber without first obtaining a certificate of registration, he may contest the constitutionality of the law by habeas corpus.

Valliant, Brace, and Robinson, JJ., dissent.

In banc. Application by Daniel Lucas for a writ of habeas corpus directed to Samuel Chiles, marshal of Jackson county. Dismissed.

Hamner & Hamner, for petitioner. Dodge & Mulvihill, for respondent.

MARSHALL, J. This is a proceeding by habeas corpus to test the legality of the imprisonment of the petitioner by Samuel Chiles, marshal of Jackson county, under an information filed in the criminal court of Jackson county by the prosecuting attorney of that county charging him with practicing the occupation of barber without having procured a certificate of authority so to do from the state board of examiners for barbers, contrary to the provisions of chapter 78, Rev. St. 1899, being "An act to establish a board of examiners and to regulate the occupation of a barber, in this state, and to prevent the spreading of contagious disease," approved May 5, 1899 (Acts 1899, p. 44). The petitioner has not yet been tried on that information, but pending the trial he applied to one of the judges of this court, and obtained the writ of habeas corpus. The petitioner asserts that the act of 1899 is unconstitutional and void, and therefore there

is no law or authority warranting his arrest, detention, or prosecution, and hence he is entitled to have his liberty restored to him by this great writ of right, which the constitution of this state (section 26, art. 2) declares shall never be suspended. The act of 1899 is claimed to be in conflict with section 53, art. 4, section 1, art. 6, section 3, art. 10, section 4, art. 2, section 30, art. 2, section 43, art. 4, section 7, art. 9, section 28, art. 4, and the whole of article 3 of the constitution of Missouri, and with the fourteenth amendment to the constitution of the United States, and with section 2, art. 4, of the federal constitution. If the act offends against so many provisions of the organic law of the United States and of the state of Missouri, the petitioner is suffering a grievous wrong by being arrested, cast into prison, and compelled to stand trial and employ counsel to defend him, simply because he has offended against its provisions, when the act itself is a greater offender against the law than he is against the act. The particular points relied on by petitioner as affecting the unconstitutionality of the act are: (1) That it is a special law, because it applies only to such cities as now have a population of 50,000, and does not apply to such cities as may hereafter attain such a population. (2) That it requires all barbers who were practicing their trade on the date of the passage of the act (May 5, 1899) to apply to the board of examiners for a certificate within 90 days thereafter, which time would expire August 5th, and as the law did not take effect until August 22d, 90 days after the general assembly adjourned on May 22d, the governor could not appoint a board of examiners until that time, and therefore there could be nobody to issue a certificate. Or, otherwise stated, the act requires barbers who were practicing their trade on May 5th to obtain a certificate by August 5th, when there could be no board authorized to issue such a certificate until August 22d, or until 17 days after the expiration of the time limited by the act for such barbers to obtain a certificate. The result is claimed to be that barbers who were practicing their trade on May 5, 1899, were effectually barred from ever afterwards practicing their trade in any city having over 50,000 inhabitants, and would be compelled to move to cities having less than 50,000 inhabitants in order to practice their trade. (3) That the act requires the governor to appoint a board of three examiners, one to be recommended by the Missouri State Barbers' Protective Association, one by the Boss Barbers' Protective Association, and one by the Journeymen Barbers' Union,—all, however, subject to approval as to qualifications by the state board of health, and this method of appointing is claimed to interfere with the division of powers between the legislative and executive branches of the government; and, further, because it requires a recommendation fr

such unions as a condition precedent to the right of the governor to appoint, it is asserted that it might in effect repeal the law, because such unions might refuse to recommend any one, and because in this way legislative functions are delegated to these unions. (4) That the act provides that the board of examiners shall receive a compensation of three dollars a day and railroad and traveling expenses, to be paid out of any money in the hands of the treasurer of the board; and this is asserted to be in conflict with section 43, art. 4, of the constitution, which provides that all money received by the state from any source whatever shall go into the treasury of the state, and shall not be drawn out except pursuant to a regular appropriation made by law. These propositions will be considered in the inverse order of their statement, so disposing of the least meritorious first.

The fourth contention is not well founded, for the simple reason that section 43, art. 4, applies only to money provided for and received by the state. The money authorized to be collected under this act is not state revenue, but is simply a provision to make the board of examiners self-supporting.

The third contention is one which is not available to the petitioner. If the act is unconstitutional because it limits the governor's privilege of appointment to persons recommended by the unions specified, the governor alone could object. If he does not do so, no one else can complain. That no such trouble has arisen under this act is shown by the fact that it appears that in fact the governor has appointed a board of examiners,—whether they were recommended by such unions, or whether the governor treated that provision of the act as unconstitutional, and appointed such persons as he chose, does not appear,—and that this prosecution is at the instance of that board. No rights of this petitioner have been invaded by the method of appointment provided by this act. But it may be observed, en passant, that section 9 of article 14 of the constitution provides, "The appointment of all officers not otherwise directed by the constitution shall be made in such manner as may be prescribed by law," and that the constitution does not prescribe how the board of examiners for barbers shall be appointed. The conclusion follows that it was competent for the general assembly to provide the manner, form, and conditions precedent for their appointment, and in so doing no constitutional prerogatives of the governor were infringed or impaired. But no such refusal could interfere with the operation of the law, for the parties could be mandamus and compelled to act. *City of St. Louis v. Wettzel*, 130 Mo. 620, 31 S. W. 1045. The fact that the unions might refuse to recommend any persons for appointment would have an effect upon the practical working of the law, but not upon the law itself. The law would

not be repealed by such refusal. The same result would follow if the power to appoint had been conferred upon the governor, and for any reason he saw fit not to make the appointment. His refusal would not have the effect to repeal the law. Nor does such a contingency render the act obnoxious to the objection that it is a delegation of legislative power. The act, whatever its force and practical efficacy may be, is the product of legislative will. Whether the instrumentalities provided for its enforcement are adequate or not does not take away from its force as a legislative enactment.

The second contention, that the time limited for barbers practicing their trade at the time of the passage of the act to qualify expired 17 days before the act took effect, or before the board of examiners could qualify them, and therefore the act is a prohibition leveled against all barbers who were so practicing their trade from ever afterwards following their occupation, except in cities of less than 50,000 inhabitants, is the necessary deduction from following the rule of construction expressed in the maxim, "*Qui hæret in litera, hæret in cortice.*" Section 36, article 4, of our constitution provides, "No law passed by the general assembly, except the general appropriation act, shall take effect or go into force until ninety days after the adjournment of the session at which it was enacted, unless in case of an emergency (which emergency must be expressed in the preamble or body of the act), and the general assembly shall by a vote of two-thirds of all members elected to each house otherwise direct," etc. Section 6595, Rev. St. 1899, is to the same purport. Under this constitutional provision the general assembly cannot make a law take effect from its passage except by declaring an emergency. No emergency was declared in this act. Therefore the act took effect 90 days after the adjournment of that session of the general assembly, to wit, 90 days after May 22, 1899, and the barbers had 90 days after the act took effect to qualify. The statement in the act that they should qualify 90 days after the "approval of this act," as it appears in the Session Acts, or after the "approval of this chapter," as it appears in section 5040, c. 78, Rev. St. 1899, must therefore be considered technical terms, having a peculiar and appropriate meaning in law, and must be construed according to their technical import, as is required by section 4160, Rev. St. 1899, in construing laws. That is, those words must be understood, under the constitution, to mean 90 days after the act can and does constitutionally take effect, in the absence of a declared emergency. The conclusion is illuminated by reference to section 4155, Rev. St. 1899, which declares that the words "heretofore" and "hereafter," in a statute, shall be construed to have reference to the time when the statute took effect. The words "prior to the passage," in a legislative act, were construed

in *Charless v. Lamberson*, 1 Iowa, loc. cit. 443, to mean the same thing as "heretofore"; and under the statute of that state, exactly like section 4155 of our statute, the words "prior to the passage" and "heretofore" being synonymous, they were held to relate to the time of the taking effect of the statute, and not to the time of its actual passage, for, as was said in that case, "to say that section 1249 took effect from its passage would be to violate an express provision of the organic law, as well as the Code itself." The converse is true where the constitution contains no such provision postponing the taking effect of the act. There "from its passage" means from and including the whole day it actually passed,—not even deferred until the day of its approval by the president, if it is a federal statute, or by the governor, if it is a state statute. *U. S. v. Williams*, 1 *Palne*, 261, *Fed. Cas. No. 16,723*; *Eliot v. Cranston*, 10 *R. I.* 88; *Johnson v. Fay*, 18 *Gray*, 144. As the act of 1899, under consideration, did not take effect until August 22d, and as the relator and all others similarly situated had 90 days after that time to qualify, the direful consequences so graphically pictured by counsel are dissipated, and the law is stripped of this objection to its validity.

This leaves for decision the first objection, to wit, that the act is a special law, and that it can only apply to cities having 50,000 inhabitants at the time it took effect, and not to such as might thereafter attain that population. What is and what is not a special law has passed into final adjudication by the many decisions in this state holding that "a statute which relates to persons or things as a class is a general law, while a statute which relates to particular persons or things of a class is special." *Lynch v. Murphy*, 119 *Mo.* 163, 24 *S. W.* 774; *Owen v. Baer*, 154 *Mo.*, loc. cit. 434, 55 *S. W.* 644, and cases cited. The act in question is general and prohibitive. It provides, "It shall be unlawful for any person to follow the occupation of a barber in this state, unless he shall have first obtained a certificate of registration, as provided by this act," etc. So far it applies to every one in the state. It is exactly like the act of 1897 relating to dentists (chapter 128, art. 3, § 8525, *Rev. St.* 1899); like the doctors (chapter 128, art. 1, §§ 8507, 8517, *Rev. St.* 1899); like the osteopaths (chapter 128, art. 4, § 8537 et seq., *Rev. St.* 1899); like the embalmers (chapter 103, §§ 7375, 7378, *Rev. St.* 1899); and even lawyers are subject to quite as much regulation and examination (chapter 73, *Rev. St.* 1899). The act, clearly, so far, is general, and not special. The next provision of the act is a proviso, which is as follows: "Provided, however, that nothing in this act contained shall apply to or affect any person who is now actually engaged in such occupation, except as hereinafter provided." The only provision is that he shall file with the secretary of the board of exam-

iners an affidavit setting forth his name, residence, and the length of time during which, and the place where, he has practiced such occupation, and pay the treasurer one dollar, and thereupon he shall receive a certificate entitling him to practice such occupation for the fiscal year ending January 1, 1900; and this certificate he is entitled to have renewed every year by making application within 30 days after its expiration and by paying one dollar. There is nothing special in the character of this provision. Section 1 of the act, however, closes with this additional proviso: "Provided, that the provisions of this law shall not apply to barbers in any city, town or village containing less than 50,000 inhabitants." And it is asserted that, because it does not cover cities that may hereafter attain a population of 50,000 inhabitants, it is obnoxious to the charge of being a special law, as defined in *State v. Herrmann*, 75 *Mo.* 840, and *State v. County Court of Jackson Co.*, 89 *Mo.* 237, 1 *S. W.* 307. In *Herrmann's Case* the act was held to be special because it applied only to cities of 100,000 inhabitants, and St. Louis was the only city that at that time filled this description, and only to such notaries as held commissions bearing date prior to the passage of the act. In the *Jackson County Case* the act was held special because it attempted to establish reform schools for juvenile offenders "in all counties in this state in which there is located a city of over fifty thousand inhabitants," and Kansas City was then the only city in the state that filled this designation, and therefore, as the act was intended to act only presently, and not prospectively, it could never apply to any county except Jackson. But neither of the acts construed in those cases is like the act involved in this case. Here the act, on its face, by its terms and under the machinery it provides, treats not only of the present, but deals with the future. It creates a permanent board of examiners. It permits barbers who are practicing their vocations at the date of the act to continue to do so, simply requiring them to apply for a certificate each year thereafter. It deals with barbers who were not then practicing that vocation, but who might want to do so at any time thereafter, by requiring them to be examined by the board as to their qualifications,—among them, that such appellants must be "possessed of sufficient knowledge concerning the common diseases of the face and skin to avoid the aggravation and spreading thereof in the practice of said trade." In short, its purpose, expressed not only in the title of the act, but all through its body, is to regulate the business and to prevent the spread of contagious diseases; and these purposes are clearly within the police power of the state, and tend to promote the health of the people. In short, the act is bottomed upon the same legal principles as the acts in reference to physicians, embalmers, osteopaths, and d

tists, and is evidently modeled after, and follows closely the lines of, the act of 1897 relating to dentists. If this act is not a valid police regulation, then all those other acts also fall. A similar act regulating the practice of dentistry was held valid in Indiana (*Wilkins v. State*, 113 Ind. 514, 16 N. E. 192); in Minnesota (*State v. Vandersluis*, 42 Minn. 129, 43 N. W. 789, 6 L. R. A. 119); in Arkansas (*Gosnell v. State*, 52 Ark. 228, 12 S. W. 392).

The case of *State v. Zeno*, 81 N. W. 748, 48 L. R. A. 88, decided by the supreme court of Minnesota on the 5th of February, 1900, construed a statute of that state regulating barbers that is so nearly like the act of 1899 as to create the impression that our statute was modeled after the Minnesota law, or else that both emanated from the same mind; for in all their essential features, except the exception in favor of cities having less than 50,000 inhabitants, the two acts are the same. What is said in that case applies so well to this that I adopt the following portion of the opinion: "The question in this case is, is it competent for the legislature to prohibit persons from practicing the calling of a barber without first obtaining a license or certificate of registration? Laws enacted for the purpose of regulating or throwing restrictions around a trade, calling, or occupation, in the interests of the public health and morals, are everywhere upheld and sustained. Such laws are within the police power of the state, and are universally sustained where enacted in the interests of the public welfare. The question presented in cases where the validity of such laws is called in question is no longer the power or authority of the legislature to enact them, but whether the occupation, calling, or business sought to be regulated is one involving the public health and interests. A person engaged in such an occupation is not alone interested therein. The public served by him is also interested. He is interested to the extent that it provides and furnishes him with employment and a means of livelihood. The public is interested in his competency and qualifications, and it is eminently proper that there be thrown around the calling protection from intrusion by incompetents and others inimical to the public good. It is unnecessary to discuss the grounds upon which such laws are upheld, or the objections urged against them. Counsel for defendant ably present their side of the question, but the authorities are all against them. We cite, as pertinent to the question, *State v. State Medical Examining Board*, 32 Minn. 327, 20 N. W. 238; *State v. State Board of Medical Examiners*, 34 Minn. 387, 28 N. W. 123; *Barbier v. Connolly*, 113 U. S. 27, 5 Sup. Ct. 357, 28 L. Ed. 923; *People v. Warden of City Prison*, 144 N. Y. 529, 39 N. E. 686, 27 L. R. A. 718; *Singer v. State*, 72 Md. 464, 19 Atl. 1044, 8 L. R. A. 551; *Dent v. West Virginia*, 129 U. S. 121, 9 Sup. Ct. 231, 32 L. Ed. 623. Is the occupa-

tion of a barber a calling or trade involving to any degree the public health and public good? If it is, the law must be sustained. We hold that it is, and that the health of the citizen, and protection from diseases spread from barber shops conducted by unclean and incompetent barbers, fully justify the law. It is a fact of which we must take notice that the people of today come in contact with, and engage the services of, those following the occupations of barber, as much as, if not more than, any other occupation or profession. We must take notice of the fact, too, that the interests of the public health require and demand that persons following that occupation be reasonably familiar with, and favorably inclined towards, ordinary rules of cleanliness; that diseases of the face and skin are spread from barber shops, caused, no doubt, by uncleanness or the incompetency of barbers. We must take notice of the fact that to attain proficiency and competency as a barber requires training, study, and experience,—training in the art, and study and experience in the management and conduct of the calling. A design and purpose to protect the public from injurious results likely to follow from such conditions is the foundation of statutes like this. And, as we must take judicial notice of the foregoing facts, the foundation for this law is apparent. And it may be said, further, that there is as much reason for a law of this kind as to barbers as there is for such a law as to dentists, pharmacists, lawyers, and plumbers. It is enacted in the interests of the public health and welfare, and we sustain it."

This would be decisive of this case, were it not for the last provision of section 1 of the act, which limits the operation of the law to cities of this state containing a population of more than 50,000 inhabitants, and the effect of that provision upon the law is the only remaining question in the case. This act is unlike the acts construed in the *Herrmann Case* and the *Jackson County Case*, in this: that in those cases the acts could never apply to any city except St. Louis (or to any notary unless his commission was dated prior to the act) or to Jackson county, respectively, while this act would apply to St. Louis, Kansas City, and St. Joseph, at any rate, even if it be construed that the words "containing 50,000 inhabitants" mean having that population at the date of the passage of the act; and hence the act is not local, or, if these words be construed to mean containing such a population at the time an offense is charged to have been committed, the act is clearly not local or special. The act does not expressly limit its operation to cities that "now" contain, or that contained at the date of the passage of the act, such a population. The language is "that the provisions of this law shall not apply to barbers in any city, town or village containing less than 50,000 inhabitants." The whole law must be construed together. *State v. Marion Co. Ct.*, 128 Mo.

427, 30 S. W. 103, 81 S. W. 23; *State v. Slover*, 126 Mo. 652. The intention of the legislature must be ascertained and enforced if legal. *State v. Sibley*, 131 Mo. 519, 33 S. W. 167. The act must be construed as having a prospective operation unless the contrary intent is plainly manifest. *State v. Wofford*, 121 Mo. 69, 25 S. W. 851. So interpreted, it is plain that it was the intention of the lawmakers, when using the word "containing," to cover not only the present conditions, but the future conditions also,—not only those cities that now have that population, but also such as may have such a population at any time hereafter. The whole scheme of the act is to protect the health of the people in large cities. The legislature must be presumed to have known that there is more disease where large numbers of people are congregated, and more probability of the spread of disease in large and closely settled cities, than there is in the country or in a small town. History shows that there is greater need of stringent police regulations of all kinds in large than in small cities. It is not unreasonable to believe that the wisdom and experience of the lawmakers may have taught them the greater necessity for regulations to prevent the spread of contagious diseases through barber shops in large cities than exists for such regulations in smaller places. The line must be drawn somewhere. Here it was drawn at cities containing 50,000 people. The same reason which would apply such regulations to cities that now contain 50,000 people would make it necessary to apply them to a city that one, five, or ten years hereafter attains that population. The act, by its terms, is continuing, and intended to be a permanent regulation. It applies now to the three large cities of the state, and hence is not within the rules of condemnation laid down in the cases relied on. In a few years, if reasonable expectations are fulfilled, it will apply to Springfield, Hannibal, Sedalia, Joplin, Carthage, and Jefferson City. The act is susceptible of such a construction, and it is our duty to place that construction upon it if by so doing we do not violate the commands of the organic law or settled rules of construction. That it is so susceptible is not only shown by what is here pointed out, but is also clearly apparent from what is so conclusively said in *City of St. Louis v. Dorr*, 145 Mo., loc. cit. 493, 41 S. W. 1094, et seq., showing that even the adverb "now," as applied to the number of inhabitants of a city to which an act is made applicable, does not necessarily mean at the present time. In this act there is no adverb of time used qualifying the verb "containing." An act that relates to all cities containing 50,000 inhabitants is a proper classification of natural or artificial persons or subjects, and different regulations for people congregated in such large bodies from those governing people of smaller aggregation are not illegal or unconstitutional under the federal or state consti-

tution. *Missouri v. Lewis*, 101 U. S. 22, 25 L. Ed. 989 (*Bowman's Case*). The conclusion is irresistible that the act in question is a general law, which will continue in force until repealed, and apply to all cities that now or hereafter contain 50,000 inhabitants, and therefore it is not a special or local law. In my judgment, the right of the petitioner to raise the question by habeas corpus is settled by the cases of *Ex parte Smith*, 135 Mo. 223, 36 S. W. 623, 33 L. R. A. 606, and *Ex parte Neet* (not yet officially reported) 57 S. W. 1025. It follows that the defendant is detained for trial for an offense against a valid law, and therefore he is not entitled to be discharged from custody under this writ, but must be remanded to the custody of the marshal of Jackson county.

BURGESS, C. J., and SHERWOOD, J., concur. GANTT, J., concurs in all except the approval of dissenting opinion in *Dorr Case*. ROBINSON, BRACE, and VALLIANT, JJ., concur in remanding prisoner, for reasons given in separate opinion of VALLIANT, J.

SHERWOOD, J. (concurring). In an opinion which has been read in this cause, the "act to establish a board of examiners," etc., approved May 5, 1899, has been held constitutional; but there has arisen a difference of opinion among us as to whether habeas corpus is the proper remedy for petitioner, who preparatory to his trial has been imprisoned on a capias issued upon an information charging violation of the act above cited. On this point another opinion in this cause has been read before us, in which it has been asserted that, in the circumstances stated, petitioner has no redress by the writ which he has invoked. A summary of the doctrine thus announced is best conveyed in excerpts from the language employed by the learned writer of the opinion. He says: "But where a man is taken into custody under a warrant from a court competent to try him for the offense charged, and competent to decide whether or not the act charged is an offense against the law, and the court is proceeding in due course with the case, or where it has proceeded to judgment, and has adjudged the accused guilty and pronounced the sentence of the law upon him, it cannot be said, in the language of *Magna Charta*, that he is deprived of his liberty without having been adjudged to have forfeited it 'by the judgment of his peers or the law of the land,' and therefore the writ of habeas corpus has no place in his case. If the prisoner is held in custody under process, awaiting trial, or under commitment, awaiting the action of the grand jury, and bail has been refused him, the habeas corpus act expressly provides that he may be brought before a court or judge under this writ and admitted to bail to await his trial or the action of the grand jury, if it is a bailable case. Section 3568-3570, Rev. St. 1899. But, except for t

purpose of admitting to bail, the writ of habeas corpus was not designed, and should not be issued, to interfere with the due procedure in a court of competent jurisdiction. This is the doctrine announced by this court in its earlier decisions, and is the only doctrine consistent with the original purpose of the writ, and with the spirit of the habeas corpus act in our statutes, and under our state judiciary system, although reason exists for a different view under the federal judiciary system. * * * Under the judiciary system of this state any one tried and condemned as for a crime may have the proceedings in his trial reviewed on appeal or writ of error, in which he may have relief not only against the errors and irregularities, if any, of the trial court, but, if he raises the constitutionality of the statute under which he was convicted, he may have the judgment of the highest court in the state on that question. And, if the point he desires reviewed goes to the jurisdiction of the trial court, the record may be brought here on certiorari and quashed. If, therefore, under our system, any one is left to pine in prison because of error or irregularity in his trial, or invalidity of the law under which he was convicted, or lack of jurisdiction in the court that condemned him, it is only because he has omitted to avail himself of one of the several remedies the law affords him. There is absolutely no occasion in such case to invoke the remedy by habeas corpus, and it would be a misuse of that writ to so extend it." These utterances, being synopsisized, announce: First. That a person arrested and imprisoned on a capias issued by a court competent to try him for the offense with which he is charged cannot, prior to his trial, have inquiry made into the legality of his imprisonment; nor can he be released from such imprisonment through the writ of habeas corpus. Second. That after he has undergone his trial in the tribunal possessed of jurisdiction, in criminal causes, and been convicted of and sentenced for the offense with which he is charged, he still cannot have the legality of the proceedings, nor the resultant judgment, inquired into by that writ. In other words, in the circumstances already set forth, he cannot be released on habeas corpus, neither before nor after final judgment. Third. But it is graciously added, however, that if the prisoner be refused bail in "a bailable case," "where he is held in custody under process, awaiting trial, or under commitment, awaiting the action of the grand jury," "he may be brought before a court or judge under this writ, and admitted to bail to await his trial," etc. Fourth. But habeas corpus does not lie except for the purpose of admitting to bail, and "was not designed * * * to interfere with the due procedure in a court of competent jurisdiction." Fifth. One tried and convicted as for a crime, under the judiciary system of this state, is entitled to have an appeal or writ

of error to review the proceedings which resulted in such conviction; and in such appeal, or on such error brought, he may have the constitutionality of the statute under which he was convicted passed upon by the judgment of the highest court in the state. And, if the point he desires reviewed goes to the jurisdiction of the trial court, certiorari is the only appropriate remedy, and by it the record may be brought up and quashed. If, with all these available remedies before him, the condemned man prefers "to pine in prison," he himself is alone to blame. Habeas corpus has no function to perform in his case, and to extend it so far would be a misuse of the writ. From these premises I propose to draw my own deductions, and those deductions will, I apprehend, be based upon abundant authorities and what I consider sound reasoning; but it would be superfluous to say that such authorities and such reasoning will widely differ from the aforesaid epitome of the doctrine I shall now endeavor to combat.

Lord Coke, in his day, called habeas corpus "festinum remedium." Were he present to-day before us, he would quickly conclude that the writ had nothing left in it, either speedy or remedial,—only a bare authority to take bail. Prof. Minor, on the subject now under discussion, says: "The writ of habeas corpus is the most celebrated writ in the law. Several kinds are made use of by the courts, either for the purpose of removing prisoners from one court into another, for the more easy administration of justice, or for the purpose of formally inquiring into the legality of an imprisonment, and discharging the party if it be found that he is restrained of his liberty without due warrant of law. It is of the latter, the great and efficacious writ in all manner of illegal confinement,—of habeas corpus ad subjiciendum,—to which reference is now made. It is awarded with us when one is alleged to be illegally detained under color of the authority of the United States, or in violation of the federal laws or treaties, by the district or circuit courts of the United States, or by any judge of either of those courts in vacation, and in all other cases of alleged illegal detention by any circuit, corporation, or county court of the state, or any judge of either in vacation. It is directed to the person who is supposed to have the party in whose behalf the complaint is made in custody, and commands him to produce the body of the prisoner, with the day and cause of his caption and detention, ad faciendum, subjiciendum, et recipiendum,—to do, submit to, and receive whatsoever shall be considered in that behalf." 4 Minor, Inst., pp. 9, 10. In another place, still treating of the same subject, the eminent author says. "This great and important writ, which is aptly denominated the 'citizen's writ of right,' is the means whereby an imprisonment or restraint of liberty alleged to be illegal may be formally inquired into, and if found to be illegal the party may

be finally discharged. The person having in his custody the party in whose behalf the complaint is made is required by the terms of the writ forthwith to have the body of such party before the court or judge, to do, submit to, and receive whatever shall in that behalf be adjudged. The writ is not designed to test anything but the sufficiency of the authority under which the prisoner is held." 4 Minor, Inst., pp. 405, 406. Of course, this writ cannot serve the purpose of an appeal or writ of error, for mere error or irregularity are neither affected nor cured by it. But aside from errors, etc., the peculiar function of the writ is as exemplified in the following extract: "The habeas corpus ad subjiciendum is that which issues in criminal cases, and is deemed a prerogative writ, which the king may issue to any place, as he has a right to be informed of the state and condition of the prisoner, and for what reasons he is confined. It is also, in regard to the subject, deemed his writ of right,—that is, such a one as he is entitled to ex debito justitiæ,—and is in nature of a writ of error to examine the legality of the commitment, and therefore commands the day, the caption, and cause of detention to be returned. * * * 4 Bac. Abr. "A." p. 564. "It is said, in general, that upon the return of the habeas corpus the cause of the imprisonment ought to appear as specifically and certainly to the judges before whom it is returned as it did to the court or person authorized to commit. For if the commitment be against law, as being made by one who had no jurisdiction of the cause, or for a matter for which by law no man ought to be punished, the court are to discharge him, and therefore the certainty of the commitment ought to appear." Id. "B." 10, pp. 585, 586. Chitty says: "The habeas corpus ad subjiciendum (so termed from the language of the writ,—to undergo and receive all such things as the court shall consider of the party in that behalf) issues in criminal cases, and is deemed a prerogative writ, which the king may send to any place; he having a right to be informed of the state and conditions of every prisoner, and for what reason he is confined. It is, also, in regard to the subject, deemed his writ of right, to which he is entitled ex debito justitiæ, and is in the nature of a writ of error to examine the legality of the commitment, and therefore commands the day, the caption, and the cause of detention to be returned." 1 Chit. Cr. Law, 119. "The true test of jurisdiction is whether the relator is detained or imprisoned without legal authority. The source from which the imprisonment emanates, or the authority by which it is sought to be enforced, operates as no barrier to the allowance and validity of the writ. The power exists to make inquiry into the cause of the caption and detention, and it may be pursued without regard to the origin of the imprisonment or the condition of the imprisoned." Ex parte Collier, 6 Ohio, 55. Coulter, J., aptly observes: The "writ of habeas corpus ad sub-

jiciendum is the prerogative of the citizen, the safeguard of his person, and the security of liberty. No matter where or how the chains of his captivity were forged, the power of the judiciary in this state is adequate to crumble them to dust if an individual is deprived of his liberty contrary to the law of the land." Com. v. Fox, 7 Barr, 336. In Cox v. Hakes, 15 App. Cas., loc. cit. 514, Lord Halsbury said: "For a period extending as far back as our legal history the writ of habeas corpus has been regarded as one of the most important safeguards of the liberty of the subject. If upon the return to that writ it was adjudged that no legal ground was made to appear, justifying detention, the consequence was immediate release from custody. If release was refused, a person might make fresh application to every judge or every court in turn; and each court or judge was bound to consider the question independently, and not to be influenced by the previous decisions refusing discharge."

Instances will now be given from leading text writers touching this subject: "It will be readily seen that the question before the court is not to ascertain whether the plaintiff has committed a crime, but to inquire into and determine whether he is lawfully held in custody by the defendant, who has charge of him. The legality of the process by which he is held, the power of the court to issue the process, if any, and the right of the defendant to hold the plaintiff thereunder, all arise. If the plaintiff is charged with crime, this proceeding tests the jurisdiction of the court issuing the process, the constitutionality of the statute creating it, the process itself, the legality of the judgment, or any right or immunity of the plaintiff under the constitution itself. Therefore the writ tests not only the legality or power of the court to issue process, but also the process, and the power of the legislature under the constitution to pass the act under which the prisoner was convicted, as well as any other right or immunity guaranteed by the constitution, and appearing by the record to have been denied him. Hence, if, for any legal cause so appearing, the court had no power to render the judgment it did render, the writ will lie. If, therefore, the defendant in a criminal proceeding was protected by a constitutional provision forbidding his being placed twice in jeopardy for the same offense, he may avail himself of the writ, although the court had jurisdiction over the subject-matter and case; yet, because it has no constitutional right, under the facts shown of record, to enter the judgment, it is void. Therefore, when the sentence exceeds the jurisdiction of the court, there is no legal authority to hold the defendant under it. Where he has been once put in jeopardy for the same offense, and this fact appears of record by plea confessed by demurrer, the court has no jurisdiction to sentence him again. If, however, the court misconstrues the statute thereby rendering him liable when he should

not be, such misconstruction is mere error of law, and can only be rectified on appeal; the one being an error in judgment of the court, like receiving improper evidence; the other being the exercise of the powers of the court, going directly to its jurisdiction, and forbidding the rendition of any judgment whatever under the record." *Brown, Jur.* § 98. "Where the sentence given is beyond the jurisdiction of the court, because contrary to the provisions of the constitution, which bounds and limits all jurisdiction, the writ of habeas corpus will lie. * * * Therefore whatever goes to the jurisdiction or authority, statutory or constitutional, and affects the power so as to destroy the judgment, is an avoidance of the judgment, and comes within the writ and its functions. * * * A trial which denies or fails to secure to the accused the benefit of these provisions would not be a trial under due process of law. * * * As before remarked, irregularity in the trial does not enter into the hearing under this writ; for the judgment must, in order that the plaintiff shall be discharged because of illegality, become a nullity. * * * The writ of habeas corpus is not, therefore, in its nature, one that is intended to review the facts already tried or intrusted for trial to a tribunal that by statute is authorized to hear, try, and determine a case, but it is, rather, a legal proceeding to test the legality of the trial; and in this respect the power of the court is reviewed, down to the moment of and including the entering of the judgment. The law giving the power is under review; also, the law under which the petitioner for the writ is convicted, the legality of the trial, and every subject going to the making up of the jurisdiction, and particularly the judgment itself. It does not act as a writ of error, but of right, and its high functions are to see that the law is maintained. It is not to destroy the law, but to fulfill its requirements; and the question which is considered is, in the main, whether the applicant for the writ (the plaintiff) is unlawfully, or, rather, illegally, restrained of his liberty without due process of law. It is a law test and trial, but not one of fact." *Id.* §§ 101, 102, 112, 114.

"The writ of habeas corpus *ad subjiciendum* is a high prerogative writ, summary in its character. * * * This writ is a remedy for every illegal imprisonment. * * * It was not framed to retry issues of fact, or to review the proceedings of a legal trial. It cannot be used as a substitute for an appeal or for a writ of certiorari. Errors and irregularities in procedure, not going to the question of jurisdiction, are not reviewable on habeas corpus. * * * It is not in the power of the legislature to take away the right of any one to the writ of habeas corpus, or the remedy furnished by it, or to limit, restrict, abridge, impair, or suspend it in any degree, except in the exigencies specially provided for in the constitution. The authority

of all other writs must yield to the authority of the writ of habeas corpus." *Church, Hab. Corp.* (2d Ed.) § 87. In another section, when speaking of the prisoner's impeaching the legality of his imprisonment, the learned author says: "But this he may do in various ways. He may show that the jurisdiction of such court or officer has been exceeded: * * * that the process is defective in some matter of substance required by law; that, though proper in form, it has been issued in a case not allowed by law; * * * that the process is not, in reality, authorized by any order, judgment, or decree of any court, or by any provision of law. * * * Mere errors and irregularities of procedure, however, not affecting the question of jurisdiction, are never reviewable on habeas corpus; and, where the process is regular and valid upon its face, there is no doubt that a preponderance of authority supports the rule that inquiry on habeas corpus will go only to the question of jurisdiction. * * * But jurisdiction is always an open question, and may be inquired into by any court or judge competent to issue the writ. Thus the prisoner may be discharged on habeas corpus, either before or after judgment, where the statute or ordinance under which the proceedings are inaugurated against him is unconstitutional, as this is a jurisdictional defect, or where the complaint or commitment does not charge any crime known to the law, or where a commitment to answer has been made by a magistrate after a preliminary examination, and after the defendant has filed an affidavit that he could not have a fair and impartial trial or hearing before him, which, under the statute, would disqualify such magistrate from hearing the case." *Id.* § 236. Elsewhere he says: "* * * An indictment must contain the statement of an offense known to the law, and, under the rule, well settled by judicial decision, that this may be inquired into, if the court or judge determines that it does not the prisoner must be discharged as a matter of right, particularly in those states where a statute provides that he shall be discharged 'when the process, though proper in form, has been issued in a case not allowed by law.' The better opinion is that not only after indictment, but even after conviction, the courts will, by means of habeas corpus, inquire into the constitutionality of the law under which the applicant for the writ was indicted and tried, and, if the law is determined to be unconstitutional, the prisoner will be discharged, no matter what may be the status of his case." *Id.* §§ 245, 245a. And see, also, *Id.* §§ 81, 349, 351, 352.

The writer of an elaborate work, discussing the effect and operation of the writ, remarks: "It is a writ the object of which is to liberate those who are unlawfully imprisoned, whether by the action or under the order or judgment of a court, or without the forms of law. The right to the writ exists independently of, and cannot be taken away

by, statute. The right is guarantied by the constitutions of the United States and of the states. * * * The causes for which the writ may issue have been increased, and the extent to which courts may go in investigating such causes have been extended and enlarged quite materially, in some of the states. But in none has the writ been made less effective, or the causes for which it may issue been diminished. The general rule is that the writ is jurisdictional, when directed to a court or judicial officer, and can only be used to inquire into the jurisdiction of such court or officer, and that it cannot be used as a writ of error or appeal for the purpose of inquiring into mere errors or irregularities; nor can the court determine, under the writ, whether the acts alleged constituted the offense charged or not, or the sufficiency of the evidence to warrant the imprisonment of the party seeking the writ. But the inquiry is not confined to the question whether the court had jurisdiction of the cause and of the defendant, but may be extended to the question whether the court had power to render a particular judgment or impose the particular penalty inflicted. * * * If the court has acted without jurisdiction or has transcended its powers, the petitioner will be discharged from imprisonment as a result of its unauthorized action as well after as before final judgment." *Works, Courts & Jur.* § 82, pp. 639-641, 647. In reference to the jurisdiction incident to the issuance of this writ, it is observed that: "In a general sense, this jurisdiction is appellate in its nature. The expression 'appellate jurisdiction' has been defined to be 'the power of one tribunal to review the proceedings of another.' * * * It is not, strictly speaking, a power of revision, which includes, properly, the power to affirm or reverse the judgment or order, and so establish or destroy it, but a power to arrest the execution of a void judgment or order. It acts directly on the effect of the judgment, to wit, the imprisonment, but only collaterally on the judgment itself. The jurisdiction, therefore, under the writ of habeas corpus, over the judgment or order relied on to justify the imprisonment, is only collaterally appellate. * * * If it appears clearly that the fact for which the party is committed is no crime, * * * the court discharges. * * * A proceeding defective for irregularity and one void for illegality may be reversed upon error or certiorari, but it is the latter defect only which gives authority to discharge on habeas corpus. * * * Illegality is, properly, predicable of radical defects only, and signifies that which is contrary to the principles of law, as distinguished from mere rules of procedure. It denotes a 'complete defect in the proceedings.' * * * When the cause of commitment is shown, and the prisoner is found in custody of a court of competent jurisdiction, not illegally asserted, the writ has fulfilled its office, and the pris-

oner should be remanded." *Hurd, Hab. Corp.* pp. 324-328, 333.

In a recent recognized work of merit it is stated: "The writ of habeas corpus is a high prerogative writ, known to the common law, the great object of which is the liberation of those who may be imprisoned without sufficient cause. It is in the nature of a writ of error to examine the legality of the commitment. It is the proper remedy for every unlawful imprisonment, both in civil and criminal cases. The writ is the remedy which the law gives for the enforcement of the civil right of personal liberty. While it becomes necessary oftentimes to resort to it where enforcement of the laws for the punishment of crime has been attempted, yet the proceeding under the writ is not to inquire into the criminal act which is complained of, but the right to liberty notwithstanding the act. * * * The writ of habeas corpus has not been given for the purpose of reviewing judgments or orders made by a judge or court or officer acting within their jurisdiction. To put it to such a use would be to convert it into a writ of error, and confer upon every officer who has authority to issue the writ appellate jurisdiction over the orders and judgments of the highest political tribunals in the land. It is well settled that habeas corpus cannot be put to such use, and that its functions, where the party who has appealed to its aid is in custody under process, do not extend beyond an inquiry into the jurisdiction of the court by which it was issued, and the validity of the process upon its face. * * * It is only when the court announces a judgment in a criminal case which is not authorized by law under any circumstances in the particular case made by the pleadings, whether the trial court has proceeded regularly or otherwise, that judgment can be said to be void, so as to justify the discharge of the defendant held in custody by such judgment. * * * If the court which renders a judgment has not jurisdiction to render it, either because the proceedings or the law under which they are taken is unconstitutional, or for any other reason, the judgment is void, and may be questioned collaterally; and a defendant who is imprisoned under and by virtue of it may be discharged from custody on habeas corpus. * * * As the laws of congress are only valid when they are within the constitutional power of that body, the validity of the statute under which a prisoner is held in custody may be inquired into under a writ of habeas corpus, as affecting the jurisdiction of the court which ordered his imprisonment. * * * The mere decision of a tribunal, however, that it has authority to try and determine a case, when no such power exists in the court, does not give it the power. Its judgment may be questioned anywhere for want of jurisdiction. The jurisdiction of a court can never depend upon

its decision upon the merits of a case brought before it, but upon its right to hear and determine it at all." Sections 310, 311, 322, 1 Bailey, Jur. In illustration of the quotation made from the section last cited, mention is made in another section of a case which arose in Pennsylvania, where an unsigned paper purporting to be a last will was admitted to probate by a decree entered to that effect; and in that state such a decree is held judicial and conclusive, after five years have elapsed, as to the real estate disposed of by it, and no appeal taken; and no appeal was taken in that case. Thereupon plaintiff, claiming title under the will, brought ejectment, and recovered in the trial court; but on appeal to the supreme court it appeared on the record, from the testimony of the subscribing witnesses, that "the deceased died before he signed and sealed the same, and, further, that the deceased was at the time of so making his will of sound and disposing mind and memory," etc. And upon this it was ruled that, on the foregoing facts, the register was without jurisdiction, and his decree admitting to probate the unsigned writing void; Justice Williams saying: "If the court has no jurisdiction, it is of no consequence that the proceedings have been formally conducted, for they are coram non iudice. If such want of jurisdiction appear upon the record, it can be taken advantage of at any time and in any court, where the conclusiveness of the judgment is the subject of judicial inquiry. The reason for this is found in the fact that the record of the judgment bears on its face the proof of its illegality, and shows the want of power in the tribunal to render it. When it is offered as a conclusive adjudication between the parties, an inspection shows it is not, because the court had no power to make an adjudication. The adjudication of the register was conferred by statute. Within these limits his decrees are conclusive. Outside of them he is without any authority to make a decree, and his decree, if made, is a nullity." *Wall v. Wall*, 123 Pa. St. 545, 16 Atl. 598, cited in section 10, 1 Bailey, Jur. Speaking again, in another place, of the question of jurisdiction as affected by that of unconstitutionality, the same author expresses himself thus: "It is conceded, as a general rule, that a court of general jurisdiction has the power to decide all questions of law that may arise in the particular case; that the question of the validity of any law that may be applicable must be decided, when the question is raised, in the first instance by the court which is proceeding with the trial. It is purely a question of law, yet the courts quite generally hold the doctrine that proceedings under an unconstitutional law are absolutely void; that the act, being void, has no effect to confer jurisdiction; that the power to determine is wanting; therefore any decision the court may make

is without the power to make it, and must be void." 1 Bailey, Jur. § 15.

In a very comprehensive text-book, the nature, scope, and functions of the writ in question are exhaustively treated. Among other things, it is said: "The writ of habeas corpus is a high prerogative writ given by the common law, and of authority paramount to that of all other writs, for the purpose of effecting a speedy release of the subject or citizen, whether an infant or a person of full age, from any illegal restraint of his liberty. * * * The writ issues *ex debito iustitiæ*, as a matter of right, but not as a matter of course; for the authorities are uniform in holding that sufficient probable cause must be shown to enable the court to form some judgment in the case, and, if it appears from the petitioner's statement that there is no sufficient ground for his discharge, the court should not issue the writ. * * * A person who is in custody under a warrant or commitment on a criminal charge, before indictment, may have a writ of habeas corpus for the purpose of an inquiry into the legality of his detention and to procure his release, in case it appears that he is illegally detained. The grounds, among others, on which a discharge will be granted under this head, are want of jurisdiction or power in the committing magistrate to make the commitment, failure to indict for the offense charged within the time prescribed by statute, that no criminality is attached by law to the acts charged, and radical defects in the commitment. * * * Even after indictment has been found, and the party is held in custody to respond to the charge against him, he may still question the legality of such detention by means of the writ of habeas corpus, and may procure his discharge if it appears that he is illegally detained, as where the offense charged was not committed within the jurisdiction where the indictment was found, or where the court in which the prosecution is pending has no jurisdiction of the offense charged; but no matter of defense on the facts, however clear, can be thus determined in advance. * * * A person who is in custody by virtue of any judgment or order of court may be discharged therefrom on habeas corpus in any case where the court, whether it was one of general or limited jurisdiction, did not for any reason have jurisdiction of the person of the defendant or of the subject-matter involved, civil or criminal, so that the judgment would be held void on collateral attack, or if the process under which the party is in custody is void for any reason. * * * A conviction under an unconstitutional statute is generally considered void, so that the prisoner may be discharged from custody under it by habeas corpus. * * * If the acts of which the defendant was convicted are not criminal in law, the judgment is void, and a person

who is imprisoned under it may be discharged on habeas corpus. * * * But it is only when the court pronounces a judgment which is not authorized by law under any circumstances in the particular case made by the pleadings, whether the trial has proceeded regularly or otherwise, that such judgment can be said to be void, so as to justify the discharge of the defendant held in custody by it." 15 Am. & Eng. Enc. Law, pp. 154, 155, 157, 161-163, 166, 169, 170.

I have thus given in outline and in substance the chief points, properties, and functions of the writ of habeas corpus, and of the jurisdiction of the courts in relation thereto and in connection therewith, as set forth in the leading text writers, as heretofore quoted. True it is that there are some authorities opposed to the views contained in those I have quoted, but I am persuaded that the great current of authority flows in the direction indicated in the quotations I have made, and that the current of common sense and common reason flows towards the same point of the compass, to say nothing of the sacred principles of personal liberty which the great writ of habeas corpus was designed to protect and preserve against all illegal assaults, whether made by laymen, ministerial or judicial officers, or the orders or judgments of courts. In discussing the invalidity of acts repugnant to the constitution, Judge Cooley says, with his accustomed force: "When a statute is adjudged to be unconstitutional, it is as if it had never been. Rights cannot be built up under it, contracts which depend upon it for their consideration are void, it constitutes a protection to no one who has acted under it, and no one can be punished for having refused obedience to it before the decision was made. And what is true of an act void in toto is true, also, as to any part of an act which is found to be unconstitutional, and which consequently is to be regarded as having never at any time been possessed of any legal force." Cooley, Const. Lim. (6th Ed.) p. 222. This quotation was, in substance, adopted and applied by this court, where it was held that, the act of 1895 being unconstitutional, the repealing clause of that act which repealed "all acts or parts of acts inconsistent or in conflict with the foregoing section" had no effect on such unconstitutional law, because of its being "a nullity," and therefore there was nothing on which the repealing clause could operate, because there was no law in existence which could be inconsistent or in conflict with an act void by reason of its unconstitutionality. *State v. Thomas*, 138 Mo., loc. cit. 99, 39 S. W. 481. Touching the same thought of the nullity which results in either process or judgment where the statute on which the proceedings are based is unconstitutional, Mr. Justice Bradley, in passing judgment in a habeas corpus case, made, among others, the following observations: "The validity of the judgments is assailed

on the ground that the acts of congress under which the indictments were found are unconstitutional. If this position is well taken, it affects the foundation of the whole proceedings. An unconstitutional law is void, and is as no law. An offense created by it is not a crime. A conviction under it is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment. It is true, if no writ of error lies, the judgment may be final, in the sense that there may be no means of reversing it. But personal liberty is of so great moment in the eye of the law that the judgment of an inferior court affecting it is not deemed so conclusive but that, as we have seen, the question of the court's authority to try and imprison the party may be reviewed in habeas corpus by a superior court or judge having authority to award the writ. We are satisfied the present is one of the cases in which the court is authorized to take such jurisdiction. We think so because, if the laws are unconstitutional and void, the circuit court acquired no jurisdiction of the causes." *Ex parte Siebold*, 100 U. S. 371, 25 L. Ed. 717. Repeated affirmances of that doctrine have occurred in the federal supreme court. And it was held in that case that the question of the constitutionality of the laws involved in that case was good ground for issuance by the supreme court of the writ of habeas corpus to inquire into the legality of the imprisonment under a conviction resting for its basis on such laws. The doctrine announced in *Siebold's Case* has since been followed by the federal courts and most of the state courts, such as had not previously taken the same view of the matter. This is true of Michigan, Nebraska, Texas, Iowa, and Missouri. In Wisconsin a person convicted and sentenced under an unconstitutional law was discharged on a writ of habeas corpus issued by a court commissioner. *State v. Ryan*, 70 Wis. 676, 36 N. W. 823. In an earlier case in that state (*In re Eldred*, 1 N. W. 175), *Ryan, C. J.*, in delivering the opinion of the court, after remarking that where the prisoner is held by legal process the writ of habeas corpus raises only the question of the jurisdiction of the court or officer to issue the process of arrest, held that, inasmuch as the justice of the peace had no authority to cause the arrest of a person for an offense committed in another county, consequently such persons were entitled to their discharge on habeas corpus.

In this state the writ of habeas corpus has frequently issued for the purpose of determining the constitutionality of statutes involved in such litigation. *Ex parte Slater*, 72 Mo. 102; *Ex parte Marmaduke*, 91 Mo. 223, 4 S. W. 91; *Ex parte Swann*, 93 Mo. 44, 9 S. W. 10; *In re Thompson*, 117 Mo. 83, 22 S. W. 863; *Ex parte Wooldridge*, 30 Mo. App. 612. It is asserted in the opinion now being discussed that there was no express ruling made either in *Swann's Case*, or in *Ex parte Marmaduke*.

or in *Re Thompson*, on that point of the unconstitutionality of a statute rendering all proceedings thereunder void. It was not necessary that this court should in terms state that it had authority to test the constitutionality of a statute by means of a writ of habeas corpus. The very fact that it issues the writ, and that it hears and determines the cause, either by discharging the petitioner or else by remanding him, is, in and of itself, an implied declaration of authority to take either alternative indicated. I do not suppose that, in the whole range and realm of jurisprudence, an instance can be found where a court issuing a writ of replevin or attachment or injunction or habeas corpus, or what not, has seen fit to declare it had authority to do so. In such circumstances the issuance of the writ is an assumption of jurisdiction thus to issue it, and of the propriety of its issuance. *Bouldin v. Ewart*, 68 Mo., loc. cit. 335; *Ex parte Kougres* (Wyo.) 19 Pac. 442; *State v. Peyton*, 32 Mo. App. 522; *State v. Fleming*, 147 Mo., loc. cit., 12, 44 S. W. 758. "Hence any steps taken in an application of the law to all the facts disclosed by the record necessarily implies an adjudication of the right to take that step." Section 62, *Van Fleet*, Coll. Attack. "The assumption of jurisdiction and the exercise of authority is a decision upon the question of notice, without any formal entry declaring the notice sufficient. So, where an objection was made to the right of the circuit judge to sit in the probate court, his assuming to act, ignoring the objection, is an adjudication of his right to do so." *Id.*; *Updegraff v. Palmer*, 107 Ind. 181, 6 N. E. 353; *Jackson v. State*, 104 Ind. 516, 3 N. E. 863; *Landon v. Comet*, 62 Mich. 80, 28 N. W. 788. But the cases mentioned do more than impliedly assert the authority to act, and the propriety of the court's acting in the premises. For instance: In *Marmaduke's Case* it was held in the majority opinion that section 4031, Rev. St. 1879, was not in contravention of that provision of the constitution (section 22, art. 2) which gives the right to the accused to "have process and compel the attendance of witnesses in his behalf"; and, so holding, it was further held that the warden of the penitentiary was guilty of no contempt of the criminal court of St. Louis in refusing to obey a writ of habeas corpus *ad testificandum* by producing before that court the body of Frederick Whitrock, a convict then in the penitentiary, and the warden, having been arrested by the sheriff of Cole county on an attachment issued by the criminal court, was discharged on habeas corpus. In that case you will note that whether section 403 was a constitutional law was the hinge on which turned whether the warden was guilty of contempt. Being held constitutional, his discharge followed. And in that case you will note further that the writ of attachment issued from a court of competent jurisdiction, and was fair and regular on its face, and the warden was arrested on it; and yet this court, notwithstanding

that fact, thought the writ of "habeas corpus had a place in his case." In *Swann's Case* it was expressly determined, on a demurrer to the return to the writ of habeas corpus, that the local option law was not a local or special law, within the meaning of section 53 of article 4 of the constitution, nor a delegation of legislative power, nor did it violate the above section of the constitution in regard to that provision about enacting a local or special law by the partial repeal of a general law, nor did it contravene section 1 of article 14 of the federal constitution. And upon this the return was held sufficient, and the prisoner remanded. If remanded because of the law being held constitutional, it necessarily and inevitably follows that if unconstitutional the prisoner must have been discharged. In *Thompson's Case* the point involved was whether section 8849, Rev. St. 1880, respecting vagrants, was constitutional. That section of chapter 169 authorized that the person whom the jury found to be a vagrant should be kept in the custody of the sheriff, and then, after three days' notice, hired out at the courthouse door for six months, etc. In the course of the opinion in that case it is, among other things, said: "Section 2 of article 1 of the constitution of this state, adopted July 4, 1865, declares 'that there cannot be in this state either slavery or involuntary servitude, except in punishment of crime, whereof the party shall have been duly convicted.' This section has now become section 31 of article 2 of our present constitution, and is substantially a literal transcript of a like provision contained in the ordinance of 1787, penned by the hand of Thomas Jefferson; and this is, in substance, section 1 of the thirteenth amendment to the constitution of the United States. * * * So that the constituent elements of this case are: Imprisonment, punishment, and involuntary servitude, without any charge, proof, or legislative enactment establishing the act of petitioner to have been a crime. The question then is, can a statute which authorizes such proceedings as are here brought under review stand before the prohibitions of our state and federal constitutions? * * *

The opinion then concludes: "The premises considered, we hold that the law under which petitioner is restrained of his liberty contravenes the constitution of the United States and of this state, and he is therefore entitled to be discharged, and it is so ordered." In *re Thompson*, 117 Mo. 83, 22 S. W. 863.

If these cases do not contain express rulings as to the constitutionality of the respective statutes, and recognize habeas corpus as the appropriate remedy in such circumstances, then the power of our vernacular to convey our meaning has been greatly curtailed. They certainly did not follow the *Harris' Case*, and others of that ilk. Now, I will take up the other cases which have been mentioned, and see what they amount to, and in what they differ from those analyzed above:

Slater's Case, 72 Mo. 102, involved the constitutionality of section 1804, Rev. St. 1879, which is substantially identical with section 42, p. 848, Gen. St. 1865. That section made provision, as was lawful under the constitution of 1865, that in case a crime were committed in a county, and no indictment could be found, it devolved on the circuit judge to have the cause certified to another county, where an indictment could be found. Section 12, art. 11, Const. 1865. In that case it was determined that, though section 1804 was a valid law under the constitution of 1865, yet, in consequence of the change effected by the constitution of 1875, the constitution of 1865 was abolished by the constitution of 1875, which made provision only for finding indictments in the county of the crime committed. The indictment in that case showed "upon its face that it was preferred by a grand jury of Scotland county, and charged the offense not to have been committed in said county, but in Clark county." And concerning section 1804, *supra*, in delivering the opinion, this court remarked: "We are of opinion that this statutory provision is utterly null and void, for the reason that it undertakes to deprive a person of the constitutional right conferred upon him by section 12, *supra*; of the constitution, which section, as we have shown, gives to every person charged with a felony, before he can be tried, the right to have the charge preferred in an indictment found by a grand jury of the county where the offense was committed. While the constitution gives this right to every person, the statute in question takes it away and denies it to some persons. While the constitution declares that a person charged with a felony can only be tried after an accusation has been made upon the oaths of the grand jury of the county where the crime was committed, the statute in question declares, on the contrary, that a person charged with a felony may be tried upon an accusation preferred upon the oaths of the grand jury of another and different county than the one where the crime charged was committed. The statute being thus in direct conflict with the constitution, which can in no way be reconciled, must therefore fall and be considered as no law." And upon the ground of the unconstitutionality of section 1804 the prisoner was discharged on habeas corpus. The above case announces the very doctrine ruled in Siebold's Case, heretofore cited. In Bethurum's Case, 66 Mo. 545, the prisoner would have been discharged on habeas corpus but for the passage of a law which permitted the resentencing of the prisoner, and this was done, whereby the excess of punishment was obviated and the prisoner was remanded. But the writ was granted in that case in order to test the constitutionality of that remedial and error-correcting law. In *Ex parte Page*, 49 Mo. 291, the excessive sentence proved

fatal on habeas corpus, and the prisoner was discharged. This, of course, occurred prior to the curative act above mentioned; and the discharge of the prisoner was ordered by reason of the fact that the jurisdiction of the court had been exceeded, etc., and by reason of the further fact that the process was not authorized by any provision of law. Wag. St. § 35, p. 690. And in that case the court is careful to point out that, if the fact of excess of jurisdiction lay dehors the record, this court could not interfere in the manner prayed, but inasmuch as the excess of sentence, etc., appeared on the face of the record, habeas corpus was the proper remedy. *Ex parte Snyder*, 64 Mo. 58, was one where the court was organized by a valid law, but the law of its organization was necessarily, though not in terms, abolished by the adoption of the constitution of 1875, to which the law establishing the probate and criminal court of Cass county became repugnant; and after that the trial of Snyder occurred, and upon this it was held he was entitled to his discharge on habeas corpus, as there was no statute left in existence establishing the court aforesaid. But if it be true, as stated in Siebold's Case, that "an unconstitutional law is void and is as no law," and if, as stated in Slater's Case, a similar statute is to be "considered as no law," how can Snyder's Case, being a conviction in a court organized under an abolished law, be made to differ from a conviction in a court validly organized, but based on an unconstitutional law? Point out the difference if you can. In Harris' Case, 47 Mo. 164, it was held that an arrest of a person under an unconstitutional law could not be reviewed or relieved by habeas corpus, and this on the ground that our statute on that topic contained no provision for that kind of a case; referring to section 35, p. 690. Wag. St. That section is now section 3578. Rev. St. 1890. But in that case the court did not consider, as it did afterwards, in Page's Case, that, if the arrest was "not authorized by * * * any provision of law," then the prisoner was entitled to his discharge; nor was it considered that, if the statute were unconstitutional, there could not be "any provision of law," for his arrest. But the whole case was passed over lightly, without any reference to or citation of authority; and upon that case, in all its meagerness, rests Boenninghausen's Case, 91 Mo. 301, 1 S. W. 761. In 1854, 16 years before the Harris Case was decided, Chief Justice Shaw had determined that a conviction on an unconstitutional law was void; and the chief justice disposed of a number of other cases involving, in one way or another, the validity of the same law,—actions for damages, for torts in enforcing the law, prosecutions for violating the law, etc. Herrick's Case came up among the number. He had been convicted for a violation of the law, and sentenced to and confined in the common

jail. The papers were "all right and regular." Herrick thereupon sued out a writ of habeas corpus, and his cause was heard and determined along with the rest. Of that the chief justice said: "In Herrick's Case a question was made by the attorney general, whether the prisoner could be relieved on habeas corpus, even if the conviction is wrong, and whether his remedy is not by writ of error or certiorari, on the authority of Riley's Case, 2 Pick. 172. We take the distinction to be this: When the proceedings are irregular or erroneous, if the court or magistrate has jurisdiction, the judgment is voidable only, and not void, and, of course, must stand good until reversed or annulled in a proper course of proceeding, by a court having authority to revise and annul it. But, where it appears on the face of the proceedings that the magistrate had no jurisdiction, the proceedings are wholly void, the commitment is without authority, and the party committed is entitled to be discharged from his imprisonment without reversal of the judgment. The case being rightly before us, the court are all of opinion that, for the reasons already given, that section of the law under which the conviction was had is unconstitutional, and therefore the judgment is void, and the prisoner is entitled to be discharged from custody." *Herrick v. Smith*, 1 Gray, 49. And in one of the associate cases (*Fisher v. McGirr*) it was ruled that, where an officer acted on a warrant apparently regular on its face, though ordinarily this would be a full protection to the officer making the seizure, yet this would not be the case where, owing to the statute being unconstitutional, the magistrate had no jurisdiction, and consequently "the process was not merely voidable, but wholly void. The officer taking property under it has no authority, and is therefore liable to an action of trespass. * * * The law relied on for a justification, being void, gave the magistrate no jurisdiction and no authority to issue the search warrant, the officer cannot justify the seizure under it, and therefore an action lies against him for the taking." 1 Gray, 45, 46. You will observe in the above case that the attorney general suggested a doubt as to whether habeas corpus would lie, but this doubt was promptly solved by the chief justice saying that, as "the commitment is without authority, the party committed is entitled to be discharged without reversal of the judgment." In 1852 a similar ruling as in Herrick's Case had been made on circuit by that eminent judge, B. R. Curtis, to the effect that, if a statute is in conflict with the constitution, it confers no jurisdiction on the magistrate who acts under it. *Greene v. Briggs*, 1 Curt. 311, Fed. Cas. No. 5,764.

But there is an earlier original, by way of authority on the point in hand, than any of the cases I have recently mentioned. I have already quoted this sentence: "For if the

commitment be against law, as being made by one who had no jurisdiction of the cause, or for a matter for which by law no man ought to be punished, the courts are to discharge him." 4 Bac. Abr. "B" 10. Chief Baron Gilbert is thought to be the author of that sentence. The latter part of the rule there quoted is confined to cases of clear and manifest want of criminality in the matter charged, such as render the proceedings void. The authority commonly cited as pertinent to this point is *Bushell's Case*, decided in 1670. There 12 jurymen (Bushell among the number) were convicted "for giving a verdict against full and clear evidence," whereby William Penn and others, charged with meeting in a conventicle, were acquitted. Bushell and his associates, being imprisoned for failure to pay their fines, sued out habeas corpus, and were discharged on the ground that their conviction was void; that jurymen could not be indicted for rendering any verdict they chose. *Bushell's Case*, Vaughan, 135; s. c. 6 How. St. Tr. 99, T. Jones, 13. So that it is at once evident that *Siebold's Case* announced no new doctrine to that last cited, unless there be a distinction to be taken between an absence of a law for doing a certain thing, and an unconstitutional law, which is no law at all, professedly giving permission to do that thing.

Our right to the writ of habeas corpus had its origin in the common law, and though the legislature may, to some extent, regulate the issuance of the writ, yet it cannot take away the right of any one to the writ or the remedy furnished by it, or to limit, restrict, abridge, impair, or suspend it in any degree, except in the exigencies specially provided for in the constitution. The authority of all other writs must yield to the authority of the writ of habeas corpus. *Church, Hab. Corp.* § 87. But our constitution provides that "the privilege of the writ of habeas corpus shall never be suspended." Article 2, § 26. Treating of this question, Judge Cooley said: "When the constitution gave this court jurisdiction of the writ, I think it conferred the same full powers upon the court, as representing the sovereignty of the people, which the court of king's bench possessed as representing the crown of England. Our jurisdiction does not depend upon the statute, and the main purpose of that, here as in England, is to compel the performance of judicial and ministerial duties. Chancellor Kent says (2 Kent, Comm. 27), 'The right of deliverance from all unlawful imprisonment, to the full extent of the remedy provided by the habeas corpus act [of 31 Car. II., c. 2], is of common right.' And by this he means, as the context shows, without regard to the cause of imprisonment, so that it be unlawful. The statute does not give the writ, but renders it more effectively and actively remedial. I therefore attach no special importance to the particular wording of the statute, where it speaks of the cases in which the writ is to be

issued. * * * If the statute lacks comprehensiveness, it may be that the same opportunities are afforded for evasions of duty by courts that existed in England before the statute 31 Car. II.; but, until a disposition to evade duty shall be manifest, it will not be important. The common-law jurisdiction is ample. As it came from no statute, it is not confined in its scope to any prescribed limits, but is co-extensive with the cases to which its principles can be applied, and in which it can afford a remedy. I am aware of nothing which limits the power of the court upon this writ but its capacity to give relief in the particular case in accordance with the settled rules which govern this mode of proceeding. I know of no other test that can have determined its jurisdiction at the common law, and, while the law holds the right to personal liberty in the same high regard as now, the same test will probably continue to be applied." In *re Jackson*, 15 Mich. 417. Works says: "The right to the writ exists independently of, and cannot be taken away by, the statute." Courts, p. 639, § 82. Prof. Minor says: "The guaranties and securities" which surround this writ "are not susceptible of being evaded or modified by the legislature; that is, not legally." 4 Minor, Inst. pt. 1, 416. The statute of New York concerning this writ underwent elaborate discussion in *People v. Liscomb*, 60 N. Y. 559, by Allen, J., who said: "The prohibition of the forty-second section of the habeas corpus act, forbidding the inquiry by the court or officer into the legality of any previous judgment, decree, or execution specified in the twenty-second section, does not, and cannot, without nullifying, in good measure, the provisions of that and other sections of the act, take from the court or officer the power, or relieve him from the duty, of determining whether the process, judgment, decree, or execution emanated from a court of competent jurisdiction, and whether the court making the judgment or decree, or issuing the process, had the legal and constitutional power to give such judgment or send forth such process. It simply prohibits the review of the decision of a court of competent jurisdiction. * * * The inquiry is, necessarily, in every case, whether the process is void, and the officer or court having jurisdiction of the writ must pass upon it. If a process good in form issued upon a judgment of a court having jurisdiction, either general or limited, must in all cases be assumed to be valid until the judgment be reversed upon error, the remedy by the writ of habeas corpus will be of but little value." And that the relief afforded at common law by "this, the greatest of all writs," is, under the constitution, beyond the pale of legislative discretion, and should not be "shorn of its power and its glory by a subtle and metaphysical interpretation; rather should it receive a liberal construction, in harmony with its grand purpose, and in disregard, if need be, of technical lan-

guage used." And, in regard to the construction to be placed on the statute, it is not to be presumed that the legislature intended by the use of general words therein to defeat the very object and purpose of the writ of habeas corpus, which, according to all the authorities, as already quoted, "is in the nature of a writ of error to examine the legality of the commitment." 1 Chit. Cr. Law, 119; 1 Bailey, Jur. § 310. If all opportunity for examination into the legality of the commitment were to be foreclosed by bare, formal recitals in writs or judgments, such "pitiful evasions" would often be resorted to in order to balk the operation of "the great writ." In this writ legality and jurisdiction are inseparably blended. Whatever shows legality to be non-existent shows jurisdiction occupying the same vacuum. See text-books, *supra*. But in this case, inasmuch as this cause has not proceeded to judgment, the words of section 3578 will be sufficient for the purposes of this case, to wit: "Where the process, though in proper form, has been issued in a case or under circumstances not allowed by law. * * * Where the process is not authorized by any provision of law." *Ex parte Page*, *supra*. Many of the cases upholding the doctrine that habeas corpus lies to question legality of process and judgments issued, entered under unconstitutional laws, will be found in a note to section 83, Church, *Hab. Corp.* *Ex parte Mitchell*, 104 Mo. 121, 16 S. W. 118, was correctly decided. The subject-matter of the proceeding which resulted in the judgment in that case was the local option law; but, as the evidence as to whether that law had been adopted or not did not appear in the record, there was nothing left for this court to do but deny the writ. In *re Wooldridge*, 30 Mo. App. 612, the prisoner was very properly discharged on habeas corpus because it was apparent of record that the local option law was adopted at a void election. In *Ex parte Bedard*, 106 Mo. 616, 17 S. W. 693, an affidavit was filed which disqualified the judge of the court of criminal correction, but who nevertheless committed the defendant; and it was ruled that the judge, having been disqualified, had no jurisdiction to imprison defendant, and so he was discharged on habeas corpus. That case is, in effect, the same as one where the statute involved is unconstitutional, for in either case jurisdiction is absent. In *Re Flukes*, she was arrested on a charge, and was discharged by us on habeas corpus, on the ground that the statute was unconstitutional. (Mo. Sup.) 57 S. W. 545. So far as concerns the case of *State v. Dobson*, 135 Mo. 1, 36 S. W. 238, it suffices to say that no question of an unconstitutional law was presented, and therefore it would have been wholly obiter to have discussed such a point in that case. *Ex parte Mallinkrodt*, 20 Mo. 493, was a case where a witness required by a subpoena duces tecum to produce books and papers before a notary refused to do so, and was committed to pri-

on. The notary's authority only extended to commitments for contempts in failing to give testimony. Consequently, as authority was lacking to the notary, in that particular case, to commit, the petitioner was discharged on habeas corpus. It can make no difference, in point of principle, what ground causes the absence of authority. It suffices to show such absence, and, when shown, the conclusion follows. In *Re Knaup*, 144 Mo., loc. cit. 665, 46 S. W. 153, it was said: "There is no doubt upon the proposition that a person committed for contempt in disobeying an order which the court had no legal right to make may be discharged on habeas corpus." In *State v. Bland* (Mo. Sup.) 46 S. W. 440, it was said: "It is a solecism to say a court of law would enter a judgment punishing a defendant for doing an act that was never made unlawful by any law. *Kansas City v. Corrigan*, 86 Mo., loc. cit. 69."

In conclusion, I have this to say: That, if the opinion I have endeavored to discuss is held good law, such a ruling will be in violation of section 26 of article 2 of the constitution, in that it will suspend the writ of habeas corpus in this state,—something which that section says "shall never be suspended."

Inasmuch as the statute referred to in the beginning of this opinion has been held to be constitutional, it follows that the prisoner must be remanded, as heretofore ordered.

BURGESS, C. J., and MARSHALL and GANTT, JJ., concur with SHERWOOD, J.

VALLIANT, J. (concurring in result). The conclusion reached by the majority of the court is that the prisoner be remanded for trial, and in that conclusion I concur, but for the following reasons only:

The original purpose of the writ of habeas corpus, as its office was described and defined under the act of 31 Car. II., in which form, substantially, it has come down to us, was to give effect to that provision of the thirtieth section of the Great Charter of King John, which declared that no individual in the realm should be deprived of his liberty unless his right to the same had been declared forfeited "by the judgment of his peers or the law of the land." Although it was an ancient common-law writ, and although the right to personal liberty was clearly enough defined in the Great Charter, yet such was the opposition of the kings to the enforcement of the right, and their influence with the crown judges, the remedy was often denied and the right disregarded. Blackstone says: "And yet early in the reign of Charles I. the court of king's bench, relying on some arbitrary precedents (and perhaps misunderstood), determined that they could not, upon an habeas corpus, either bail or deliver a prisoner, though committed without any cause assigned, in case he was committed by special command of the king or by the lords of the privy council. * * * These

pitiful evasions gave rise to the statute of 16 Car. I. c. 10, § 8, whereby it is enacted that if any person be committed by the king himself, in person or by his privy council, or by any of the members thereof, he shall have granted unto him, without any delay upon any pretense whatsoever, a writ of habeas corpus," etc. Then, after pointing out the new shifts and devices that were resorted to by the crown judges to render the writ impotent, the great law writer adds: "But whoever will attentively consider English history may observe that the flagrant abuse of any power by the crown or its ministers has always been productive of a struggle, which either discovers the exercise of power contrary to law, or, if legal, restrains it for the future. This was the case in the present instance [*the Jenks Case*, unreported]. The oppression of an obscure individual gave birth to the famous habeas corpus act (31 Car. II. c. 2)," etc. 3 Bl. Comm. pp. *134. 135. Reference to the origin and purpose of this writ is here made to recall to our minds that its office was to afford a man who was imprisoned otherwise than on the judgment of a court a hearing before a competent court or judge, to the end that the legality of his commitment might be inquired into, and, if unlawful, that he might be discharged from custody, even though the king himself had ordered his imprisonment. Although the conditions that surround us to-day have materially changed from those that our ancestors contended with at that period of English history, yet in essential principle there is no difference in the office of the writ of habeas corpus now from what it was then. We have now no kings or privy councils, but we have men in executive authority who sometimes do imprison people without legal right, and who, sometimes from overzeal and sometimes from bad motives, are induced to use their power to the oppression of the citizen, and would confine him in silence and without judicial inquiry if they were not subject to the writ of habeas corpus. Therefore the writ is not only preserved in our system of jurisprudence, but ranks perhaps as the most important in influence, as it certainly is the most famous in history, of all writs known to the English common law. But where a man is taken into custody under a warrant from a court competent to try him for the offense charged, and competent to decide whether or not the act charged is an offense against the law, and the court is proceeding in due course with the case, or where it has proceeded to judgment, and has adjudged the accused guilty and pronounced the sentence of the law upon him, it cannot be said, in the language of *Magna Charta*, that he is deprived of his liberty without having been adjudged to have forfeited it "by the judgment of his peers or the law of the land," and therefore the writ of habeas corpus has no place in his case. If the prisoner is held in custody under process, await-

ing trial, or under commitment, awaiting the action of the grand jury, and bail has been refused him, the habeas corpus act expressly provides that he may be brought before a court or judge under this writ, and admitted to bail to await his trial or the action of the grand jury, if it is a bailable case. Sections 3568-3570, 3581-3590, Rev. St. 1899. But, except for the purpose of admitting to bail, the writ of habeas corpus was not designed, and should not be issued, to interfere with the due procedure in a court of competent jurisdiction. This is the doctrine announced by this court in its earlier decisions, and is the only doctrine consistent with the original purpose of the writ and with the spirit of the habeas corpus act in our statutes, and under our state judiciary system, although reason exists for a different view under the federal judiciary system.

In *Re Harris*, 47 Mo. 164, the petitioner was under legal process, and held for further action of the court; and he claimed that he was unlawfully restrained of his liberty, because the statute under which he was held was unconstitutional. The court, per Wagner, J., after quoting from what is now section 3578, Rev. St. 1899, which provides that when the prisoner is held on legal process he shall not be discharged except in certain cases, refused to go into the question of the constitutionality of the statute under which the prisoner was held, and said: "The prisoner can have his trial, and if he is dissatisfied with the verdict and judgment, and desires to test the validity of the law, the courts are open to him, as they are to all other persons charged with the violation of the laws of the land. Admit this proceeding, and then every person charged with committing an offense of any kind and description whatsoever, instead of standing his trial and litigating the matter as the law directs, can come here and ask our advice as to the validity of the law under which he is arraigned. And the legislature clearly saw the impolicy of the proceeding when it placed a prohibition upon it." This decision was approved and its doctrine reaffirmed in *Ex parte Boenninghausen*, 91 Mo. 301, 1 S. W. 761. In that case it was contended that the *Harris* Case had been overruled in *Ex parte Slater*, 72 Mo. 102, *Ex parte Bethurum*, 68 Mo. 545, and *Ex parte Crenshaw*, 80 Mo. 447; but the court, per Norton, J., pointed out the distinction that in those cases the courts that issued the process were acting beyond their jurisdiction, and the court in that case remanded the prisoner, refusing to consider the question of the constitutionality of the city ordinance under which he had been convicted in due form. In *Ex parte Mitchell*, 104 Mo. 121, 16 S. W. 118, the prisoner had been convicted and sentenced in the circuit court for selling intoxicating liquors in violation of what was called the "Local Option Law." His contention was that that law had not

been adopted in that county, and therefore it was no law. The court, per Gantt, P. J., said: "The writ of habeas corpus is not the remedy to correct errors of trial courts, and cannot be substituted for appeals and writs of error. Every suggestion made in behalf of the prisoner here could have been made in the circuit court of Marion county, and that court should have had an opportunity of passing upon those questions. This court has a sufficient docket, without reaching out and assuming jurisdiction committed by law to other courts." No difference in principle is perceived between that case and one in which the constitutionality of the law is in question. In both the question is, is the statute under which the prisoner is held a valid law? If, as has been said, an unconstitutional law is no law at all, a law not legally adopted is no law at all. The one is as void as the other, and the circuit court was as competent to decide status of the one as it was to decide that of the other; and, if its decision was wrong in either, the aggrieved party had his remedy in a due and orderly manner. In *Ex parte Swann*, 96 Mo. 44, 9 S. W. 10, this court, in a habeas corpus proceeding, did consider the question of the constitutionality of the local option law under which the prisoner had been convicted, and, after reaching the conclusion that the law was valid, remanded the prisoner. But the question of whether it was a proper subject for decision in a habeas corpus case was not referred to either in the briefs of counsel or the opinion of the court. Whether, if the court had reached the conclusion that the law was unconstitutional, and had thus been brought to the question we are now considering, it would have discharged the prisoner, in the face of the judgment of the trial court, whose jurisdiction was in no respect questioned, may be doubted. That case is referred to in *Church, Hab. Corp.* § 374, as holding contrary to the other Missouri cases above referred to. If the text writer's estimate of that case is correct, it is so only because the point is passed over in silence.

Under the judiciary system of this state, any one tried and condemned as for a crime may have the proceedings in his trial reviewed on appeal or writ of error, in which he may have relief not only against the errors and irregularities, if any, of the trial court, but, if he raises the question of the constitutionality of the statute under which he was convicted, he may have the judgment of the highest court in the state on that question. And, if the point he desires reviewed goes to the jurisdiction of the trial court, the record may be brought here on certiorari and quashed. If, therefore, under our system, any one is left to pine in prison because of error or irregularity in his trial, or invalidity of the law under which he was convicted, or lack of jurisdiction in the

court that condemned him, it is only because he has omitted to avail himself of one of the several remedies the law affords him. There is absolutely no occasion in such case to invoke the remedy by habeas corpus, and it would be a misuse of that writ to so extend it. Under our habeas corpus act, application for the writ is to be made "to some court of record in term or to any judge thereof in vacation." No appeal lies from the decision of the court or judge in such case, and the judgment of one such court or judge is of as much force as that of any other. "No person who has been discharged by the order of any court or magistrate upon a writ of habeas corpus issued pursuant to this chapter shall be again imprisoned or kept in custody for the same cause." Rev. St. 1890, § 3598. In *Ex parte Jilz*, 64 Mo. 205, the prisoner had been discharged from jail, to which he had been committed by judgment of the criminal court of St. Louis, under a habeas corpus proceeding before a judge of the circuit court. He was rearrested under the same commitment, and discharged by this court under habeas corpus, on the ground that having been once discharged by the circuit judge, whether rightfully or wrongfully, he could not again be confined on the same judgment. In that case this court, per Norton, J., said: "In proceedings by habeas corpus this court only exercises original jurisdiction, and, in issuing the writ and determining the questions arising under it, possesses no more power than is possessed by a circuit court or a county court or judge, or officer authorized by law to issue the writ," etc. As our habeas corpus act makes no distinction between the courts or judges who may issue this writ, so it makes no distinction as to who may have ordered the imprisonment,—whether it be the successor of the king and his privy council, or the highest court in the land. As the action of the circuit judge in the *Jilz* Case, discharging the prisoner confined by judgment of the criminal court, was held to be final, whether right or wrong, so would a judgment under a habeas corpus of a judge of the county court discharging a prisoner held under judgment of this court be final, however erroneous it might be. This goes to show the unwisdom of attempting to apply the writ of habeas corpus to the case of a man in custody under judgment of a court of competent jurisdiction, or held for trial under its process, except for the purpose of admitting to bail, as the act expressly provides. The circuit judge in the *Jilz* Case made a misuse of the writ of habeas corpus. He should not have granted the writ if the facts sufficiently appeared on the face of the petition; or, having granted it, he should have remanded the prisoner when it did appear by the return that the petitioner was held under the judgment of a court of competent jurisdiction. But, having discharged the prisoner under an erroneous view of the office of the writ, that was

the end of the case, as the statute expressly provides (section 3598, *supra*), and as this court correctly held. In *State v. Dobson*, 135 Mo. 1, 36 S. W. 238, a circuit judge had issued a writ of habeas corpus on the petition of one in jail under conviction in the Jackson county criminal court for the crime of murder, and the proceedings under that writ were brought to this court under certiorari at the suit of the attorney general and quashed. In declaring the law of the case, this court, per Sherwood, J., said: "Now, nothing is better established than that the writ of habeas corpus possesses none of the attributes and performs none of the functions of a writ of error or an appeal or certiorari." *Loc. cit.*, page 12, 135 Mo., and page 240, 36 S. W. And again: "It matters not what the purpose was, or the object in view. In any event the issuance of the writ was in disregard of the plainest statutory provisions and prohibitions, and was the establishment of a precedent most dangerous in its tendencies and innovations, and one not to be contemplated without the gravest apprehension. Just look at it! If such a proceeding as this is to be tolerated, after a man has been duly tried and convicted of murder, and judgment rendered, and that judgment affirmed by this court, and the day of its execution set, any probate or county judge in the state may, if the trial has happened in his county, interpose with a habeas corpus, retry the case on its merits, impeach the judgment of the trial court, and discharge the prisoner, if in his opinion this be the correct thing to do. The fact that in this instance the writ has been issued by a judge of a circuit court, a court of general jurisdiction, does not alter the complexion of the case in the least, because, after all, the sole question to be answered is, does the power exist anywhere in this state thus collaterally to impeach the judgments of courts of competent jurisdiction, and thus to thwart the judgments and mandates of this court? We are not of the opinion that any such power or jurisdiction exists or has any foundation either in statutory law or in legitimate precedents." *Loc. cit.*, pages 16, 17, 135 Mo. and page 242, 36 S. W. In the few lines thus quoted the whole principle governing this subject is compressed and forcibly expressed; and it follows that this court, exercising as it does, under a writ of habeas corpus, original and not appellate or supervisory jurisdiction, can no more set at naught the judgment of a circuit court than can a judge of the circuit or county court set at naught a judgment of this court. Under the habeas corpus act, all courts and judges are on a plane. The supreme court of California, expressing the same idea, have said: "Not only that, but, as already suggested, inferior tribunals would be called upon to review judgments of superior tribunals, and tribunals of equal grade to interfere and review each other's proceedings. Such a rule would

render all judicial proceedings amorphous and lead to the utmost confusion and disorder. It is well settled that habeas corpus can be put to no such use, and that its functions, where the party who has appealed to its aid is in custody under process, do not extend beyond an inquiry into the jurisdiction of the court by which it was issued, and the validity of the process on its face." *Ex parte McCullough*, 35 Cal. 97. Although it is said that an unconstitutional law is no law at all, and therefore a conviction under such a law is void, yet, while that is true in a certain sense, it is inaccurate if by it it is intended to say that the judgment is *coram non iudice*. If the court had authority to pronounce the judgment provided the law was constitutional, it had jurisdiction to decide whether or not it was constitutional; and, if it decided erroneously, the error did not go to the jurisdiction of the court. In a decision of the United States supreme court cited in *State v. Dobson*, *supra*, Chief Justice Marshall said: "The question whether an offense was or was not committed (that is, whether the indictment did or did not show that an offense had been committed) was a question which that court was competent to decide. If its judgment was erroneous, * * * still it is a judgment, and until reversed cannot be disregarded." *Ex parte Watkins*, 3 Pet. 193, loc. cit. 203, 206, 7 L. Ed. 650, 654. It is failing to observe the distinction there indicated that has misled some courts in this country to giving sanction to the use of this writ in setting at naught the judgment of a court of competent jurisdiction, or interfering with its due process to discharge a prisoner upon the ground that the legislative act under which the prisoner was condemned or is being held for trial is, in the opinion of the magistrate granting the writ, unconstitutional. A text writer of ability, formerly chief justice of the supreme court of Wisconsin, commenting on this point, says: "Those who have pretended to treat the subject, as some have, by merely collecting such general expressions, have tended to confuse, rather than demonstrate and make plain. They make no distinction between errors of law and errors which are jurisdictional. * * * It is evident that these distinctions must be observed, or else an intelligent treatment of the subject is not made." *Bailey*, *Jur.* note to section 409. The right which this writ is intended to secure is that a man shall not be deprived of his personal liberty, in the language of the Great Charter, "*nisi per iudicium parium suorum vel per legem terre*"; but who are his peers, if they be not those appointed by law to try his case, and what is the law of the land, if it be not that which is solemnly so adjudged to be by the court designated to pronounce the judgment? Can it be that the habeas corpus act is intended to substitute the individual opinion of any magistrate intrusted by its provisions with the issuance

of the writ for the judgment of a fully equipped court, proceeding in solemn form? It would be as wise to do so as to adopt for the measure of equity the ancient illustration of the chancellor's foot or the chancellor's conscience.

The doctrine announced by this court in *Re Harris* and *Ex parte Boenninghausen*, above quoted, continued to be the doctrine of this court, and was not expressly departed from, until the decision in *Ex parte Smith*, 135 Mo. 223, 36 S. W. 628, 33 L. R. A. 606, which has since been followed by a divided court in *Ex parte Neet* (Mo. Sup.) 57 S. W. 1025, not yet officially reported. There were the cases of *Ex parte Swann*, above commented upon, *Ex parte Marmaduke*, 91 Mo. 228, 4 S. W. 91, and *In re Thompson*, 117 Mo. 83, 22 S. W. 863, 20 L. R. A. 462; but in neither of those was there an express ruling on this question. The learned judge (Sherwood, J.) who wrote the opinion in *Ex parte Smith* referred to the decision of the supreme court of the United States in *Ex parte Siebold*, 100 U. S. 371, 25 L. Ed. 717, and to the text of *Church, Hab. Corp.*, wherein are collected references to decisions in other states following the supreme court of the United States in the *Siebold Case*. But a reading of the opinion in that case shows that although it is founded in reason, as applicable to the federal judiciary, the doctrine announced is in discord with our state judiciary system. The supreme court of the United States was there defining its own authority, not under the habeas corpus, as an original writ, but as using the writ in its capacity of an appellate and supervisory court. Because in the case before it there was no appeal from and no writ of error to the United States circuit court, by which the judgment under which the prisoner had been convicted could be reviewed, and no other method prescribed by law by which the validity of the act of congress under which the conviction was had could be tested in the supreme court, that court said it would, under its appellate jurisdiction, review the judgment to that extent on habeas corpus. This is the language of that court: "The question is whether a party imprisoned under a sentence of a United States court, upon conviction of a crime created by and indictable under an unconstitutional act of congress, may be discharged from prison by this court on habeas corpus, although it has no appellate jurisdiction by writ of error over the judgment. It is objected that the case is one of original, and not appellate, jurisdiction, and therefore not within the jurisdiction of this court. But we are clearly of the opinion that it is appellate in its character. It requires us to revise the act of the circuit court in making the warrants of commitment upon the convictions referred to. This, according to all decisions, is an exercise of appellate power. [Citr

cases.] That this court is authorized to exercise appellate jurisdiction by habeas corpus directly is a position sustained by abundant authority. It has abundant power to issue the writ, subject to the constitutional limitations of its jurisdiction, which are that it can only exercise original jurisdiction in cases affecting ambassadors, public ministers, and consuls, and cases in which a state is a party, but has appellate jurisdiction in all other cases of federal cognizance, with such exceptions and under such regulations as congress shall make." Loc. cit., page 374, 100 U. S., and page 718, 25 L. Ed. Again the court says: "The validity of the judgment is assailed on the ground that the acts of congress under which the indictments were found are unconstitutional. If this position is well taken, it affects the foundation of the whole proceedings. An unconstitutional law is void and as if no law. A conviction under it is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment. It is true, if no writ lies the judgment may be final in the sense that there may be no means of reviewing it. But personal liability is of so great moment in the eye of the law that the judgment of an inferior court affecting it is not deemed so conclusive but that, as we have seen, the question of the court's authority to try and imprison the party may not be reviewed on habeas corpus by a superior court or judge having authority to issue the writ." Thus it will be seen that the whole reason on which the United States supreme court founded that case is absent in our state law and in our state judiciary system. In the first place, since, under our system, as we have seen, no man can be convicted under a legislative enactment without having an opportunity of testing the validity of the act in the highest court in this state, there is no necessity for straining a point in the interest of personal liberty to supply what may have been an oversight in the lawmakers. And, in the next place, we cannot, as did that court, say that, as a superior court, and by virtue of our appellate jurisdiction, we will review the judgment of an inferior court under a writ of habeas corpus, because, as said by Norton, J., in the *Jilz Case*, supra, with the concurrence of all the judges, in such case this court exercises only original jurisdiction, and "possesses no more power than is possessed by a circuit court or a county court, or any judge or officer authorized to issue the writ"; and as said by Sherwood, J., in the *Dobson Case*, supra, the fact that the writ was issued by a circuit judge did not alter the complexion of the case in the least. It might as well have been issued by a probate or county judge. We cannot declare for ourselves a power under this writ that we must not concede to any court or judge that can issue it. If by this writ we can set at naught the judg-

ment of a circuit court, by the same writ a judge of the circuit court can set at naught a judgment of this court. We said in the *Dobson Case* that a circuit judge had no such authority, and we must, for the same reason, say that we have no such authority. By adhering to the doctrine in the *Harris Case*, supra, we put no one in peril of his liberty otherwise than "by the judgment of his peers or the law of the land," and by the same means we preserve due order in our courts in the administration of our criminal laws. For these reasons, the decisions in *Ex parte Smith* and *Ex parte Neet*, in so far as they hold that the court had authority under the writ of habeas corpus to discharge the prisoners, should be overruled. And, for the same reasons, we should not in this proceeding decide the question as to the validity of the act of the legislature under which the petitioner in this case is held; and, since it appears that he is held under due process of a court of competent jurisdiction, he should be remanded to the custody under that jurisdiction.

BRACE and ROBINSON, JJ., concur in these views.

RIESTERER et al. v. HORTON LAND & LUMBER CO. et al.

(Supreme Court of Missouri, Division No. 1.
Feb. 12, 1901.)

CORPORATIONS—STOCKHOLDERS' MEETING—NOTICE—CONSTITUTION—STATUTES—BONDS—TRUST DEED—ATTACHMENT—PRIORITIES—TRIAL—ISSUES—APPEAL AND ERROR—BANKS AND BANKING—NATIONAL BANKS—UNLAWFUL ACTS.

1. All the stockholders of a corporation signed an agreement that the bonded indebtedness be increased to an amount fixed therein at a meeting called for that purpose, expressly waiving all notice of the meeting required by law. The meeting was held, and bonds authorized issued, and secured by deed of trust, and sold for full value. *Held*, that the bonds and deed of trust issued pursuant to such agreement and meeting so held were valid obligations of the corporation, notwithstanding Const. art. 12, § 8, providing that no corporation shall increase its bonded indebtedness except in pursuance of general law, nor without consent of the persons holding the larger amount in value of the stock, first obtained at a meeting called for the purpose on 60 days' public notice, and Rev. St. 1899, § 2499, providing that any corporation may increase its bonded indebtedness with the consent of the persons holding the majority of its stock obtained at a meeting called for that purpose on 60 days' notice; since such provisions for notice are for the benefit of the stockholders, and the notice may be waived by them by express agreement, or by all attending a meeting held without such notice.

2. The lien of the trust deed was superior to that of attachments subsequently levied on the property of the company.

3. An issue as to the priorities of holders of corporate bonds secured by trust deed and attaching creditors, not raised in the trial court, cannot be reviewed in the appellate court.

4. A national bank to which a corporation was indebted purchased the funding bonds of the corporation secured by a trust deed of its real estate to the amount of its claims and

more, and to conform in appearance with Rev. St. U. S. § 5137, authorizing a national bank to take a mortgage only to recover debts previously contracted, and to make it appear that it held the notes of two corporations instead of bonds secured by mortgage, it took the note of another corporation, which was not indebted to it, indorsed by the one issuing the bonds, for the same amount as the bonds. *Held*, that the bonds and mortgage were not held as collateral security for such note, and, as such, subordinate to defendant's lien on the property under an attachment subsequent to the trust deed, since the note did not represent any debt, and defendant could not usurp the province of the government, and punish the bank for its evasion of the act of congress.

Appeal from circuit court, Ripley county; John G. Wear, Judge.

Action by Edward G. Riesterer and others against the Horton Land & Lumber Company and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

Seneca N. Taylor, Charles Erd, and S. C. Taylor, for appellants. J. E. McKieghan, Shepard Barclay, and M. F. Watts, for respondents.

MARSHALL, J. This is an action to foreclose a deed of trust, covering several thousand acres of land in Ripley county, Mo. The plaintiffs are the trustee and the holders of all the outstanding bonds secured by the deed of trust, and the defendants are the mortgagor and its creditors and other parties claiming title under it. There was a decree for the plaintiffs, from which the defendants perfected this appeal.

Briefly stated, the controversy is this: The Horton Land & Lumber Company owned the land. There was a mortgage on it for \$6,500. Outside of this, the company owed a large floating debt, the bulk of which was held by the seven banks that are parties hereto. The total indebtedness amounted to \$110,000. The company desired to fund the indebtedness, and pay the small creditors, and concentrate the indebtedness in the hands of the seven banks. To accomplish this, it made a deed of trust for \$110,000, securing bonds to that amount, and sought to have each of the banks take bonds covering the amount of their claims, and to a further amount equal to 48 per cent. of their respective claims, and to apply the 48 per cent. cash thus raised to pay the smaller creditors. The banks agreed to this arrangement. After about \$40,000 bonds had been negotiated, it was found that the deed of trust was defectively executed; so, to remedy the defect, on the 15th day of May, 1895, all of the stockholders of the Horton Land & Lumber Company signed a written resolution or agreement that the bonded indebtedness be increased to \$110,000, and directing the vice president and secretary to issue bonds to that amount, and secure the same by a mortgage on the real estate and franchises of the company, and providing that the bonds should not be sold for less than their par value, or for any purpose except

money, labor done, or money or property actually received, and expressly waiving the 60-days notice and all other notice required by law to be given of a meeting of stockholders of said company "called to be held at office of said company on the 21st of May, A. D. 1895, at nine o'clock a. m., for the purpose of taking an election for or against an increase of the bonded indebtedness of the said company as aforesaid, and desire and direct that this paper be taken as our vote in favor of said increase, and in favor of the adoption of the above resolution." On May 17, 1895, the directors held a meeting, and unanimously rescinded the prior defective mortgage for \$110,000, and also rescinded a resolution directing a general assignment for the benefit of its creditors. On May 21, 1895, the directors held a meeting, and, pursuant to the direction in the resolution of the stockholders of May 15th aforesaid, adopted a resolution ordering the issuance of bonds for \$110,000 secured by mortgage, and this is the mortgage sought to be foreclosed in this case. Accordingly, the bonds were issued, and the deed of trust properly executed. The bonds contained this provision: "This bond will not become obligatory until the certificate thereon shall be signed by the trustee," and the certificate to be signed by the trustee was: "This bond is one of a series and issue amounting in the aggregate to \$110,000, described in the mortgage deed of trust mentioned therein." Thereupon the seven banks took the bonds, and advanced the 48 per cent., and with the cash thus secured the first mortgage for \$6,500 and the claims of the smaller creditors were paid, the defective mortgage for \$110,000 canceled, the \$40,000 bonds secured thereby, which had been negotiated, were taken up, and the funding scheme carried out. Thus the matter stood from about June, 1895, until the 1st of April, 1896, when five of the seven banks that went into the funding arrangement began suits by attachment against the Horton Land & Lumber Company in the circuit court of the United States for the Eastern division of the Eastern district of Missouri to recover the amounts of their respective claims, and offering to return the bonds they had received, claiming that they were void because no notice of the stockholders' meeting which authorized their issue was published for 60 days before the meeting. These cases resulted in consent decrees stipulating that the five banks should surrender the bonds they held, and take judgment against the company, but that the decree should not be construed as settling or affecting the validity or invalidity of bonds held by persons other than the five banks. The plaintiffs in this action were not parties to that agreement. Thereafter executions were issued on said decrees, the land covered by the deed of trust here sought to be foreclosed was sold by the United States marshal, and was bought by defendants Bell and Murphy, as trustees, for the benefit of

said five banks. When the bonds matured, they were not paid, and the trustee under the deed of trust and the bondholders instituted this action in the circuit court of Ripley county to foreclose the deed of trust, with the result first herein stated.

1. The defendants contend that the bonds and deed of trust are void because 60 days' public notice of the meeting of the stockholders at which their issue and execution was authorized was not given. There is no claim made that the bonds are fictitious, or were fraudulently issued. Neither is it claimed that the company did not get value received for every dollar represented by them. It is admitted that every stockholder of the company signed the resolution directing the issue. The sole claim is that under the constitution and laws of this state 60 days' public notice must be given of any meeting held to vote upon a proposition to issue bonds, and, as this was not done in this case, the bonds and mortgage are void. This contention is based upon section 8, art. 12, of the constitution, and section 2499, Rev. St. 1889. The provision of the constitution is as follows: "No corporation shall issue stock or bonds, except for money paid, labor done or property actually received, and all fictitious increase of stock or indebtedness shall be void. The stock and bonded indebtedness of corporations shall not be increased, except in pursuance of general law, nor without the consent of the persons holding the larger amount in value of the stock first obtained at a meeting called for the purpose, first giving sixty days' public notice, as may be provided by law." The statute carrying the constitutional provision into effect is: "Any corporation may increase its capital stock or its bonded indebtedness, with the consent of the persons holding the larger amount in value of the stock, which consent to such increase shall be obtained at a meeting of the shareholders, called for that purpose—sixty days' notice of the time and place of such meeting and the amount of the proposed increase of stock or bonded indebtedness having been given, as hereinafter provided; but the shares of stock or bonds arising from such increase shall only be disposed of for money paid, labor done or money or property actually received. All fictitious issue or increase of stock or bonds of any corporation shall be void." In further support of their contention the defendants rely upon the case of *State v. McGrath*, 86 Mo. 239. That was a case by mandamus to compel the secretary of state to issue to relator a certificate that it had complied with the law in increasing its capital stock. The secretary of state refused to issue the certificate solely because 60 days' public notice of the meeting of the stockholders at which the increase of stock was authorized had not been given. It appeared that a notice was given (not 60 days' public notice) and received, and all of the stockholders assembled, and signed a written con-

sent to hold the meeting without further notice, and, being assembled, they unanimously voted to increase the capital stock. It was held that the 60-days notice required by the constitution was for the benefit of the public, and not merely for the benefit of the stockholders. It was said that section 938, Rev. St. 1879, then in force, in addition to a publication of a notice once a week for 60 days before the meeting, required a notice to be sent by mail to each stockholder 60 days before the meeting, and the deduction was drawn therefrom that the notice by mail was intended for the benefit of the stockholder, while the published notice was intended for the benefit of the public, and it was suggested that the reason for requiring the notice to the public was "the prevalent practice of watering the stock of corporations, resulting oftentimes to the injury of the public." It was accordingly held that the stockholders could not, even by unanimous consent, waive the public notice, and therefore the increase, accomplished in the manner stated, was void. It is a settled rule of construction that "every word employed in the constitution is to be expounded in its plain, obvious, and common-sense meaning, unless the context furnishes some ground to control, qualify, or enlarge it. Constitutions are not designed for metaphysical or logical subtleties, for niceties of expression, or for the exercise of philosophical acuteness or judicial research. They are instruments of a practical nature, founded on the common business of life, adapted to common wants, designed for common use, and fitted for common understandings. The people made them, the people adopt them, the people must be supposed to read them with the help of common sense, and cannot be presumed to admit in them any recondite meaning or any extraordinary gloss." 1 Story, Const. § 451. There is great diversity of opinion as to whether any provision of a constitution can be construed to be merely directory, and the rule obtains in some jurisdictions that every provision of the constitution is mandatory. In our state provisions of the constitution have been held merely directory. Section 24, art. 4, provides that "the style of the laws of this state shall be: 'Be it enacted by the general assembly of the state of Missouri, as follows.'" Yet in *City of Cape Girardeau v. Riley*, 52 Mo. 424, this was held to be merely directory. Section 38, art. 6, provides that "all writs and process shall run and all prosecutions shall be conducted in the name of the 'state of Missouri,'" etc. Yet in *State v. Foster*, 61 Mo. 549, this was held to be only directory. Section 37, art. 4, provides that "no bill shall become a law until the same has been signed by the presiding officer of each of the two houses in open session," and, further, that before the officer affixes his signature he shall suspend all other business, order the bill read at length, and, if no objections are made, sign it, and the fact shall be noted on the journal, and the bill immediately sent

to the other house, and, if objections are made, the procedure is prescribed for determining them. Yet in *State v. Mead*, 71 Mo. 266, the first clause, literally quoted above, was held mandatory, but the remainder of the section was declared to be merely directory. The decision of such questions ought always to be approached cautiously, and every word of the constitution be given full force, and a practical meaning be attached to the provision construed. In no case, however, ought a construction be adopted that could serve no useful purpose, or that would be absurd, or make the provision ridiculous.

The constitutions and laws of many of our sister states contain provisions similar to the provisions of our constitution and statutes requiring a public notice to be given a specified number of days before the meeting of the stockholders is held to increase the capital stock or bonded indebtedness, and in every instance in which the question has come before the courts it has been held that the notice required is for the benefit of the stockholders; that the public has no interest in the matter; and that, if all the stockholders get together, even without any previous notice, and unanimously (or the requisite majority of the whole number so assembled) vote to increase the stock or bonded indebtedness, the act is legal, for those for whose benefit a protection is promised may, *if sui juris*, waive the benefit of the protection, and bind themselves by contract. For these reasons mortgages executed to secure a bonded indebtedness, pursuant to the order of the stockholders when they were all assembled in a meeting, although the meeting was not called by giving the public notice required by the constitution, have been held to be valid. *Campbell v. Mining Co.* (C. C. Mont.) 51 Fed. 1; *Ice Co. v. Meader* (O. C. A. Ala.) 72 Fed. 115; *Trust Co. v. Condon* (O. C. A. Tenn.) 67 Fed. 84; *Wood v. Waterworks Co.* (C. C. Pa.) 44 Fed. 146; *Nelson v. Hubbard*, 96 Ala. 238, 11 South. 428, 17 L. R. A. 375. In other instances the provision for notice was by statute, but not in the constitution, and the same rule was adopted. *Beecher v. Mill Co.*, 45 Mich. 103, 7 N. W. 695; *Thomas v. Railroad Co.*, 104 Ill. 462; *Farmers' Loan & Trust Co. v. Toledo, A. A. & N. M. R. Co.* (O. C.) 67 Fed. 49; *Commissioners v. Aspinwall*, 62 U. S. 539, 16 L. Ed. 206. The same doctrine is maintained by the standard text writers. 5 *Thomp. Corp.* §§ 6060, 6069; 2 *Cook, Corp.* 599; 2 *Mor. Priv. Corp.* § 675. The rule thus adopted as to private corporations is very different from the rule applicable to public corporations. In the latter case the public officers must act strictly and literally within the letter of the law giving the power to act, and, if a specific mode or method for contracting is prescribed, it must be rigidly followed, or the act will be void. *Ruggles v. Collier*, 48 Mo. 353; *City of St. Louis v. Russell*, 9 Mo. 507; *Keating v. Kansas City*, 84 Mo. 415, loc. cit. 419. The rea-

son for the difference is plain. Public officers are trustees for the people, who have to pay whatever liability is incurred, and are vested with only the powers conferred, to be exercised in the modes prescribed; whereas the stockholders of a private corporation act for themselves, bind themselves, and must pay whatever liability is incurred. The rest of mankind are not liable for their acts, incur no responsibility from their contracts, have no voice in their meetings, and no standing in court to call their acts in question. The state creates the corporation, can place limitations upon their power, and can call their acts into question. But the people composing the state, as individuals, have no interest in or power over them. It has been pointed out in *State v. McGrath*, supra, that the 60-days notice was held to be for the benefit of the public, and not for the benefit of the stockholders. A similar contention was made as to the statute of Michigan which required a public notice of a meeting for such purpose to be given, and in *Beecher v. Mill Co.*, 45 Mich. 103, 7 N. W. 695, Cooley, J., answered it in his usual clear style, and said: "These are strong, and seem very imperative, words, and, if full effect is given to them, it may be difficult to support this mortgage; but we are not hastily to conclude that words thus apparently imperative are to be given a literal interpretation, and enforced accordingly. Courts often speak of acts and contracts as void when they mean no more than that some party concerned has a right to void them. * * * If it is apparent that an act is prohibitory, and declared void on grounds of general policy, we must suppose the legislative intent to be that it shall be void to all intents; while, if the manifest intent is to give protection to determinate things who are *sui juris*, the purpose is sufficiently accomplished if they are given the liberty of voiding. * * * The statute now under consideration was passed to protect the interests of stockholders in mining companies. It intends that their mining property shall not be conveyed away or mortgaged except by their deliberate action, after they have been notified of the proposal to do so, and have had time to deliberate upon and fully consider it, but the matter does not concern the public at large. No principle of public policy is at stake. No wrong, direct or indirect, is done to any human being if conveyance is made or mortgage given without the exact notice required, unless it be wrong to the stockholders themselves; and, as others are not concerned, why should the statute give them the right to raise questions of irregularity which the stockholders elect to waive? We are satisfied such was not the purpose." If it be said that the framers of the organic law have seen fit to limit the power of corporations in this respect in plain words, and the courts have no right to construe away such limitations, the answer is afforded by the

lucid remarks of Lord Halsbury in *Cox v. Hake*, 15 App. Cas., loc. cit. 518, where he said: "From these and similar examples a canon of construction has been arrived at which has often been quoted, but which is so important with reference to the question now before your lordships that I quote it once again: 'From which cases it appears that the sages of the law heretofore have construed statutes quite contrary to the letter in some appearance, and those statutes which comprehended all things in the letter they have expounded to extend but to some things, and those which generally prohibit all people from doing such an act they have interpreted to permit some people to do it, and those which include every person in the letter they have adjudged to reach to some persons only, which expositions have always been founded on the intent of the legislature, which they have collected sometimes by considering the cause and necessity of making the act, sometimes by comparing one part of the act with another, and sometimes by foreign circumstances. So that they have ever been guided by the intent of the legislature, which they have always taken according to the necessity of the matter, and according to that which is consonant to reason and good discretion.'" The same rule is declared in *Stradling v. Morgan*, Plowd. 205a. This rule is the same whether applied to constitutions or to statutes. It is pertinent to inquire what good or useful purpose would be subserved by requiring a public notice to be given for a stockholders' meeting if all the stockholders actually knew of the meeting, and were personally present at the meeting. A notice published in a paper is only constructive notice. It is never held to be as good as actual personal notice. Its sole purpose is to call the stockholders together. If they all get together, they are as much present at the meeting as if they had come upon notice. The notice is a means to an end. That end is to get the parties in interest together, or give them an opportunity to be present. But, when they are all present, the end is attained. A summons is a notice to bring a party into court. But, if the summons is never issued or served, and yet the party voluntarily comes into court, and tries the case, neither he nor the adversary party can be heard to say that the judgment is void, or even voidable. So it is with a stockholders' meeting, if all the stockholders are actually assembled in meeting. When assembled, the power to make a contract or execute a mortgage is just as full and complete as if a notice had been given of intention to hold the meeting. Their acts bind only themselves. If a public notice of a stockholders' meeting is intended for the benefit of the public, and not of the stockholders, then some purpose beneficial to the public must be intended. What is it? If the public, or any member of it, saw such a notice in the papers, and attended the meeting, he

could not participate in it; he could not vote at it; he could not compel the meeting to increase its capital stock, or prevent it from doing so. If the purpose of the stockholders was the ulterior one of watering the stock, or increasing the bonded indebtedness to an unlawful extent, his presence must not prevent that purpose being carried out; or, if it was carried out, he would have no standing in court to stop its consummation by legal action. If the purpose was to have him present so he could warn investors not to buy the watered stock or illegally issued bonds, it would be impossible for him to do so, for he could not reasonably be expected to know to whom the stock or bonds were offered, or when or where on the face of the earth the offer would be made. And this could not be the purpose as to an increase of stock, because section 984, Rev. St. 1890, requires a certificate of the increase of stock to be filed with the secretary of state, and section 1329, Rev. St. 1890, requires a certificate of the secretary of state that in making the increase the law has been complied with, thus furnishing a public record of the fact that such an increase has been made, which is open to every one who chooses to inquire before investing in such stock. If this is not sufficient to prevent stock being watered, it is not clear how the publication of the notice 60 days before the meeting is to be held at which it is contemplated doing the act of watering the stock will have any such effect, or be any protection to the public. Neither can it be construed that this provision is intended to give notice to the officers of the state whose duty it would be to call the act in question that such a meeting for such a purpose was to be held; for, as above pointed out, the increase of stock does not become effective until the proceedings of the stockholders and directors have been certified to the secretary of state, and he has filed them among his records, and issued his certificate of compliance. So that the state's officers do not need any notice of the meeting, but get notice of the result of the meeting, and must certify to the legality of the act before the result of the meeting becomes effective, and before any one can be imposed upon by investing his money in such watered stock. It follows that the reasons given for the result reached in the case of *State v. McGrath*, 86 Mo. 241, fail to support that result. It is apparent also that that case is out of line with the adjudications upon the same question in all the other states. It is clear that the constitutional and statutory provisions construed are for the benefit of the stockholders, and not for that of the public; that no useful purposes would be subserved by construing them to be for the benefit of the public; and that, being for the benefit of the stockholders, they can waive that benefit, and, if they do so, and all meet, and unanimously or by a legal majority vote to increase the stock or bonded indebtedness,

their act is binding on them, and neither they nor their creditors can be heard to deny the validity of the act. For this reason the case of *State v. McGrath*, supra, is overruled, and the deed of trust in this case held to be valid, and a superior lien to the title of the defendants, acquired under the attachment proceedings in the United States court.

2. It is argued, however, that the bonds specify on their face that they shall not be binding on the company unless they are certified by the trustee, and that only 16 of the 76 bonds held by the plaintiff the German-American Bank were so certified until several months after the defendants instituted their attachment suits. No such issue was made by the pleadings, and no such relief was asked, no such objection was raised, and no such point relied on in the trial in the circuit court. The defendants pleaded that none of the bonds held by the German-American Bank were certified by the trustee until four months after they began their attachment suits, and that, therefore, that bank was not a bona fide holder of the bonds, and hence their rights under the attachment were superior to the rights of that bank under the mortgage. This is a very different position from that here taken. Here defendants concede that 16 of the bonds were properly certified before the attachment suits were begun, and also concede that, if the mortgage is valid, the German-American Bank's claim as to such 16 bonds is superior to defendants' rights under their attachments, but ask that their rights be given priority over the rights of that bank as to the 60 bonds that were not certified by the trustee. In other words, after charging that none of the bonds were superior in right to their rights, the defendants now for the first time ask this court to adjust the priorities of the parties as above stated. It is too late to raise such a question now. The case must be tried on the same issues and theories here that it was tried upon in the lower court.

3. It is insisted that the bonds held by the German-American Bank are held simply as collateral security for notes of the L. A. Kelsey Lumber Company, and hence that bank is not a bona fide holder of those bonds, and therefore its claim is subordinate to the rights of the defendants under their attachments. The evidence does not sustain this contention. The facts are that, before the first defective mortgage for \$110,000 was issued, the Horton Land & Lumber Company owed the German-American Bank \$25,726.23. Under the funding scheme that bank advanced a sum equal to 48 per cent. thereof additional, amounting to \$12,348.86, to help to supply the cash to pay the small creditors; thus making the bank's claim against the Horton Land & Lumber Company \$38,075.09. For this it received \$38,000 in bonds of that company. It did not surrender the original notes of the company, but it did take the note of the L. A. Kelsey Lumber Company to an amount equal to the amount of its claim against the Horton Com-

pany, indorsed by the Horton Company. There was no novation, however. Neither was there any agreement that the Horton notes and bonds were to be held as collateral security for the note of the Kelsey Company. The Kelsey Company owed the bank nothing, and owed the Horton Company nothing. The bank knew the Kelsey notes were made so as to apparently conform to the national banking laws. The bank could never have enforced them against the Kelsey Company. It was simply an arrangement to make it appear that the bank held the notes of the two corporations, instead of bonds secured by real-estate security. While the attempt to thus evade the national banking laws is not to be commended, the form of the transaction did not change the fact or the debtor; and the defendants cannot usurp the province of the government, and punish the bank for the evasion of the act of congress. *National Bank v. Matthews*, 98 U. S. 621, 25 L. Ed. 188. For these reasons the judgment of the circuit court is affirmed. All concur.

STATE v. WESTLAKE.

(Supreme Court of Missouri, Division No. 2.
Feb. 12, 1901.)

HOMICIDE—THREATS—OPENING STATEMENT— OBJECTIONS TO QUESTION—INSTRUCTIONS—EXCEPTION.

1. It is not a ground of complaint that defendant, in his opening statement, was confined to relevant matters.

2. In the absence of more specific objection to a question than "we object to it," objections that it was improper on cross-examination of defendant, because he had not in his examination in chief been examined in regard to the matter inquired about, will be held waived.

3. Rev. St. 1899, § 2627, making it the duty of the court to instruct the jury on all questions of law, does not embrace the question of the credibility of defendant as a witness.

4. Exception not having been taken at the time the instructions were given, because the court had failed to instruct on all questions in issue, it will be held waived.

5. In order that threats of violence previously made by deceased might justify defendant in assaulting and killing him, defendant must have had good reason to believe that deceased was then about to assault him or do him some great bodily harm.

Appeal from criminal court, Jackson county; John W. Wofford, Judge.

Thomas Westlake was convicted of murder, and appeals. Affirmed.

Blake L. Woodson, for appellant. Edward P. Crow, Atty. Gen., and Sam B. Jeffries, Asst. Atty. Gen., for the State.

BURGESS, J. On the 9th day of January, 1900, the defendant shot and killed, with a shotgun, at Jackson county, one Wood Mitchell, for which he was thereafter indicted by the grand jury of said county, and charged with murder in the first degree. Thereafter, at the April term, 1900, of said court, he was put upon his trial, and convicted of murder in the second degree, and his punishment

fixed at 50 years' imprisonment in the state penitentiary. He appeals.

The facts, briefly stated, are that at the time of the homicide defendant lived on a farm in said county which belonged to one Clinton D. French, and had in his custody a lot of hogs and other personal property belonging to him. The farm had recently theretofore been occupied by one Moore, who had executed a chattel mortgage upon the hogs to Mrs. W. A. Moore, which was transferred to the J. H. North Furniture & Carpet Company, a business firm at Kansas City. The deceased, Mitchell, was an attorney at law. On the morning of the 9th of January, 1900, Mitchell went to the farm upon which defendant then resided to make arrangements to recover the hogs, and for that purpose took with him a deputy constable, who had a writ of replevin for the hogs, which had been sued out by the North Furniture & Carpet Company before a justice of the peace in Kansas City. On the morning of the difficulty, in a conversation deceased had with one John Fred, Fred said to him, "If you go down to get those hogs, and meet that man Westlake as a gentleman, he will meet you halfway, but if you don't you are liable to have trouble," deceased replied, "I will show that big stiff a trick that he has never learned," etc. This was communicated to defendant before the shooting. As deceased and the deputy constable, Sherman, were walking across a field towards the house of defendant, he observed them, and he immediately went to his house, got his shotgun, stationed himself in front of a wire which was stretched across the passageway leading into his yard, and waited until deceased and Sherman came walking up, and had gotten within about 12 feet of defendant, when he admonished them at least once, and perhaps twice not to come in; but they made no halt, and defendant at once fired his gun at Mitchell, killing him instantly. The deceased and Sherman made no attempt to assault defendant or to harm him in any way. Defendant did not know that Sherman was an officer, or that he had a writ of replevin in his possession, at the time he shot the deceased. Defendant, in his own behalf, testified as follows: "I went to Grandview from my place late in the forenoon, and shortly before the shooting. It was some little time before noon I was there with Mr. Irwin. That was on the 9th day of January, 1900. I went after my mail, and called up Mr. French, who owned the place on which I lived, and talked with him over the telephone. I was not there but a few minutes. I saw two men coming from the north, and turn across the field east towards my place. They were coming from towards the Phelan house. I started with Mr. Irwin towards home. I wanted to get down there and see who they were. I wanted to see if they were going down there to the place, and what they wanted,—whether they want-

ed to take the property, and if they were officers. I wanted to see that they didn't take anything away unless they had a writ of replevin. I didn't know who they were, but I thought one of them was Vic Moore. He is the son of W. A. Moore, who was a former tenant on the farm, before I took charge of it. I went straight home, walked pretty fast, and went to the house and got my gun. I came out and stood in the yard, close to the fence,—I supposed, six or eight feet from the wire. I think I had my gun in my left hand when I first spoke to the deceased. He was about ninety or a hundred feet away from me. I recognized Mitchell when I first spoke. The other man I had never seen before. The first thing I said to him was, 'You can't come in here, so go back;' but he came right on towards me and started across the road, and I said to him, 'You are no officer, and you can't come in.' From the talk I heard that morning, I was suspicious of him, as I was of other people in the neighborhood. What I mean by this: I had talked with Mr. Fred, and he had told me what the deceased had said. It was to learn me a trick that I had never heard or never knew. I feared it was something that wasn't very pleasant. It caused me to think I was in danger from being in company with parties that had threatened me. I supposed I was liable to be killed almost any time. When he turned directly towards me, I cocked my gun and put it to my shoulder, and commenced telling him to stop. I told him he was no officer, and couldn't come in. He looked vicious, and made no answer. Neither one answered nor said a word, but he came right on to me, while the other man walked around and passed about ten feet from me. I didn't notice the other man particularly, because I had heard nothing that he had said. I was watching Mitchell. I knew he was not an officer. Mitchell told me he was an attorney for the North Furniture Company. When he came towards me I hollered for him to stop, very loud and with as much force as I could. I did this to make him think he was in danger if he came on, or make me an answer. I told him to turn back before I drew the gun on him. I told him he was no officer, and couldn't come in. I told him two or three times. I will not be positive which. Just called to him to stop, as he came near me. I just called to him to stop. Deceased had on his overcoat, which was rather long, and kinder lent over a little just at the time I shot. He moved the coat kinder forward, and I inferred from the movement he intended to shoot from his pocket. I have often heard of people shooting from the pocket that way. I have known of one or two people to do it. I shot simply because, from his looks and his actions, I thought he intended to shoot me. That is just the reason I shot. I think he was about twelve feet from me when I shot. He didn't

slacken his speed any, but came fully as fast as he had been coming. I looked to see if there was any badge of an officer. He never spoke a word, and I thought he had plenty of time to tell me if he were an officer. If they were not officers, they were not there on any peaceable mission at all. By Mr. Sherman going south of me, it looked to me like he was to get on the opposite side, so they would have me between two fires. I brought the gun out from the house because I thought perhaps I would need it to protect myself. I thought one of these men was Moore. That is the reason I got my gun. I thought one of them was Moore. What Mr. Fred had told me about Mr. Mitchell had the effect of making me judge him to be with Moore, and he would do the same they would, and I was satisfied they would kill me if they got a chance. I thought he would do the same." The defense interposed was that of self-defense.

The point is made that the court committed error in refusing to allow defendant's counsel to make an opening statement of the case to the jury. But this contention is not, we think, borne out by the record, which shows that the court did not refuse to permit defendant to make a statement of the facts relied upon by him as tending to show that Mitchell at the time of the shooting was approaching defendant in a hostile manner, and that he shot him in self-defense, but only to show such facts as were, in the opinion of the court, illegal, improper, irrelevant, and incompetent, and which evidence to support would not have been admissible. The court also announced to defendant that he could make any statement of the case that was relevant, than which nothing more could have been desired or expected.

During the cross-examination of defendant as a witness, the following occurred: "Q. You were tried for killing a man once before? A. No, sir; I wasn't. Q. Weren't you convicted for shooting a man? A. No, sir; I wasn't. I never shot anybody in my life. Q. Weren't you convicted of shooting at a man? By Mr. Woodson: We object to it. By the Court: Objection overruled. By Mr. Woodson: We except. By Mr. Porterfield: The defendant objects to the question as incompetent (the record is the best evidence), irrelevant, and immaterial (if the defendant doesn't introduce evidence as to the good character of the defendant, the state can't produce evidence to the contrary), and because the defendant cannot be cross-examined as to matters not touched upon in his direct examination. By the Court: Overruled by the court for the reason that the defendant, when he becomes a witness and places himself on the witness stand, he places himself in the same position as any other witness, and is subject to the same cross-examination, exactly. A. I was convicted of shooting, but not shooting at him. I didn't shoot at him. I got out of it all right, with-

out any further trouble. Q. You were convicted of shooting? A. Yes, sir. Q. Shooting at a man? A. I didn't shoot at him. He was an old man. Q. You were convicted of shooting at him with the intent to kill? A. He was an old man who annoyed me and my folks a great deal. Q. You were convicted of shooting at the man with intent to kill? A. That was the verdict of the jury when they found out the circumstances. The prosecutor wrote to the governor that a \$500 fine would have been the limit at the start, after they learned the circumstances." As the subject of this cross-examination was not adverted to in the examination in chief of the defendant, it is claimed that it was improper and should not have been permitted. It will be observed, however, that no objection was made to the first two questions, and that no exception was saved to the ruling of the court as to the others, with the exception of the third, the objection to which was in these words: "We object to it." It is well settled that, in order that a party to a suit may take advantage of the adverse ruling of the court in the admission of evidence against him, he must not only make timely objection to the admission of such evidence, stating the grounds therefor if it be admissible for any purpose, but he must except to the ruling of the court at the time, and save his exception. Now, the only objection made to which an exception was saved to the ruling of the court was a general one, without stating upon what ground the objection was based,—whether because the question was improper on the cross-examination of defendant, for the reason that he had not, in his examination in chief, been examined in regard to such matter, or upon some other ground. We cannot presume that it was one or the other, for in either case defendant could have waived the objection if he had been so inclined; and, in the absence of more specific objection, he must be held to have done so. Moreover, defendant's counsel concedes that this error, if one, could have been remedied by an instruction restricting the testimony to the credibility of defendant as a witness. But no such instruction was asked by defendant, and while it is true that section 2627, Rev. St. 1899, makes it the duty of the court to instruct the jury on all questions of law, etc., this does not embrace the credibility of defendant as a witness. But, in any event, as defendant did not, at the time the instructions were given, except because the court had failed to instruct upon all questions at issue in the case, he must be regarded as having waived the same, and will not now be heard to complain. *State v. Cantlin*, 118 Mo., loc. cit. 100, 111, 23 S. W. 1091; *State v. Paxton*, 126 Mo. 500, 29 S. W. 705; *State v. Nelson*, 132 Mo. 184, 33 S. W. 809; *State v. Hillsabeck*, 132 Mo. 348, 34 S. W. 38; *State v. Frazier*, 137 Mo. 317, 38 S. W. 913.

Defendant claims that the court erred in refusing the third instruction asked by him,

to the effect that if they believed from the evidence that any threat had been made against the defendant by the deceased, which had been communicated to defendant on the day of the shooting, and prior thereto, such threat should be taken into consideration by them in determining the reasonableness of the apprehensions by defendant that the deceased was about to do the defendant some great bodily harm or take his life. We are unable to conceive, under the facts disclosed by the record, how the defendant could have been prejudiced by the refusal of this instruction. The mere fact that Mitchell may have threatened violence against defendant did not justify the defendant in assaulting and killing him, but, in order to have done so, there must have been, or defendant must have had, good reason to believe that deceased was then about to assault him or to do him some great bodily harm; and the evidence failed to show that deceased was making any attempt to assault defendant or to do him great bodily harm at the time he fired the fatal shot. While evidence of threats is usually admissible in cases of assault, as tending to show who is the aggressor, we do not wish to be understood as holding that it is the duty of the court to instruct to that effect.

The facts disclosed by the record did not justify an instruction for manslaughter in any degree; for, if the evidence was to be believed, defendant was guilty of murder in the first or second degree. The instructions which were given were, as a rule, in form often approved by this court, free from substantial objection, and presented the case fairly to the jury. Nor was error committed in refusing instructions asked by defendant. Finding no reversible error in the record, we affirm the judgment.

SHERWOOD, P. J., and GANTT, J., concur.

STUDYBAKER et al. v. COFIELD et al.
(Supreme Court of Missouri, Division No. 1.
Feb. 12, 1901.)

DEEDS—UNDUE INFLUENCE—BURDEN OF PROOF—FIDUCIARY RELATION—EVIDENCE—SUFFICIENCY—MISREPRESENTATIONS—OBJECTION—WAIVER—DEED OF GIFT—CONSIDERATION.

1. Where the grantor in a deed was single, 85 years of age, and had lived apart from all his relatives for many years, and was living with his tenant during his last illness, the fact that his niece, the grantee, came to see him in his last sickness, and for several days prior to his death assisted the tenant's family in nursing him, and talked kindly to him, and promised to take him home with her if he recovered, and asked concerning his property, and that no other relative was present, did not cast the burden of proof on the grantee to show that the deed was not obtained by undue influence, since the facts were not sufficient to establish a fiduciary relation between the grantor and grantee.

2. The facts were not sufficient to sustain an allegation that the deed was procured by entreaties, solicitations, arts, and blandishments,

and by prejudicing the grantor against his other relatives.

3. B., who was 85 years of age, deeded his property to his niece during his last illness. For three years B. had lived with his tenant, who testified that B. got up in the night, and brought fence posts into the house, and burned the ends of them in the fireplace, and that he hummed to himself during the night, and that about six months before his death he had a fainting spell, and that during his last sickness he could not talk. The hired man and the wife and daughter of the tenant corroborated his testimony. A neighbor, who called the day after the deed was executed, testified that B. talked intelligently, and had no difficulty in speaking; and the lawyer who drew the deed and the physician who attended B. in his last sickness were of the opinion that he was of sound mind, and testified that he had no difficulty in talking. Held, that B. had sufficient mental capacity to make a deed.

4. B., a single man, 85 years of age, deeded his farm to his niece, C., and in an action by B.'s heirs to set aside the deed it was brought out on cross-examination of a tenant with whom B. had lived for some time prior to his death that when C. came to visit B. in his last sickness she told him that E., B.'s nephew, was dead, and that B. had told the witness some time before his death that he intended to deed his farm to E. B. had never seen E., or corresponded with any of his relatives other than C., and none of them came to see him in his last sickness. Held, that the evidence was not sufficient to show that C. fraudulently represented that E. was dead, or that E. was B.'s favorite nephew, since the fact that the matter was not pleaded or brought out by the plaintiff in chief showed that it was an afterthought.

5. Where plaintiffs brought an action to set aside a deed as fraudulent, without tendering issue that the deed was ever delivered, and introduced no evidence that it was not, the question of its nondelivery cannot be raised on appeal.

6. Where a childless old man in his last sickness deeded his property to his niece for the expressed consideration of \$10 and love and affection, and that the niece should care for the grantor's sister during her lifetime, the fact that the money consideration was nominal, and never paid, did not invalidate the deed, since it was manifestly a deed of gift, and not one of bargain and sale.

Appeal from circuit court, Pettis county; George F. Longan, Judge.

Action by Elizabeth Studybaker and others against Elmira Coffield and another. From a decree in favor of defendants, plaintiffs appeal. Affirmed.

Sangree & Lamm, for appellants. Barnett & Barnett, for respondents.

VALLIANT, J. This is a suit in equity by the collateral heirs of Joseph Boyer, deceased, to set aside a deed made by him a few days before his death to his niece, the defendant Elmira Coffield, on the ground that he was of unsound mind when he made the deed, and was induced to make it through her undue influence. The deceased was 85 years old, had never married, and at his death left as his heirs two sisters, Catherine Tarman, one of the plaintiffs, and Susan Black, one of the defendants, and seventeen nieces and nephews, children of deceased brothers and sisters, all of whom are plaintiffs except the defendant Elmira Coffield. The sister Susan Black, who

was one of the defendants, was the mother of Elmira, and has died since this suit was begun. The deed assaulted conveys a farm of about 200 acres in Pettis county, which was the bulk of his property, to defendant Elmira. His estate was solvent, although the personalty amounted to only a few hundred dollars. He died intestate. The deed reserves in the grantor the use, possession, rents, and profits of the land for life. The consideration expressed is \$10 cash, love and affection, and the obligation of the grantee to maintain and support her mother, the grantor's sister Susan Black, during her life. The petition charges that the deed was made (or essayed to be made) "when his mind had become so impaired by the accumulated ravages of age and disease that he was not capable of contracting, or of intelligently transacting business"; that it was "procured and brought about by the selfish and wrongful entreaties, solicitations, and machinations" of Elmira and her husband, who "were at the time the only relatives and confidential advisers of said Joseph Boyer in attendance on him and nursing him, and they wrongfully contrived, by their position as relatives and nurses and confidential advisers, and their arts and blandishments, to obtain and assert an unfair and selfish domination and undue influence over his feeble will power, to the detriment of the absent heirs and to the gain of said Elmira and her mother, Susan Black, and by such unfair and selfish domination and undue influence, and by said solicitations, entreaties, and blandishments and consulting and advising him thereto, thus procured" the deed; that it was not the act and deed of Joseph Boyer, but that of Elmira and her husband, obtained through those influences, and by prejudicing him against his other relatives, the plaintiffs herein, who resided in distant states. There were no specifications in the petition demonstrative of those charges, but they were denied by the answer.

The evidence showed that Joseph Boyer was an old bachelor, who, for the last 25 years or more of his life, had lived in Pettis county, without the society of any of his relatives, who lived in other states,—Ohio, Illinois, and Iowa. There was nothing very peculiar about his habits or character to distinguish him from an ordinary recluse of that kind. He was a man of usual intelligence, attended to his own business, and grew old with habits formed and hardened under the somewhat arid conditions that ordinarily environ the life of an old bachelor. One of plaintiffs' witnesses (Davidson), who was a hired man on the farm, in conversation with Boyer casually said that he had come from Tama county, Iowa, whereupon the old man said that he had relatives living in that county, and named Edgar Boyer, his nephew, whom he said he wanted to come and take charge of his place when Jones' lease was out; and that, after he himself was done with it, he intended to give it to Edgar. Mr. Jones, the tenant on the place, with whom the old man lived, and who was the plaintiffs'

chief witness, testified that, some time before he was taken sick of his last illness, the old man spoke to him about his relatives and his property, and said that there were a good many people who wanted his property, but he was not going to give it to any one, but, if he ever did deed it to any one, his nephew Edgar, who lived in Iowa, should have the biggest part of it; that if any old person deeded away what he had he was liable to get kicked out of the back door, and go to the poor house; that he was sorry he could not take his property along with him when he died, but, as he could not do that, he would just leave the law to settle it; that he had not received a letter from any of his relatives for seven years, except Coffield. Mrs. Coffield and her husband lived in Ohio. The year before her uncle's death they had come on an excursion to Kansas City, and had stopped off at Sedalia, and gone out to the farm, and paid the old man a visit of a day or a day and night. That was a pleasant visit. He was glad to see them. They talked of old times and old acquaintances. This is the only visit that the evidence shows any of his relatives ever paid him. When he was taken sick in his last illness, and grew so ill as that the Jones family, who were attending him, became apprehensive that he was going to die, Mr. Jones suggested to him to telegraph for the Coffields; but he objected, saying that he thought he would get better, and that Coffield was a busy man, and it would trouble him to leave his business. But the next day he was no better, and Jones again said that some of his relatives ought to be sent for, and Boyer said he did not know the address of any of them, except the Coffields, and finally requested that they be telegraphed to come. Jones accordingly telegraphed them on Sunday, and they arrived on Monday. The meeting between the old man and his niece was affectionate. He wept, and said, "Mira, I am glad to see you." She immediately began to minister to his comfort, and continued to do so until his death, which occurred 12 days thereafter, and 4 days after the deed was made. The testimony on the part of the plaintiffs was to the effect that on the day of her arrival she asked him about the condition of his property, if he owed anything on it, etc., and, being assured that it was clear of debt, she told him that he would not get well, and that he should prepare to die; or, as the plaintiffs' witnesses expressed it, "give up all thought of business, and lay it all on the altar." There was some testimony about a note of \$1,000 which he held, and which, when the tax assessor, some months before, wanted to assess, he tore into pieces, and threw away; but a member of the Jones family collected the pieces, and put them together. This incident was mentioned in the conversation in which Mrs. Coffield asked about the condition of his business, and she advised him to give her husband a power of attorney to attend to that, and he agreed to do so. In this same conversation he told

her that he had about \$400 in bank (which was the fact), and she said she thought he ought to have more money than that. In a subsequent conversation, on another day, plaintiffs' witness Jones "heard her tell Mr. Boyer if he got well she was going to take him home with her; take him and keep him until fall; go and see all of his folks, and all of his friends back there. Talked on considerable. I can't remember what all. Q. Anything more about property matters? A. No, I don't believe there was at that time." After plaintiffs had closed their case, and the defendants were introducing their evidence, the plaintiffs, by leave, were allowed to recall two of their chief witnesses,—Jones and his daughter,—who testified that on the morning of the arrival of the Cofields the old man asked Elmira where Edgar was, and that she said he was dead, and that that was all that was said on that subject. Plaintiffs' witness Jones testified that on the first day of the arrival of the Cofields, Mrs. Cofield sent her husband to town to buy bed clothes and bedding for the old man, as those he was using were in a very unsanitary condition. Witness testified that he accompanied Cofield on that trip, and that Cofield on that day consulted the lawyer who afterwards wrote the deed as to which was better under the circumstances, a deed or a will, and that the lawyer advised a deed. On that point this witness was contradicted by the lawyer, who testified that Cofield came to see him first on the day next before the deed was executed, asked him to write the deed, and said nothing about a will. That is substantially all that the evidence tended to prove to support the charge of undue influence.

In support of the charge of mental incapacity the plaintiffs called in chief four witnesses,—Davidson, a farm hand in the employ of Jones; Jones, the farmer who was the lessee of the farm, and in whose family Joseph Boyer was living at the time; and Jones' wife and daughter,—and in rebuttal plaintiffs called three physicians, who had not seen Boyer, but who gave testimony as experts in answer to a hypothetical question. Davidson's testimony was to the effect that he was occasionally employed as a hand on the Boyer farm, was there as such about three weeks before his death; saw him several times, and talked with him. "I thought lots of times the old man was kinder out of his mind." When asked why he thought so, he said that the old man would lie in bed at night when he could not sleep, and would sing or hum; and one time late at night he got up and went out, and brought in fence posts, and put the ends in the fire, and charred them; and sometimes he charred them too much; burnt several of them too bad to use. He was asked: "Are posts sometimes charred for the purpose of putting them in the ground? A. I suppose they are; yes, sir. Q. Did you think there was

anything remarkable to char them in the fireplace there? A. Yes, sir; I think so. To leave the ends of them to stick out, and fill the house full of smoke, I thought it looked curious." On cross-examination: "Q. Isn't it true that you simply thought he was nervous and childish, and that was all you thought was the trouble? A. I don't know what was the matter with him. Q. He could talk reasonable and sensible about any business matter? A. Seemed to." Mr. Jones, in whose family Boyer had lived the last three years of his life, and who was the plaintiffs' chief witness, and not a reluctant one, gave testimony both as to his physical and mental condition. This witness testified that some six months before his death Mr. Boyer had a dizzy or fainting attack, and would have fallen into the fire but for the presence and timely interposition of witness' wife and daughter. He was laid on his bed, and witness could see no life in him. In a short while he came to his consciousness, and said, "I am pretty near gone." It seemed to witness as if his tongue was stiff. That was several months before his last sickness. This witness also narrated the incidents of charring the ends of the fence posts, and of singing or humming to himself at night, that the former witness had testified in relation to. He testified that the old man was finally taken with a derangement of the bowels, thought to have been caused by a dose of coal oil and dose of blue mass which he administered to himself. In this sickness he occasionally had fever, and was at times delirious. One night, when in this condition, he saw his coat hanging in the room, and asked witness to take it down. He said it was something black that was going to catch him; and, when the coat was taken down, he said, "Now it is gone." That was before the Cofields came. After they came, the witness sometimes heard him call Mrs. Cofield "Ritta," mistaking her for a neighbor, Mrs. Ritta Hill. Cross-examined on this point, he said: "Q. You say he didn't know Mrs. Cofield? A. At times. Q. How often? A. I heard him at different times call Mrs. Cofield 'Ritta.' Q. Did he know Mrs. Cofield when she came then? A. Yes, sir. Q. Did he know her except at certain times when he was delirious? A. I suppose so, or be out of his head. Q. But at other times he knew her? A. Yes, sir." Witness also related that within five or six months before his death he saw the old man seize a raw biscuit and jab it in his mouth, smearing it over his mouth and whiskers, and upon another occasion doing likewise with a handful of flour. Witness' attention was drawn to the date of the deed, and asked if before that, during that sickness, he had noticed anything peculiar in the old man's appearance, to which he answered: "Yes, sir; his eyes looked faint—looked coldish—for several days. Q. Anything about his appear-

ance? A. Yes, sir; he couldn't talk. He tried to talk to me once about getting him some medicine, and I couldn't understand what he said. He motioned towards the medicine." Witness also testified that on the day the deed was made, before the doctor and the lawyer arrived, the old man's bowels moved while he was in bed, and he was unconscious of the fact, causing an intensely offensive smell, and that to deodorize the room Mrs. Cofield took leaf tobacco and burned it; that Boyer did not use tobacco, and that the smell of burning tobacco to one unaccustomed to its use was liable to make him dizzy. Witness told Mrs. Cofield she ought not to do that; that it would kill Boyer; and it did seem to strangle him; and then witness opened the windows and let the smoke out. The doctor and lawyer came about a half or three-quarters of an hour after that. The deed was executed while they were there. Witness was not in the room when it was executed, having been invited out by Cofield. Was informed that afternoon by Mrs. Cofield that her uncle had made a deed to her. Witness' daughter asked her if she believed he knew what he was doing, and she said, "No; if he had, he would never have done it." Witness was of the opinion that on the day the deed was executed and the day before Boyer could not understand what he was doing. Witness would ask him if he wanted his medicine, and he would answer, "Uh, uh." "Q. You think he was unable to make himself understood at all? A. That is, according to my— Q. And was unable to understand what people said to him? A. That is the way I took it. Q. You don't think he would have been able to have recognized them? A. He might have recognized them, but still he could not talk. He couldn't talk. His tongue was thick. But how long he would stay in that condition I don't know." At the conclusion of his testimony this witness was asked: "Q. In your judgment, from what you saw of Mr. Boyer there for the last week or ten days before he died, state to the court whether he was of mind sufficient to understand what he was about in business matters. A. No, sir. When he was up and around, it was only at times he had a mind fit for business. As Elmira told him, he ought to have a guardian appointed." The witness had previously stated that the old man had told him that when Mrs. Cofield was there to visit him the year before she had told him that he ought to have a guardian appointed, and that he had told her she needed a guardian worse than he did. Then she left the room "kinder mad." The foregoing is the substance of Mr. Jones' testimony, and on the main features he was corroborated by his wife and daughter, who testified to the same incidents, and were of about the same opinion as to the old man's mental condition. A hypothetical question embody-

ing what the witness for plaintiffs on that subject had testified to was propounded to three eminent physicians of Sedalia, to which the following answers were given: Dr. Overstreet: "I would not think that his mental condition was such that he would be able to transact business." Dr. Evans: "I do not think his mental condition was good." Dr. Scales: "And, these conditions existing as described there, I would think it was doubtful about his sanity."

On the part of defendants, Henry A. Hill, a neighbor who had lived near Mr. Boyer for 26 years, testified that he called to see him on Wednesday before his death, which was the day after the deed was made. "Q. How long were you there? A. I think I was in the room perhaps a half hour. Q. What were you talking about? A. We were talking about his sickness. I went and spoke to the old gentleman, and asked him how he was, and he inquired about my family and children. I had lived with him previously. Q. How was his utterance? Could he talk? A. I didn't see anything wrong. Q. Did you notice anything wrong with his mind? A. Not a thing. Q. How did he appear as to his mental condition? A. He seemed just as clear in his mind as he ever did. Talked just as rational as ever." Dr. Gresham was the physician in attendance. He began attending him on March 13th, and continued until March 22d, and on the day the deed was executed—which was March 19th—had been requested by Mr. Cofield to let Mr. Fast, the attorney who drew the deed, ride out to Mr. Boyer's with him, and he did so. This is from his testimony: "Q. From the time you commenced attending him up to the date of this deed, just describe to the court his condition physically and mentally. A. His physical condition was, he had been sick, he told me, for something over a month, when I had been to see him the first time; and he was naturally in a debilitated condition, and was feeble. He was up the first time I was to see him. Still he was weak from his sickness and his age together. Q. What was his mental condition? A. I took it to be all right; that is, as near right as you could expect a person of his age. He was about eighty-four, I think. Q. He was weak, and was an old man. A. Yes, sir. Q. Did he converse rationally? A. Yes, sir. Q. Did you observe anything wrong with his mental condition? A. No, sir; I did not. Q. Were you there the day the deed was made? A. Yes, sir. Q. Explain to the court his condition on that date. A. He was gradually growing weaker. At first he seemed to be improving. Q. What do you mean by first? A. The first few days I attended him his physical condition seemed to be better, and I think he was slightly improving at the time the deed was made, but I would not be positive about that. His fever was not as high, though. As well as I remember, his fever was not as high that day as it had been." Speaking of the execution

of the deed, he said: "Q. State whether he seemed capable of comprehending and understanding what he was doing. A. Yes, sir. Q. And wanted to do it? A. Yes, sir. I talked right along with him, and he seemed to understand everything that was going on, and he told me about it. Q. Was there any trouble about his utterances? A. I didn't notice it if there was. Q. Could he talk so you could understand him? A. Yes, sir. Q. And he could understand you? A. Yes, sir. Q. From what you saw there as a physician, state what your opinion is as to whether he was of sound mind, and capable of understanding the nature of the business he was transacting. A. Yes, sir; I believe his mind was all right,—that is, as much as you could expect of a person of his age. Of course, any person of his age is more or less childish, but, as far as his mental condition, I think he was all right. Q. You think he understood clearly what he was doing, and what he desired to do? A. Yes, sir. Q. Was Mr. Coffield there? A. Yes, sir. Q. State whether any persuasion was used to induce him to sign the deed. By Mr. Lamm: State what was said. By the Court: Yes, sir. By Mr. Barnett: Did Mr. Coffield state anything? A. I did not hear." The witness saw his patient the next day, and his condition was about the same, though weaker. The testimony of Mr. Fast, the lawyer who wrote the deed, was to the effect that the day before the deed was executed Mr. Coffield came to his office in Sedalia, and requested him to prepare the deed, and he did so, conforming it to the terms and conditions dictated by Mr. Coffield; and on the next day, at like request, he went out with Dr. Gresham, and saw to the execution, and took the acknowledgment. This witness had never seen Mr. Boyer before. He went into his room. Was introduced to him by the doctor, who said, "You understand what Mr. Fast has come out here for?" and Mr. Boyer said, "Yes." Then witness began conversing with him; asked how he was; and, after talking awhile about his sickness, witness introduced the subject of the deed, explained the contents of it fully. The old man asked him several questions about it, and seemed to comprehend its terms. Then witness read it over to him, and he said at the conclusion, "Yes, that is all right." Witness asked him if he could write his name. He replied that he could not write very well at any time, and did not think he could write that day. He was then propped up in bed with pillows, and, with the assistance of witness, made his mark to the deed, and the same was witnessed by this witness, Dr. Gresham, and Mr. Coffield, witness taking the acknowledgment as notary. Those three were the only persons in the room. He was asked as to the old man's mental condition, and answered, "I am clearly of the opinion that it was entirely sound." There are 150 printed pages of evidence, but the above is a substantial epitome of it. The chancellor found the issues for

the defendants, and rendered a decree accordingly, from which the plaintiffs have appealed.

1. Upon whom is the burden of proof? Plaintiffs insist that a fiduciary relation existed between Mrs. Coffield and her uncle, and, the deed having been executed while that relation existed, the presumption arises that it was the result of undue influence, and the burden is upon her to show that such was not the case. In support of the proposition that such presumption arises when such relation exists, and that the burden of proof shifts to the defendant when the plaintiff's proof established that relation, a large number of cases are cited from our reports, and the proposition is fully sustained. *Garvin's Adm'r v. Williams*, 44 Mo. 465; *Cadwallader v. West*, 48 Mo. 483; *McClure v. Lewis*, 72 Mo. 314; *Martin v. Baker*, 135 Mo. 495, 36 S. W. 369; *Dingman v. Romine*, 141 Mo. 466, 42 S. W. 1087. But did such a fiduciary relation exist? The law is as cautious in defining a fiduciary relation in the sense which we are now using that term as it is in limiting by definition the boundaries within which fraud may be pursued. There are certain technical relations that are readily comprehended as fiduciary, such as guardian and ward, attorney and client, priest and communicant, etc.; but there are other relations not falling in either of those specified classes that are in fact fiduciary, and, conversely, it is not every guardian, attorney, or priest, *quia eo nomine*, who is to be adjudged to hold a fiduciary relation with the party in regard to a particular subject. It is in each case a question of fact. The law regards the real, rather than the nominal, condition. The principle is thus stated in 27 Am. & Eng. Enc. Law, 460, 461: "The origin of the confidence and the source of the influence are immaterial. The rule embraces both technical fiduciary relations and those informal relations that exist whenever one trusts in and relies upon another. The only question is, does such a relation in fact exist?" While the relation of nurse and patient may raise the question, yet it does not in itself answer that question, but the inquiry is still one of fact,—was trust reposed? That Mrs. Coffield was the only blood relation of the sick man in attendance upon him; that she nursed him, spoke kindly to him, encouraged him by saying that when he got well she was going to take him home with her, when he could see all his old acquaintances, etc.; and that at one time, in the presence of several persons, she advised him to turn his attention to his spiritual welfare,—are the only facts, if any, in the record, going to sustain the allegation of fiduciary relation; and they are the sole foundation for the charges of "blandishments" and "ghostly ministrations." But the evidence does not show that she was his exclusive nurse or attendant after she arrived. On the contrary, Mr. Jones' daughter testified as follows: "State to the court whether you had access to him, and could see and

observe him, from day to day. A. I gave him his medicine all the time, and attended to him all the time as much as I possibly could. Q. How was he about swallowing medicine? A. He took it very good as long as I gave it to him. He called me, and told me he wanted me to give him his medicine." And Jones himself testified that he gave him medicine, and attended to him. Jones also took sufficient control of the sick room to remonstrate against the burning of tobacco, and opened the windows to let the smoke out. He also testified that in the presence of Mrs. Cofield he asked Mr. Boyer if he was going to deed away his farm, and Mr. Boyer said, "No." This he said he asked because he had broken his ground for corn and wheat. He was anxious about what he would have to do. Thus we see there was no exclusive control, no secrecy, no confidence, and scarcely a pretext on which to predicate the idea of a fiduciary relation and abuse of confidence. The burden of proof, therefore, was upon the plaintiffs.

2. While the law watches with a jealous eye the conduct of a person in the situation of Mrs. Cofield in this record, yet its sense of justice is never lost in mere artificial rules. The law is as much the perfection of reason and common sense on this as it is on any other subject. It lays down no such cast-iron rule as would deter a kinsman who might have expectations of a testamentary benefit from ministering to the wants of his sick and dying relative, or soothing his last days with kind attentions. Even though we might suspect that the services rendered and the attentions bestowed were with the hope of inducing favorable testamentary action, yet, if they went no further than ministering to the comfort and consoling the mind of the sick relative, they would not be brought under the condemnation of the law. *Riley v. Sherwood*, 144 Mo. 354, 45 S. W. 1077; *Aylward v. Briggs*, 145 Mo. 605, 47 S. W. 510; *McKissock v. Groom*, 148 Mo. 459, 50 S. W. 115. The charges in this petition of "entreaties," "solicitations," "machinations," "arts and blandishments," and "prejudicing him against his other relatives" are not supported by the evidence, and the chancellor was justified in finding for the defendants on that issue.

3. On the proposition that Joseph Boyer had not sufficient mental capacity to make a deed the plaintiffs' evidence was weak, and was entirely overcome by the testimony of the defendants. The incidents mentioned by the plaintiffs' lay witnesses were trivial, and did not justify the conclusion that the old man was more whimsical or childish than men of his age ordinarily are. The hypothetical question propounded to the learned witnesses brought answers that indicated that there might, in the opinion of the experts, be doubt as to the sanity of the man hypothetically described. But in the face of the clear and intelligent testimony of the physician

who attended him, and of the lawyer who was present when the deed was made, and of the neighbor, Hill, who called to see him the next day, when, as his physician testified, he was weaker than on the day the deed was made, that doubt was entirely removed.

4. It is argued that the old man was defrauded into the belief that his favorite nephew, Edgar Boyer, was dead. The plaintiffs have the advantage of position on that point. No one living besides the Joneses were present when Mrs. Cofield is said to have made that misrepresentation, and, as she is not a competent witness, the evidence could not be contradicted, even if it was untrue. But the learned chancellor, who had a better opportunity of weighing the oral evidence than we have, seems to have concluded that the Joneses were probably mistaken on that point. The evidence, however, was irrelevant, because there was no issue of that kind tendered in the petition. The record before us shows that plaintiffs' case has been presented in the pleadings, evidence, and argument, both in the trial court and here, with great ability, learning, and industry. The fact that the point was not made in the petition nor alluded to in the plaintiffs' evidence in chief, but was only brought in out of order by interruption of defendant's testimony, indicates very strongly that it was an afterthought of the plaintiffs, and that their counsel had never heard of it. Whether the chancellor either discredited the testimony or disregarded it as irrelevant, there is no ground to complain of his conclusion. Besides, there is little on which to base an argument that Edgar was a favorite nephew, or a very deserving one. Whether his uncle had ever seen him, we do not know, but we do know that he had not heard from him for more than seven years. True, the testimony tends to show that he said that after Jones left the farm he wanted to bring Edgar there, and give it to him after he himself was done with it. Again, he said that he would never deed the place to any one, but, if he should do so, Edgar should have the biggest share. But his last statement was that he would like to carry it with him when he died, but, as he could not do that, he would make no disposition of it, but leave the law to settle it. Thus we see that he had no decided favorite, and was in such a condition of indifference in regard to his relatives that his choice was liable to fall on any one of them. He was under no obligation to any one of them, and we do not know that he knew even the names of any of his 17 nieces and nephews, the plaintiffs in this case, except that of Edgar. Under these circumstances it is not strange or unnatural that he concluded to give the farm to the only one of his relatives who had ever visited him, or who had written to him in more than seven years, or who had ever held even a glass of water to his fevered lips.

5. The point is made in the brief of ap

lants that there is no evidence that the deed was ever delivered. But there is no such issue tendered in the petition. The instrument is treated as a deed duly executed, so far as the formal requisites of the law are concerned, and it is attacked in equity on the ground of fraud. It is also insisted that the considerations expressed on its face are fictitious. The money consideration named was merely nominal. The real consideration was love and affection, which was alone sufficient to sustain the deed. It is manifest from the whole transaction that it was a deed of gift, and not the result of a bargain and sale. The argument is made that the agreement of Mrs. Cofield to support and maintain her own mother, the grantor's sister, was a mere device to give the deed the aspect of resting on a substantial valuable consideration. The deed would doubtless have expressed the real fact if it had rested on the recital of love and affection as the sole consideration. But it is not at all improbable that the grantor wanted to give his sister Mrs. Black, who the evidence shows was in poor circumstances, an interest in the property, and, instead of giving her such interest in direct form, he made Mrs. Cofield's obligation to care for her during her life a part of the consideration under which she would take the property. The deed is not vulnerable on that ground.

6. Plaintiffs complain that they were cut off in their cross-examination of Dr. Gresham. But the court's interruption did not occur until all the questions asked had been answered, and the counsel gave no intimation to the court of any other question they desired to propound. The learned chancellor rightly viewed the law and the facts of this case, and his judgment is affirmed. All concur.

STATE ex rel. BALLEW et al. v. WOODSON, Judge.

(Supreme Court of Missouri. Feb. 19, 1901.)

COURTS — VACATION ORDERS — FINAL DECREE — VALIDITY — CONSTITUTIONAL PROVISION — BUILDING AND LOAN ASSOCIATIONS — DISSOLUTION — RECEIVERS — APPOINTMENT — POWERS — CERTIORARI — REVIEW — JURISDICTION.

1. In a suit to dissolve a building and loan association, it was error for the circuit judge in vacation, in addition to appointing receivers for the property and requiring bond from them, to order them to wind up the affairs of the association, to appoint appraisers, declare all loans owing to the association due and payable, and direct the directors to order the conveyance of all property of the association outside the state to the receivers, since such order was a final decree, and not within the jurisdiction of the court in vacation.

2. Under Const. art. 6, § 1, vesting the judicial power of the state as to matters of law and equity in certain courts, except as the constitution itself otherwise provides, the legislature has no power to authorize a circuit judge to hear and determine all the issues in a suit for dissolution of a building and loan association in vacation, since such power can only be conferred on a fully-organized court.

3. Rev. St. 1890, § 1393, provides that the jurisdiction of the circuit court and the processes, pleadings, and proceedings in winding up a building and loan association shall be the same as those provided for the winding up and dissolution of insurance companies, as far as applicable. Rev. St. 1899, § 8026, provides that in winding up insurance companies the adjournment of the court for a term shall not work a postponement of the proceedings to the next term, but the same may be had in vacation as well as term time. *Held*, in proceedings under Rev. St. 1899, § 1393, that the circuit judge had no jurisdiction to make a final decree in vacation, since the statute did not provide that the jurisdiction of the circuit judge should be the same as in insurance company proceedings, but only that the jurisdiction of the circuit court should be the same.

4. On the filing of a petition by the supervisor of building and loan associations for dissolution of a building association, it was proper for the circuit judge to appoint receivers, and require bonds from them, to take possession of the concern and its affairs, and preserve them from attack, in vacation, and until the court, in due season and order, could make a judicial investigation and pass judgment on the case.

5. Under such final order the receivers had the right to take possession of the assets of the corporation and preserve them, but they had no authority to proceed to administer the estate.

6. Where, on petition of the supervisor of building and loan associations to dissolve an association, the circuit judge in vacation appointed receivers therefor, any orders made by the court thereafter in term time, though made on the assumption that its decree in vacation was final, cannot be considered on certiorari, since it had complete jurisdiction of the case, and any errors in such orders were not jurisdictional, and could be corrected on appeal or writ of error.

In banc. Certiorari by the state, on relation of one Ballew and others, against A. M. Woodson, judge, etc. Order quashed in part.

Crow & Eastin and Vinton Pike, for relators. O. M. Spencer, Huston & Brewster, and Ben. J. Woodson, for respondent.

VALLIANT, J. This writ of certiorari, which issued at the instance of certain stockholders of the Phoenix Loan Association, brings up the record of the Buchanan circuit court in the case of State v. Phoenix Loan Ass'n (Mo. Sup.) 60 S. W. 74, from which record it appears that it is a suit instituted by the supervisor of building and loan associations, in his official character, under section 1392, Rev. St. 1890, looking to the dissolution of the Phoenix Loan Association and the winding up of its affairs. The suit was begun by the filing of the petition in the circuit clerk's office during the vacation of that court, on July 15, 1899. At the same time the answer of the defendant corporation was filed, and on the same day the petition and answer were presented to a judge of that court in chambers, who thereupon made and signed an order in the words following, to wit: "In the Circuit Court of Missouri, within and for Buchanan County. In Vacation. State of Missouri ex rel. Henry L. Gray, Supervisor of Building & Loan Associations, Relator, v. Phoenix Loan Association of St.

Joseph, Missouri, Respondent. Whereas, Henry L. Gray, supervisor of building and loan associations of the state of Missouri, has this day filed his petition in the circuit court of Buchanan county, in division number 1, in vacation, against the Phoenix Loan Association, of St. Joseph, Missouri, stating that he is the supervisor of building and loan associations of said state of Missouri, and that respondent is a building and loan association organized and existing under the laws of the state of Missouri, and further states that he has made an examination of the affairs of said association, and finds that it is no longer able to carry out the object and purposes of its organization, and that its continuance in business would work injuriously to the stockholders and others interested in said association, and the same having been taken up and considered by the undersigned judge of said court, who finds from the petition and the answer filed herein that the allegations of said petition are true, it is therefore ordered that said building and loan association be dissolved, and the officers, agents, and employees of said association are hereby enjoined from further conducting the business of said association, and from in any manner interfering with its business and its property and effects, and that the court hereby appoints Graham G. Lacy and Harry M. Tootle as receivers to take charge of the property and assets, and to wind up the affairs of said association according to law, and as this court may from time to time order. And it is further ordered that each of said receivers execute a bond or bonds to the state of Missouri, each to aggregate the sum of fifty thousand dollars, to be approved by the judge of this court, before they enter upon the discharge of the duties of their office. And it is further ordered that the said receivers select their own bank in which to deposit the funds of said association as they are collected by them, and said bank is ordered to execute bond to the said state of Missouri in the sum of one hundred thousand dollars, to be approved by the judge of this court, to the use and benefit of all parties interested in assets of said association, for the faithful keeping and accounting of such money and funds as may be deposited in said bank by said receivers from time to time; and said bank is ordered to notify the judge of this court of the daily deposit made in said bank by said receivers. And it is further ordered that the receivers make a complete and accurate inventory of all the assets of said association at the earliest possible time, and G. P. Kincaide and F. A. H. Garllich are appointed appraisers to appraise the assets of said association; and the court hereby declares all loans owing said association, however evidenced, to be, and they are now, due and payable. It is further ordered that the board of directors of said association forthwith make an order directing the president and secretary of said association to execute proper deeds and

conveyances conveying to the receivers herein named all the property, real, personal, and mixed, belonging to said association, and not located in the state of Missouri; and said president and secretary are hereby ordered to forthwith execute said instruments conveying said property to said receivers, and said receivers are hereby ordered to proceed to wind up the affairs of said association as speedily as is consistent with the best interest of the creditors and shareholders of said association. It is further ordered that the receivers hereby appointed employ R. A. Brown as their attorney and counselor in all matters connected with the management and winding up of the affairs of said association; the compensation of said attorney to be approved by this court. It is further ordered that the receivers employ such clerical assistance as may be necessary in the protection, collection, and preservation of the assets of said association; the compensation of said clerical assistance to be approved by this court. A. M. Woodson, Judge. July 15, 1899." The receivers so appointed gave their bonds, respectively, as the order required, on July 17th and 19th. On August 5th the receivers filed a petition in which they requested instructions in relation to determining the amount due on certain mortgages. On August 30th the receivers and appraisers filed an inventory and appraisal showing assets valued at \$434,728.81. On September 2d A. L. Crawford and 14 others filed their petition showing that they were stockholders in the corporation, and asking to be made parties to the suit. The petition is elaborate in its statements, averring mismanagement on the part of the officers of the corporation, and that the suit was brought, not in the interest of the stockholders, but by collusion between the relator and the guilty officers, to aid them in covering up their misdeeds, and enable them to profit in the fees and salaries incident to the winding up of the affairs of the corporation. Special objection was urged against one of the receivers, and his removal was asked. This petition was presented to the judge who had made the order of July 15th, and thereupon he ordered the petitioners to be made parties defendants, modified the order of July 15th so as to authorize the receivers to make their own selection of an attorney, and denied the prayer for the removal of the receiver against whom the special objections had been urged. All of the above-mentioned proceedings were in vacation, before the judge in chambers.

At the September term, 1899, and at subsequent terms, the court, treating the order of July 15th, above set out, as the final decree in the case, proceeded to make orders in the way of directions to the receivers to guide them in the administration of the affairs of the supposed defunct corporation, and other orders of an administrative character. A brief summary of the proceedings is as follows: On September 21st the court

responded to the petition of the receivers filed August 5th, above mentioned, and instructed them upon what basis they should settle with borrowing stockholders. On September 23d a referee was appointed to adjust claims against the concern, and directions given for his conduct. On September 25th one of the receivers resigned, and another was appointed in his place. October 3d directions were given the receivers in regard to receiving payments, and authorizing them to release mortgages. October 23d the stockholders who had been admitted as parties filed their motion for a change of venue, which on November 4th the court overruled; and on the same day they filed their motion to set aside the order appointing a referee, and also a motion to discharge one of the receivers, to reduce expenses. November 6th the stockholders above named filed their bill of exceptions to the action of the court in denying them a change of venue. At the January term, 1900, on January 1st, the referee filed his report, showing total stock claims allowed, \$522,583.23; total preferred claims allowed, \$4,744.61; aggregate, \$527,337.84. On January 2d the intervening stockholders filed their petition, showing that a suit was pending in another division of the same court, wherein George A. Cowden and others, in the names of themselves and all other stockholders who desired to unite, were plaintiffs, and William H. Crawford and others, who composed the board of directors of the corporation, were defendants, seeking to wind up the affairs of the concern, and that a like suit was pending in the United States circuit court for that district, wherein Laura A. Snider and other stockholders were plaintiffs, and the directors were defendants, looking to the same end, and that a suit by certain other stockholders, residents of Iowa, was pending in the United States circuit court in Kansas against the directors for the same purpose, in all of which the validity of the act of the judge in vacation above set out is attacked, and that in the two suits in the federal courts the act of March 12, 1897, under which the supervisor of building associations acted in instituting this suit, is attacked as in violation of the constitution of the United States. And the prayer of the petition is that the court order the receivers to enter their appearance as parties defendants in those suits, and submit to judgment there. On the same day the intervening stockholders filed objections to an application of the receivers for leave to compromise or settle what is called the "Seelman Debt," for reasons set out, and also a second motion for a change of venue. In this last application for a change of venue it is alleged that the court had overruled the former motion on the ground that there was then no issue pending in the case, whereas since then these motions had been filed, which were then pending. On January 6th all the pending motions, including the motion for a change

of venue, were overruled. On January 11th the same stockholders filed a petition and bond for removal of the cause to the United States circuit court for that district, on the ground that the controversy was one arising under the constitution and laws of the United States, in that the stockholders were being deprived of their property and interest in the corporation under the form of the act of March 12, 1897, which, as construed by the court in that case, was depriving them of their property without due process of law. January 20th Theodore Hoppel and others, stockholders, filed a protest against the removal of the cause to the federal court, and on the same day the court refused the petition for removal. On May 9th, at the May term, 1900, the first-mentioned intervening stockholders filed a motion to vacate and set aside the order appointing receivers. May 16th the court ordered the receivers to pay all the general debts allowed, in full, and 30 per cent. of 80 per cent. of the amount of stockholders' claims allowed, and gave them directions in regard to adjustments and equalizations of dividends of stockholders in Kansas and Texas, where suits were pending and receivers had been appointed. On the same day the report of the referee was approved and confirmed. May 19th the motion of stockholders to vacate the order appointing receivers was overruled, to which order exception was taken, a bill of exceptions filed, and appeal granted to this court. June 1st the stockholders filed an answer to the original petition in the case, denying its allegations, and also averring that it does not state facts sufficient to warrant the action sought to be taken. That seems to be the last act in the case.

The cause came to this court on the appeal of the stockholders from the order overruling their motion to vacate the order appointing the receivers. Upon that appeal we held that only so much of the record as related to the action of the court in refusing to vacate the order appointing receivers was under review, because it was a special appeal on a particular point, authorized by the act of April 11, 1895. The views of the court on the point are shown in the opinion in that case. *State v. Phoenix Loan Ass'n*, 60 S. W. 74. The record is now brought to us by the writ of certiorari, and we are still within limits in the matter of review. In *State v. Smith*, 101 Mo. 174, 14 S. W. 108, this court per Sherwood, J., said of the writ of certiorari: "This writ, under constitutional provisions, is strictly the common-law writ of that name. It only brings up the record, and can only reach errors or defects which appear on the face of the record of the tribunal to which it is issued, and which are jurisdictional in their nature,"—citing *Hannibal & St. Joseph R. Co. v. State Board of Equalization*, 64 Mo. 294. The same doctrine is laid down in *Ward v. Board*, 135 Mo. 309, 36 S. W. 648; and in 4 Enc. Pl. & Prac. p. 90, it is said: "At com-

mon law * * * the function of a writ of certiorari is simply to bring up for review questions affecting the jurisdiction of the inferior tribunal, there being no other adequate remedy." We will not, therefore, in this instance, decide questions that relate only to alleged errors in the rulings of the court, when the subject was within its jurisdiction. When errors of that kind are committed, they can be corrected on appeal or writ of error.

The main question in this case relates to the action of the judge in vacation making an order in form of a final decree, and designed to have effect as such. If it had been rendered by a court having jurisdiction of the case, it would unquestionably have filled all the requirements of a final decree, and have left nothing to do but to execute the decree by administering the estate. Under our judicial system a judge of a circuit court in vacation has no authority to render a final judgment or decree in any case. By our constitution the judicial power of the state, as to matters of law and equity, except as in the constitution itself otherwise provided, is vested in certain courts therein named. Const. art. 6, § 1. The word "court" is there used in its technical sense. A court is a judicial assembly. The judge of the court is its presiding officer. While the judge is often called the "court," yet he is only so rightly called when the tribunal over which he presides is in session. Bouvier gives to the word "court" this definition: "A body in the government to which the public administration of justice is delegated. The presence of a sufficient number of the members of such a body, regularly convened in an authorized place at an appointed time, engaged in the full and regular performance of its functions." The supreme court of California have said: "A court is a tribunal, presided over by one or more judges, for the exercise of such judicial power as has been conferred upon it by law. Blackstone, following Coke, defines it as a place where justice is judicially administered. 3 Bl. Comm. 23. But it is also essential that this place be designated by law, and that the person or persons authorized to administer justice be at that place for the purpose of administering justice at such times as may be also designated by law. * * * As the judicial business increased, it became impossible to transact it all within those periods of time, and there grew up the practice of hearing matters 'out of court' with the same effect as if heard while the court was in session. * * * The motions and orders thus made were said to be heard and disposed of 'at chambers.' * * * The distinction between those matters which could be heard in court and those which could be heard at chambers arose from convenience, rather than from any other cause; but they were limited to the subsidiary and incidental steps in practice and procedure, leaving to the court the judicial determination of the issues

presented by the pleadings, and which formed a part of the record." Von Schmidt v. Widber, 99 Cal. 511, 34 Pac. 109. Our constitution ordains that "the courts of justice shall be open to every person." Article 2, § 10. And our statute requires, "The sitting of every court shall be public and every person may freely attend the same." Rev. St. 1899, § 1597. The courts have their periods of terms and vacations. The law prescribes when and where a circuit court shall sit, and it can only sit then and there. The statute makes provision in certain emergencies for the holding of special terms upon proclamation at the close of a regular term, or notice as prescribed by law; but, when such special term is held, it is an open session of the court, convened as the law prescribes. Our statute confers upon circuit judges the power to perform certain acts in vacation, judicial in their character, among which is the power to appoint a receiver to hold and preserve property, the subject of litigation, until the court can dispose of it. To that extent we upheld the act of the circuit judge in this instance when the cause was here on the former occasion, but our affirmance of the act went no further than the appointment of the receiver to take possession of and hold the property subject to disposal by the court.

It is contended that our statutes confer on the judge the authority to hear and determine the whole issues in a case of this kind in vacation. If there is such a statute, it is in violation of section 1, art. 6, of our constitution, above quoted. In that section the constitution disposes of all the judicial power of the state in matters of law and equity, and it leaves nothing to be disposed of by the general assembly. This is the view the supreme court of Michigan took of the same subject. That court said: "By article 6, § 1, of our constitution, the judicial power is vested in our supreme court, in circuit courts, in probate courts, and in justices of the peace. * * * Section 2 of this act confers upon the judge in vacation the authority to hear and determine summarily upon the questions of the insolvency of the debtor, the giving or attempting to give preferences, his refusal or neglect to make assignment of his property; and his orders and judgment, if he makes any, are final and conclusive. * * * A statute which confers such judicial powers upon a circuit judge at chambers is clearly in conflict with article 6, § 1, of the constitution." *Risser v. Hoyt*, 53 Mich. 185, 18 N. W. 611. What is here said is in reference to judicial power in its strict sense. There are quasi judicial powers conferred upon quasi judicial bodies, and powers to do certain acts in vacation, judicial in character, but subsidiary to a suit pending or about to be instituted in court, are conferred on judges of courts; but the power to try issues in a suit at law or in equity, and pronounce judgment or decree upon the facts found or confessed, can

conferred, under our constitution, only on a fully-organized court.

The statute which is relied on as attempting to confer the power on a judge in vacation is section 1393, Rev. St. 1899, which directs how proceedings to wind up a building association are to be conducted, and which contains this clause: "The jurisdiction of circuit courts and the processes, pleadings and proceedings had in the cases instituted under this act, shall be the same as are now provided by law for the winding up and dissolution of insurance companies, so far as such provisions of law are applicable." The insurance statute referred to is section 8024 et seq., *Id.* Those sections do essay to confer such power on the judge in vacation. In section 8026 is this clause: "Nor shall the adjournment of the court for a term work a postponement of proceedings hereunder to the next term, but the same may be had in vacation as well as term time." And there are other expressions in those sections indicating that the court or judge in vacation may sit in judgment. If the validity of that feature of the statute has ever been passed on by this court, our attention has not been drawn to the decision. The provisions of those sections first came into our law through the act of March 10, 1869, and have been copied without change of language into our revisions ever since; the only material change having been introduced in the revision of 1879, when it was provided that, instead of appointing receivers to wind up the affairs of the corporation, the title of all its property should vest in the superintendent of insurance, and he should administer on the estate. The constitution in force in 1869 did not limit the judicial power of the state to the courts named, but included also such other tribunals as the legislature might create. But, even under the constitution as it was then, it is doubtful if that provision of the act of 1869 which attempted to confer such power on a judge in vacation was valid, because, while the legislature was authorized to establish other tribunals, yet it cannot well be said that the legislature, by conferring this power on a judge in vacation, intended to establish in him, as apart from the circuit court, another separate tribunal. That would be a strained interpretation of the statute. Revisions are generally literal copies of original statutes, except when an express amendment has been made, and so it not infrequently occurs that inapt expressions are in that way perpetuated. But the statute under which this suit was filed (section 1393, Rev. St. 1899), which was first enacted in 1897, does not go to the extent that is claimed for it. While it says that the process, pleadings, and proceedings shall be the same as in the winding up of insurance companies, yet it does not say that the jurisdiction of the circuit judge shall be the same, but on the point of jurisdiction it only says, "The jurisdiction of the circuit court shall be the same as in such cases."

So there is not even a statutory authority for the jurisdiction attempted to be exercised in this instance.

When the petition and answer were filed in the clerk's office they gave publicity to a condition of the corporation that was likely to cause a feeling of distrust, and if the learned judge to whom the petition and answer were shown thought that such distrust might, before the court could sit in term, cause action on the part of the stockholders or creditors that would be injurious to the interests of all concerned, he had the authority and it was his duty to appoint a receiver to take possession of the concern and its affairs, and preserve them from attack until the court, in due season and in due order, could make a judicial investigation and pass judgment on the case. And, as incidental to his right to appoint a receiver or receivers for that purpose, he had the right to require them to qualify by giving bond and security. But that is the extent to which his authority went. So much of the order of July 15, 1899 as "appoints Graham G. Lacy and Harry M. Tootle as receivers to take charge of the property and assets" of the defendant corporation, and as requires them to give bond and security for the faithful performance of their duties, is valid, but all the rest of the order is without authority and void. The receivers had the right under that order to take possession of the assets of the corporation and preserve them. The order was no authority to them to proceed to administer the estate. There has been no final decree in the case. There has been no adjudication upon the statements contained in the petition. But what is to be said of the orders made by the court in term directing the administration of the estate? Those orders have all proceeded on the assumption that there had been a final decree dissolving the corporation, and vesting the title to all its property in the receivers. The corporation, however, is not dissolved, and it still holds title to all its assets. But when the circuit court assembled at its September term, 1899, it found itself in possession of this corporation's affairs, through the hands of the receivers, and it had complete jurisdiction of the case. It was then for the first time in position to pass judgment on the petition, or upon the petition and answer together. Until such judgment or decree was rendered, neither the corporation nor its officers could be permanently deprived of their property or relieved of their duties. But the court, being in possession of the assets, and having jurisdiction of the persons and property, had the right to make such orders as the immediate emergency demanded, to preserve the estate, or to prevent the condition from operating upon it more injuriously than necessary until the court, in due season, could hear the case on its merits and pronounce its judgment. It is for a similar reason that our statute authorizes the court to order the sheriff to sell perishable property seized un-

der attachment before the rightfulness of the attachment has been adjudged. What was necessary to be done in such condition was a question which the court had jurisdiction to determine. If, in the exercise of that jurisdiction, it has done what was unnecessary, it has committed error; but, as long as the act done is within limits where it may be reasonably adjudged to have been necessary to preserve the estate until the court could finally adjudicate the rights of the parties, the error is not jurisdictional, and is not within the limits of a writ of certiorari. We will not, therefore, decide, under this writ, whether the court went too far in some of these administration orders. We conclude, therefore, that the appointment of the receivers "to take charge of the property and assets" of the corporation, and their qualification by giving bonds and security, were authorized and valid; but in all else the order above set out, of July 15, 1890, was without authority, and should be quashed. It is so ordered. All concur.

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MATTINGLY et al. v. VANCLEAVE.¹
HAWKINS v. DAVIS, County Superintendent.
 (Court of Appeals of Kentucky. March 18, 1901.)

SCHOOLS AND SCHOOL DISTRICTS—EXTENSION OF TERMS OF TRUSTEES—APPOINTMENT TO FILL VACANCY—DE FACTO OFFICERS.

1. By the act of March 17, 1898, changing the time of election of school trustees from June to October in each year, the terms of all trustees in office July 1, 1898, were extended one year.

2. The term of O. as trustee, which would have expired July 1, 1898, was extended by act of March 17, 1898, to July 1, 1899. In October, 1898, H. was elected to succeed O., and C. at once quit his office and permitted H. to enter upon his duties. H. died in March, 1899, and the county superintendent appointed J. to fill the vacancy caused by his death. *Held*, that J., who entered at once upon his duties, became de facto trustee until July 1, 1899, and then became de jure trustee for the term for which H. was elected, though he was appointed before that term began.

3. The county superintendent, by declaring a vacancy in the office of school trustee when none in fact existed, did not create a vacancy, and an appointment to fill the supposed vacancy was void.

4. Though such an appointee may have been a de facto officer by reason of his recognition by the county superintendent, yet he ceased to be so when notified by the county superintendent that he was no longer considered trustee; and his acts thereafter, though on the same day he received such notice, were void.

Appeals from circuit court, Nelson county.
 "Not to be officially reported."

Action by William Mattingly and Charles Allen, trustees of colored school district A, of Nelson county, against Samuel Vancleave, to recover possession of personal property. Judgment for defendant, and plaintiffs appeal. Affirmed.

Action by F. B. Hawkins against J. Tyler Davis, superintendent of schools in Nelson

county, for a mandamus. Judgment for defendant, and plaintiff appeals. Affirmed.

Morgan Yewell, John D. Wickliffe, and Nat W. Halstead, for appellants. A. V. McKay and Geo. S. & John A. Fulton, for appellees.

WHITE, J. These two appeals involving the same question (i. e. who were the trustees of common-school district A, in Nelson county), they have been ordered heard and tried together. Appellants Mattingly and Allen claim to be trustees of the district, and as such claim the furniture belonging to the district, in the one action. Appellant Hawkins seeks a mandamus to compel appellee Davis, who is superintendent of schools in Nelson county, to pay to him (Hawkins) the public fund belonging to the district, for teaching the public school. Hawkins entered into a contract with Mattingly and Allen, as trustees of the district, in July, 1899, and began the school in January, 1900. Samuel Vancleave contracted with Johnson and Grundy, as trustees of the district, in August, 1899, and began teaching in September, 1899, and taught under that contract till in January, 1900, when a new contract was made for the same purpose, for the reason that the state superintendent had held the first contract illegal and void. After this new contract Vancleave again began, and taught the school for the full term. It is conceded by all parties that Mattingly is and was a trustee; his term beginning July 1, 1897, and for the term of three years. It appears from the proof that on July 1, 1897, the three trustees and their terms were: Charles Clemons, elected June, 1895; Henry Rapier, elected June, 1896; W. C. Mattingly, elected June, 1897,—each with a term of three years from July 1st after their election, so that as the law then stood Clemons' term would expire July 1, 1898; Rapier's, July 1, 1899; and Mattingly's, July 1, 1900. By the opinion in the case of Swango v. Rose, 49 S. W. 40, 435, this court held that by the act of March 17, 1898, changing the time of election from June to October in each year, the terms of all trustees in office July 1, 1898, were extended one year. By this ruling the term of Clemons would end July 1, 1899, instead of 1898; that of Rapier would end July 1, 1900, instead of 1899; and Mattingly would hold till 1901. At the election in October, 1898, Martin Hays was elected to succeed Clemons, and by this election his term would begin July 1, 1899; but it appears that, immediately after the election, Clemons, without a formal resignation, quit the office, and permitted Hays to qualify and enter upon his duties as trustee. This was in October, 1898. Clemons never afterwards claimed to be, or acted in any way as, trustee. In March, 1899, before the term of Hays under his election began in July, he died, and thereupon the county superintendent appointed Johnson to fill the vacancy caused by the death of Hays. In July, 1899, the county superintendent, act-

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

ing under an opinion from the state superintendent, as in the Swango Case, declared a vacancy in the office held by Rapier, and appointed appellant Allen to fill that vacancy; the order showing that he was to succeed Rapier. The board of trustees, as then recognized, consisted of Mattingly, Johnson, and Allen, and thus continued up to July 8th, the very day the contract was made with Hawkins. However, on the day the contract was made, and before the hour of the meeting called to employ a teacher, the county superintendent notified Allen he was no longer recognized as trustee, and that his written resignation in the hands of the county superintendent had been accepted. Rapier afterwards reclaimed his office, and was recognized as the trustee under the decision in the Swango Case. He then resigned, and Grundy was appointed in his place and to fill his term. Subsequently Johnson and Grundy were reappointed, this being to correct any error or informality in the original appointment. After the second appointment of Johnson and Grundy, they again contracted with Vancleave, and he retaugt the school, as stated supra. It is contended by appellants that Allen is and was trustee, vice Rapier, who thought his term had expired and abandoned the office; if that be not so, then Allen is trustee, vice Hays, deceased; and, finally, if he was not de jure trustee, he was de facto, and recognized as such, and his acts binds the district, and his contract with Hawkins is valid.

We are clearly of opinion that the opinion in the Swango Case, supra, settles the first contention. Allen did not fill the place of Rapier, as there was no vacancy in law or fact. The vacancy caused by the death of Hays was attempted to be filled by the appointment of Johnson. There was never any appointment of Allen to fill that vacancy or for that term.

Upon the qualification of Hays in October before his term began in July following, by the consent and acquiescence of Clemons, the de jure officer, and the county superintendent, and acting by the consent of all parties, he was a de facto officer; and upon his death there was in fact a vacancy in the office for the short term till July 1st, and a legal vacancy in the full term for which he was elected. The county superintendent had the power of appointment to fill the vacancy for the full term, and did so by appointing Johnson, as his orders show. Johnson has acted without objection, and has been recognized by Allen, Mattingly, and Hawkins, as well as by the county superintendent, as a trustee of the district. The notice of the meeting to select and employ a teacher, when Hawkins was employed, was given to Johnson as trustee. That the order appointing Johnson was made before the day the term began does not render the appointment void or voidable. While he could not become a de jure officer till July 1st, he might and did act as de

facto officer, as Hays had done before that time. We are of opinion that Johnson was a trustee at the time of the employment of Hawkins, and that Allen was not.

As to the third proposition,—that Allen was de facto trustee on the day of the employment, and recognized as such,—it is sufficient answer to say that he was notified before the meeting that his written resignation left with the county superintendent had been accepted, and that he was no longer recognized as trustee. Whatever of criticism, if any, might be made on the acts of the officer as regards the resignation, would not affect the matter. If Allen was trustee de facto by reason of recognition of the county superintendent, he ceased to be when notified that this recognition ceased, and that he was no longer considered a trustee by the appointing power, who also in some cases has power of removal from office. Being of opinion that Allen was not trustee de jure or de facto when the contract with Hawkins was made, it follows that the contract is a nullity so far as the district is concerned.

On the other branch of the case, it follows that appellants Mattingly and Allen are not entitled to possession of the district property. The judgments appealed from are therefore affirmed.

FIELD et al. v. FARMERS' & DROVERS' BANK.¹

(Court of Appeals of Kentucky. March 8, 1901.)

TENANTS IN COMMON—PURCHASE BY ONE INURING TO BENEFIT OF ALL.

A purchase at a tax sale, made by one of several tenants in common, inures to the benefit of all, though the purchaser had agreed with a stranger that the bid should be for his benefit to the extent of one-half the property.

Appeal from circuit court, Jefferson county, chancery division.

"To be officially reported."

Action by the Farmers' & Drovers' Bank against A. H. Field and others for a decree adjudging plaintiff to have an undivided interest in a city lot. Judgment for plaintiff, and defendants appeal. Affirmed.

Kohn, Baird & Spindle, for appellants. Bennett H. Young and H. M. Lane, for appellee.

WHITE, J. The appellee, the Farmers' & Drovers' Bank, brought this action seeking a decree that it has an undivided interest of two-fifths in a certain lot on Sixth street, in the city of Louisville. The petition alleges as cause of action that appellee owned two-fifths interest, A. H. Field owned one-fifth, J. Lawrence Field owned one-fifth interest, and N. A. Miller and N. R. Cayton jointly owned one-fifth, all subject to the life estate of Rebecca Field, mother of A. H. and J.

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

Lawrence Field. It is alleged that, there being a charge against the property for street improvement, an action was instituted, and the lien enforced, and at the sale A. H. Field became the purchaser at the price of the full sum due, \$39.90, and after the sale had same confirmed, and deed made to himself alone. Appellee tendered and paid into court two-fifths of the purchase price, and asked the court to decree that said A. H. Field hold such property subject to the appellee's rights, and that the purchase by Field inured to the benefit of all the undivided owners as joint tenants. For answer the appellants admit the joint tenancy, the sale, and purchase by A. H. Field, but say that by agreement between A. H. Field and J. Lawrence Field it was provided that A. H. Field was to bid off the property for the benefit of both jointly, each to pay one-half and own one-half thereof; that, pursuant to that agreement, the property was bid in by A. H. Field for both, and they each paid one-half the purchase price, and a one-half interest was conveyed to J. Lawrence Field; that at the time of the sale under the foreclosure for improvement lien J. Lawrence Field had and owned no interest in the property, but had long prior sold and conveyed his one-fifth interest therein to one Underwood. For reply appellee alleged that the deed made to Underwood was fraudulent and void, being made voluntarily, and for the purpose to defraud his creditors. This was denied by rejoinder. Upon the trial, on proof, the court adjudged, as prayed by appellee, that it was the owner of an undivided two-fifths interest in the property, and that the purchase by appellant A. H. Field inured to the benefit of all joint tenants in the property. From that judgment this appeal is prosecuted.

The pleadings and uncontradicted proof show that appellant A. H. Field owned an undivided one-fifth interest, appellee owned an undivided two-fifths interest, Underwood held title to one-fifth interest, and Miller and Cayton jointly owned one-fifth; that the property was worth at the time of the sale some \$3,000 or over, and that the purchase price bid by the appellant was \$39.90. Under these facts we are of opinion that the purchase of A. H. Field inured to the benefit of all the joint tenants. This court said in *Venable v. Beauchamp*, 3 Dana, 324: "One joint tenant or a tenant in common cannot purchase any adverse claim to the lands for his exclusive benefit; still less can he use it to expel his co-tenant." In the case of *Coleman v. Coleman*, 3 Dana, 403, the court said: "If one tenant in common buys an adverse claim to the land, the purchase avails the co-tenant also." Also in case of *Lee v. Fox*, 6 Dana, 176, the court said: "Whenever one of several joint tenants buys in an incumbrance under the joint estate, the purchase will inure to the equal benefit of his co-tenants." The same doctrine was recognized in *Perkins v. Smith* (Ky.) 37 S. W. 72. The

identical question here has been decided by various courts of last resort. See *Conn v. Conn*, 58 Iowa, 749, 13 N. W. 51; *Davis v. King*, 87 Pa. St. 261; *Downer's Adm'rs v. Smith*, 38 Vt. 464; *Brown v. Hogle*, 30 Ill. 119; *Battin v. Woods*, 27 W. Va. 67; *Page v. Webster*, 8 Mich. 265; and others. These cases all hold that a purchase by a joint tenant at a tax sale inures to the benefit of all, and that he cannot acquire a title to himself. With this view of the case, it becomes immaterial whether J. Lawrence Field, at the time of the sale, had any interest in the property. The purchase was made by A. H. Field, who was a joint tenant with appellee, and he could not defeat its rights in the purchase by agreement with another, a stranger to the title. The court, in its decree, made provision for repairs and improvements made by appellants, and as to that branch of the case rendered no judgment. The judgment appealed from, being in harmony with well-settled principles and sustained by authority, is affirmed.

SIMONS et al. v. PEARSON.¹

(Court of Appeals of Kentucky. March 8, 1901.)

APPEAL AND ERROR—RECITALS OF MOTION FOR NEW TRIAL AS EVIDENCE OF COURT'S RULINGS—BURDEN OF PROOF—DISCRETION AS TO ORDER OF ARGUMENT.

1. The assignment, as a ground for new trial, that the court refused to permit plaintiffs to conclude the argument to the jury, is not sufficient to show such refusal; but that fact, and plaintiffs' exception thereto, must appear from the bill of exceptions or the orders of court.

2. Where the burden of proof was upon one of two defendants, and as to the other the burden was on plaintiff, the order of argument to the jury was in the sound discretion of the court.

Appeal from circuit court, Jefferson county, common pleas division.

"Not to be officially reported."

Action by J. H. Pearson against Lum Simons and another for libel. Judgment for plaintiff, and defendants appeal. Affirmed.

Fairleigh, Straus & Eagles, for appellants. Bodley, Baskin & Morancy, for appellee.

WHITE, J. This is an action for libel for the publication of an article in the Critic, a newspaper published in Louisville, reflecting on the official conduct of appellee, Pearson, as engineer of the city, in regard to certain asphalt work. Appellant Simons, admitting the publication, averred its truth as justification. Appellant West denied having published the article, or being in any way connected with it. On trial, a verdict and judgment was rendered against appellants jointly for \$1,000, and, after their motions for new trial were each overruled, they prosecute this appeal.

Counsel for appellants urge in their brief

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

that the court below erred in refusing to award to appellant Simons the burden of proof and the closing argument to the jury. This is the only action of the court complained of as error. By the pleadings, the burden of proof as to West was on appellee, while, as to Simons, he had the burden, and not appellee. The record shows that the appellee introduced his testimony first, before either appellant offered any; but there appears in the record no objection or exception to this action, nor was there a motion by either party for the court to assign the burden of proof. The record fails to show the order of argument of counsel, and there appears no motion by appellant Simons or appellee, Pearson, to be permitted to conclude the case before the jury. The motion for new trial assumes that this happened by assigning the action of the court as error, but the bill of exceptions and orders of court fail to show that such was done.

It has been repeatedly held that the motion for new trial alone will not bring these matters before the court. They must appear in the bill of exceptions or orders showing an exception thereto. However, if the record showed that the court had held that appellee had the burden of proof and the concluding argument, such ruling would not have been error. Under the peculiar circumstances of the pleas, the regulation of the burden rested in the sound discretion of the court. There appears no error in the admission or rejection of testimony to the prejudice of appellants. Counsel points to no error in the instructions given, and we find none. The verdict is sustained by the evidence. Finding no error, the judgment is affirmed, with damages.

SPARKS, Judge, et al. v. BOHANNON.¹
(Court of Appeals of Kentucky. March 8, 1901.)

COUNTIES—COMPROMISE OF BONDED DEBT—
VALIDITY OF BONDS.

1. Bonds issued by a county in payment of its subscription to the capital stock of a railroad corporation pursuant to authority granted by the charter of the corporation were valid, as were also bonds issued by the county in lieu thereof under an act of the legislature authorizing the county to compromise and fund its outstanding indebtedness.

2. Under Ky. St. § 1852, bonds issued by a county, pursuant to a resolution of the fiscal court, for the purpose of compromising and taking up bonds for a much larger amount legally issued by the county prior to September 28, 1891, and which had matured, are valid.

Appeal from circuit court, Muhlenberg county.

"Not to be officially reported."

Action by T. J. Sparks, judge of the Muhlenberg county court, and others against J. G. Bohannon. Judgment for defendant, and plaintiffs appeal. Affirmed.

W. L. Reeves, for appellants. Humphrey, Burnett & Humphrey, for appellee.

PAYNTER, C. J. This court, in *Brown v. Tinsley*, 21 S. W. 535, held that Muhlenberg county, under an act of the legislature incorporating the Elizabethtown & Paducah Railroad Company, and an act amendatory thereof, was authorized to subscribe to the capital stock of that company, and to issue \$400,000 in bonds in payment thereof, and that the bonds so issued were valid. In the same case it was also held that bonds issued under the act of March, 1878, entitled "An act to authorize and empower the county of Muhlenberg to compromise and fund its outstanding bonded indebtedness, issue bonds and levy and collect taxes to pay the same," were valid. Acts 1878, c. 519. So the bonds issued under the provisions of the original and amendatory acts constituted a valid and enforceable indebtedness against the county of Muhlenberg. They were issued prior to the 28th of September, 1891, and several hundred thousand dollars thereof remained unpaid. Section 1852, Ky. St. (part of act of August 16, 1892), provides "that any of the counties of this commonwealth, through and by the fiscal courts of the respective counties, are authorized and empowered to call in any of their outstanding bonds matured or subject to call, legally issued prior to the twenty-eighth day of September, one thousand eight hundred and ninety-one, for railroad purposes or otherwise, and issue and substitute therefor new bonds of such county, not exceeding the amount of such old bonds and interest then outstanding. * * *". On May 3, 1900, the fiscal court of Muhlenberg county convened and adopted a resolution looking to the issuing of bonds to the amount of \$215,000, with interest coupons attached, to be sold; the proceeds of which to be used in compromising and taking up the old bonds of the county. June 11, 1900, was fixed as the day upon which the fiscal court would make the necessary order for the issuance of the bonds contemplated by the resolution. Due notice was given of the proposed action of the fiscal court, and every requirement of section 1852, Ky. St., was complied with. No protest was made against the proposed action of the fiscal court. In our opinion, the fiscal court of Muhlenberg county had the authority to order that the bonds of the county to the amount of \$215,000 should be issued for the purposes stated in the resolution and order of the court. As the old bonds had matured, the fiscal court of the county had the right to substitute new ones therefor. *Smith v. County of Mercer* (Ky.) 47 S. W. 596. It would certainly be an advantageous adjustment of the bonded indebtedness of Muhlenberg county to substitute \$215,000 of bonds at 5 per cent. interest for bonds aggregating an amount several times that of the pro-

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

posed issue, and drawing a greater rate of interest. To do so would give hope to the people of the county that they will be able in the near future to meet the county's obligations, and be relieved of the enormous indebtedness. The court properly overruled the demurrer to the petition, and the judgment is affirmed.

WATTS v. HURST et al.¹

(Court of Appeals of Kentucky. March 7, 1901.)

WRONGFUL ATTACHMENT—FAILURE TO ALLEGE DISCHARGE.

1. An action does not lie to recover damages for wrongfully suing out an attachment for rent until the attachment has been discharged, and that fact must be alleged.

2. A petition alleging that defendant caused "an attachment and distress" to be issued against plaintiff, and wrongfully caused "said attachment to be levied" on the property of plaintiff, alleges only the issuance and levy of an attachment, and not the issuance of a distress warrant.

Appeal from circuit court, Bell county
"Not to be officially reported."

Action by Edgar Watts against Udoxie Hurst and William Hurst to recover damages for wrongfully suing out an attachment. Judgment for defendants, and plaintiff appeals. Affirmed.

N. B. Hays and G. W. Saulsberry, for appellant. A. K. Cook for appellees.

HOBSON, J. Appellant complains that the court below sustained a demurrer to the following petition: "The plaintiff, Edgar Watts, says that while a citizen and a housekeeper of Middlesboro, Kentucky, and a tenant of the defendants, Udoxie and William Hurst, that the said defendants, Udoxie and William Hurst, for the benefit of the defendant Udoxie Hurst, on the — day of July, 1899, made affidavit before the police judge of the city of Middlesboro, and caused an attachment and distress to be issued against the plaintiff for the sum of three hundred and sixty dollars, alleged to be due on rent from this plaintiff; that at the time of the issuing of said attachment and the levying of the same on the property of this plaintiff the plaintiff was not due the defendants for rent or any other thing in any sum whatever; that said defendants wrongfully caused said distress and attachment to issue, and did then and there wrongfully and without cause or provocation cause said attachment to be levied on the household goods of this plaintiff, worth three to five thousand dollars, and did hold said household goods from this plaintiff from the — day of July, 1899, to the — day of September, 1899, to the plaintiff's damage in the sum of five thousand dollars; that the plaintiff has large interests in the United States, in Kentucky, and in England; that the wrongful issuing and publica-

tion of said attachment damaged him in the commercial world in the further sum of fifty thousand dollars. Wherefore plaintiff prays judgment against the defendants in the sum of fifty-five thousand dollars, and all proper relief." It is insisted for appellant that this is an action for the wrongful entry and seizure of his goods at a time when the landlord had no rent due or right of action, and that there is no necessity for an allegation that the attachment has been discharged. *Bell v. Norris*, 79 Ky. 48, is relied on to sustain this conclusion; but that was an action to recover damages on account of the illegal levy of a distress warrant. A distress warrant may be issued under section 2301, Ky. St., and by section 2309 the property levied on under it, or so much as may be necessary, shall be sold by the officer in the same manner as property levied on under an execution, unless the demand is replevied, or other legal procedure taken as provided by that section. There is no allegation in the petition that a distress warrant was issued. The allegation is that appellees caused an attachment and distress to be issued, and at the time of issuing said attachment and the levy of the same the plaintiff was not due the appellees for rent, or any other thing, in any sum whatever, and that appellees wrongfully, and without cause or provocation, caused said attachment to be levied on appellant's household goods. Taken all together, the petition clearly alleges only the issuance and levy of an attachment. An attachment for rent is governed by sections 2302, 2303, Ky. St. The proceedings thereon are the same as on other attachments issued under the Code of Practice. Section 2303. In *Nolle v. Thompson*, 60 Ky. 123, this court said: "It is well settled that no action will lie on an attachment bond for maliciously suing out an attachment until the attachment shall have been discharged, and such final disposition of it must be alleged." The same rule is stated in *Cooley, Torts*, pp. 187, 188. *Bish. Noncont. Law*, § 246; and *Drake, Attachm.* § 729. Judgment affirmed.

COX et al. v. FIELDS et al.¹

(Court of Appeals of Kentucky. March 7, 1901.)

WILL CONTEST—INSTRUCTIONS TO JURY.

Though the instructions to the jury, in a will contest, defining undue influence and mental capacity, were not specially apt, yet as they are substantially the same instructions which have been approved by the court in other cases, and the evidence shows clearly that the testator had testamentary capacity, and without undue influence executed the paper in contest, a verdict for the will will not be set aside.

Appeal from circuit court, Casey county.
"Not to be officially reported."

Elvira Fields and others offered for probate the will of James M. Cox, deceased,

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

in the county court. H. N. Cox, and others, contestants, appealed to the circuit court from a judgment admitting said will to probate. Judgment for propounders, and contestants again appeal. Affirmed.

J. D. Belden, Q. C. Cody, W. B. Cochran, and James Denton, for appellants. P. H. Taylor and J. Bryan Stone, for appellees.

BURNAM, J. The probate of the will of James M. Cox was vigorously resisted in the county court on the ground of mental incapacity and undue influence. The contestants appealed to the circuit court, where a trial before a jury resulted in a verdict in favor of the validity of the will. A new trial was asked on the grounds: First, that the verdict was flagrantly against the weight of the evidence; and, second, that the court erred in giving instructions Nos. 2 and 3 to the jury. The deceased, after providing for the payment of his debts, gave all of his property, real and personal, to Elvira Fields during her life, and at her death to her child, Sally Fields; and further provided that, in the event of the death of the child, Sally Fields, during her infancy, and without issue, the residue of his estate was to go to his daughter Mary Wesley. The testimony shows that the wife of testator died about 10 years before he died, leaving surviving her four children, two sons and two daughters, all of whom were grown and married, and lived in their own homes, except one son; that for about 30 years before the death of testator his deceased wife's half-sister, a weak-minded woman, had lived in his family, performing the duties of a domestic servant; that after the death of testator's wife she continued to live with him, and rendered the same character of services; that some two years before the execution of the will in contest she had given birth to an illegitimate child by testator, and to whom he finally devised the small estate left by him. The decided weight of the testimony is to the effect that the deceased was a strong-minded, self-willed, capable man, but at times afflicted with an uncontrollable temper; and an estrangement grew up between him and his older children by reason of his relations with Elvira Fields. There is no evidence of undue influence exercised over him by her, and it seems wholly improbable that this feeble-minded woman, who had for so many years occupied a dependent and servile position in the family of decedent, could have acquired any real ascendancy over his mind. In fact, the testimony very strongly conduces to show that the only effort to control the free agency of deceased in the disposition of his property came from the appellants, or a part of them. While the instructions complained of, defining undue influence and mental capacity sufficient to authorize the making of a will, are not specially apt, they are sub-

stantially the same instructions which have been approved by this court in *Wise v. Foote*, 81 Ky. 10; *Bush v. Lisle*, 89 Ky. 400, 12 S. W. 762; *Barlow v. Waters*, 28 S. W. 785. In our opinion, the evidence in this case shows clearly that testator had testamentary capacity, and freely and without undue influence executed the paper in contest; and, a jury having so found, the judgment rendered pursuant thereto should not be disturbed. Judgment affirmed.

KERR v. HOUGH.¹

(Court of Appeals of Kentucky. March 6, 1901.)

TRANSFER TO EQUITY—RIGHT TO JURY TRIAL—DELIVERY OF PROPERTY TO SURETY'S DEVISEES TO INDEMNIFY ESTATE—MEASURE OF RECOVERY.

1. Defendant was entitled to a jury trial of the issue whether he had undertaken, in consideration of the transfer of property to him, to pay a debt due by plaintiff to another, and it was error to transfer the action to equity.

2. Where personal property was delivered by the principal obligor in a note to defendants, the principal devisees of a surety therein, in anticipation of the loss which the estate would probably sustain by reason of the suretyship, the estate of the surety having proved insolvent, and the debt not being paid, the principal, in an action by him for the benefit of the creditor, is entitled to recover the value of the property delivered to defendants.

Appeal from circuit court, Bourbon county. "Not to be officially reported."

Action by C. L. Hough, for himself and for the use and benefit of J. T. Cook, against J. W. Skinner and others upon a contract. Judgment for plaintiff, and defendant W. H. Kerr appeals. Reversed.

McMillan & Talbott, for appellant. Neville C. Fisher, for appellee.

GUFFY, J. In May, 1897, C. L. Hough, and C. L. Hough who sues for the use and benefit of J. T. Cook, brought suit in the Bourbon circuit court against J. W. Skinner and W. H. Kerr. The substance of the averments of the petition is to the effect that Hough in 1894 borrowed from said Cook \$450, for which he gave his note, with Lucy J. Skinner as surety; that on March 1, 1895, he paid on said note \$75; that said Lucy died in November, 1895; that she devised the principal part of her estate to defendant Skinner and Fannie Kerr, wife of defendant W. H. Kerr; that defendants, fearing that plaintiff, Hough, would be unable to pay said note, agreed with Hough that, if he would deliver to them two certain horses, they would pay and satisfy said debt due to Cook; and that he did deliver said horses; and that defendants appropriated them to their own use, but failed to pay the Cook debt. Judgment was prayed, for the benefit of Cook, for said sum. The first paragraph of Kerr's answer is a traverse of all the material averments of the

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

petition. In the second paragraph it was substantially alleged that Hough was expecting the estate of Mrs. Skinner would be compelled, as surety, to pay debts for him, and was anticipating a loss to the estate on that account, and turned over said horses to reimburse defendants, who were entitled to the estate, for the money which Hough knew the Skinner estate would lose, and the same was, as between Hough and defendants, to be considered a reimbursement to that extent. The defendant Skinner denied his liability for any sum, and stated that any trade made in reference to the horses was made between Hough and Kerr, not in his presence. It appears that after this Skinner does not appear in this suit as a party taking an interest therein. A demurrer was sustained to the answer of Kerr. He amended his answer, and from the averments therein it appears that Mrs. Skinner was surety for Hough in several notes aggregating about \$600, and the horses were turned over to be sold, and the proceeds applied in making good the loss which he knew would thereafter be sustained by defendants J. W. Skinner and Fannie L. Kerr because of the liability of their mother on several notes of Hough, and that plaintiff did not propose to him to become liable for the Cook debt; that the horses were not worth \$400. Some other amendments were filed. A general demurrer was sustained to the answer as amended, and judgment rendered in favor of Hough, for the use of Cook, for the amount of the Cook note, less a credit by the \$75 paid by Hough. From this judgment an appeal was prosecuted, and this court reversed the judgment. Upon the return of the cause to the circuit court, various amended pleadings were filed, and on motion of the plaintiff the court, over the objections of defendants, transferred the cause to equity. The court finally rendered judgment against the defendants for \$450, with interest from October 1, 1894, and costs, subject to various credits therein named. The judgment recites that defendant Kerr realized \$326 for the horses, and that Cook had collected from the Skinner estate certain sums which reduced his debt to \$293.54. It is further stated that the court is of the opinion that the plaintiff cannot recover from defendants, under any circumstances, more than that amount, and the court is further of the opinion that the defendants Kerr and Skinner are bound to pay the balance of the said debt to plaintiff Cook out of the proceeds of said horses, whether they assumed payment of the Cook debt or not. From the judgment aforesaid, Kerr prosecutes this appeal.

The record does not, in terms, show whether the judgment is more or less than the sum due Cook. We think the court erred in transferring the case to equity. Appellant was entitled to a jury trial as to whether he agreed to pay the Cook debt or not. It is perfectly evident that the parties expected the estate of Mrs. Skinner to have to pay the

debt in question, and that whatever the estate had to pay would be a loss to defendants. It, however, turned out that the estate was insolvent. One of three propositions seems to us to be true, viz.: First, that the horse trade was a chancing bargain between the parties, by which Hough was to be released to the extent of \$400 liability to defendants on account of the loss expected to fall on them; or, second, that the defendants were to account to Cook for \$400; or, third, that defendants were to sell the horses and account for the proceeds. The history of this case conduces to some extent to sustain the first proposition,—much more so than to sustain the second. If the third proposition was in fact the trade, then the court erred in not allowing defendants credit for the necessary cost and expense of preparing the horses for market and selling them. We are, however, of the opinion that the true criterion of recovery in this case is the value of the horses at the time of sale to defendants, which, from all proof, we fix at \$200; and, inasmuch as this case is now in equity, we think it should be finally decided. The judgment is therefore reversed, and the cause remanded, with directions to set aside the judgment appealed from, and in lieu thereof enter a judgment for \$200, with interest from May 26, 1897, and for proceedings consistent herewith.

BUCKEYE ENGINE CO. v. BUCKWALTER.¹

(Court of Appeals of Kentucky. March 7, 1901.)

VERDICT—CERTAINTY—EVIDENCE.

1. In an action on an account for repairs to an engine, in which defendant answered, alleging that the engine was defective, and that plaintiff guaranteed to remedy the defects by making the repairs sued for, which proved to be worthless, whereby defendant was damaged, a verdict stating that the jury "set aside the amount sued for, and give the defendant \$150 for damages," is not void for uncertainty; it being clear, in the light of the record, that the jury intended to find against plaintiff as to the account sued on, and to find for defendant, in addition, \$150 on his counterclaim.

2. The original contract under which the engine was bought by defendant from plaintiff was admissible in evidence as matter of inducement to the making of the second contract, the court properly telling the jury that they were not to consider any defects in the engine before the repairs were made.

Appeal from circuit court, Rowan county.
"Not to be officially reported."

Action by the Buckeye Engine Company against J. R. Buckwalter on an account. Judgment for defendant, and plaintiff appeals. Affirmed.

A. T. Wood and J. G. Whitt, for appellant.
A. W. Young, for appellee.

HOBSON, J. Appellant brought this suit to recover of appellee \$444.80, balance of an

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account for repairs to an engine. Appellee answered, alleging that the engine was bought from appellant and was defective; that it guarantied to remedy its defects by placing on it the repairs sued for; that he was induced to make the contract with appellant by the fact that it guarantied to remedy the defects in the engine and put it in good condition, so that it would perform its work properly; that this appellant wholly failed to do; that the work was defective and wholly worthless; that he was at the time operating a large sawmill, and the engine was guarantied to operate the mill, but broke down and failed to drive the mill; that, by reason of the imperfect repairs put upon the engine, he was unable to run his mill, his hands were kept idle, and he lost a good deal of time by breakage, and was put to expense and damaged in all in the sum of \$500. The allegations of the answer were denied by a reply. The case was submitted to a jury, who returned the following verdict: "We, the jury, agree and set aside the amount sued for, and give the defendant \$150.00 for damages." It is insisted that this verdict is too uncertain to sustain the judgment of the court below dismissing appellant's petition, and giving judgment against it on the counterclaim of appellee for \$150 and costs. A verdict is good if its meaning may be understood in the light of the record. The evidence for the appellee showed clearly that the repairs put on the engine were of no value, and failed to remedy in any degree the troubles that then existed. The court instructed the jury that if appellant, knowing the amount of work the engine was intended to perform, undertook to remedy the defects then existing, and guarantied that it would do so by the repairs sued for, but failed to remedy said defects, they should find for appellee. Under the evidence and this instruction, the verdict of the jury, "We, the jury, agree and set aside the amount sued for," clearly means that the jury found against appellant on the account; this is, they set aside the amount sued for, as not proper to be allowed or taken into consideration, and, having said this, they added, "and give the defendant \$150.00 for damages." The reason they put their verdict in this form was that the court authorized them, by one of its instructions, to set off any damages they might find in favor of appellee against the account of appellant.

It is also insisted for appellant that the evidence fails to show that it made the guaranty relied upon in the answer, and that the verdict is against the evidence in this respect. This would undoubtedly be true, but for the cross-examination of appellee. But it seems to us that his statements on cross-examination made out his case in this respect.

The evidence as to the original contract under which the engine was bought was properly admitted in evidence as matter of in-

ducement to the making of the second contract, and the court, by its instruction, properly told the jury that they were not to consider any defects in the engine before the repairs sued for were put on it. The evidence is clear, we think, that the engine was not benefited by the repairs, and was as defective after they were put on as before. The proof sustains the verdict of the jury as to the defectiveness of the engine, and we cannot say that the allowance of \$150 in damages was excessive. Judgment affirmed.

HEWLING et ux. v. WILSHIRE.¹

(Court of Appeals of Kentucky. March 7, 1901.)

PRINCIPAL AND AGENT—RATIFICATION.

The husband, having ratified the act of his wife in signing his name to a note, is bound thereby.

Appeal from circuit court, Campbell county.

"Not to be officially reported."

Action by George P. Wilshire, receiver of the First National Bank of Newport, Ky., against Joseph Hewling and wife on certain promissory notes. Judgment for plaintiff, and defendants appeal. Affirmed.

E. H. Kilpatrick, for appellants. W. H. MacKoy, for appellee.

BURNAM, J. This is an appeal from a judgment in favor of appellee, as receiver of the First National Bank of Newport, Ky., upon three promissory notes alleged to have been executed and delivered by appellants to Steelman & Wagner, for groceries sold and delivered by them to appellants, and which were subsequently indorsed by Steelman & Wagner to the bank. The notes sued on purport to be renewals of notes originally given by appellants to Steelman & Wagner. Appellants, by answer, denied the execution and delivery of the notes. The case was brought on the equity side of the docket, and, numerous depositions having been taken by both parties, upon final submission judgment was rendered for plaintiff for the notes sued on, and from that judgment defendants in the court below prosecute this appeal. Both Steelman and Wagner, the grocerymen, testify that appellants were customers of theirs from some time in 1889 until February, 1893, a period of about four years; that during all of this time they ran an account with them, and that frequently, when called upon to pay same, they did not have any money on hand, and that, by an arrangement between them and the First National Bank, of which appellee is the receiver, it was agreed that the bank should discount the notes of appellants, with their indorsement, to the amount of about \$200 or \$300; that thereafter, when appellants did not have the money to pay their running account

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

when due, they took their notes for the amount and sold them to the bank, and that the obligations sued on were renewals of some of these notes; that, when appellants failed to pay the notes in bank, new notes would be filled up for the proper amount, and brought to them, sometimes by Mr. Hewling, at other times by Mrs. Hewling, and sometimes by his daughter, for their indorsement; that this was carried on for two or three years. These statements of Steelman and Wagner are substantially corroborated by the testimony of Mr. Henglebrook, the teller of the bank, who identifies the notes sued on as the property of the bank, and states that the proceeds thereof were originally credited to Steelman & Wagner, and that they were subsequently renewed several times, and that, at the maturity of the notes, notice was given both to appellants and to the indorsers, and that renewal notes were executed therefor: that sometimes these renewal notes were brought to the bank by Steelman & Wagner, and sometimes by appellants one or both. And this witness also testifies that both signatures to the obligations sued on are in the handwriting of the appellant Katherine Hewling. A number of bank officers testify as experts that both the bodies and signatures of the notes were in the handwriting of appellant Katherine Hewling. And while both the appellants deny that they either signed or authorized the execution of the notes sued on, and prove by a number of witnesses that they were not in the handwriting of either of them, it seems to us that the weight of evidence on this point supports the finding of the chancellor. While the testimony as to the signature of appellant Joseph Hewling is not so clear and conclusive as that as to the signature of his wife, yet we think it is conclusively shown that, if he did not actually sign the obligations, he consented to their execution by his wife, and subsequently ratified them. It is a well-recognized principle of law that any act done, or contract made by one for, or in the name of, another, becomes the act or contract of the party, if subsequently adopted and ratified by him. See 2 Bouv. Inst. 25; Bruen v. Grahn, 5 Ky. Law Rep. 312; Forsythe v. Bonta, 5 Bush, 547. Judgment affirmed.

FOX v. BLUE-GRASS GROCERY CO.¹
(Court of Appeals of Kentucky. March 6, 1901.)

DISMISSAL OF ACTION—PARTNERSHIP—UNINCORPORATED COMPANY AS DEFENDANT.

1. Where plaintiff, after the court had quashed the return on a summons, insisted that defendants were before the court, and submitted the case for such judgment as the court might deem proper, a judgment dismissing the petition will be regarded as a judgment of dismissal without prejudice.

2. A partnership cannot be sued by its firm

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

name, but the individual partners should be named as defendants.

Guffy, J., dissenting.

"Not to be officially reported."

Modified opinion. For former report, see 60 S. W. 414.

DU RELLE, J. Appellant brought suit against appellee, the Blue-Grass Grocery Company, the only defendant named, alleging that it was a co-partnership formed by J. W. Langdon and others, of the city of Cincinnati, state of Ohio, and doing business in the city of Middlesboro, Ky.; that it entered into a contract with him for the sale of first-class German millet seed; that the seed furnished was not German millet, but a worthless mixture of other seeds; and that he had been damaged in the sum of \$1,000. The return upon the summons was to the effect that it was executed on the Blue-Grass Grocery Company by delivering a copy "to L. L. Childers, the agent and general manager of the defendant, Blue-Grass Grocery, and the only officer in Bell county of deft. Co." Thereupon Langdon & Creasy entered their appearance specially for the purpose of a motion to quash the return on the process, the grounds of which were that they were partners doing business under the firm name and style of the Blue-Grass Grocery Company; that all the members of the co-partnership did not reside in another state, or out of the state of Kentucky; and that Creasy, one of the members, resided in the city of Covington, in Kenton county, Ky., at the time of the institution of the action, and had so resided ever since,—an affidavit being filed in support of the motion by the attorney of the members of the partnership, showing the facts stated as ground of the motion, and that the affidavit of Creasy to the same effect had been filed in another suit pending in the same court between the same parties, upon the same cause of action, of which appellant and his attorney had full knowledge. The court sustained the motion to quash. Appellant declined to take any further steps to bring appellees before the court, but insisted they were before the court by virtue of the return, and submitted the case for such judgment as the court might deem proper, and the court dismissed the petition. This judgment, we are of opinion, is a judgment of dismissal without prejudice. In considering the court's ruling upon this motion, we must assume that the uncontroverted statements of the affidavit in support of the motion are true. Subsection 6 of section 51 of the Code of Civil Practice was adopted by the act of 1893, and is as follows: "In actions against an individual residing in another state, or a partnership, association or joint stock company, the members of which reside in another state, engaged in business in this state, the summons may be served on the manager, or agent of, or person in charge of such business in this state in the county where the business is carried on, or

in the county where the cause of action accrued." We are not referred to any case in which this subsection has been construed, nor have we been able to find any, except the case of *Soper v. Lumber Co.*, 53 S. W. 267, which does not touch the question before us. The Blue-Grass Grocery Company is not a partnership the members of which reside in another state. Neither Langdon nor Creasy is made a defendant to the action or a party to the appeal. The only person named as a defendant is the Blue-Grass Grocery Company, which is not incorporated, and cannot be sued in this way. For the reasons given, the judgment is affirmed.

GUFFY, J., dissents.

KICE et al. v. PORTER.¹

(Court of Appeals of Kentucky. March 7, 1901.)

DECEIT—FRAUDULENT REPRESENTATIONS BY BROKER—INSTRUCTIONS TO JURY—HARMLESS ERROR—ACTION BY WIFE ALONE—DEFECT OF PARTIES WAIVED.

1. While, in an action for deceit, it must be shown that the representation was false, and known by defendant to be false, and also that plaintiff was innocent, and relied on the representation, yet the failure to fully and clearly instruct the jury to that effect was harmless error, where the only dispute was as to what representations were made.

2. Where the purchaser of property from a broker was induced to pay more than the owner asked for the property by the fraudulent representation of the broker that the owner would not accept less than the price paid, the purchaser is entitled, in an action for deceit, to recover of the broker the excess, which he pocketed, less the usual commission for making the sale.

3. The purchaser, though a married woman, could maintain the action without joining her husband.

4. The husband having died pending the action, the objection that there was no revivor in the name of his representative cannot be made for the first time on appeal, he not having been a necessary party.

Appeal from circuit court, Jefferson county, common pleas division.

"Not to be officially reported."

Action by Annie I. Porter against Kice & Co. for deceit. Judgment for plaintiff, and defendants appeal. Affirmed.

P. B. & Upton W. Muir and Gardner & Moxley, for appellants. D. W. Baird and Pryor & Sapinsky, for appellee.

HOBSON, J. This is the second appeal of this case. The facts are fully stated in the opinion delivered on the former appeal. See *Kice v. Porter*, 53 S. W. 285. On the return of the case to the court below a new trial was had, resulting in a verdict and judgment in favor of appellee for \$337.50. The opinion delivered on the former appeal is the law of the case. It was there held that appellant was liable to appellee for deceit if he practiced a fraud upon her, and

that she might recover in this action to the extent she was thus made to pay above the amount for which Keller sold the property. Pursuant to that opinion, the court below, on the last trial, instructed the jury as follows: (1) "The court instructs the jury that if they shall believe from the evidence that the defendant falsely informed the plaintiff that the house and lot mentioned in the petition which was conveyed by Lewis Keller to the plaintiff could not be bought for less than \$7,000, and thereby fraudulently induced her to pay \$500 more than the real purchase price therefor, then the law is for the plaintiff, and they should find for her in the sum of \$500, with interest from the 1st day of April, 1895, subject to a credit in such a sum as represents the commission due Kice & Co. for their services in making the sale to her of said property, to be ascertained by the scale usually charged by real-estate agents in this city for similar services." (2) "But if Kice & Co. purchased said property from Keller before it was sold to the plaintiff, and the purchase by Kice & Co. was in good faith, and not with a purpose to defraud the plaintiff out of the said \$500, as mentioned in instruction No. 1, the law is for the defendant, and the jury should so find." We fail to see any substantial objection to these instructions. It is true, in an action for deceit it must be shown that the representation was false, and known to be false by the defendant; also that the plaintiff was innocent, and relied on the representation. But the only point of dispute here is as to what representations were made. There is no question as to appellant's knowledge of the facts or appellee's innocence, and, if the instruction did not present all this to the jury, it could not possibly have prejudiced appellant. The failure of the court to embody in the instruction the claims alleged to have been released by appellant in the transaction with Keller is not sufficient ground for setting aside the verdict, as these claims are not referred to in the written contract between appellant and Keller, and under all the evidence we are of opinion that the jury would not have been warranted in allowing anything for these claims. The testimony on this subject is fuller than it was on the former appeal. The jury evidently found for appellee under the first instruction on the ground that the purchase by Kice & Co. from Keller was not in good faith. The second instruction was, therefore, not prejudicial.

Appellee was clearly damaged when, by fraud, she was made to pay \$500 for the property,—not to Keller, the owner of it, but to the broker, who, as found by the jury, took advantage of her confidence, and imposed upon her. Appellee was the real plaintiff in the action. The property was conveyed to her. She paid the money for it, and might have maintained the action with-

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

out joining her husband with her. No objection was made in the court below that there was a want of necessary parties, and the objection that the husband was dead, and that there had been no revivor of the action in the name of his representative, cannot be made for the first time in this court. The case has been twice tried before a jury, who on each trial found for appellee, and, on all the evidence, we do not think a new trial should be had. Judgment affirmed.

BUSH et al. v. STAMPER.¹

(Court of Appeals of Kentucky. Feb. 28, 1901.)

PARTNERSHIP—SETTLEMENT—REFERENCE TO COMMISSIONER.

Where the pleadings disclosed that there was a partnership existing between the parties, and each claimed an indebtedness by the other, there should have been a reference to a commissioner for a statement of the partnership accounts.

Appeal from circuit court, Wolfe county. "Not to be officially reported."

Action by J. T. Day and Robert J. McLin against James H. Stamper and others to enforce a lien. Cross action by defendants W. E. Bush and William Curran against defendant James H. Stamper, Jr. Judgment in favor of defendant James H. Stamper, Jr., against defendants W. E. Bush and William Curran on a counterclaim, and they appeal. Reversed.

Foreman & Foreman, for appellants. A. F. Byrd and C. P. Chenault, for appellee.

WHITE, J. The pleadings in this case between appellants and appellee disclose that there was a partnership existing between them, and each claims an indebtedness by the other. It appears from the contract filed that each side was to pay in so much, and after this was repaid, and the necessary expenses of the business, the profits were to be divided. There is no statement of the partnership business in the pleading or in any deposition, nor was there a reference to a commissioner to state the partnership accounts. From the pleadings and proof, it is impossible to arrive at a satisfactory settlement of the matters between the parties, or to state the partnership accounts; nor have we been able to reach a basis upon which the judgment below was rendered. For this reason the judgment is reversed, and the cause remanded, with directions to order a reference to a commissioner to take proof if necessary or desired, and, from the books and papers relating thereto, state the partnership accounts, and report his acts and findings,—such report subject to exception by either party,—and for further proceedings consistent herewith.

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

DICKINSON v. JOHNSON et ux.¹

(Court of Appeals of Kentucky. March 6, 1901.)

PUBLIC OFFICERS—SUBJECTION OF SALARY TO PAYMENT OF DEBTS—ASSIGNMENT OF FUTURE SALARY—EXEMPTION OF PROPERTY IN WHICH SALARY IS INVESTED—HUSBAND AND WIFE—CONVEYANCE OF PROPERTY TO WIFE—RIGHTS OF HUSBAND'S CREDITORS.

1. As the constitution provides that no officer except the governor shall receive a greater compensation than \$5,000 per annum, public policy demands that the courts refuse to require any officer to set apart any part of his salary for the payment of his debts; and, therefore, in an action, under Civ. Code Prac. § 439, to enforce a judgment, the defendant will not be required to pay into court, for the payment of the judgment, any part of his salary as a public officer.

2. The assignment by an officer of salary to be earned in the future is void, as against public policy.

3. The fact that real estate was purchased by the owner with his salary as a public officer does not exempt it from the payment of his debts.

4. Where property conveyed to the wife was paid for by the husband, it is subject to the payment of his debts; the evidence not being sufficient to show that the relation of creditor and debtor existed between them.

Appeal from circuit court, Jefferson county, chancery division.

"To be officially reported."

Action by John Dickinson against William P. Johnson and wife to enforce a judgment. Judgment for defendants, and plaintiff appeals. Reversed.

W. W. Thum and Stanley E. Sloss, for appellant. Kohn, Baird & Spindle, for appellees.

GUFFY, J. The appellee William P. Johnson is, and has been for several years, clerk of the Jefferson county court, entitled to a salary, payable by the state, amounting to \$5,000 per annum. The other appellee is his wife. Some time prior to the institution of this action the appellant obtained a judgment in the Jefferson circuit court against the said William P. Johnson for the sum of \$3,313.12, with interest from August, 1897, upon which judgment execution was issued to the proper county, which was returned by the sheriff, in substance, "No property found." The object of this action is to enforce the collection of said judgment. The two principal funds or items of property sought to be subjected are a reasonable portion of appellee's salary and certain real estate in Jefferson county which is alleged to have been purchased and paid for, to the extent that it has been paid for at all, by the said William P. Johnson, but that the same was conveyed to the wife, Emma Johnson, for the purpose of delaying, hindering, and defrauding the creditors of the said William P. Johnson. It is also alleged in the petition that William P. Johnson, Jr.,

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

a son of the said appellee, and a minor, is working for a salary of \$2,000. The prayer of the plaintiff, in substance, is for an attachment against the property of said William P. Johnson, and that he be compelled to make a discovery of any money, choses in action, or legal and equitable interests, or any other property, and the amount of same, and to disclose when and in what sums and how the salaries of himself and son are collected, and that so much of the said property be subjected to the satisfaction of plaintiff's claims as is necessary, and that the real estate and improvements be adjudged the property of said William P. Johnson, and that the same be subjected to the satisfaction of his debt, and that out of his salary he be required to provide for and pay this judgment, and for all proper and equitable relief, general and special. The answer of the appellees, after denying that either Johnson or any of his family are living upon or occupying the ground or premises described in the petition, states, in substance, that the title to the property was not placed in the said Emma for the purpose of delaying creditors, and that appellee William should not be required to set apart any of his salary for the payment of plaintiff's debt. The answer further avers, in substance, that the salary is paid to him for services as clerk of the Jefferson county court, and that he has no interest or right over any part of the salary paid to his son William P. Johnson, Jr., or that he exercises or ever has exercised any right to said salary, and that he would not have any right so to do. It is then further stated that, long before the giving of the note upon which the judgment was rendered, he was indebted to his wife in the sum of more than \$20,000, and long before the transfer of the land; that he is now county clerk as aforesaid, and that under and by virtue of the laws of Kentucky the said salary is exempt from execution, attachment, or garnishment; that, in part satisfaction of his indebtedness to the said Emma, he did assign and transfer the salary to be paid to him to her, the said Emma, and out of said salary so transferred the said Emma made the payments that have been made on the property, etc. It is also claimed that they have been occupying the same as a home, and only temporarily absent. The reply may be considered a complete traverse of all the matters relied on as a defense. Upon final hearing the court adjudged in favor of the appellees, and from that judgment this appeal is prosecuted.

It is the contention of appellee that under no state of case could he be required to set apart any part of his salary for payment of the debt in question. He also contends that he had received, many years before he incurred the debt sued on, a large amount of money from his wife, and that he had a right to pay the same to her, either by an assignment of the salary, or by having the land in question conveyed to her. The ap-

pellant contends that, after allowing the said appellees Johnson a sufficient amount of the salary to support himself and family in a style commensurate to his surroundings and social position, he should be required to set apart annually, or from time to time as his salary is paid, the surplus, to be applied to the payment of the judgment sued on. Appellant further contends that the money received by appellees from his wife was not an indebtedness of appellee, and that the payment for the real estate in question was in fact and law paid for by or with appellee's money, and therefore the real estate is liable or ought to be subjected to the payment of plaintiff's claim. It is further contended by appellant that the question involved as to the salary has never been passed upon by this court; that the decisions heretofore rendered where parties sought to garnish fees or salaries of officers have no application to the question involved in this case. It is not contended that the plaintiff could attach salaries in the hands of the state or its officers, and require the money to be paid directly to the plaintiff, but it is contended that the court may lawfully require the appellee to pay into court or to its receiver, in installments, so much of the salary as is not necessary for his support as aforesaid. Many authorities are cited by appellant.

We are not aware of any decisions of this court in which the precise question here presented has ever been passed upon, nor do we find any statute expressly providing that officers' fees or salaries shall not be subjected to the payment of debts against them. But it is very earnestly contended for appellee that various decisions of this court announce the doctrine that it is contrary to public policy to so subject the fees or salaries of officers. But, as before intimated, the appellant contends that no such rule or doctrine is contained in any of the decisions in this court, and refers us to many decisions which, as he assumes, sustain his contention. We will now proceed to notice some of the authorities from states other than Kentucky relied on in support of appellant's contention: *Pendleton v. Perkins*, 49 Mo. 565, is cited. The court in that case held that, notwithstanding municipal corporations are exempt by statute from creditors' bills or garnishment, nevertheless money due the defendants in the city treasury might be subjected by proceedings in equity for the payment of plaintiff's claim. But from the opinion in this case we find that the debtor was not an officer. And it seems that, even in the absence of such statute, it has been held that towns and cities could not be garnished for a sum due an officer as part of his salary. *Fortune v. City of St. Louis*, 23 Mo. 239; *Hawthorn v. Same*, 11 Mo. 59. The court further said: "Public policy forbids creditors from thus stepping in between the city and its public servants; and a statute, in seeking to prevent any future attempt in that di-

rection, went much further, and included all kinds of liabilities, so that a debtor's funds, if in the hands of a municipal corporation, are placed beyond the reach of his creditors by statutory garnishment." The court, however, held in this case that the funds of the debtor were not exempt simply because the same are placed in the city treasury, or under the control of the city. Dill. Mun. Corp. § 101, is also cited, together with the notes. We are unable to see that either the author or the notes sustain appellant. The weight of authority referred to by the writer, as well as his own opinion, seems to be, even in the absence of statute, that municipalities are not subject to garnishment for the salaries of its officers. The case of Luthy v. Woods, 1 Mo. App. 167, holds that, although a municipality is not subject to garnishment, a debt due from it to a debtor may be reached by proceedings in equity, and subjected to the payment of plaintiff's claim, although the municipality is not subject to garnishment. But it does not appear in this case that the debt there subjected was the salary of an officer. We are unable to see that the opinion in *McDermutt v. Strong*, 4 Johns. Ch. 680, has any bearing upon the case at bar. In *Lyell v. Board*, 8 McLean, 580, Fed. Cas. No. 8,621, the plaintiff sought to subject certain bonds, mortgages, and assets under the control of defendants for payment of two judgments at law recovered against them. The court below sustained a demurrer, but the supreme court reversed the judgment, and, after a discussion of the questions involved, from which it appears that under the statute of Michigan the county might be sued, said: "The county being made subject to a suit, no serious objection is perceived against reaching the rights in question by the ordinary exercise of chancery powers, independently of statutory provisions." It appears from the opinion in *Furlong v. Thomssen*, 19 Mo. App. 364, that the court held that a debt due by a municipal corporation to its creditor may, by a creditors' bill, be subjected to the satisfaction of judgment against the latter. In this case it appears that the debt due Thomssen was for erecting an engine house for the city. In *Browning v. Bettis*, 8 Paige, Ch. 568, it is, in substance, held that the salary or compensation to become due at a future time for the performance of services which had not been completed at the time of filing the bill could not be reached by a creditors' bill. But where all the services, to entitle defendant to his salary or compensation, had been rendered at the time of filing the complainant's bill, such salary or compensation may be reached by the creditor, although it had not become actually payable when the bill was filed. It seems that the defendant in this case was a census taker. It was decided in *McCoun v. Dorsheimer*, 1 Clarke, Ch. 144, that the unearned salary of an officer cannot be reached by creditors' bill, but so much of the sal-

ary as is earned and due at the time of the filing of the bill may be subjected. The same doctrine announced in the case *supra* is reaffirmed in *Smith v. —*, 4 Edw. Ch. 658. The object there sought was to subject one quarter's salary of one of the judges of New York City. It may be inferred from the decision in *Hadley v. Peabody*, 18 Gray, 200, that the supreme court of Massachusetts sustains the doctrine announced in the foregoing opinions. The supreme court of Arkansas decided in *Riggin v. Hilliard*, 56 Ark. 476, 20 S. W. 402, that (we quote from the syllabus), "While a county is not subject to the ordinary process of garnishment, yet, in equity, when the interest of the public will not be injuriously affected, the claim of an insolvent creditor of the county may be subjected, by sale or compulsory assignment thereof, to the payment of his debts." The demand sought to be subjected was a debt due from the county to the defendant for repairing the court house. The court, in the opinion, said: "The courts commonly concur in holding that public policy forbids any interference between the county and its contractor under such circumstances if the work is still in progress, for the interference would tend to retard the occupancy of the building." The court, in discussing the fact that the county could not be sued, recognized the doctrine to be that a county was not subject to garnishment, and in referring to the case of *Boone County v. Keck*, 31 Ark. 387, said: "It was a suit directly against the county. The plaintiff's judgment debtor was not a party to it, and the only relief asked was against the county. In the case at bar the plaintiff's debtor is the party against whom relief is sought, and the county is not sued. Therein lies the cardinal difference between the cases. The complaint states a cause of action against Hilliard, and shows a right in the plaintiff to subject the debt due by the county to the satisfaction of his demand. That can be accomplished under proper orders of the court, as by a sale or compulsory assignment of the debt for the purpose of applying the proceeds to the satisfaction of any judgment which the plaintiff is entitled to recover." In *Knight v. Nash*, 22 Minn. 458, the supreme court of Minnesota held (quoting from the syllabus) that: "A debt due from a municipal corporation to a judgment debtor, even though denied by the corporation, may be reached by a final order upon disclosure, directing the transfer of the claim, and appointing a receiver to collect it for the benefit of the creditor. The rule that a debt due from a municipal corporation cannot be reached by process of garnishment has no application to an order of this character." The debt sought to be subjected in this case was not due as salary or fee. We fail to see that the case of *Whidden v. Drake*, 5 N. H. 13, has any application to the case at bar. The supreme court of Connecticut, in *Bray v. Town of Wallingford*, 20 Conn. 416,

held that a town is subject to the process of attachment in a suit brought against its creditor. The supreme court of Ohio, in *City of Newark v. Funk*, 15 Ohio St. 462, decided that salaries of officers of incorporated cities, due and unpaid, might be subjected by judgment creditors of such officers to the payment of such judgments, under the provisions of the Code of Civil Procedure. The Code provision referred to is substantially the same as the provision of the Kentucky Code in regard to the enforcement of judgments. 2 Chinn, *Attachm.* § 501, is cited by appellant, but the doctrine there announced does not seem to be different from that announced in the opinions supra.

This action is assumed to be authorized by section 439, Civ. Code Prac. Ky., which we deem it unnecessary to quote. The appellant refers us to numerous decisions of this court in support of his contention, which we have carefully examined, but deem it unnecessary to refer to in detail, but will only refer to such as we think necessary. It was held in *Field v. Chipley*, 79 Ky. 260, that a contract by which the clerk of the Louisville chancery court transferred and assigned to a trustee, for the benefit of appellant, in consideration of a debt due him, all the fees and emoluments of his office in the future, until the debt was paid, with conditions to pay deputies, etc., was void. It is against public policy that such contracts should be enforced. That the auditor has, under the statute, the right to look to the clerk for taxes on suits collected by him. The trustee will not be recognized as the person to receive them. In *Johnson v. Elkins*, 90 Ky. 163, 13 S. W. 448, 8 L. R. A. 552, it was held that when pension money was invested in land the land was subject to the debts of the pensioner. This proposition has been so often and so recently decided that any further reference to the same is unnecessary. It may be remarked that it was decided by this court in *Hudspeth v. Harrison*, 6 Ky. Law Rep. 304, that pension money is exempt only until it reaches the hands of the pensioner. In *Rodman v. Musselman*, 75 Ky. 354, it was held that salaries of officers of towns and cities may be attached and subjected to the payment of their debts; but the salary of a state officer cannot be attached, because the state, being a necessary party, cannot be sued. It is otherwise as to a town or city. *Stone v. Mayo* (Ky.) 55 S. W. 700, is referred to. The opinion in this case holds that the auditor might withhold money due a circuit clerk on account of the clerk's official indebtedness on account of unconstitutional payments made to him as clerk during a former term of office; the action of the auditor being based upon section 4701, Ky. St. It was said in the opinion that there seemed to be no reasons of public policy which would preclude the auditor from so withholding the former indebtedness of the clerk to the commonwealth. It may be conceded that this court, in *Teeter v. Williams*, 42 Ky. 562, in

substance decided that the plaintiff, by the aid of the chancellor, could attach whatever might be due his debtor for labor already performed, and he might attach whatever might become due upon an existing contract for his future labor. But neither the creditor nor chancellor could compel him to work out his part of the contract, so as to earn the promised reward for the exclusive use of his creditor. In the case of *Kennedy v. Aldridge*, 41 Ky. 141, it appears that Robinson, by the authority of Kennedy, had drawn \$50 as his compensation, as one of the commissioners of Garrard county, for taking in the lists of taxable property. The court below held that the money in Robinson's hands was subject to the attachment. In passing upon this question, this court said: "It is contended, on the authority of the case of *Divine v. Harvie*, 7 T. B. Mon. 439, that the fund now in question, being the compensation payable by the state to a public officer or agent, should be protected until it reaches the hands of the officer or agent. But this case differs essentially from the one referred to, in the fact that in that case the money attempted to be appropriated to the satisfaction of the creditor's demand remained in the treasury, whereas in this it has been paid to the authorized agent of the person entitled to receive it from the state. The objection that the act authorizing the attachment and subjection of the debtor's choses in action does not include his debts due from the state does not, therefore, apply in this case." We have examined the case of *Speed v. Brown*, 49 Ky. 108, but the doctrine therein announced is in accord with other decisions noticed; hence we need not restate the same proposition.

The appellees cite numerous authorities in support of their contention, which we have examined at great length. It may be taken as well settled that in the case of jailers, school commissioners, and school teachers, their salaries should not be subjected to the claims of creditors, for reasons given in the several opinions. The opinions chiefly rest upon the ground of public policy,—that the salaries are necessary to enable those officers to discharge the duties resting upon them. It is not the contention of appellant that he can, by an ordinary attachment or garnishment, subject the salary of appellee, nor appropriate the whole of it to the payment of his claim. It is the contention of appellant that the proof in this case shows conclusively that \$3,000 per annum is amply sufficient to support the appellee in the style in which he moves, and sufficient for an ample support commensurate with his social position; and it is argued that a court of equity has the power, and that it ought, by appropriate orders, to compel the appellee to set aside from time to time a reasonable portion of his salary for the payment of plaintiff's claim. It may be conceded that there is some conflict of authority upon this question. It does not seem to have ever been directly passed upon by this court.

Nor do we deem it necessary to now decide as to the power of a court of equity to make such orders as are contended for by appellant. Undoubtedly, one of the objects in allowing to officers fees or salaries is for their support, and to enable them to discharge the duties of office; but we are not inclined to the opinion that it was the intention of the lawmakers to limit such compensation to the actual necessities of life, but, rather, that it was intended to allow such officers compensation commensurate with the official duties and responsibilities devolving upon them. And inasmuch as most men desire to accumulate something, and the public commends such desire, we think it not unreasonable that the lawmakers intended that the officers might have like opportunities. Under our present constitution, no officer except the governor is allowed a greater compensation than \$5,000 per annum. This being true, we think public policy demands that the courts refuse to require any officer to set apart any part of his salary for the payment of his debts. The judgment of the court below is therefore affirmed in respect to this question.

It is, however, earnestly contended for appellant that the real estate mentioned in the petition should be held subject to plaintiff's claim, while it is equally as earnestly contended for appellee that he has a right to assign his salary to his wife, or to have the land in question deeded to her, and especially so for the reason that he had received large sums of money from her in the past, and that he desired to pay the same. That he did receive such large sums of money from her is clearly proven in this case. We have already referred to the decision holding the assignment of fees to be void and against public policy. It has been repeatedly decided by this court that pension money received by a pensioner and invested in real estate can be subjected to the demand of an antecedent creditor, and it would be entirely inconsistent with such a rule to hold that officers' fees or salary invested in real estate should be exempt from antecedent debts, even if we were deciding—which we do not—that an officer's fees or salary are exempt by statute from the debts of the officer. It is further suggested for appellee that, even if the debt due his wife was barred by the statute of limitation, he had a right to waive that statute and pay the debt, which he undoubtedly did have, if such a debt existed, and its payment was not prejudicial to the rights of another. After a careful consideration of the law and facts, we have reached the conclusion that the relation of creditor and debtor did not exist between the appellees at the time of the purchase and conveyance of the real estate in question. It therefore follows that the conveyance to Mrs. Johnson was without consideration and void as to creditors, and that the court erred in refusing to subject the same to the payment of plaintiff's claim. The judgment to that extent is therefore reversed, and the cause remanded,

with direction to adjudge the real estate subject to plaintiff's claim, and for proceedings consistent herewith.

COMMONWEALTH v. FOSTER.¹

(Court of Appeals of Kentucky. March 8, 1901.)

CRIMINAL LAW—PEREMPTORY INSTRUCTION.

Where there is any evidence tending to show guilt in a criminal case, it is error to give a peremptory instruction for defendant.

Appeal from circuit court, Jefferson county.

"Not to be officially reported."

Wesley Foster was acquitted of the offense of detaining a woman against her will, with intent to have carnal knowledge of her, and the commonwealth appeals. Opinion certified.

C. J. Whittemore, for the Commonwealth.

PAYNTER, C. J. Under a peremptory instruction the appellee was acquitted of the charge of detaining a woman against her will, with intent to have carnal knowledge of her. Of course, the case cannot be reversed, under our Code of Practice, and the defendant cannot again be put upon trial on the charge. It is difficult to understand what principle of law there is to be settled in this case. The commonwealth introduced testimony tending to establish the charge in the indictment. The question of guilt should have been submitted to the jury under appropriate instructions. Wherever there is evidence presented in a criminal case tending to show guilt, the question should be left to the determination of the jury. Although this case cannot be reversed (section 339, Code Cr. Prac.), still we are of the opinion, for the reasons given, that the court erred in giving a peremptory instruction.

BOLI'S ADM'R et al. v. CITIZENS' BANK OF KUTTAWA.¹

(Court of Appeals of Kentucky. March 7, 1901.)

MORTGAGES—CONDITIONAL CANCELLATION.

Where a mortgagee indorsed his mortgage "Canceled," to enable the mortgagor to obtain money by a new mortgage for the purpose of discharging the existing mortgage, the mortgagor failing to obtain the money, the cancellation, which was never recorded, did not take effect; and a bank to which the mortgagor, in his efforts to obtain the money, represented that the mortgage had been canceled, cannot, by reason of that fact, have the mortgage postponed to the payment of a debt it held against the mortgagor when the representation was made, as it would not have that right even if its debt had been created after the representation was made.

Appeal from circuit court, Lyon county.

"Not to be officially reported."

Action by the Citizens' Bank of Kuttawa against Jacob Boli's administrator and oth-

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

ers to enforce a judgment. Judgment for plaintiff, and defendants appeal. Reversed.

W. G. Bullitt and Campbell & Campbell, for appellants. Sam O. Molloy, for appellee.

PAYNTER, C. J. Upon the same, or substantially the same, testimony, in the action of Boli v. Irwin, 51 S. W. 444, this court adjudged that the mortgage which L. A. Boli, Sr., executed to Jacob Buckle and Jacob Boli, and also a writing purporting to be a bill of sale by L. A. Boli, Sr., to Charles H. Zwick, were valid and in full force and effect; and we adhere to the conclusion reached in that case as to the validity of the mortgage and the writing purporting to be a bill of sale. For the appellee it is contended that it extended credit to L. A. Boli, Sr., upon the assurance that the \$15,000 mortgage had been canceled. The facts with reference to the alleged cancellation of the mortgage are as follows: L. A. Boli, Sr., had not paid the mortgage, but assured the mortgagees that he could, by mortgaging the property, borrow some money from banks in Kentucky to pay on their mortgage debt, and, in the event he failed to borrow the money by executing a mortgage thereon, the indorsement of cancellation was not to be operative. The indorsement on the mortgage was never placed upon record. Boli, Sr., endeavored to borrow from \$3,500 to \$5,000 from the appellee, and give a mortgage upon the property, upon which Buckle and Jacob Boli held a mortgage, at the same time saying their mortgage had been canceled; but, not desiring to loan money upon the property, it refused to let him have it. Therefore he never borrowed any money upon the strength of the cancellation; neither did it ever become operative, because it was only conditionally made. The president and cashier of the bank did not even look at the indorsement on the mortgage, nor did they at any time examine the records in the clerk's office of Lyon county, to see whether the mortgage had been satisfied. So the object of making the indorsement on the mortgage that it was satisfied was with the view of Boli, Sr., borrowing money from the appellee, and to enable him to execute a mortgage therefor; but, as they refused to loan the money and take a mortgage, nothing came of the proposed transaction by which the conditional cancellation was made. So the mortgage never was canceled, and remained in full force and effect. But it is said that the bank extended Boli, Sr., credit by reason of the fact that he had said that the mortgage was canceled. At the time Boli told the bank that the mortgage was canceled the debt in suit was in existence, and he could not have contracted the debt on account of any declaration which he made with reference to the mortgage being canceled. If the mortgage had been unconditionally released, and the debt not paid, he could have again executed

another mortgage to Buckle and Jacob Boli, which would have been valid unless it could have been assailed as a preferential act. Even if Boli, Sr., had borrowed the money which the appellee is seeking to collect in this action after he had stated that the mortgage was canceled, still it would not give it the right to postpone the enforcement of the mortgage until its debt was paid, for it was never released or satisfied. The judgment is reversed, with directions that the action be dismissed in so far as it seeks to treat as invalid the mortgage to Buckle and Jacob Boli and the bill of sale to Zwick, and for proceedings consistent with this opinion.

KENTUCKY UNION CO. et al. v. LOVELY et al.¹

(Court of Appeals of Kentucky. March 14, 1901.)

DEPOSITIONS—FILING AFTER COMMENCEMENT OF TRIAL—FAILURE TO GIVE NOTICE.

1. Under Civ. Code Prac. § 585, it was error to permit the reading of depositions which were not filed until after the jury had been impaneled.

2. Exceptions to depositions for failure to give notice to certain of the defendants who had filed separate answers should have been sustained, there being no waiver of notice by cross-examination.

Appeal from circuit court, Breathitt county.

"To be officially reported."

Action by William Lovely and another against the Kentucky Union Company and others to recover damages for injury to real estate. Judgment for plaintiffs, and defendants appeal. Reversed.

Marcum & Pollard, for appellants. J. J. C. Bach and T. T. Cone, for appellees.

WHITE, J. This is an action for damages to real estate. Issue was joined as to title of the land and the question of damages. The bill of exceptions shows that after the jury had been impaneled and sworn there were filed with the clerk depositions of one of appellees, as well as several witnesses for them. Appellants then filed exceptions to the depositions because of defective notice, or rather, as to part of appellants who had filed separate answers no notice at all was given or attempted. The exception was overruled. On the trial the court, over objection, permitted appellees to read these depositions. A verdict and a judgment were rendered for appellees, and after motion for new trial had been overruled this appeal was prosecuted.

Section 585 of the Civil Code of Practice provides, "No deposition shall be read on a trial, unless before the commencement thereof, it be filed with the papers of the case." This provision of the Code is plain and un-

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

ambiguous, and it is decisive of the question presented.

The depositions were not filed before the commencement of the trial, and it was clearly error to permit same to be read on the trial. The testimony proven in the depositions was material, and probably in a large measure influenced the verdict. The notice given to take the depositions was not executed on appellants Hagins and Blanton, nor their attorney of record, and was not even addressed to them, yet the court permitted same to be read against them on the trial, when there was no waiver of notice by cross-examination by any person. The exception to the depositions should have been sustained.

Other questions argued by counsel are not necessary to a determination of the case, and are not decided. For the reasons given, the judgment is reversed, and the cause remanded for a new trial, and for proceedings consistent herewith.

BLOOD et al. v. HERRING et al.¹

(Court of Appeals of Kentucky. March 13, 1901.)

WITNESSES—TRANSACTIONS WITH PERSONS SINCE DECEASED—AUTHORITY OF AGENT—MEASURE OF DAMAGES—PROSPECTIVE PROFITS—INSTRUCTIONS TO JURY.

1. Plaintiff was a competent witness as to a transaction had with an agent of defendants, though one of the defendants was dead at the time of the trial; the agent having testified as to the transaction.

2. Defendants are liable for the act of their agent in refusing to permit plaintiffs to carry out a contract which they had made with him to saw lumber for defendants; the act being within the apparent authority of the agent.

3. Estimated direct profits which must have been in the contemplation of the parties at the time a contract was made may be recovered as damages for breach of the contract.

4. An instruction telling the jury that the measure of damages for defendants' refusal to permit plaintiffs to carry out their contract to saw lumber for defendants was the difference between the cost of sawing and putting on the banks of O. river the uncut lumber, "and the actual cost to plaintiff of cutting and placing said lumber on the bank of said river," laid down no measure of damages, and was prejudicial to defendants; the evidence being conflicting as to the difference between the contract price and the amount it would have cost plaintiffs to carry out the contract, which was the true measure of damages.

5. As plaintiffs could not recover both estimated profits and damages for loss of time, the court properly instructed the jury to disregard plaintiffs' claim for loss of time.

Appeal from circuit court, Lyon county.

"Not to be officially reported."

Action by D. N. Herring and another against Aretus Blood and another to recover damages for breach of contract. Judgment for plaintiffs, and defendants appeal. Reversed.

Bishop & Hendrick and Wilson & James, for appellants. Molloy & Utley and Wheeler & Worten, for appellees.

BURNAM, J. In May, 1895, appellants entered into a contract with appellees to saw for them 400,000 feet of white-oak lumber, which was to be cut from a tract of land owned by them in Lyon county. Appellants lived in the East, and were represented in making the contract by T. F. Abildguard, who seems to have had entire charge of their interests in this state. On the 20th of July, 1897, appellees instituted this suit against appellants, and alleged that, after they had cut and delivered 186,000 feet of lumber under the contract, they were requested by Abildguard to suspend work for a short time, to enable him to dispose of the lumber already delivered, and that by his express consent they moved their mill from the premises of appellants to those of other parties living in the neighborhood, with the view of doing some sawing for them, until appellants were ready for them to resume work under the contract; that he repeatedly assured them that he would be ready for them to go on with the work in a short time; that the promises continued to be made up to the fall of 1896, when they were notified by Abildguard that they would not be permitted to complete the contract at all. They allege that their profit upon the 186,000 feet of lumber delivered was \$4.11½ per 1,000 feet, and that they could have realized the same profit on the 214,000 feet which they had a right to cut under the contract, and upon which they would have realized a profit of \$881.61, and that they were damaged in consequence of their failure to finish the contract in that amount. They further alleged that during this interval of time their teams and mules were idle, and that they were damaged on this account in the sum of \$750 in addition to the \$881.61 by reason of loss of profit. All of these allegations were denied by appellants in their original and amended answer. And they affirmatively alleged that plaintiffs moved the mill and refused to go on with the work over their protest and without their consent; and that they were damaged by such breach of contract on the part of appellees in the sum of \$1,498, and for which they prayed judgment by way of counterclaim. A trial before a jury resulted in a verdict and judgment for appellees for \$700, with interest from the 19th day of July, 1897. Their motion for a new trial having been overruled, defendants prosecuted an appeal to this court, and plaintiffs also sued out a cross appeal.

The chief ground relied on for reversal by appellants is that the court, over their objections, permitted appellees to testify in their own behalf against the estate of the defendant Blood, who was dead at the time the testimony was given, and also permitted these witnesses to testify that Abildguard would not permit them to cut the 214,000 feet of lumber

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contracted for; it being insisted on this point that plaintiffs had failed to show that Abildguard had any authority to represent them in this matter. They also complain that the court erred to their prejudice in instructions given to the jury, permitting plaintiffs to recover prospective profits which they might have realized under their contract, and also complain that the measure of damage laid down was erroneous. Appellees, on their cross appeal, complain that the court erred in instruction No. 5, in which the jury were told that in estimating the damages of plaintiffs, if any, they could not consider loss of time in the use of their machinery, teams, and mules, or damages by reason of their being idle. We will consider these alleged errors in regular order.

The testimony shows that appellants Blood and Lawrence did not reside in Kentucky, and that appellees never had any transactions with them in person; that, so far as they were concerned, all of the business was conducted by Abildguard. The trade was made with him; the work of sawing the lumber under the contract was under his supervision; he received it, paid for it, and in all respects, so far as this transaction was concerned, represented his principals; and he was not only alive when the testimony was offered to be given, but actually testified concerning all of these transactions, at great length, before the testimony of appellants. In addition to this, Lawrence, one of the appellants, was alive, though his partner, Mr. Blood, was dead. While, as a general rule, it is the duty of all persons having transactions with an agent in his representative character to inquire into his authority, and they must, at their peril, know that the agent is within the authority given him, it is equally well settled that the principal is bound by the acts of his agent within the apparent authority which he knowingly permits him to assume, or which he holds the agent out to the world as possessing. And we think that appellants were clearly bound by the acts and agreement of Abildguard in connection with the contracts relied on, and that the testimony excepted to was competent.

Appellants also complain of instructions Nos. 1 and 2. Of the first, upon the ground that recovery is authorized upon the basis of a calculation of profits which might have accrued if they had been permitted to go on with the work under the contract; it being insisted that under the testimony these estimated profits were too vague and uncertain in character to have authorized recovery. This identical question has been frequently before this court, beginning with the case of *Railroad Co. v. Pottinger*, 10 Bush, 188, in which it was held, viz. "that profits which are the direct and immediate fruits of a contract alleged to have been violated, are part and parcel of the contract itself, and must have been in the contemplation of the parties when the agreement was entered into, may be recovered in an action for dam-

ages." This case has been so frequently followed that it may be regarded as settled law on this question, and we think the instruction is not objectionable.

Instruction No. 3 is as follows: "The court further says to the jury that, if they believe from the evidence that plaintiff is entitled to recover in this case, then the measure of the damages would be the difference between the cost of sawing and putting on the banks of the Cumberland river of the 214,000 feet of lumber not cut by them under said contract, and the actual cost to plaintiff of cutting and placing said lumber on the banks of said river." This instruction lays down no measure of damage to guide the jury. The true test was, and probably what the court intended to say to the jury was, the difference between the actual cost to plaintiffs of putting the lumber on the barges for defendants and the contract price; and this was a vital point in the case, and about which there was great conflict in the testimony. While plaintiffs testify to the facts relied on in their petition, defendants introduce a number of witnesses who testify that there was no profit at all in the contract of appellants, and would not have been in sawing the remaining lumber under the contract, as they had exhausted the nearest and best timber. Abildguard contradicts every statement of appellee on this point, and is partially supported by the witness Kuhn, who testifies that about two weeks before they removed the mill one of the plaintiffs informed him that the contract was not a paying one, because there was too much second-class lumber. The witness Luttrell testified that R. L. Henning informed him that there was nothing in the job; that he could not get money to pay his men, and was going to move. Frank Degraffinried testified that R. L. Henning told him about the time he moved the mill that he had his own time about cutting the timber, and that he could come back if he wanted to, and would not if he did not want to. In fact, it seems to us that the decided preponderance of testimony on this point supports the contentions of appellants, and, while this would not of itself be sufficient ground to justify a reversal of the judgment, yet, taken in connection with the failure of the court to lay down any rule for the guidance of the jury in measuring the alleged damage to plaintiffs, it seems to us that it was prejudicial to the rights of appellants.

We think the court properly instructed the jury to disregard plaintiffs' claim for loss of time, as they cannot recover both the estimated profits, if they had actually been permitted to perform their contract, and in addition thereto damages for loss of time in not being permitted to carry out the contract. For the reasons indicated, the judgment complained of must be reversed, and the cause remanded for proceedings consistent with this opinion.

CAWEIN v. COMMONWEALTH.¹

(Court of Appeals of Kentucky. March 13, 1901.)

CRIMINAL LAW—FORMER CONVICTION—CONTINUOUS NUISANCE—KEEPING POOL ROOM.

Where a pool room for betting on horse races was never vacant during several months, a watchman being left in charge each night, the nuisance thus maintained was a continuous offense; and a conviction under an indictment charging the nuisance to have been maintained at any time during that period is a bar to another prosecution for the same offense, though alleged to have been committed at a different time during the same period, provided that time was prior to the former indictment, as time was not a material ingredient in the offense, and defendant might have been punished under the first indictment for the whole time he had kept the house prior to that indictment.

Guffy, J., dissenting.

Appeal from circuit court, Kenton county.
"To be officially reported."

John D. Cawein was convicted of the offense of maintaining a nuisance, and he appeals. Reversed.

John L. Rich, for appellant. C. J. Whittemore and D. A. Glenn, for the Commonwealth.

HOBSON, J. On July 13, 1898, the grand jury of Kenton county returned four indictments against appellant for the offense of maintaining and continuing a common nuisance. The first indictment charged that he did from March 31, 1898, to and including April 30, 1898, unlawfully suffer and permit divers and sundry persons, to the grand jury unknown, habitually to assemble in a certain house in Covington, known as "Sharp's Place," which was in his possession and control, and then and there engage in betting, winning and losing money, on horse races. The second indictment charged the same offense committed from April 30, up to and including May 31, 1898; the third, from May 31 up to and including June 30, 1898; the fourth, from June 30 to July 13, 1898. The four indictments are precisely the same, except the dates between which the offense is alleged to have been committed. They cover a continuous period of 112 days,—from March 31st to July 13th. Appellant was arraigned on the last indictment and pleaded not guilty. A trial was had. He was fined \$75, and paid the judgment. He was then put on trial under the first indictment. He entered a plea of not guilty, and also pleaded his conviction under the other indictment in bar. The testimony was heard, and the court below at the conclusion of the evidence held the plea of former conviction not to be good. The jury returned a verdict finding appellant guilty as charged, and fixing his punishment at a fine of \$100. Judgment was entered upon the verdict, and this appeal is prosecuted on the ground that

a conviction under one of the four indictments was a bar to a further prosecution under the others.

The evidence showed that appellant kept the place referred to in the indictments from some time in March, 1898, until after the indictments were found; that it was what is known as a "pool room," at which bets were made on horse races in different parts of the United States; that there were blackboards on the walls, on which the names of the horses, also the weights and jockeys, were entered; that the Western Union Telegraph Company ran a wire to the room, so as to give the results of the races as they were run, the operator calling out the news to the public as it was received from the race course, and giving the relative positions of the horses at different points on the course; that there was a ticket writer, who took bets, and a cashier, who cashed the tickets. The pooling commenced about 1 o'clock in the afternoon, and continued at times until 6 or 7, depending on the point where the races were run. From 75 to 150 people gathered there. The daily business amounted to from \$1,200 to \$1,500. There were from 10 to 15 employes in the establishment. About 8 o'clock in the morning one man put upon the board the entries for the day. Some betting was done in the morning. Six or eight of the employes came about 8 o'clock in the morning, the rest about 12. The crowd left about 7 o'clock. The cashier stayed to finish up his accounts. The room was then swept and scrubbed every night, and a watchman left in charge until morning. There were several desks and other furniture in the room, for use in the business, all of which were placed there for the purpose of carrying on the business permanently. The employes were employed in March, with no fixed time of employment. For a time they were paid every three days, but after that, for convenience, they were paid daily, so that each day's business would show for itself. The house was operated continuously in this way during the whole time covered by the four indictments, without any change in its furnishings or the mode of doing business. It was never vacant, there being a man there every night, and it was clearly intended as a continuous thing from the time it was opened. No new impulse was subsequently given.

Under this evidence the keeping of the house was a nuisance maintained uninterruptedly, and was plainly a continuous offense from the time it was opened until the finding of the indictments. The commonwealth could not arbitrarily split up a continuous offense, and make what was done in April one offense, what was done in May a second, what was done in June a third, and what was done in July a fourth. If it could do this, it might further have split the offense up, and made each week the subject of a separate indictment, or followed a

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other arbitrary division of the time. The rule of law is elementary that a single cause of action cannot be split so as to be the subject of two suits. *Freem. Judgm.* § 238. The rule in criminal prosecutions is thus stated in *Freem. Judgm.* § 225: "The conviction of an offense, like the recovery of judgment in a civil action, is a bar to any further prosecution based on the same cause of complaint. The question often arises whether the offense of which one is accused is not a part of an offense of which he has already been convicted, and, if so, whether the whole crime is not merged in the former conviction; for the same offense cannot be split into parts, and made to sustain two or more convictions of the same person." In *Re Snow*, 120 U. S. 274, 7 Sup. Ct. 556, 30 L. Ed. 658, three indictments were returned against the defendant under the act of congress providing that, if a male person cohabits with more than one woman, he shall be deemed guilty of a misdemeanor. The indictments were just alike in all respects, except that each covered a different period of time. The first charged a continuous offense from the 1st day of January to the 31st day of December, 1883; the second charged the same offense with the same women from January 1, 1884, to December 31, 1884; the third, from January 1, 1885, to December 1, 1885. He was convicted under each of the indictments, and his punishment under each was fixed at a fine of \$300 and imprisonment for six months. The conviction under one indictment was held a bar to a prosecution under the others. The court said: "The division of the two years and eleven months is wholly arbitrary. On the same principle there might have been an indictment covering each of the thirty-five months, with imprisonment for seventeen years and a half, and fines amounting to \$10,500, or even an indictment covering every week; with imprisonment for seventy-four years, and fines amounting to \$44,400, and so on, ad infinitum, for smaller periods of time. It is to prevent such an application of penal laws that the rule has obtained that a continuing offense of the character of the one in this case can be committed but once, for the purposes of indictment or prosecution, prior to the time the prosecution is instituted. Here each indictment charged unlawful cohabitation with the same seven women; all the indictments were found at the same time, by the same grand jury, and on the testimony of the same witnesses, covering a continuous period of thirty-five months; and it was the mere will of the grand jury which divided the time among three indictments, and stopped short of dividing it among thirty-five, or one hundred and fifty-two, or even more." In *State v. Lindley*, 14 Ind. 430, the defendant was charged with keeping a gaming house on July 27, 1858, and on divers other days before that day. In bar of the prosecution

he relied on a previous conviction for keeping the same house as a gaming house from July 28, 1858, to November 27, 1858. The court said: "Keeping a gaming house may be a continuous act, and all the time during which a given house is continuously thus kept, prior and up to the prosecution for the keeping, constitutes one indivisible offense, which can be punished but in a single prosecution. Like a civil cause of action, it cannot be split up in the prosecution of it. But one penalty can be assessed." So, in *U. S. v. Burch*, 1 Cranch, C. C. 36, Fed. Cas. No. 14,683, it is said: "The keeping of a disorderly house is a single offense, and one conviction is a bar to a prosecution for keeping a disorderly house at any time prior to the finding of the indictment." In *Freeman v. State*, 119 Ind. 501, 21 N. E. 1101, at the March term, 1889, the grand jury returned at the same time two indictments against the defendant for keeping a house of ill fame. The first charged the offense to have been committed on January 9, 1889; the second, on February 11, 1889. The defendant was tried and convicted under the second indictment. She was then placed on trial under the first, and set up the former conviction. The proof showed that both the indictments were for the continuous keeping of the same house. The plea was held good. The court said: "The offense charged is a continuing one. A conviction might have been obtained under either of the indictments by proof of the keeping of the house at any time prior to the finding and returning of the indictment, and not beyond the time fixed by the statute of limitation. The crime charged is the continuous keeping of the same house. The same proof was admissible under the one indictment as the other." Section 129 of our Criminal Code of Practice reads: "The statement in the indictment as to the time at which the offense was committed is not material, further than as a statement that it was committed before the time of finding the indictment, unless the time be a material ingredient in the offense." In *Cincinnati R. Co. v. Com.*, 80 Ky. 137, the defendant was charged with a common nuisance committed on October 16, 1880. The court said: "The commonwealth was not confined to the day alleged in the indictment, but had the right to prove the commission of the offense on any day within twelve months before the finding of the indictment." The same rule was followed in the subsequent case of *Chesapeake & O. R. Co. v. Com.*, 88 Ky. 368, 11 S. W. 87. Time here was not a material ingredient in the offense. The indictments being all precisely the same, except as to the statement of the time at which the offense was committed, under any one of them the defendant might have been convicted and punished for the whole time that he had kept the house prior to the finding of the indictments. In *Bish. Cr. Law*, § 1053, the rule applicable in such cases is

thus stated: "The test is whether, if what is set out in the second indictment had been proved under the first, there could have been a conviction. When there could, the second cannot be maintained. When there could not, it can be."

It follows, therefore, that the court below erred in disregarding the plea of former conviction, and that on the evidence he should have sustained the plea and dismissed the prosecution. It is due the court below to say that he followed in his rulings *Com. v. Respass* (Ky.) 50 S. W. 549. That case is rested on the ground that the proof there failed to bring it within the rule referred to, and so far as it is in conflict with this opinion it is overruled.

Where the defendant has been found guilty under an indictment for nuisance, the court may by proper orders require it to be abated. *Bollinger v. Com.*, 16 Ky. Law Rep. 395; *Bish. Cr. Law*, § 1079. And if, after the indictment is found against him, the defendant continues to maintain the nuisance, he may be subsequently indicted for its continuance after the finding of the former indictment; for proof of this could not be used to secure a conviction under that indictment, and prosecution for an offense cannot operate as a licence to continue it. The state has, therefore, an adequate remedy for the suppression of such offenses, without splitting them up in different prosecutions, all begun at the same time, as was done in this case. Judgment reversed, and cause remanded for further proceedings consistent with this opinion.

GUFFY, J., dissents.

PUCKETT et al. v. SNIDER et al.¹
(Court of Appeals of Kentucky. March 12, 1901.)

INTOXICATING LIQUORS—LOCAL OPTION—PETITION FOR ELECTION—FIXING OF TIME—ELECTION OFFICERS—PUBLIC ANNOUNCEMENT OF RESULT—FAILURE TO DESTROY UNVOTED BALLOTS.

1. The fact that the petition to the county judge, under Ky. St. § 2554, for an election to take the sense of the voters of a precinct as to the sale of liquor therein, did not name a date for the election, did not invalidate the election.

2. The county judge had power to fix any day for the election, not earlier than 60 days after the application was lodged with him.

3. It was proper for the county judge to appoint special officers to hold the election, as the spirit of the statute requires a division of the officers between the parties favoring the sale of liquor and those opposed to it.

4. It was proper that the order for the election should be directed to the sheriff of the county, whose duty it was to give notice thereof.

5. In the absence of evidence to the contrary, it will be presumed that the result of the election was publicly announced by one of the

judges at the close of the polls, as required by the statute.

6. The requirement of the statute that the unvoted ballots shall be destroyed is directory merely, and a failure to comply with it does not invalidate the election.

7. As the statute provides for a contest of such an election, that remedy is exclusive, and an action does not lie to have the election and the certificate thereof adjudged void.

Appeal from circuit court, Spencer county.

"To be officially reported."

Action by J. M. Puckett and others against Peter Snider and others, praying that a local option election, and the certificate thereof, be adjudged null and void. Judgment for defendants, and plaintiffs appeal. Affirmed.

C. G. Gilbert, for appellants. P. J. Foree and Wm. Reasor, for appellees.

GUFFY, J. It appears from the petition in this case that on the 7th June, 1897, a petition was presented to the county judge of Spencer county, signed by the voters in Mt. Eden precinct, exceeding 25 per cent. thereof, petitioning the judge to make an order directing an election to be held in said district to take the sense of the voters upon the proposition whether or not spirituous, vinous, or malt liquors should be sold, bartered, or loaned therein. On the next county court day thereafter the said county judge directed Sheriff A. J. Massie to open a poll in said district and hold an election therein on August 7, 1897, for the purpose of taking the sense of the voters in said district, and on said day appointed officers to conduct said election. It further appears that the sheriff gave the proper notice of said election, and the election was held August 7, 1897, and at the time provided the canvassing board canvassed the returns, and are threatening and about to have said certificate spread upon the order book of the Spencer county court. It is further alleged that at the July term certain parties—not the ones named in the order of appointment for officers—were the legal officers of the election, having been appointed in August, 1897. The return of the canvassing board showed the following result: "In favor of the sale of liquor is 124. Against the sale of liquor, 141." It is further alleged that said election is null and void for many reasons. First, because the petition in writing did not name or state therein any day on which the election was to be held; second, because it did not state that the election should be held not earlier than 60 days after said application is lodged with the judge of said court; third, because said election was held on a day fixed by the county judge, when he had no authority to designate August 7th, or any other day; fourth, because said election was held, in violation of law, on the day fixed by the county judge in the order of his court, instead of on a day which should have been named in their petition; fifth, because the election was held by special officers appointed by the judge, when it should have been held by the regular officers then in office; sixth, be-

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

cause the result of the election was not publicly announced in front of the voting place; seventh, because the ballots remaining unvoted were not destroyed by one of the judges or any other person, but were returned to the county clerk. The prayer of the petition is that the election and the certificate thereof be adjudged null and void. It further appears that the appellants and others served notice to contest the said election, but that only nine of the contestants were citizens of the aforesaid precinct. It further appears that the notice was not served within 10 days after the vote was canvassed. The defendants plead in bar of this action the attempt to contest the election, and the decision of the canvassing board dismissing the contest, and also deny the jurisdiction of the court to grant the relief prayed for. The reply attempts to avoid that plea by an admission of the attempt to contest, but that the endeavor to contest the election was null and void because one of the plaintiffs (Puckett) was not at the time a citizen of Mt. Eden precinct, and because the notice was not served on the county judge within 10 days after the final action of the examining board, and the said judge and justices refused to hear and determine the question in contest except upon the two grounds above stated. In an amended answer the defendants deny that the result of said election was not publicly announced in front of the voting place after the close of the polls. The defendants in their rejoinder denied that plaintiffs did not contest said election on its merits, or that the court had no jurisdiction of the person or subject-matter attempted to be presented by the contestants, and now presented to this court. The court upon final hearing adjudged that plaintiffs are not entitled to the relief sought, and dismissed the petition; hence this appeal.

Section 2554, Ky. St., provides for elections to be held to determine whether or not spirituous, vinous, or malt liquors shall be sold, bartered, or loaned therein, and it is provided that, if 25 per cent. of the votes cast in such precinct at the last preceding general election shall be signed to the petition, the judge at the next regular term thereof after receiving said petition shall make an order on his order book directing an election to be held "on some day named in said petition, not earlier than sixty days after said application is lodged with the judge of said court, which order shall direct the sheriff, or other officer of said county, who may be appointed to hold said election, to open a poll at each, and all of the voting places in said county * * * for the purpose of taking the sense of the legal voters of said county * * * upon the proposition whether or not spirituous, vinous or malt liquors shall be sold," etc., therein. Section 2556 provides that any election held under the local option law may be contested, and shall be heard and determined by certain county officers, who are by law the board of contest.

As to the first ground relied on in this action, it is sufficient to say that the omission

of the petitioners to name a day upon which the election should be held did not invalidate the election, and the same may be said as to the second ground relied on.

We think the county judge had power to fix any day not earlier than 60 days after the application was lodged with him, whether such day or any day was named in the petition. This being true, the third and fourth grounds relied on by appellants are not tenable.

The fifth reason given for invalidating the election was because said election was held by officers appointed by the judge to hold said election, when it should have been by the regular officers then in office. We are inclined to the opinion that it was proper for the county judge to appoint special officers to hold said election, for the reason that the spirit, if not the letter, of the statute required a division of the officers between the parties favoring the sale of liquor and those opposed to it. If the regular county officers for that precinct had been directed to hold the election, it might have happened that they would all have been in favor of the sale, or all against it. And the manifest intention of the law seems to be that the order directing an election to be held should have been directed to the sheriff of the county, whose duty it was to give requisite notice thereof, which it is admitted he did give.

The sixth ground is because the result of the election was not publicly announced by one of the judges at the close of the polls, and this ground is controverted by the defendants, and no proof introduced upon the question, and the presumption is that the officers discharged the statutory duty required. But, even if such announcement was not made, the election would not thereby be invalidated.

The seventh objection is that the ballots unvoted were not destroyed, but were returned to the county clerk. Such failure could not invalidate the election. The provisions of the statute which it is alleged were not observed were, as we think, directory, and ought always to be obeyed, but the failure to observe the same would not necessarily invalidate the election. It was held in *Anderson v. Winfrey* that mere irregularities upon the part of election officers, or their omission to observe some merely directory provisions of the law, will not vitiate the poll.

It is the contention of appellees that the only remedy open to the appellants was to contest the election as provided by statute. It was decided in *Russell v. Road Co.*, 13 Bush, 807, that when a statute has created a new right, and has also prescribed a remedy for the enjoyment of a right, he who claims the right must pursue the statute remedy. It was also said in the case of *Kentucky River Nav. Co. v. Com.*, 13 Bush, 436, that, whenever a statute creates a right and provides a remedy, that remedy can alone be

made available. In the case of *Stine v. Berry*, 96 Ky. 66, 27 S. W. 809, this court had under consideration a suit in which it was sought to question the right of Berry to hold the office of mayor of the city of Newport. The law authorized a contest for the office in such cases. Stine gave notice of contest, but afterwards withdrew the same, and instituted an action against appellee for the usurpation of an office. The court, in discussing the question, said: "It is insisted that the manner of contesting city elections provided by the city charter is merely cumulative, and the action in ordinary, in lieu of the writ of quo warranto, may be maintained. We understand, and so adjudge, that the statute in regard to contesting elections for state and county offices is exclusive, and that, when a mode of contest is provided in a city charter for contesting the election of city officers, it excludes any other remedy." It was held in *Wilson v. Hines* (Ky.) 35 S. W. 627, 37 S. W. 148, that the contesting board is clothed with full power and ample authority to consider any question that is a ground of lawful contest. It seems to us that the only remedy open to appellants was a contest as provided by the statute hereinbefore referred to. It is evident from the pleadings and exhibits in this cause that the election was in fact held, and there is nothing to indicate that there was any fraud or misconduct upon the part of the officers, petitioners, or canvassing board. It is not pretended that a majority of the legal voters in the district voting at the election did not vote against the sale of liquors, etc. For the reasons indicated, the judgment is affirmed.

WHITE v. LOUISVILLE & N. R. CO.¹

(Court of Appeals of Kentucky. March 12, 1901.)

APPEAL AND ERROR—BILL OF EXCEPTIONS—QUESTIONS FOR REVIEW.

1. In the absence of a bill of exceptions, it will be presumed that a peremptory instruction for defendant was proper; the pleadings being sufficient to support the judgment.

2. An order made by the court of appeals before the submission of the appeal striking the bill of exceptions from the record will not be reviewed on the final hearing of the appeal, especially as more than five years elapsed after the motion for a new trial was made before it was overruled.

Appeal from circuit court, Jefferson county, common pleas division.

"Not to be officially reported."

Action by Fountain T. White against the Louisville & Nashville Railroad Company to recover damages for personal injuries. Judgment for defendant, and plaintiff appeals. Affirmed.

Bennett H. Young, for appellant. Edward W. Hines and Lytleton Cooke, for appellee.

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

GUFFY, J. The substance of the plaintiff's complaint is that he was employed by the defendant to perform certain labor in defendant's shop, and that the defendant, by willful, gross, and utter disregard of his safety, undertook to perform, and did perform, in said shop, a short distance from where plaintiff was at work, extraordinary work, which was far more dangerous to the person employed than was usual and ordinary work done therein, and that said work was performed negligently, carelessly, and with willful and gross negligence and carelessness, whereby he was seriously injured, the details of which were properly set out in the petition. The answer of defendant is a traverse of the averments of the petition. The answer also contained a plea of contributory negligence. The reply traversed the contributory negligence. At the conclusion of plaintiff's testimony the court instructed the jury peremptorily to find for the defendant, which was accordingly done. On the 10th of March, 1894, plaintiff filed grounds and entered motion for a new trial, which motion appears to have been overruled June 10, 1899, and time given to the 8th of July, 1899, to prepare and tender bill of exceptions, and the said bill was presented and filed June 24, 1899. It further appears that on March 10, 1900, the bill of exceptions was stricken from the record by this court, and on March 17th this cause was submitted. The bill of exceptions having been stricken from the record, there is nothing before us but the pleadings, and the only question before us for decision is whether the pleadings support the judgment. The answer being a traverse of the averments of the petition, and there being no evidence before us, the presumption must be that the peremptory instruction was proper. We are not disposed to review the former order of this court as to the propriety of excluding the bill of exceptions. Especially is this so in view of the great delay in disposing of the motion for a new trial. Judgment affirmed.

STORY et al. v. STORY et al.¹

(Court of Appeals of Kentucky. March 13, 1901.)

CONTRACT TO MAKE PROVISION BY WILL—STATUTE OF LIMITATIONS—STATUTE OF FRAUDS—TRANSACTION WITH PERSON SINCE DECEASED—DECLARATIONS OF DECEASED PERSON.

1. A cause of action does not accrue upon a contract to make provision for another by will until the death of the obligor, and the statute of limitations does not begin to run until that time.

2. Such a contract is not within the statute of frauds, as the event upon which it depends may happen within a year.

3. The claim of each of several persons under a contract to provide for them by will is separate and distinct, and each may testify for the others as to the transaction with the obligor, since deceased, though all are asserting their claims in the same action, the action being one

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

to settle the estate of the obligor; but such testimony will not be allowed to control when it is contrary to the subsequent conduct of the parties, and is outweighed by the circumstances of the case.

4. Where illegitimate sons who had lived with their putative father before arriving at age continued to live with and work for him after that time, permitting him, at his request, to keep their earnings, he assuring them that it would be better for them in the end, his declarations as to what he owed them will be made the basis of a settlement after his death; the sons having kept no accounts, leaving the whole matter to their father.

Appeal from circuit court, Fleming county.
"Not to be officially reported."

Action by Newton Story, executor of Meshack Story, against America Story and others, for a settlement of the estate of plaintiff's testator. Judgment rejecting claims of America Story and others, and they appeal. Reversed.

G. A. Cassidy, J. D. Pumphrey, and B. S. Grannis, for appellants. W. G. Dearing, for appellee executor. A. M. J. Cochran, for appellee banks.

HOBSON, J. Meshack Story died on August 20, 1898, a resident of Fleming county, Ky. By his will, made just before he died, he simply appointed the appellee Newton Story his executor, requesting that he be allowed to qualify without bond. The testator was a bachelor, and owned considerable property. The executor qualified, and instituted this action for the settlement of the estate. Appellant America Story filed her answer and cross petition, alleging that she was born a slave, the property of Sampson Green; that some time in 1855 the testator hired her from her master, and she remained with him until the year 1861; that during this time she gave birth to three illegitimate children by the testator; that in 1861 he purchased her and the three children from Green, and she afterwards gave birth to three other children by him while his slave; that she was then emancipated, and after her emancipation gave birth to three more children; that after the birth of the eighth child she was about to take bastardy proceedings against Story, and in settlement of this matter a contract was made between him and her by which he was to have the custody and control of all her children until each was of age, and in consideration of this, and her taking no proceedings against him, and of the labor of the children, he agreed at his death to make a certain provision for her and each of the nine children, amounting to about \$2,200 for her, and from \$2,000 to \$4,000 for each of the children. Two of the nine children died before the testator. Six of the others also filed claims against the estate, setting up the same facts as set up by their mother. One son, named Lee, had left the testator when of age. The other three boys, Frank, Tom, and Ben, had remained with him and worked for him after

becoming of age. They claimed that he had not paid them for their services, and owed them a large balance also on this account, in addition to the amount coming to them under the contract with their mother. One daughter, Lizzie, now Gray, presented no claim. The executor denied the existence of the contract alleged, and pleaded limitation and the statute of frauds. He also denied that the testator was in debt in any way to the three sons for labor after they became of age. The case was referred to the master commissioner, who allowed appellants' claims, but on exceptions to his report the court below dismissed them all.

The proof shows very clearly the facts set out in the answer as to the birth of the children to be true, and that the testator always recognized them as his children. It also shows that the bastardy proceeding was contemplated, and that some kind of contract or agreement was reached by which the matter was settled. The court below properly held that neither the statute of limitations nor the statute of frauds applied. The contract was to be complied with by a provision at the death of the testator, and the cause of action upon it did not accrue until then. It is also well settled that, where a contract depends upon an event that may happen within a year, it is not within the statute of frauds, although the parties may in fact contemplate that the contract will probably extend over a considerable length of time.

It is earnestly insisted for appellee that all the appellants claim under the same contract, and that therefore none of them can testify as to it, even in behalf of one of his co-appellants, for the reason that, if this is allowed, each will thus be enabled in substance to testify for himself. But the claim of each of the appellants is separate and distinct. They happen all to be in the same action only because a suit has been brought to settle the estate. If each of the appellants had instituted a separate action against the executor, setting up the same facts as he now alleges in his separate answer and counterclaim, it could not be maintained that his brothers and sisters on the trial of that case would not be competent witnesses for him, because they had similar suits against the executor. The objection would go to their credibility, and not to their competency. This was determined by this court in *Beach v. Cummins' Ex'r*, 18 S. W. 360, on an issue very similar to the one before us, and upon a reconsideration of the question we adhere to the rule there announced. The court, therefore, erred in sustaining the exceptions of appellee to this testimony. But, while the testimony is competent, it must be taken, when the mouth of the adverse party is closed in death, with considerable allowance for defect of memory after so great a lapse of time, and the natural coloring from self-interest. Such tes-

timony cannot be allowed to control when it is contrary to the subsequent conduct of the parties, and is outweighed by the circumstances in the case. Without extending this opinion with a discussion of the testimony in the voluminous record before us, we conclude, from all the evidence and all the circumstances, that the contract was that Story would take care of America as long as he lived, and provide a home for her at his death; that he would also take care of the children and bring them up; and that he was to have their labor until they were of age. We think that the evidence, taken as a whole, does not justify us in concluding that there was any obligation assumed by him beyond this, and that, while he contemplated providing for these children by his will, he at no time relinquished his right to dispose of his property as he pleased, and as subsequent events might render advisable, in his judgment. It follows, therefore, that the court below did not err in rejecting the claims of all the appellants except America Story, under the contract alleged to have been made by her with the testator. As to her, the alleged contract to be paid \$1,000 in cash is not sustained by the evidence, but her claim of \$1,200 for her life interest in the 125 acres of land upon which the testator had settled her is sustained by the evidence, and should have been allowed.

Appellant Frank Story claims a debt against the testator amounting to something like \$6,000, for personal services, cash, and wheat, tobacco, cattle, and other things sold him. Appellant Thomas J. Story has a similar claim amounting to \$2,775; and appellant Ben Story, a claim for \$612. The testator treated these men as his sons. They worked for him, and at his request allowed him to keep the money, upon his promise that he would take care of it for them, and that in the end they would thus be better off. They kept no account of the matters, but left all this to their father, who seems to have exercised a strong paternal influence over them up to the time of his death. Under such circumstances, we know of no better basis on which to settle these claims than the declarations of the testator. It appears from the proof that Frank had worked for him or lived with him pretty much ever since he was of age. Frank is now 40 years of age. Some years ago he bought a farm, known as the "Pepper Place," for \$3,000, with the sanction of the testator, who then declared to a number of persons that he had in his hands, of Frank's money, more than enough to pay for the place. Only \$500 of this money has been paid, and for this a note was executed by the testator to Frank. The court below allowed Frank the \$500, but he should also, in addition, have allowed him the balance of the \$3,000, or \$2,500 more than was allowed him. Proof of similar character shows that the testator admitted indebtedness on

his part to Tom Story in the sum of \$1,500, and to Ben in the sum of \$600. The court below should have allowed Tom, under the evidence, on his claim, \$1,500, and Ben \$600. Limitation does not bar these claims; for the testator admitted their justice, as well as the amount due, shortly before his death. The evidence does not warrant any allowance to appellant Lee Story on his claim. He left his father when of age, and the testator often spoke of the difference in his conduct and that of the other three sons, and the consequent difference there would be in the end in their pecuniary condition. The judgment appealed from is affirmed as to Lee Story, Lizzie Tabor, and Lula Turner; but it is reversed as to America Story, Frank Story, Thomas J. Story, and Ben Story, and the cause is remanded for a judgment and further proceedings consistent with this opinion.

LANCASTER et al. v. LEAMAN et al.¹
(Court of Appeals of Kentucky. March 7, 1901.)

DRAINS AND DITCHES—APPEAL TO CIRCUIT COURT—TRIAL DE NOVO—APPEAL FROM PART OF JUDGMENT—BURDEN OF PROOF—CONCLUDING ARGUMENT TO JURY.

1. In a proceeding to establish a ditch the judgment of the county court is, under Ky. St. § 2396, severable for the purpose of an appeal; and, therefore, upon appeal to the circuit court from a judgment awarding damages to the owner over whose land a ditch is established, the court can consider only the question of damages, and the evidence should be confined to that question,—there being no appeal by either party from the judgment establishing the ditch.

2. A. joined in an application for a ditch, and the court appointed viewers, who made a report. B. filed a remonstrance, claiming that the ditch should be constructed across the lands of A. Reviewers were appointed, who reported that the ditch should be constructed as suggested in the remonstrance. *Held* that, in order to authorize a judgment against A. for benefits, B. was required to show that A. would be benefitted by the construction of the ditch, and therefore the burden of proof was on B., and he was entitled to the concluding argument to the jury.

Appeal from circuit court, Daviess county.
"To be officially reported."

Proceeding by Miles Lancaster and others for the establishment of a ditch. Judgment establishing ditch and fixing benefits, and Miles Lancaster and others appeal. Affirmed.

R. G. Hill and Wilfred Carico, for appellants. Birkhead & Clements, for appellees.

PAYNTER, C. J. On a former appeal of this case an opinion was delivered, which is found in 52 S. W. 963. On a return of the case it was remanded to the county court, where there was a final judgment establishing the ditch over the lands of the appellant

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

Lancaster according to the report of the reviewers. The trial in the county court resulted in a verdict and judgment to the effect that Lancaster was damaged \$400 over and above the benefits which he would derive by the construction of the ditch. From the latter judgment an appeal was prosecuted. None of the parties to the proceeding appealed from the judgment of the county court establishing the ditch. On the trial of the question in the circuit court it resulted in a judgment fixing \$750 as the benefit which the appellant Lancaster would derive by the construction of the ditch over his land. As there was no appeal by Lancaster or any of the parties from the judgment establishing the ditch, the court confined the evidence to the question which they sought to have reviewed on the appeal.

Section 2397, Ky. St. (part of the act relating to the "drainage of lands"), provides that when there is an appeal from the county court to the circuit court the "case shall stand for trial as all other appeal cases, and shall be tried as other appeal cases are tried in the circuit court." By reason of this provision of the statute it is insisted for the appellants that the circuit court erred in refusing to consider any question except the one of damages. The theory of counsel for appellants is that, whenever a party to a proceeding to establish a ditch takes an appeal to the circuit court, it necessarily brings before that court for review all questions which were before the county court in the matter of establishing the ditch, as well as the question of the amount of expense each person benefited by it should pay. To the extent that there is an appeal from the judgment of the county court, it is true that it is tried as other appeal cases are tried in the circuit court, which is *de novo*. Except for the statute, the position of counsel would be correct. Section 2396, Ky. St., reads as follows: "Any person or corporation aggrieved thereby may appeal from any final order or judgment of the court made in the proceedings and entered upon the record, determining either of the following matters: (1) Whether said ditch will be conducive to the public or private health, convenience or welfare. (2) Whether the route thereof is practicable. (3) Whether the assessments made for the construction of the ditch are in proportion to the benefits to be derived therefrom. (4) The amount of damages allowed to any person or persons or corporation. And the appellant shall file with the circuit court clerk an appeal-bond, with at least two free-hold sureties, to be approved by the circuit court clerk, conditioned that he will duly prosecute such appeal and pay all costs that may be adjudged against him in the circuit court; provided, that such appeal-bond shall be filed within ten days after such final order or judgment of the county court is made; and after the lapse of such ten days no appeal can be taken. And if an ap-

peal be taken the clerk shall withhold his notice to the viewers or reviewers to make their final report, and he shall, within twenty days after the appeal-bond is filed make a transcript of the proceedings had before the county court and certify the same, together with all the papers filed in his office pertaining to such proposed work, to the clerk of the circuit court." A party may be perfectly satisfied with one part of the judgment establishing the ditch, and very much dissatisfied as to another part of it, and thus feel greatly aggrieved as to part of the judgment. Whenever the court has determined the questions enumerated in the section quoted above: First, whether the ditch will be conducive to public or private health, etc.; second, whether the route thereof is practicable; third, whether the assessments made for the construction of the ditch are in proportion to the benefits to be derived therefrom; fourth, the amount of damages allowed to any person or persons or corporation,—the party aggrieved may appeal to the circuit court from the whole of the judgment or a part thereof. Any person who is a party to a proceeding, and feels aggrieved by any part of the judgment, and desires to have that part reviewed, must appeal therefrom. If one party appeals from a certain part of the judgment, and does not question the correctness of the balance of it, it does not give those who may be made defendants in the appeal that is prosecuted the right to have the circuit court review the whole judgment that was rendered in the proceeding in the county court. Knowing that numerous persons might be parties to a proceeding like this, and that a variety of questions would arise, and some might want to appeal from one part of the judgment, and others from another part that might be rendered, the legislature made the judgment of the county court severable for the purposes of an appeal. In view of this conclusion, it eliminates from our consideration some of the questions which have been made for a reversal of the case. It follows from this conclusion that the court did not err in not allowing the appellant Lancaster to introduce proof to show that the route reported by the viewers was cheaper and better and more practicable than the one reported by the reviewers, and in not allowing him to prove that he could drain his own land at a small expense.

The only question remaining which we think necessary to consider is as to whether the court erred in refusing to allow the appellant Lancaster to assume the burden of proof, and consequently have the closing argument to the jury. Lancaster joined in the application for the ditch, and viewers were appointed to view the proposed route and report thereon. They did report, but appellee Leaman filed a remonstrance, claiming that the ditch should be constructed across the lands of Lancaster; and, as authorized

by the statute, reviewers were appointed, who reported that the ditch should be constructed over the lands of Lancaster according to the suggestions in the remonstrance. This being true, then those who joined in the remonstrance had the necessity imposed upon them to show that Lancaster would be benefited by reason of the construction of the ditch. No judgment could have been rendered against Lancaster for benefits unless those who joined in the remonstrance made it appear to the court that it was proper to do so. Therefore the burden was upon them to show the benefits which Lancaster would receive. From this view, it follows that the court did not err in holding that the burden was upon the appellees here.

We are of the opinion that the court properly submitted to the jury the questions at issue on the appeal in the circuit court. The judgment is affirmed.

HERR et al. v. CENTRAL KENTUCKY LUNATIC ASYLUM.¹

(Court of Appeals of Kentucky. March 13, 1901.)

INJUNCTION — REMEDY AT LAW — ACQUIESCENCE IN ERECTION OF DAM.

1. As an action lies against a charitable institution of the state to recover damages for an injury to plaintiff from the pollution by defendant of a stream upon which plaintiff's land borders, and it must be presumed that the legislature would make provision for the payment of any judgment which plaintiff might obtain in such an action, the existence of this remedy at law would seem to be a sufficient reason for denying plaintiff an injunction restraining defendant from continuing the nuisance.

2. Where the owner of land bordering on a stream permitted a charitable institution of the state, without objection, and at great expense, to erect dams across the stream above plaintiff's land, with knowledge of the fact that the institution had for many years maintained a sewer, through which it emptied its slops and offal into the stream at a point between the dams and plaintiff's land, plaintiff's acquiescence precludes his right to an injunction restraining defendant from maintaining either the dams or the sewer, especially as the injury to defendant and the public from granting the injunction would be out of proportion to the injury to plaintiff from the continuance of the nuisance.

Appeal from circuit court, Jefferson county, chancery division.

"To be officially reported."

Action by Mary Herr and others against the Central Kentucky Lunatic Asylum for an injunction. Judgment for defendant, and plaintiffs appeal. Affirmed.

For former report, see 30 S. W. 971.

Pryor & Sapinsky and Pryor, O'Neal & Pryor, for appellants. Carroll & Carroll, for appellee.

BURNAM, J. The Central Kentucky Lunatic Asylum is the largest of the three

charitable institutions provided by the state of Kentucky for the care and treatment of the insane. It was located in 1872 upon a tract of 600 acres of land near Lakeland, in Jefferson county, at a point some six or seven miles distant from the Ohio river. A water course known as "Goose Creek," which is about ten feet wide and from one to two feet deep, runs through the territory of the asylum, close to the buildings erected thereon, in a westwardly direction, and empties into the Ohio river. Soon after the location of the asylum a sewer was constructed, through which the slops and offal of the asylum were emptied into Goose creek above the lands of plaintiff, and it has been continuously used from that time. From the date of the original location in 1872 the state has been continuously enlarging and improving the asylum, until it has expended in building alone more than \$500,000; and it now furnishes accommodations to more than 1,200 lunatics, in addition to necessary attendants. Early in the history of the institution an adequate water supply for its use became a matter of deep concern, and it was compelled to rely largely upon Goose creek to supply this want. The proof shows that for several months during the dry season of the year the creek became very low, and, for the purpose of providing against a scarcity of water during this period, the authorities in 1887 erected a dam across the creek, by means of which a reservoir was formed. In 1893 they erected a second dam across the stream, which formed a second reservoir. Both of these dams were above the point on the creek where the sewer emptied into it. The appellants, Mary Herr and her three children, owned and resided upon a tract of 300 acres of land, lying upon both sides of Goose creek, below the lands owned by the lunatic asylum, and adjoining those owned by one Valentine Hauns, whose land lies between that of the appellants and appellee. Appellants in February, 1894, instituted this suit in equity in the Jefferson circuit court, in which they stated substantially the facts hereinbefore recited, and alleged that the emptying of the sewer from the asylum into Goose creek, and the erection of the dams across the stream, had rendered the stream itself a nuisance, and its waters below the point where the sewer emptied into it unfit for use; that an offensive odor arose therefrom, poisoning the water and rendering their homes disagreeable and unhealthy,—and asked the court by injunction to compel appellee to tear out the dams and sewer, and to restore Goose creek to its natural condition. A general demurrer was sustained to this petition, which, upon appeal to this court, was reversed. The opinion rendered upon that appeal is reported in 97 Ky. 458, 30 S. W. 971, 28 L. R. A. 394. Upon the return of the case the defendants filed an answer. In the first paragraph they denied all of the affirmative averments of the petition. In the second they alleged that they drew no wa-

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

ter from Goose creek except what is reasonable and necessary for the use of the institution, and that it has no other adequate source of supply, and that but for the supply of water provided by the lakes the institution itself could not be maintained, and the state would be forced to abandon the buildings and improvements erected at an enormous cost, and to provide quarters elsewhere for its unfortunate inmates. In the third paragraph they plead that the sewer complained of has been in existence and operation for more than 15 years continuously, without any effort on the part of plaintiffs to interfere therewith, and that they had full notice and knowledge of the proposed erection of the dams and lakes complained of before they were completed by the state at great expense, and offered no objection thereto; that to grant the relief sought by plaintiffs would inflict enormous damage upon the defendants, wholly out of proportion to the alleged injury to themselves.

The evidence in the record, we think, shows that for several months during the summer and early fall the waters of Goose creek are polluted below the point where the sewer empties into it to such an extent as to render it unfit for stock water, and that at times an offensive odor arises from the stream, which to a large extent renders the home of plaintiff disagreeable, and that the stream itself has a filthy and disagreeable appearance. There is no evidence to support the claim that any epidemics or diseases result therefrom. While, on the other hand, it is conclusively shown that it is absolutely necessary for the use of the asylum that the lakes should be maintained, in order to furnish a sufficient water supply for the use of the institution, and that if they were taken out the buildings and present site of the asylum would have to be abandoned, at least until some means of supplying the necessities of the institution in this particular could be devised. It is also shown that engineers have been unable to provide any suitable or proper sewer arrangement for the one complained of, and that it has been in use in substantially the same manner for more than 20 years.

The question first to be determined under this state of facts is whether appellant has an adequate remedy at law for the injuries complained of by an action for damages, as the rule is settled that an injunction will not be granted where the remedy at law is full, adequate, and complete. It was held in *Hauns v. Lunatic Asylum* (Ky.) 45 S. W. 890, that an individual could maintain a common-law action against appellee for injuries identical in character with those herein complained of, and that an execution sued out upon a judgment in such a proceeding could be levied upon the property of appellee, unless the sale of such property would render the corporation wholly unable to care for the insane under its charge. And, even if it be conceded that appellee had no prop-

erty which came under this head,—that would be liable to such an execution,—we think it must be conclusively presumed that the legislature would make suitable provision for the payment of such a judgment, as it is in reality a claim against the state, when it had been properly ascertained and determined in the courts of the state. But, even if it be conceded that appellants' claim for an injunction could not be defeated on this ground alone, "it is a rule, practically without exception, that a court of equity will not grant relief by injunction where the party seeking it, being cognizant of his rights, does not take those steps to assert them which are open to him, but lies by and suffers his adversary to incur expenses which would render the granting of the injunction a great injury to him. This rule is especially applicable where the granting of an injunction will operate injuriously to the public as well as to the party against whom the injunction is sought." 16 Am. & Eng. Enc. Law, p. 368, and authorities there cited. Pomeroy, in his work on Equity Jurisprudence (sections 816, 817), announces the general doctrine as follows: "Acquiescence is an important factor in determining equitable rights and remedies, in obedience to the maxims, 'He who seeks equity must do equity, and he who comes into equity must come with clean hands.' * * * Acquiescence in the wrongful conduct of another by which one's rights are invaded may operate often, upon the principles of and in analogy to estoppel, to preclude the injured party from obtaining many distinctively equitable remedies to which he would otherwise be entitled. This form of quasi estoppel does not cut off the party's title, nor his remedy at law. It simply bars his equitable relief, and leaves him to his legal action alone." Mr. High, in his work on Injunctions (section 786), says: "He who seeks relief against a nuisance must show due diligence in the assertion of his rights; and where complainant has allowed the defendant for a long period to continue in the erection of his obnoxious structure, at great expense, equity will not interfere. * * * Complainants who have long slept on their rights will not be allowed to enjoin the nuisance, and thus put themselves in a position from which their own laches has debarred them." This principle was applied in *Southard v. Banking Co.*, 1 N. J. Eq. 518; *City of Logansport v. Uhl*, 99 Ind. 531; *Easton v. Railroad Co.*, 24 N. J. Eq. 49; *Traphagen v. Mayor*, etc., 29 N. J. Eq. 206; *Swaine v. Railway Co.*, 9 Jur. (N. S.) 1196. It has also been frequently applied by this court. See *Murphy v. Ice Co.*, 50 S. W. 835. An injunction ought not to be granted where the benefit secured by it to the party applying therefor is comparatively small, while it will operate oppressively and to the great annoyance and injury of the other party and to the public, unless the wrong complained of was so wanton and

unprovoked as to properly deprive the wrongdoer of all consideration for its injurious consequence. See *Jones v. Mayor, etc.*, 11 N. J. Eq. 452. In this case appellants stood by for more than 15 years, and permitted the defendant to spend enormous sums of money, adding to the improvements on the land, with a full knowledge and complete remedy at law for all of the injuries complained of; and they have at this late day no equitable standing in court, and their petition was properly dismissed. Judgment affirmed.

BRASHEARS v. LETCHER COUNTY COURT.¹

(Court of Appeals of Kentucky. March 13, 1901.)

PLEADING—ORIGINAL PLEADING NOT RENDERED BAD BY AMENDMENT—INARTIFICIAL ANSWER—STRIKING FROM FILES—FILING IN VACATION—TRANSFER TO EQUITY.

1. Where it had been held upon appeal that defendant's counterclaim stated a cause of action, but that it should be reformed so as to state the cause of action in a clear and comprehensive manner, it was error to sustain a demurrer to the counterclaim as amended after the return of the cause to the lower court, as the amendment, though it should have been stricken from the files because it was more inartificially drawn than the original pleading, did not render that pleading bad.

2. An amended answer and counterclaim which was filed in vacation without leave of court should have been stricken from the files.

3. Under Civ. Code Prac. § 11, subsec. 4, the court may, in its discretion, transfer an ordinary action to the equity docket without motion, if the action involves accounts so complicated, or such great detail of facts, as to render it impracticable for a jury to intelligently try the case.

Appeal from circuit court, Perry county.

"Not to be officially reported."

Action by the Letcher county court against R. O. Brashears to recover a balance claimed to be due on account of taxes collected by defendant. Judgment for plaintiff, and defendant appeals. Reversed.

R. O. Brashears, in pro. per.

HOBSON, J. This is the third appeal herein. The action was instituted by appellee, the Letcher county court, to recover of appellant, Robert O. Brashears, as late sheriff of Letcher county, a balance claimed to be due by him to the county on account of taxes collected. Appellant by his answer set up a counterclaim, and prayed judgment against the county. The venue of the action was changed to the Perry circuit court, and a trial was begun in that court before a jury. After some progress in the trial, the county court dismissed its action without prejudice; and thereupon the court, over appellant's objection, also dismissed without prejudice his counterclaim. From this judgment he prosecuted an appeal to this court, and obtained a reversal on the ground that under section 872

of the Code of Practice he was entitled to a trial on his counterclaim, although the plaintiff dismissed its action. It was insisted on that appeal that the judgment should be affirmed on the ground that appellant did not show by his pleading a right to recover, and therefore was not prejudiced by the dismissal. But the court said: "We cannot concur in this view of the case. It is true that the answer and amendments are not as clear and specific as might be required, and the court could, upon proper motion, require the claim to be made more specific." *Brashears v. County Court*, 41 S. W. 22. On the return of the case to the court below, a demurrer was sustained to appellant's answer and counterclaim, and, he failing to plead further, it was again dismissed. From this judgment he prosecuted the second appeal; and a reversal was again had, on the ground that the pleading had expressly been held good on the former appeal, and that the opinion then delivered was the law of the case. The court, however, said: "The answer and counterclaim is voluminous, inartificially drawn; and the court should require appellant to reform his answer as amended, and state his cause of action in a clear and comprehensive manner. Then the appellee may tender such issue by a pleading as the law and facts would authorize," *Brashears v. County Court*, 54 S. W. 840. On the return of the cause to the court below, appellant filed on September 1, 1900, what is styled in the record, "Amended Answer and Counterclaim No. 2, Reformed." This paper is more voluminous and more inartificially drawn than the one before the court on the second appeal. Thereafter, on September 10th, he entered a motion that the cause be submitted on the pleadings. Three days afterwards the following order was entered: "Counsel for plaintiff came in open court, and tendered and filed herein a special and general demurrer to pleading or proceeding,—does not state facts sufficient to fully constitute a valid cause of action or support a judgment of this court. Therefore the demurrer is now sustained, and, defendant not being desirous to plead further in said cause, his counterclaim is now adjudged dismissed," etc. From this judgment the appeal before us is prosecuted.

We have had great difficulty to determine just what was submitted to the court below, or what judgment this court should render on the appeal. The trouble with appellant throughout the case has been that he has not followed the legal maxim that the first thing for a lawyer to do in his own case is to get him a lawyer. This he should do. We have with some hesitation concluded from the record that appellant, having filed his amended answer, undertook by his motion to raise the question whether the pleadings then conformed to the opinion of this court. If the judgment is affirmed, grave injustice may be done appellant, as his cause of action, though just, might thereby be lost, and the ends of sub-

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

stantial justice defeated by a misunderstanding of a preliminary motion. The court below should not have sustained a demurrer to the counterclaim, which this court had on both the appeals held sufficiently pleaded, as there was nothing in the amended answer to affect the former pleading. The Code of Practice provides: "Parties must before trial form a material issue concerning each cause of controversy; and it is the duty of the court upon, or without motion, to compel them to do so, and for that purpose they may be required to reform their pleadings, or the pleading of a party who is in fault may be stricken from the case." Section 114. "Irrelevant or redundant matter in a pleading shall be stricken out upon or without motion at the cost of the party whose pleading contains it." Section 121. There is so much irrelevant matter in the "Amended Answer and Counterclaim No. 2, Reformed," filed September 1, 1900, and it is so inartificially drawn, that the court should have stricken the entire paper from the record. The paper filed in vacation on August 16, 1897, and styled, "Reformed Answer and Counterclaim No. 3," should also be stricken from the record. An amended answer cannot be filed in vacation, unless by leave of court. This paper is also objectionable as containing irrelevant matter. On the return of the case to the court below, he will enter an order striking both of these pleadings from the file; and he will also strike out from the amended answer filed March 25, 1893, such parts as are immaterial. He will then allow appellant a reasonable time to amend his pleading, and give appellee opportunity to complete the issue. If an amendment is not made within the time allowed, he will proceed to try the case under the issues as they then stand, and if either party desires it the action, under subsection 4 of section 11 of the Civil Code of Practice, may be transferred to the equity docket. The court below, under that section, may, in its discretion, without motion, order such a transfer, if the case involves accounts so complicated, or such great detail of facts, as to render it impracticable for a jury to intelligently try the case. Judgment reversed, and cause remanded for further proceedings consistent with this opinion.

FUNK et al. v. PROCTER et al.¹

(Court of Appeals of Kentucky. March 13, 1901.)

BURDEN OF PROOF—IDENTITY OF MORTGAGE NOTE.

Where a mortgagee was made a party defendant to an action by another lienholder, who alleged in his petition that the mortgage was fraudulent and was executed to secure a note for \$500 which was without consideration, and the mortgagee filed an answer alleging that the mortgage was executed in good faith to secure a note for \$500, money borrowed, which

by payments was reduced to \$319, for which a new note was executed, the allegations of the answer being denied by reply, the burden was on the mortgagee to show that the note for the payment of which the mortgage was sought to be enforced was a renewal of the note secured by the mortgage.

Appeal from circuit court, Warren county.
"To be officially reported."

Action by B. F. Procter and others against M. S. Funk and the Warren Deposit Bank to enforce a lien. Judgment for plaintiffs, and defendants appeal. Affirmed.

T. L. Edelen and Wright & McElroy, for appellants. W. E. Garth and Proctor & Herdman, for appellees.

BURNAM, J. This action was instituted by appellees against M. S. Funk to subject his property to the payment of judgments that had been obtained against him, and upon which executions had been issued and returned no property found. The Warren Deposit Bank was made a defendant, and the allegations as to them are as follows: "Plaintiff further says that on the — of —, 1894, the defendant executed and delivered to the Warren Deposit Bank, a corporation created and organized under the laws of Kentucky, a certain instrument of writing, called a 'mortgage,' for the sum of \$500, by which writing the said Funk attempted to give to said bank a lien upon his property situated in said store above described, and now levied on by these plaintiffs; that said attempted mortgage was made during the pendency of the suits in which the aforesaid judgments were rendered, and before execution could be issued thereon, and that it was for the purpose of hindering, delaying, and defrauding these plaintiffs in the execution of their debt; that the property upon which they hold their aforesaid lien consists of a lot of finished stock, at the date of the levy: Marble, \$635; rough stone on hand, \$115; rough limestone on hand, \$80; tools and machinery, \$190,—amounting in all to \$1,010." The material averments of the answer of the Warren Deposit Bank to the allegations quoted supra are as follows: "The defendant says that M. S. Funk agreed, by his promissory note dated April 24, 1894, thirty days after date to pay to the defendant the sum of \$500, negotiable and payable to the Warren Deposit Bank, and that said Funk, in order to secure to this defendant the payment of this debt, which was a loan to said Funk, on that day mortgaged to this defendant the finished monuments on hand, the tools and machinery, and the unworked stone on hand; that said Funk paid said debt, and reduced same until now it was only \$319, with interest from August 2, subject to a credit of \$26 paid August 27, 1894; that the money was loaned simultaneously with the taking of the mortgage, and that its mortgage is a superior lien to the execution lien of plaintiffs; that the property upon which the plaintiff is seeking to enforce a

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

lien is the same property upon which the defendant has a mortgage lien, and the defendant objects to the property mortgaged to it going into the hands of a receiver." And it says "that this debt herein is a renewal of the \$500 debt, and will not fall due until October 2, 1894." Appellant M. S. Funk filed his separate answer, in which he admits the execution of the mortgage to the Warren Deposit Bank, and avers that it was executed in good faith to secure the payment of the money borrowed from the bank for the purpose of buying stock and material in his business as a marble dealer. Appellees filed a joint reply to the separate answers of Funk and the bank. In reply to the answer of Funk they deny that the mortgage was given in good faith to secure a loan of money made simultaneously with its execution. And, for reply to the answer of the Warren Deposit Bank, they admit the execution of a note by M. S. Funk to the bank for \$500 on April 24, 1894, but deny that the mortgage given on that day was a valid one or that it was given in good faith, and allege that, if said mortgage was given in good faith to secure any debt, it was for the note of \$500 dated April 24, 1894, and was not given to secure the payment of a note for \$319 dated August 2d; and they allege that this note was executed for a new debt, and that said bank loaned Funk other money to the amount of \$—— subsequent to the loan of \$500, for which the mortgage was executed, and that Funk had made payments on the \$500 note executed to the bank, in addition to those admitted in the answer; and they deny that the \$319 set up by the answer of the bank is a renewal of the \$500 note, and allege that Funk had paid the bank since the execution of that note sufficient money to discharge same, and that the bank had relinquished its lien for that amount. Subsequently the Warren Deposit Bank filed a rejoinder to this reply, in which they traversed the affirmative allegations of the reply, and denied that the \$319 note filed with their answer dated August 2d was executed for a new debt, and alleged that it was the successor to the note for which the \$500 mortgage was given; and that they had received no more payments on their original note than were admitted in their answer, or had in any way surrendered or abandoned their mortgage lien to secure its payment. No proof of any kind was taken upon the issues raised by the pleadings between the appellees and the bank, and upon final submission the circuit judge held that the burden of proof was upon the bank to identify the \$319 note set up with its answer as a renewal of the \$500 note which was secured by the mortgage, and also to identify the property covered by the mortgage by proof aliunde, and in default of such proof decided against their alleged lien. And to reverse that judgment the bank and M. S. Funk prosecute this appeal.

The main question, therefore, to be determined on this appeal, is where the burden of proof rested under the pleadings. "An unfailing test adopted by the courts for ascertaining upon which side the affirmative of an issue really lies is to consider which party would be successful if no evidence at all were given, or, what is substantially the same thing, to examine whether, if the particular allegations to be proved were struck out of the answer or the pleadings, there would or would not be a defense to the action, or answer to the previous pleadings." See 1 Wait, Law & Prac. (5th Ed.) 465; Civ. Code, § 528. There are cases where both parties hold the affirmative as to the issue to be tried, as where the plaintiff sues for the recovery of money lent, and the defendant interposes with a general denial and also a claim for set-off. In such a case the plaintiff would be bound to prove his case, and if he do so, and then rest his case, the defendant would be required to prove his set-off by evidence, or it will not be allowed. Another well-recognized rule of evidence in regulating the proof is that the law will not force a man to show anything which by intendment of law is not within his knowledge. In this case the plaintiffs allege, in substance, that the defendant bank has a mortgage of record upon the same property of the defendant Funk, as they levied upon by their executions, to secure the payment of a note for \$500; but they allege that the note itself was without consideration, and the mortgage itself fraudulent and against their rights. The bank answers that the mortgage was executed in good faith to secure a note for \$500 for money borrowed, but that the original note had been materially reduced, and a new note executed for the balance for \$319. Plaintiffs, by way of reply, deny that the \$319 note is a renewal of the \$500, and allege that it was executed for an entirely independent consideration. In passing upon a case of this sort, 1 Jones, Mortg. p. 52, § 71, says: "Upon the foreclosure of a mortgage, it is necessary to produce the note, if there be one; and if the note produced corresponds with the description in the mortgage, as to the date, amount, parties, rate of interest, and maturity, such correspondence, coupled with the possession of the note by the holder of the mortgage, raises a presumption of identity, and throws upon the mortgagor the burden of showing another note of like description. Parol evidence is admissible to identify the note intended to be secured." And the Encyclopedia of Pleading and Practice (volume 9, p. 400) says: "Where a mortgage secures a note or bond, it is a general rule that the secured instrument must be produced in court, or its nonproduction accounted for, before a decree of foreclosure can be properly rendered. The absence of the note or bond raises the presumption of payment, and entitles the defendant to a dismissal."

In this case the note alleged to be a re-

newal of the note which the mortgage was made to secure does not correspond either in date or amount with that secured by the mortgage. The alleged facts showing it to be a renewal of the secured obligation were peculiarly within the knowledge of the bank, and it seems to us that, as these facts were put in issue by the reply, the burden of showing them was upon the bank; and, it failing to do so, the court properly found against the validity of the claim. For the reasons indicated, the judgment is affirmed.

GREENE v. MIDDLESBOROUGH TOWN & LANDS CO.¹

(Court of Appeals of Kentucky. March 12, 1901.)

CORPORATIONS—ASSUMPTION OF LIABILITIES OF ANOTHER CORPORATION—CONSIDERATION—ULTRA VIRES.

1. An undertaking by defendant corporation, in consideration of all the assets of another corporation, to assume all the liabilities of that corporation, including that created by its guaranty of dividends on certain shares of stock, is supported by a sufficient consideration, and is binding.

2. An allegation that defendant is a corporation, with full powers to contract, is sufficient to bind it by the contract sued on, in the absence of a plea by defendant that the contract was ultra vires.

Appeal from circuit court, Bell county.

"Not to be officially reported."

Action by Lillian E. Greene against the Middlesborough Town & Lands Company to recover dividends on certain shares of stock. Judgment for defendant, and plaintiff appeals. Reversed.

Isaac T. Woodson, for appellant. Sampson & Chapman and J. R. Sampson, for appellee.

WHITE, J. Appellant instituted this action to recover of appellee, Middlesborough Town & Lands Company, the sum of \$420, alleged to be due her as dividends on certain shares of stock issued by the Investment Company of Middlesborough, which dividends were guaranteed for 10 years, at 7 per cent., by the Middlesborough Town Company. It is alleged that, in consideration of 200 shares of stock in the investment company, the Middlesborough Town Company, a corporation duly organized and created, with powers to sue and be sued, and to contract and be contracted with, by a writing on the back of the stock issued by the investment company guaranteed the payment of dividends for a fixed period. The written guaranty is as follows: "For value received, the Middlesborough Town Company guarantees to the holder hereof payment of a dividend at the rate of seven per cent. per annum, payable semiannually on the first day of Jany. and July at the Coal & Iron Bank of Middlesborough, Ky., for a period of ten years from

the first day of July, 1891." This was signed by the vice president and secretary, with the corporate seal attached. It is alleged that, the town company becoming embarrassed, it was determined to reorganize that company, which was done, and the new company, the Middlesborough Town-Land Company, which is alleged to be a corporation with full powers to contract, for and in consideration of the property of the town company, including the shares of the investment company, undertook and agreed to assume all the liabilities of the town company, including the guaranty of the dividends on the stock of appellant. It is then alleged that, the Middlesborough Town-Land Company likewise becoming embarrassed, that company was reorganized into the appellee, which is alleged to be a corporation with full powers to sue and be sued, and to contract and be contracted with. Then appellant alleges that appellee, in consideration of the assets of the town-land company, including the shares of stock in the investment company, agreed to and did assume all the liabilities of the town-land company, including the guaranty on the stock of the investment company as to dividends, etc. It is then alleged that no dividends had ever been paid, and that demand therefor had been made. To this petition a demurrer was sustained, and, the petition being amended, was again sustained, and the action dismissed; hence this appeal.

We are of opinion that the petition as amended states a cause of action. The allegation of power and capacity to contract is sufficient to bind appellee as to any contract it made, unless it be ultra vires. If the contract was ultra vires and beyond its power to make, that fact would be a defense, and must be pleaded. There is no inconsistency appearing from the allegations of the petition in contracting to assume liabilities of a corporation, if the assets of that corporation are given as consideration, which is alleged here. The demurrer should have been overruled. Judgment reversed and cause remanded, with directions to overrule the demurrer to the petition as amended, and for further proceedings consistent herewith.

HANLEY et al. v. COMMONWEALTH.¹

(Court of Appeals of Kentucky. Feb. 28, 1901.)

CRIMINAL LAW—REVERSIBLE ERROR.

Under Cr. Code Prac. § 281, the action of the trial court in overruling a motion for new trial cannot be reviewed on appeal.

Appeal from circuit court, Fayette county.

"Not to be officially reported."

James Hanley and others were convicted of the offense of breaking into a storehouse, and they appeal. Affirmed.

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

H. T. Duncan, Jr., for appellants. R. J. Breckinridge, for the Commonwealth.

PAYNTER, C. J. The error relied on for a reversal in this case is claimed to have been committed in passing upon the motion for a new trial. Under section 281, Cr. Code Prac., "the decisions of the court * * * upon motion for a new trial shall not be subject to exceptions." This court has held that no exception can be taken to the action of the court on a motion for a new trial; hence this court cannot review the action of the court in overruling the motion for a new trial. *Terrell v. Com.*, 76 Ky. 246; *Kennedy v. Com.*, 77 Ky. 340; *Redmon v. Com.*, 82 Ky. 333. The judgment is affirmed.

LOUISVILLE BANKING CO. v. OGDEN.¹
MUTUAL LIFE INS. CO. OF KENTUCKY
v. SAME.

(Court of Appeals of Kentucky. Feb. 26, 1901.)

BILLS AND NOTES—NEGOTIABILITY OF BONDS
—BONDS PAYABLE TO "TRUSTEE"
—NOTICE OF TRUST.

1. Bonds not payable at an incorporated bank cannot be placed on the footing of foreign bills of exchange.

2. Where the purchaser of mortgage bonds payable to a trust company as "trustee," or bearer, placed them in the hands of the trust company for sale or exchange, one to whom the trust company pledged the bonds for its own debts took them with constructive notice that the trust company was not the beneficial holder, and had no authority to pledge the bonds: the fact that the bonds were payable to the trust company as "trustee" being sufficient to put the pledgee on inquiry.

Appeals from circuit court, Jefferson county, law and equity division.

"Not to be officially reported."

Action by Louisville Banking Company against Martin Thomas and others to enforce a lien on land. Judgment allowing defendant John G. Ogden to withdraw from a fund in court the amount of certain bonds, and the Louisville Banking Company and the Mutual Life Insurance Company of Kentucky each appeal. Affirmed.

Barnett & Barnett, for appellant Banking Co. Strother & Gordon, for appellant Insurance Co. C. B. Seymour, for appellee.

PAYNTER, C. J. On June 20, 1896, Martin Thomas, to secure the payment of four bonds, Nos. 1, 2, 3, and 4, for \$500 each, due two years after date, payable to the Kentucky Trust Company, trustee, or bearer, mortgaged certain real property. The appellee, Ogden, acquired by purchase bonds Nos. 3 and 4, and on July 14, 1897, delivered them to the trust company for sale or exchange, for which it gave him a receipt reciting the fact. For a pre-existing debt which it owed the Louisville Banking Company it pledged bond No. 4, and for a pre-existing debt which

it owed the Mutual Life Insurance Company of Kentucky it pledged bond No. 3. Each of these bonds were pledged before they matured. Neither the bank nor the insurance company was aware of the fact that the bonds belonged to Ogden. The question here is, did the Louisville Banking Company and the Mutual Life Insurance Company of Kentucky acquire an interest in their respective bonds as against Ogden?

For the appellants it is insisted, first, that, as Ogden intrusted the trust company with the possession of the bonds with the authority to dispose of them, the bona fide purchaser takes a good title. For the appellee it is contended the bonds were nonnegotiable, and, under our statute, cannot be placed upon the footing of foreign bills of exchange; that the language of the bonds showed that the trust company was acting alone in a fiduciary capacity, and was not the beneficial owner of the bonds. Under the doctrine of *Insurance Co. v. Hoffman* (Ky.) 50 S. W. 979, the bonds cannot be placed upon the footing of foreign bills of exchange.

This conclusion having been reached, we will not consider the effect this transaction would have had upon the rights of appellee, could this bond be regarded as being upon the footing of a foreign bill of exchange. Appellee purchased the bonds from the Kentucky Trust Company, and paid therefor their full face value, and they were delivered to him. The fact that the bonds were made payable to the trust company as trustee was sufficient notice to put those on inquiry who were dealing with it with reference thereto. The appellants could have, after being put upon inquiry, ascertained whether or not the trust company was the beneficial holder of the bonds. Appellee delivered these bonds to the trust company for one of two purposes, either to sell or exchange them. It was a violation of its trust to pledge them to the appellants to secure its own indebtedness. It did not thereby divest appellee of his title to them. It was held in *Prather v. Weissiger*, 10 Bush, 117, that a promissory note, made payable to one as "trustee," and indorsed in blank by him as "trustee," bore upon its face such evidence of a trust as was sufficient to put one of ordinary prudence on inquiry, and to raise a presumption of constructive notice of the trust, such as would impose the duty of inquiry as to its character and limitations. This question is so elaborately and ably discussed in *Prather v. Weissiger* that we could add nothing to the reasoning of the court by extending this opinion. The judgment is affirmed.

BALCH v. JOHNSON et al.

(Supreme Court of Tennessee. Jan. 19, 1901.)
ADOPTED CHILD—BODILY HEIRS—VESTED
REMAINDER.

1. An adopted child is not within a conveyance to "bodily heirs."

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

2. A deed to J., wife of A., for life, and at her death to the bodily heirs of A., including E., daughter of J. by a former marriage, creates a vested transmissible remainder in E., which, on her dying before J., without brothers or sisters or their issue, descends to J.; no children being born to A.

3. Under Shannon's Code, § 5409, providing, "Any person wishing to adopt another as his child shall apply by petition" (this being taken from Acts 1851-52, providing that certain courts shall have jurisdiction to authorize "any person" to adopt a child), and section 62, providing that "words importing the masculine gender include the feminine and neuter," adoption proceedings instituted by a married woman and her husband make the child hers, as much as his, for purposes of inheritance.

Appeal from chancery court, Davidson county; H. H. Cook, Chancellor.

Suit by Annitta J. Balch against Josephine Johnson and others. From decree of the court of chancery appeals reversing a decree dismissing the bill, defendants appeal. Affirmed.

James Trimble and Hamilton Parks, for appellants. Noah W. Cooper, for appellee.

BEARD, J. This cause involves a question as to the ownership of a house and lot in the town of Goodlettsville. On the 19th of May, 1866, the then owner of this property (one Cummings) conveyed it by deed to Julia Johnson, wife of Andrew Johnson, for life, with remainder over, in the following terms: "To Mrs. Julia Johnson, wife of Andrew Johnson, Jr., during her lifetime, and at her death to the bodily heirs of said Andrew Johnson, including Ellen Evers, step-daughter of Andrew Johnson, Jr.," etc. The Ellen Evers mentioned in this clause was a daughter of the conveyee (Julia) by a former marriage, who, though then living, died subsequently, while still young, without issue and intestate. After her death Andrew Johnson and Julia, his wife, made application to the county court of Davidson county for permission to adopt the complainant, Annitta, as their child; and by a judgment of that court duly entered this application was granted. No question is now made upon this proceeding. It is conceded to have conformed to the statute providing for adoption, and to have created the legal relation of an adopting father and adopted child as between Andrew Johnson and Annitta. It is insisted, however, by the defendants, that it had no such effect as between Julia Johnson and Annitta. In 1884 Julia Johnson died, having never had born to her any other child than Ellen. After the death of Julia, Andrew, her surviving husband, joining with one Bradley, a surviving brother of Julia, executed and delivered a deed to the defendant Josephine Johnson, by which they conveyed, or assumed to convey, to her the property in question. Under this deed the conveyee entered into and was holding possession at the time of the institution of this suit. The complainant, Annitta, claiming ownership, filed the present bill, asking that

this deed be canceled as a cloud upon her title, and that she be placed in possession of the house and lot. This claim of complainant is rested upon two grounds: (1) That as the result of the adoption proceedings she was placed in the class of remainder-men provided for in the Cummings deed,—that is, she had become a "bodily heir" of Andrew Johnson, and, being the only such heir, took the whole estate at the death of Julia; and, if wrong in this, then (2) she insists that this deed created in Ellen Evers a vested transmissible remainder interest, which, when she died intestate and without issue, passed to her mother, Julia, and, upon the death of the latter, to complainant as her child and heir by adoption. These claims are controverted by the defendants as unsound in law, and in addition they plead that in a former suit, instituted in a court of competent jurisdiction, to which complainant, Annitta, was a party, and in which the same questions were presented as in the present bill, it was decreed complainant had no interest in this property, and that decree is relied upon as an estoppel in this case. Adverse possession of seven years is also set up as a defense. In the progress of the cause a jury was demanded and issues were prepared; but the chancellor refused a jury and dismissed the bill upon two grounds: (1) That complainant, Annitta, took nothing under the deed, as she was not a bodily heir of Andrew Johnson; and (2) that she took nothing by descent from Julia Johnson, because the latter, being a married woman, lacked legal capacity to avail herself of our statute providing for adoption. From this action the complainant appealed. The court of chancery appeals, disagreeing with the chancellor as to the latter ground, reversed his decree of dismissal and has remanded the case, in order to a trial of the issues raised by the plea of *res adjudicata*. The decree of the latter court is now complained of by the defendants.

1. We are satisfied that complainant, Annitta, does not fall within the class of remainder-men provided for in the Cummings deed. The effect of the act of adoption, so far as Andrew Johnson and Annitta are concerned, was to confer upon her "all the privileges of a legitimate child," so far as he was concerned, "with capacity to inherit and succeed" to his real and personal estate as heir and next of kin; but it did not, and in the nature of things could not, make her a "bodily heir." These terms thus in the deed are the exact equivalent of the words "heirs of the body," and have been held to make an estate tail, which, under the statute, is converted into an estate in fee. *Middleton v. Saldith*, 1 Cold. 144. As was said in *Com. v. Nancrede*, 32 Pa. St. 339: "Giving an adopted son a right to inherit does not make him a son in fact, and he is so regarded in law only to give the right to inherit." Or, as the court said in *Shafer v. Eneu*,

54 Pa. St. 304: "The right to inherit from the adopting parent is made complete, but the identity of the child remains. One adopted has the right of a child without being a child." So in the latter case it was held that adopted children could not take under a devise to trustees for the sole and separate use of a married woman for life, and on her death the property to be conveyed to her children and the heirs of her children, forever. Like limitations have been imposed upon the rights of children by adoption in *Russell v. Russell*, 84 Ala. 48, 3 South. 900, in *Bowdlear v. Bowdlear*, 112 Mass. 184, in *Wyeth v. Stone*, 144 Mass. 441, 11 N. E. 729, and in *Jenkins v. Jenkins*, 64 N. H. 407, 14 Atl. 557. All these cases involved questions very similar to the one at bar.

2. We are equally satisfied that the deed created a vested transmissible remainder in Ellen Evers, which by operation of law would open up, so as to let in after-born "bodily heirs" of Andrew Johnson, Jr. (Tied. Real Prop. § 402; 2 Washb. Real Prop. p. 511; *Bridgewater v. Gordon*, 2 Sneed, 5; *Harris v. Alderson*, 4 Sneed, 250; *McClung v. McMillan*, 1 Heisk. 655; *Cathay v. Cathay*, 9 Humph. 470; *Puryear v. Edmondson*, 4 Heisk. 43; *Whitman v. Young*, 1 Tenn. Ch. 586; *Havergal v. Harrison*, 7 Beav. 49), and that upon the death of Ellen intestate and without issue, and also without brothers and sisters, or their issue, her interest in the property passed to her mother, and upon the latter's death, under the laws of descent, to complainant Annitta, if as a matter of law she was adopted by Julia Johnson. The question, then, is: Under our statute, can a married woman, joining with her husband, legally adopt a child? Shannon's Code, § 3409, providing for adoption, is as follows: "Any person wishing to adopt another as his child shall apply by petition, * * * setting forth the reasons therefor and the terms of the aforesaid adoption." This section is taken from section 2 of chapter 338 of the Acts of 1851-52, in which it is provided that the county or circuit courts "shall have concurrent jurisdiction and power to authorize any person to adopt any child or children as their own, upon application or petition." In the original act, as well as in the Code section, it will be observed that this right to resort to the courts for the purpose of being empowered to adopt another is conferred on "any person." Under the broad power thus given, no reason in public policy or resting on any sound rule of construction has been suggested why a married woman, acting conjointly with her husband, should be deprived of the benefit of this provision. It is true that in the Code the masculine pronoun "his" is used, but we do not think that by so doing the legislature intended to make a departure from the liberal scheme provided in the original act, within the general and literal terms of which married women were included. Not only is it well settled

that, in construing the sections of the Code, the original acts from which these sections are taken may be looked to for guidance (*Bates v. Sullivan*, 3 Head, 633; *Hospital v. Fuqua*, 1 Lea, 611; *White's Creek Turnpike Co. v. Davidson Co.*, 14 Lea, 73), but it is expressly provided that "words importing the masculine gender include the feminine and neuter" (Shannon's Code, § 62). In addition, under such a construction, a wise policy is subserved. The purpose of the statute was to give the sanction of the law to the formation of new family relations between persons not necessarily of the same blood, in which the interests as well as the feelings of the husband and wife are intimately involved; and there is therefore manifest propriety in the wife uniting with her husband, as by so doing the adopted child is made to assume the same relation to her as to her husband, and occupies "in a general sense the same position in the family which it would if it were the natural child of both, born in lawful wedlock." This view, in construing statutes very similar, has been expressed by the supreme court of Indiana in *King v. Davis*, 87 Ind. 590, and *Markover v. Krauss*, 132 Ind. 294, 31 N. E. 1047, 17 L. R. A. 806, and by that of California in *Re Williams' Estate*, 102 Cal. 70, 36 Pac. 407. We therefore agree with the court of chancery appeals in its conclusion that the effect of the adoption proceedings instituted by Mr. and Mrs. Johnson was to make the complainant, Annitta, for the purpose of inheritance from them, the child of each and both, and that, upon the death of Andrew Johnson "without bodily heirs," she became entitled to the whole estate. This being so, it follows that she has a right to maintain this bill, unless it be that she is estopped by the decree set up as a bar against her by the defendants, or is precluded by some other act which would constitute a sufficient defense thereto. These matters of defense the parties have a right to have submitted to a jury, as was demanded in the court below, upon issues properly framed. To this end the cause was remanded by the court of chancery appeals, and the decree of that court is in all things affirmed.

ALLEN et al. v. DEKALB COUNTY.

(Court of Chancery Appeals of Tennessee.
Dec. 18, 1900.)

BOARDS OF HEALTH—SMALLPOX—EPIDEMIC—COUNTY PHYSICIAN—ABSENCE—EMPLOYING PHYSICIAN—STATUTES—COMPENSATION.

1. Act 1885, c. 95, § 1, declares that the county board of health shall have the management of the health of the county, and institutes such measures therefor as they may think best, and that, when contagious diseases are threatened or exist, they shall carry into effect such regulations as may be prescribed by the state board of health for the suppression of such diseases; and section 2 provides that necessary expenses incurred by the board of health in restricting diseases shall be a county charge. Held, that

where, in the absence of the county health officer, the board employed a physician to take charge of one suspected of having smallpox, and to prevent the spread of the disease, though it did not appear what regulations had been established by the state board, judicial notice would be taken of the fact that the steps taken were necessary, and hence the board had authority to bind the county for the reasonable compensation of the physician.

2. Where a physician agreed with his partner, the county health officer, that in the latter's absence he would attend to his county business, such agreement did not prevent the physician from being entitled to compensation for services performed by him at the request of the county board of health in caring for a smallpox patient beyond the amount allowed by the county court on the ground that he was in fact acting as the county health officer, and hence not entitled to any other compensation, under Acts 1885, c. 95, declaring that the compensation of the health officer shall be such as allowed by the county court.

3. Where, in the absence of the county health officer, the county judge appointed another physician in his place owing to a threatened epidemic of a dangerous disease, such action did not render the physician the county health officer; the judge having no authority to make the appointment.

4. Act 1885, § 5, declares that the compensation of county health officers shall be such as the county court shall fix; and section 6 provides that the health officer shall render medical attention to patients of the county confined therein awaiting trial, or who are under conviction by the courts of the county. *Held*, that the provision as to compensation referred only to the particular services mentioned, and hence a county health officer was not bound by the amount fixed by the county court for his services in taking care of a smallpox patient, establishing quarantine, etc.

5. Where it was suspected that a case of smallpox existed in a county, and the county board of health employed a physician to take charge of the patient, and prevent the spread of the disease, the fact that the compensation he was to receive was not agreed on between him and the board at that time was no defense to an action by him for reasonable value of his services.

6. In the absence of the county health officer the board of health employed a physician to take charge of a smallpox patient and to prevent the spread of the disease. In an action by the physician against the county for his reasonable compensation, nine physicians fixed the value of his services at \$500. It appeared that his earning capacity prior to taking charge of the case was at least \$150 a month; that he gave to the case 30 days' time, and rendered efficient services; that his business fell off for the 24 days immediately after the discharge of the patient, as compared with his business before he took charge, at the rate of \$116 a month, and that he lost some patients permanently; and physicians testified that it was proper, in diseases of such character, that the element of danger should be taken into consideration. *Held*, that a finding that \$500 was the reasonable value of plaintiff's services was proper.

Appeal from chancery court, Dekalb county; T. J. Fisher, Chancellor.

Suit by L. D. Allen and others against Dekalb county. From a decree in favor of plaintiffs, defendant appeals. Affirmed.

Eaton & Wade, for appellant. Webb, Cantrell & Gothard, for appellees.

BARTON, J. As now before us, this case involves a question as to the liability of the

county of Dekalb to Dr. Allen for services rendered by him in treating a smallpox patient in Dekalb county, and other services rendered in preventing the spread of the smallpox from this patient. As originally filed, the bill was brought in the name of L. D. Allen, W. B. Foster, and M. L. Bonham, the board of health of Dekalb county, and for the use of L. D. Allen and W. L. Estes, all residents of Dekalb county, against the county. The bill alleged that on March 26, 1900, the complainants, L. D. Allen, W. B. Foster, and M. L. Bonham, constituted the board of health for Dekalb county, Tenn., and about that date and prior thereto the smallpox had broken out in Smithville, and complainant Allen was employed by the board as physician and medical attendant during the smallpox epidemic, and that as such he attended the patient, Lesley Mitchell, and furnished his services, skill, medicine, attention, etc., and treated the smallpox then existing at Smithville under said employment, and underwent great risk of danger and loss of practice on account of said employment, services, etc.; for all of which he was reasonably entitled to \$500, in addition to \$6.94 for expenses, already paid to him. He says this account was presented to the county court at its July term, 1900, and payment of the same was refused. The bill further alleges that the board of health took and used the house of B. L. Estes for the smallpox patient, for which he claimed and was entitled to the sum of \$112.50, which the quarterly court refused to pay, or make an appropriation to pay; that A. J. Goodson and family were put under quarantine by said court, and kept there for 17 days; and the county court aforesaid failed and refused to pay all the expenses incurred by said board to said Goodson, as required by law, and that there is about \$50 due him under the law, not paid to him. The bill further says: "Your complainant L. D. Allen being president of the board of health, brings this suit in the name of himself individually and as president of the board, and in the names of W. B. Foster, county clerk, and M. L. Bonham, county judge, members of said board of health, and not in their individual rights, for the use and benefit of complainant L. D. Allen, for the purpose of recovering the \$500 aforesaid, which he charges to be reasonable compensation for what he did under his said employment by said board; and that the suit was brought in the name of the board, for the use of B. L. Estes and J. H. Goodson, for all of said amount sued for and sought by this suit, being necessary expenses incurred by said county board of health in the suppression and restriction of the smallpox epidemic in Dekalb county." After the bill was filed, the county filed a demurrer and answer. But, in order to narrow the discussion and consideration of this case, we should state that, prior to the filing of the answer, W. B. Foster, who was

named as one of the complainants, and a member of the board of health, presented an order directing that the cause be dismissed so far as he was concerned. On August 13, M. L. Bonham, county judge, also presented an order, which says: "In this cause I decline to prosecute the same in any manner, and direct the same, as to me, to be dismissed." On the hearing of the case the chancellor decreed that, so far as the compensation due or claimed to be due to B. L. Estes was concerned, he was entitled to nothing more than the county had tendered and offered to pay him, and dismissed the bill as to him, or as to the recovery sought for his benefit; and from that portion of the decree there was no appeal. So the case is narrowed down really to a suit by Dr. L. D. Allen individually, and who claims to be president of the county board of health, for services for compensation rendered by him in the matters above mentioned, and we need consider the case alone in this light.

The demurrer to the bill sets out the following causes: (1) That the cause cannot be maintained in the name of L. D. Allen and B. L. Estes, they being separate and independent causes of action. (2) That L. D. Allen could not maintain this suit, because under Acts 1885, c. 95,—the only law on this subject,—the board of health had no power or authority to employ a physician and medical attendant during the smallpox epidemic. (3) That the compensation provided by law for jail physicians and county health officers is committed to the sound discretion of the quarterly courts, and no court has any jurisdiction to review the action of that court, except by mandamus to compel an appropriation. (4) That the complainant Allen had no right in law to maintain this suit as president of the board of health. (5) That the bill failed to show that said Allen was the duly-elected jail physician in Dekalb county. (6) That the suit could not be prosecuted for mandamus, because not sworn to, and because not brought in the name of the state on relation. (7) Complainant Allen accepted the appointment as jail physician as shown by his bill, and so acted, and that he claims extra compensation for attending a smallpox case, but fails to charge or show that he had a specific contract for the payment of his fees; and that his attendance in said case was part of his duty as jail physician; and that, having accepted said position, he was bound to perform the service, and accept such compensation as was allowed by the county court, which was made. The demurrer was incorporated in the answer, which set out the following defenses: It was denied that L. D. Allen, on March 26, 1900, or since then, constituted any part of the board of health of Dekalb county. It was admitted that on March 26th M. L. Bonham, county judge of said county, attempted to appoint Allen jail physician; but it is said that the appointment was a nullity, there being no

authority conferred upon the county judge to make the appointment, and in fact no vacancy, Dr. T. J. Potter having been duly elected to said position at the January quarterly court of 1900 for the term of four years. It was denied that Allen was employed as physician by the board of health, or that the board of health had any power conferred on them to employ a physician. It was denied that any smallpox epidemic existed in Smithville, but it is admitted that one suspicious case of something existed in Smithville, announced by Dr. Allen to be chickenpox. It was afterwards pronounced smallpox, and after the patient had been removed, the complainant wrapped a sheet around him, and went into the house one time, which was the only attendance on the patient by Allen after the disease was so pronounced. But it was denied that he was entitled to \$500 compensation, or any other amount, against defendant. It was admitted that his account was presented to the county court, and the quarterly court, under and by virtue of section 5, c. 95, of the act of 1885, did allow and appropriate to complainant \$50 for the services claimed by him, thereby exercising the discretion conferred on the court by said act. A certified copy of said order is filed as Exhibit B, and made a part hereof. And it was further said that the court allowed and paid to Dr. T. J. Potter, as jail physician, his bill for the previous quarter. Defendant also answered the allegations as to the claims of Goodson and Estes, which need not now be further considered. It was denied that Allen was president of the board of health, or had any right to bring suit in that capacity. It was denied that Foster, the county clerk, or Bonham, the county judge, had authorized the bringing of the suit. It was averred that the county court had discretion to fix the compensation, if any was due, and that its award and decree were final and binding, especially when not appealed from. Proof was taken, and the chancellor decreed that the complainant was entitled to recover the \$500 sued for, and gave judgment accordingly. The county appealed, and has assigned errors.

The facts in regard to the matter appear to be, as near as we can ascertain them, as follows: At the January term, 1900, T. J. Potter was elected jail physician for the term of four years from the 1st of January, 1900. Dr. Potter and the complainant Dr. Allen were partners. Dr. Potter, under an arrangement with Dr. Allen, had left Dekalb county, and came to Nashville to attend the medical lectures at the University of Nashville. The agreement between Potter and Allen in their partnership matters had been that, if Potter was elected jail physician,—as he was,—that this matter should come under their partnership, and that both of them would attend the business, and share that, as other business, in common. When Dr. Potter went to Nashville it was agreed between them that for

services rendered during Dr. Potter's absence by Dr. Allen he should collect and be entitled to the compensation. When Dr. Potter left, as a matter of fact the jail practice was left in the care of Dr. Allen, and the arrangement between them as individuals was that Dr. Allen should also attend to the duties of county health officer. On March 26, 1900, a man by the name of Lesley Mitchell was taken sick with suspicious symptoms. Dr. Allen and other doctors had been called in, and there was doubt as to the character of his disease, but at first Dr. Allen thought it was a case of chickenpox. Mitchell was in the house occupied as a post office, and occupied by a family named Goodson. Dr. Allen, who, under the arrangement with Dr. Potter, was attending to the duties of county health officer, when suspicion arose as to the character of the disease, as he states, fearing that he did not have the legal right to take such steps as might be necessary to suppress an epidemic of smallpox, consulted with Judge M. N. Smallman, circuit judge, and Attorney General Sutton, and they advised him to go and let M. L. Bonham, county judge, appoint him county health officer, and Judge Bonham, county judge, did appoint him. A copy of this order of appointment is in the record, and is as follows: "It appearing to the court that Dr. T. J. Potter was duly elected jail physician of this county, that he is absent, and that a case of smallpox exists in the town of Smithville, it is ordered by the court that Dr. L. D. Allen, a reputable resident physician of said town, be, and he is hereby, appointed jail physician for the county of Dekalb for and during the time of the absence of said T. J. Potter, and he is clothed with all the powers, privileges, and responsibilities of the said jail physician; whereupon the said Allen appeared in open court, and accepted said position, and entered upon the discharge of his duties." This order the proof shows was made on March 26th, but appears in the minutes of the county judge as of April 3, 1900. Dr. Allen further testifies, and we find no testimony to the contrary, that the county board of health was organized, and, as they had some doubts as to the true disease, he telegraphed to the state board of health for them to send a smallpox expert to come and diagnose the case, and, while waiting for the expert to come, he (Dr. Allen) took such steps as were necessary to prevent the spread of the epidemic if it proved to be smallpox. He says: "I quarantined all that had been exposed to the disease, and letting as few be exposed as possible; and on March 27, 1900, the smallpox expert, Dr. Le Roy came, and diagnosed it a true case of smallpox, and, Dr. Le Roy being a member of the state board of health, he advised with the county board, and all the necessary steps were taken to prevent the spread of the epidemic." He further testifies: "I then secured a house of B. L. Estes, about one mile from town, and secured a

team and Jersey, and carried the patient to the house, and secured and employed an immune nurse to wait on the smallpox patient. I fumigated the room that I moved him from; also enough of clothes and bedding for A. J. Goodson's family to use for 24 hours. I then had them to pull off their clothes, and take a bath, and leave their clothes in that room, and put on fumigated clothes; and then I fumigated the other rooms and remainder of clothes; and then I had the post office moved, and fumigated the room that the post office was moved out of. I got provisions, and employed a man to carry the provisions to patient and nurse. I vaccinated all free of charge that came to me and wanted to be vaccinated; also went to the houses of those that wanted me, and vaccinated them. I seen after those that were quarantined, had them provisions carried to them, and feed for their cow, and done their corresponding for them. I also treated the patient, Lesley Mitchell, while he was quarantined. I sent medicine to him, and from the report of the nurse, when I could not safely send medicine, I then went in person, and seen and examined the patient; and at other times I went and carried medicine to him. While I was visiting the smallpox patient, I used all the necessary precautions to prevent myself and others from taking the disease by putting on an old suit of clothes, and wrapping myself in a saturated sheet of bichloride, and also put on a towel saturated with bichloride, with holes in towel for eyes and nose. Then I came back, and pulled off old clothes, and took an antiseptic bath, and put on different clothes. Many of them that had sore arms from vaccination I treated, and I treated all free of charge that called on me. After I found out that the people were afraid of me, I went in home, and stayed, only when I had to get out and see about the smallpox. I had my provisions brought to the gate, and went and got them. When I had taken this case of smallpox in charge, March 26, 1900, I stopped my practice, and gave the smallpox my whole attention. I had him in charge 30 days; and by the skillful management I prevented the spread of the disease and cured my patient. On April 24, 1900, I secured clothes for Mitchell and Sidney, the nurse, and carried over there, and had each of them take an antiseptic bath, and burn all their clothes and house fixtures they had over there, and then had them come out where I was, and put on the clothes I carried over for them, and then I dismissed them. I incurred considerable risk and loss of practice at that time while treating patient and for some while afterwards." There is no testimony which controverts these statements, and we find these statements of the complainant to be true, and to be facts. The copy of the order of the county judge has been above copied. W. B. Foster, the clerk of the county court, says he acted as a member of the board of health, and that he and Judge

Bonham, as members of the board of health, agreed that Judge Bonham should appoint Dr. Allen in the absence of Dr. Potter as a member, and that Dr. Allen should take charge and look after the smallpox patient and the smallpox epidemic; and that Dr. Allen did act under the directions and connection with the board in manipulating the quarantine and other things done in and about the smallpox epidemic in March, 1900. He says that he suggested the appointment of Dr. Allen, and that Judge Bonham made the appointment. Says that previous to this he had applied to other doctors in Smithville, who declined to take charge of the matter, or to treat the patient suspected of having the smallpox, whereupon it was agreed to secure the appointment of Dr. Allen; that Dr. Allen agreed to take charge of the case and the quarantine measures; that thereupon they telephoned to Nashville for a smallpox expert, who came, and pronounced the case smallpox. Judge Bonham's testimony is not materially different. He was the legally chosen and authorized county judge at that time, and was acting as such. Says he conferred with Dr. Allen and Mr. Foster about the matter, and agreed to appoint Dr. Allen jail physician in the absence of Dr. Potter, and that he should look after the smallpox. He says that he and Foster, the county clerk, agreed on the appointment, and he directed Foster to put down the order; that he and Foster agreed to appoint Allen to look after the matter, and it was understood that he would do what was necessary to prevent the spread of the disease. He says he told Foster for him and Allen to proceed with the epidemic or smallpox trouble, and do whatever was necessary. These appear to be the facts in regard to the appointment. The facts in regard to the services rendered are fully set out in the statements of Dr. Allen, above quoted, except that we may add it is also shown that there was great excitement in reference to the smallpox, and that for some time after his treatment of this smallpox patient Dr. Allen's business fell off. He shows that for 24 days prior to his treatment of this man his books show charges amounting to \$118.95,—this besides the cash collected; that for the first 24 days after he dismissed Mitchell, the smallpox patient, he booked only \$35.05. He had the smallpox patient in charge about 30 days. He filed the statement of some 23 reputable physicians of Dekalb county fixing as their estimate of his services the sum of \$500. The depositions of nine of these physicians were taken, and they all practically agree in their testimony on fixing his compensation at \$500. Their estimates are based on the facts shown in the record as to the time he gave, on the risk incurred, on the loss of practice necessary during his attendance, and on the loss of certain patrons, who in the meantime had secured other physicians. So that, taking all the testimony of these witnesses and the facts into considera-

tion, we are content to agree with the chancellor in fixing the compensation that he is entitled to, if any, at the sum of \$500. We should also state that the proof shows that the case turned out to be a very virulent case of smallpox, and, while the doctor took every precaution, and confesses that he was afraid, yet it is shown that he overcame his fears, and rendered every service necessary, was several times close to the patient to make necessary examinations, and underwent all the dangers incident to such treatment; that his services were so skilled that the patient recovered, and the course that was pursued was such that there was no spread of the disease. So that it appears that the claim of Dr. Allen is in every way meritorious, and the only question that remains is as to the legal liability of the county for the services rendered under the facts and circumstances above found.

The powers and liabilities of counties and county courts and of county boards of health in regard to this matter are provided for and regulated by chapter 95 of the act of 1885. This act, in substance, is as follows: Its title is, "An act to authorize the several counties in the state to adopt more efficient measures of promoting the public health." The first section provides that the county judge or chairman, the county court clerk, and the county health officer are constituted a county board of health, with the jail physician or county health officer as president; that this board of health shall have the management of the general health of the county, and "shall institute such measures therefor as they may think best, and when cholera or yellow fever or other contagious and epidemic diseases are either threatened or exist in their county, it shall be the duty of the county health officer or jail physician to report to the state board of health at once and as often thereafter as they think proper, and the county board shall adopt and carry into effect such rules and regulations as may be prescribed by the state board of health, having for their object a restriction and suppression of such diseases." Section 2 provides that the necessary expenses incurred by said county board of health in preventing or restricting such epidemic diseases as well as for the protection and promotion of the general health of the county are made a county charge, and the county court shall order the payment of the same out of the funds of the county. Section 3 makes it a misdemeanor for any person to violate the rules and regulations of the board of health having for their object the prevention, restriction, or extinction of epidemic diseases. Section 4 provides that it shall be the duty of the county courts, when there are jails in their counties, at the first quarterly term after the passage of this act, except in such counties where such officers have already been elected, to elect or appoint a jail physician or health officer for their respective counties, whose duty it shall

be to render medical and surgical attention to patients of the county confined therein awaiting trial, or who are under conviction by the courts of the county; and who shall hold office to the following January term of the court, when the successors of all county health officers throughout the state shall be elected by them for a period of four years, and so on quadrennially. Section 5 provides that the compensation to jail physicians or county health officers shall be such as the county court may fix. Section 6 provides that the act shall not be construed as conflicting with municipal boards of health throughout the state. The seventh section is the repealing section, and the eighth section provides that the act shall take effect from and after its passage. Such is the law upon this subject, and we do not find that any of its provisions have been altered or repealed. We do not find any proof in the record as to what regulations have been established by the state board of health. But we may at least take judicial knowledge of the fact that in cases of smallpox a strict and rigid quarantine of the persons affected or exposed is always required. Applying this act to the case in hand, we find that Dr. Potter had been regularly elected at the January term of the county court of Dekalb county as jail physician or county health officer. During his temporary absence the county judge assumed the power of appointing a county health officer or jail physician. We do not find that such power is imposed upon the county judge by law, but we are of the opinion that his action in this matter cuts no figure in this case. It is shown that the two remaining members of the board of health,—county judge and county court clerk,—when this suspicious case was reported to them, immediately took steps to prevent the spread of smallpox; that they conferred with other physicians in Smithville, who refused to act in the matter; and that they then not only endeavored to appoint Dr. Allen county jail physician or county health officer, but directed and authorized him to take whatever measures might be necessary, to take charge of the smallpox patient, and to do everything he thought proper to prevent the spread of the smallpox. Now, here were the only two members of the board of health of Dekalb county who were present and in condition to act. They constituted a majority of the board. Afterwards the remaining member, when he returned, ratified and approved their action, if such ratification were necessary. But this board met, and took action, and section 1 of the act of 1885 authorized the board to take such measures as they might think best when cholera, yellow fever, or other contagious and epidemic diseases either threatened or existed in their counties, and to adopt and carry into effect such rules and regulations as might be prescribed by the state board of health, having for their object the restriction and prevention of such diseases. Now here was a suspected case of

smallpox, which, on investigation, turned out to be a genuine case of smallpox, so that a contagious or epidemic disease was threatened and existed at the time in Dekalb county. In such case the board is given broad and ample powers and discretion by the act of 1885 to act, and we are of opinion that the action of the county judge and county court clerk, acting as a county board of health, was within the lines of their powers conferred by the act of 1885, and that in fact they were in duty bound to act, and they were fully authorized and empowered to take whatever measures might be deemed necessary to prevent the spread of this disease. Counsel appear to misapprehend the terms used in the act. The act does not restrict the board of health to action only during the existence of an epidemic, but authorizes and requires them to act whenever cholera, yellow fever, or other contagious and epidemic diseases are either threatened or exist in their counties. We do not mean to be understood as holding that the existence of a single smallpox case in a county constitutes an epidemic in that county, as some of the physicians in this case have testified. But it is clear that smallpox is one of the diseases mentioned in the act as contagious or epidemic diseases. It belongs to that class of diseases which, unless restricted and prevented by vigorous measures, becomes epidemic, and it was to prevent the spread of just such diseases that the act of 1885 was passed; and we are, therefore, of the opinion that the employment of Dr. Allen by the county board of health was both proper and necessary. He appears to have taken the most vigorous and wise precautions to prevent the spread of the disease by a strict quarantine of the affected patient and of those who had been exposed, and by the fumigation and disinfection of all buildings and clothing which had been exposed to the contagion. As above seen, the second section of the act provides that all necessary expenses incurred by the board of health in preventing or restricting such epidemic diseases are made a county charge, and the county court is directed to order their payment, and this, in our opinion, fixes upon the county a liability for all reasonable expenses and charges incurred in this matter by the action of the county board of health, and we are, therefore, of the opinion that the county, by reason of Dr. Allen's employment, which, as we say, was wise and necessary, became liable to him for reasonable compensation. It is said, however, that it was his duty to render these services as county jail physician or county health officer. In the first place, it is to be noted that he was not county jail physician nor county health officer. It makes no difference that he agreed with his partner, Dr. Potter, who was the county jail physician, to do the county business during his absence. Private agreements cannot be recognized as substituting one individual, who has not been duly elected

and chosen for a public officer, for another, who has; and we are also of opinion, as above stated, that the action of the county judge in appointing Dr. Allen was of no validity, because no such power is given to the county judge to make an appointment of this character. But, even if it be conceded—which we think it cannot be—that Dr. Allen was either de facto or de jure at that time county jail physician or health officer, the law imposes no such duties upon that official as he was called upon to discharge in this case. The only duty that is required of a county jail physician as such by the act of 1885, which provided for his election, is as follows: "Whose duty it shall be to render medical and surgical attention to patients of the county confined therein awaiting trial, or who are under conviction by the courts of the county." Section 4. This section plainly prescribes the duties of the county jail physician. The jail physician, just as the county judge and the county court clerk, becomes ex officio health officer. But the services for which a salary or compensation is to be fixed by the county court for him is in his capacity as county jail physician, whose duty, as we have seen, it is to render medical and surgical attention to patients of the county confined awaiting trial, or who are in jail under conviction by the courts of the county. Certainly, it could not be said that the county court clerk or the county judge, simply because they are ex officio members of the county board of health, are required to act as guards, or quarantine officers, or nurses, or in other like capacities during epidemics of yellow fever, cholera, smallpox, and the like. It is the duty of these three gentlemen, who thus become ex officio members of the county board of health, to meet as such, and devise means to protect the health of the county, and then that they are authorized to employ such men and measures as may be necessary to carry out these purposes. Such is the clear meaning of this act. And we take it that, if the county jail physician or health officer should be required to give his time and attention during such an epidemic to the suppression of a disease, he would be entitled to compensation for such time and attention aside from his salary fixed by the county court as compensation to him for services rendered as county jail physician. But, whether this be true or not, we are of opinion that Dr. Allen was not county jail physician, but that he was legally employed by the county board of health, and thus became entitled to compensation for his time and services, which became a county charge. It is insisted, however, that this record shows that he presented a claim to the county court, and that the county court refused to allow anything beyond the sum of \$50, and that this sum was decreed to him, and has been tendered him; and that from this order and decree of the county court there has been no appeal or writ of error prosecuted; and it is

earnestly insisted, therefore, that this order and decree of the county court was final and binding, and it is insisted that the act of 1885 gives the county court exclusive power to act upon such claims. It is true that the second section of this act says such claims are made a county charge, and that the county court shall order payment of the same; but that section does not provide that the county court is given any power to adjudicate or pass upon the merits and amount of any such claim presented in a final and conclusive way. It is true that section 5 says that the compensation to jail physicians or county health officers shall be such as the county court may fix, but this provision refers to the salary to be fixed for the county jail physician for attending to the duties named in the next section just above,—that is, attending patients who are in jail,—and has no reference to claims of this character.

It is next said that the complainant cannot recover because there was not a specific contract between him and the county board of health in relation to these matters. There was a specific contract to the effect that he should do everything that might be proper and necessary for the suppression of the disease, and this he appears to have done. But we suppose that the point intended to be made by counsel is that the exact amount of his compensation should have been agreed upon beforehand, but we know of no law to this effect. In fact, it would have been a very difficult matter to have provided for, because at the time of his first employment it was not certainly known that the case was a genuine case of smallpox. There was at that time no way to tell how severe the case might be, nor how long the doctor's attention and time would be required. Besides this, it appears that the board of health had consulted other physicians, and that they could get no one else to take charge of the matter. But, in any event, we know of no provision of law which requires that in a case of this kind the exact compensation should be agreed upon beforehand.

Upon the whole case we are of the opinion that there is no merit in any of the errors assigned, and that the decree of the chancellor should be affirmed, with costs.

On reflection we deem it proper to add a few facts and considerations in regard to the amount of compensation allowed Dr. Allen. We have given the estimates of nine reputable physicians who were examined, and who fix the compensation, on the facts presented by the proof of Dr. Allen, at \$500. In addition to this, the proof shows an earning capacity upon his part prior to his taking charge of this case of at least \$150 a month. He gave to the case 30 days' time. Besides the treatment in the case, he rendered most efficient services in the quarantine and disinfecting matter. He shows by figures given that his business fell off for the 24 days immediately after the discharge

the patient, as compared with the 24 days before he took charge of the case, at the rate of about \$116 a month. This would make his actual loss shown by positive figures at least \$266.20. He further testifies, without giving figures, that there was also a loss in subsequent months, and that some patients he had lost permanently. These facts are to be taken into consideration. Besides this, the physicians say that it is customary and proper in diseases of this character, where there is great danger from contagion, that the element of danger should be taken into consideration in fixing the rate of compensation; and, in our opinion, this is also proper. Aside, however, from the element of danger, we do not think that \$500, all the facts in the testimony being taken into consideration, would be an exorbitant charge. Taking the element of danger into consideration, in our opinion the amount of \$500 is a low and reasonable charge. For these reasons the decree of the chancellor will be affirmed, with costs.

NEIL, J., concurs.

Affirmed orally by supreme court, December 22, 1900.

MASON et ux. v. WILLHITE et al.

SAME v. COOPER et al.

(Court of Chancery Appeals of Tennessee.
Nov. 8, 1900.)

NOTES—OWNERSHIP—EVIDENCE—TRANSACTIONS WITH ONE DECEASED—OBJECTIONS—PRESUMPTIONS.

1. The cross-examination of a witness whose direct testimony was incompetent, being taken by deposition before hearing, does not render the testimony competent; proper objection being taken thereto at the hearing.

2. Where the suit was on notes executed by an administrator in the lifetime of his decedent, which, the plaintiff claimed, had been given her by her deceased mother, it was proper to allow her to testify that she had been claiming and holding them as her own since a time when her mother visited her.

3. It was not competent for plaintiff to testify as to statements made to her by her mother as to the gift of the notes.

4. Plaintiff claimed to own the notes sued on by gift from her deceased mother. At the time of her mother's death, in another state, plaintiff was in possession of the notes, and testified positively as to the gift. As to certain of them, plaintiff's son testified that he had asked his grandmother for them, and been told by her that she had given them to plaintiff. As to another note, it appeared defendant wrote the mother that he was ready to pay some on the note, and she replied that plaintiff had the note, and it should be paid to her, and she would arrange for defendant to pay it. There was other evidence showing the claim of plaintiff. Held sufficient to establish a gift to plaintiff.

Appeal from chancery court, White county; W. T. Smith, Chancellor.

Suits by E. Mason and wife against Sallie Willhite and others and against N. P. Cooper and others. From a decree in favor of plain-

tiffs, defendant W. S. Willhite appeals. Affirmed.

Adcock & Story, for appellant. Snodgrass & Faucher, for appellees.

BARTON, J. These suits were brought by the complainants to collect certain notes, and to assert their right of ownership thereto. The cases, involving similar issues, were consolidated and heard together. The real question in the case is one of fact, and is whether Mrs. Julia A. Randolph in her lifetime gave to the complainant Mrs. J. T. Mason the notes in question. The first bill was filed by E. Mason and wife, J. T. Mason, against Sallie Willhite and Sampson Willhite, on February 20, 1899. This bill alleged that the defendants Sallie Willhite and Sampson Willhite were indebted to the complainant J. T. Mason in the sum of \$192.80, and accrued interest, on a note for that amount dated June 15, 1896, due one day after date, and made payable to J. A. Randolph; and it was averred that the note was given and transferred by J. A. Randolph to the complainant Mrs. Mason, and that she was the legal owner of the same. It was further averred that the defendant Sampson Willhite had procured himself to be appointed administrator of the estate of Julia A. Randolph, who had died on June 14, 1899, in the state of Arkansas, where she then lived. It was charged that said appointment was illegal, because at the time of his appointment there was no asset belonging to her estate in Tennessee; that she was a resident of Arkansas at the time of her death, and at the time of the appointment of the alleged administrator there were no assets belonging to the estate, and no debtor of the deceased lived in the county, or no debtor of a debtor of the deceased; that there was no suit to be brought or prosecuted and defended in the county in which the estate was interested, and that there was no ground or reason for the appointment of the administrator, and that the county court of that county did not have jurisdiction to appoint an administrator; that the defendant Sampson Willhite had procured himself to be appointed administrator in order to defeat the collection of the note sued on and two other notes,—one against L. P. Cooper and T. A. Hennessie for \$55, and another against T. A. Hennessie for \$75; that these notes had been given to the complainant by her mother, Julia A. Randolph, before her death, and transferred by delivery. The defendants demurred to this bill (1) on the ground that it was multifarious; (2) on the ground that Sampson Willhite, the administrator, was a necessary party, and was not sued as administrator; (3) that the bill showed that Sampson Willhite had been appointed administrator of the estate of Julia Randolph, deceased, and that the jurisdiction of the county court in such matters was final, original, and exclusive, and could not be reviewed by the chancery court.

Another demurrer was filed on the ground that the bill was multifarious for nonjoinder of parties. The demurrer was overruled, and the defendants answered, and filed a cross bill, seeking to recover the ownership and control of the note, and substantially denying all the allegations and equities of the bill of complainants. The second bill was filed by R. Mason and wife, J. T. Mason, against L. P. Cooper and T. A. Hennesse. In this bill the complainants allege that Mrs. J. T. Mason is the owner of one note for \$55, dated March 28, 1895, with small credits indorsed thereon, signed by L. P. Cooper and T. A. Hennesse, payable to Mrs. Julia Randolph, and also of one other note, signed by Cooper and Hennesse, who are also parties defendant, dated March 29, 1895, for \$75, with a credit of \$25 indorsed upon it. It is alleged in the bill that both of these notes were given to the complainant Mrs. Mason by her mother, Julia A. Randolph, in her lifetime, and were assigned by delivery at the time of her last visit to Tennessee. Similar allegations were made as to the appointment of Sampson Willhite administrator, but he was not at first made a party. Afterwards complainants were permitted to amend the bill, and he was made a party to the last bill. Sampson Willhite demurred to this bill, and also filed an answer and a cross bill, in which he relied upon and charged the validity of his appointment as administrator, and sought to recover the notes in question. He also filed a similar cross bill in the first case above mentioned. Mason and wife answered both cross bills. Proof was taken, the cause heard, and the chancellor decreed that the complainants were the owners of the notes, and gave judgment accordingly. From this decree the defendant W. S. Willhite appealed, and has assigned errors.

We should further mention that on the trial of the case the defendants excepted to the testimony of the complainant J. T. Mason in so far as she testified to the transactions with and statements by the deceased, Julia A. Randolph. The exceptions were sustained, and the evidence excluded. But, by special order of the court, in lieu of a bill of exceptions the entire testimony was retained in, and made a part of, the record.

One issue of fact, in our opinion, is conclusive of the entire case. We do not deem it necessary to go into a discussion of the question as to whether the appointment of Willhite as administrator was invalid on account of want of jurisdiction in the county court or not, or into the question whether this court could inquire, under a bill filed in the chancery court, of this character, into the jurisdiction of the county court. The attack made upon the appointment of the administrator is that the county court of White county had no jurisdiction, because Mrs. Julia Randolph, the deceased, died a resident and citizen of Arkansas, and that there were no assets belonging to her estate

in White county to be administered. If we shall find as a fact that the notes in this case were not given to the complainant Mrs. Mason, then there were assets, and the county court unquestionably had jurisdiction to make the appointment. On the contrary, if we shall find that the notes were given to the complainant Mrs. Mason by her mother during the lifetime of the latter, then she is entitled to recover them, and it is immaterial whether the defendant Willhite was properly appointed as administrator or not. So we content ourselves with passing upon this one question of fact, which, as we say, is conclusive.

After a careful study of the evidence in the case, we have come to the conclusion that the evidence justifies the finding of the chancellor that the notes were given to the complainant. In the first place, it is to be said that she was found in possession of the notes at the time of her mother's death, she having died in Arkansas; and possession itself is presumptive evidence of ownership. The complainant herself positively testifies that her mother gave her these notes. This testimony was excepted to. It is insisted in behalf of the complainant that the evidence is now admissible, because on cross-examination Mrs. Mason was requested and required by the defendants to testify as to the exact words of her mother. The decree shows that all this evidence was excepted to. The depositions were taken before the hearing, and we take it that a mere cross-examination of a witness whose previous testimony has been incompetent will not make it admissible, if the question is properly raised on the hearing. It was competent and admissible, however, for Mrs. Mason to testify to the fact that she had the notes, and had been claiming them and holding them as her own since her mother's visit in March, 1895, and this she testifies to. Under our statutes, as heretofore construed by our supreme court, we take it that her testimony as to statements made to her by her mother is not competent. But, excluding this, we have the possession of the notes in her, and her claim to them. Further than this, we have, as to the Cooper notes, the testimony of the complainant's son, who asked his grandmother to let him have the Cooper notes, when she told him that she had given them to his mother. The notes all appear to have been handed to her at the same time. As to the Willhite note, it appears that W. S. Willhite wrote to his grandmother Mrs. Randolph that he was ready to pay some on that note. She replied in a letter dated April 10, 1898, which is found in the record, in which letter she said: "Samp, you say you want to pay some on that note. I will fix for you to pay it. Bunt has the note, and pay it to her." It appears that "Bunt" was the name by which Mrs. Mason, the complainant, was known. It is true, this letter can be construed in two ways. The expression, "I will fix for you

to pay it," does indicate some right of ownership or control; but, when taken in connection with the other evidence, we do not understand it to be an assertion of the right of ownership. It would have been an easy and simple matter to have directed him to send the money to her, and she could have directed her daughter to enter the credit; but the direction is to pay the money to the daughter, the complainant in this case. There is other testimony in the record showing the claim of the complainant and the conduct of the parties. But, without going into further discussion in detail, we have concluded that the weight of the evidence is that the notes were given to the complainant by her mother during her lifetime. We, therefore, so find as a fact, and affirm the decree of the chancellor, with costs. All concur.

Affirmed orally by supreme court, December 22, 1900.

ST. LOUIS, K. & N. W. R. CO. v. KNAPP, STOUT & CO. COMPANY.

(Supreme Court of Missouri, Division No. 2.
Feb. 26, 1901.)

EMINENT DOMAIN — CONSTITUTIONAL LAW — CONDEMNATION PROCEEDINGS — INSTRUCTIONS — COMPENSATION — INADEQUACY — MEASURE OF VALUE — BURDEN OF PROOF — COST OF REMOVAL OF PROPERTY — INCONVENIENCE OF OWNER — INJURY TO BUSINESS — DAMAGE TO PERSONALTY — EVIDENCE — INTEREST ON AWARD.

1. Where the land of defendant in condemnation proceedings was much lower than the grade of an adjacent street and of plaintiff's railroad, a change in the level which would render surface crossings over plaintiff's road useful was not so remote as to preclude plaintiff from offering such crossings in mitigation of damages.

2. An instruction in condemnation proceedings that the market value of the property is not to be determined by the value of the strip to the plaintiff, nor the plaintiff's necessity of acquiring it, nor its peculiar value to the defendant, and that these considerations must in no way affect the jury's determination of the property's value, was not error.

3. An instruction to the jury in condemnation proceedings that they could not consider speculative values in awarding damages was not error.

4. Where defendant in condemnation proceedings assumed and was accorded the right to open and close the case in the circuit court, both as to the introduction of testimony and the argument of the cause, and the court at its request instructed the jury that the burden of proving benefits to the land crossed by the plaintiff's railroad was on the plaintiff, an instruction that the burden of proving damages to defendant's land rested on defendant was not error.

5. Refusal to give instructions requested by defendant in condemnation proceedings, which were directly in conflict with other instructions asked by defendant and given by the court in its behalf, was not error.

6. The owner of land in condemnation proceedings was not entitled to the cost of removing lumber from the right of way, or fencing such right of way, or constructing subways thereunder allowed by stipulation, or repiling the lumber, as damages for such condemnation.

7. Where land is condemned by a railroad

company, inconvenience to the owner, injury to his business, loss of profits, damage to personal property, or the expense of removing it is not to be estimated as distinct elements of damages.

8. The words "other property," in Rev. St. § 2734, providing that in case lands or "other property" is sought to be appropriated by any railroad corporation for public use, and the owners and such corporation cannot agree as to compensation, the corporation may apply to the circuit court, etc., have no reference to the words "or damaged," in Const. art. 2, § 21, declaring that private property shall not be taken "or damaged" for public use without just compensation, which latter refer to real estate damaged by appropriation or the manipulation of property appropriated; and damages to personal property or business interests need not be compensated for in condemnation proceedings.

9. St. Louis City Ordinance No. 14,078 provided that the Terminal Railway Company, when required, should connect its tracks with any lumber yard located adjacent to the railway of such company, but that no switches or side tracks should be allowed along or across any street or public highway, unless by authority of the municipal assembly. *Held*, that a requested instruction in condemnation proceedings that such company was obliged by such ordinance to connect its tracks with any lumber yard located on defendant's land, which the company's tracks neither ran through nor touched, being wholly in H. street, was properly refused.

10. Where a railroad's real-estate experts in condemnation proceedings placed the value of certain land at from \$4,000 to \$8,000 an acre, and defendant's witnesses placed the value at \$20,000 an acre, but defendant had purchased the land 18 months before for less than \$5,000 an acre, the jury's award of \$10,000 an acre was not inadequate.

11. Where money was paid into court on the report of commissioners in condemnation proceedings, and turned over to defendant therein, and the amount finally awarded to the defendant was much less than that deposited, and the balance over such award was ordered refunded to plaintiff, the plaintiff had no right to interest on such balance from the time of deposit.

Appeal from St. Louis circuit court; D. D. Fisher, Judge.

Condemnation proceedings by the St. Louis, Keokuk & Northwestern Railroad Company against the Knapp, Stout & Co. Company. From a judgment founded on a jury's award of a smaller amount than defendant claims, defendant appeals. From an order of the court refusing to allow the plaintiff interest on the balance between the amount paid into court by it and the final award to defendant, plaintiff appeals. Both judgments affirmed.

This is an appeal in a condemnation proceeding by the plaintiff, a railroad company, to obtain a right of way over certain real estate in the city of St. Louis belonging to the Knapp, Stout & Co. Company. The jury awarded the Knapp, Stout & Co. Company \$21,500, and from the judgment on said verdict said last-named company has appealed. The original petition was filed on the 22d day of November, 1890. Commissioners were appointed, who filed their report December 22, 1891, awarding to the Knapp, Stout & Co. Company \$44,000 as damages for the appropriation of the land described in the petition

for a right of way. Exceptions were filed to the report, but the \$44,000 was paid into court by the plaintiff railroad company, and possession of the route taken by said company and its track constructed thereon. The exceptions were afterwards sustained on March 11, 1892. On the 14th of October, 1895, an amended petition was filed, substantially the same as the original, except it included a stipulation in reference to the manner in which the railroad company would build its road over defendant's land, in which it gave defendant certain underground crossings from east to west. On the 8th of February, 1897, the plaintiff filed a second amended petition, substantially like the amended petition, but which not only contained the stipulation for the underground crossings, but reserved to the defendant two surface crossings over its right of way,—one in prolongation of Salisbury street, and the other wherever defendant, its successors or assigns, shall designate, "whenever the land of said owner between Hall street and said right of way shall be filled up to the grade now or hereafter established by the city of St. Louis for Salisbury street, and the land of defendant in the east of the right of way shall be filled up to the grade now or hereafter established by the city to be constructed and maintained by the railroad." A motion to strike out the allegations as to the reservations of these surface crossings was overruled, and defendant excepted. The right of way condemned was 50 feet wide through a tract containing 20 acres in the northern part of St. Louis, lying between Destrehan street on the south, Bremen avenue on the north, Hall street on the west, and the Mississippi river on the east, and amounted to a fraction less than 2 acres of land. The defendant was engaged in manufacturing and selling lumber, and was using this 20-acre tract for the purpose of yards for storing its stock. It also owned 3 acres west of Hall street and 10½ acres north of Bremen avenue, which it used in said business. The estimated value of the product it handled yearly was in the neighborhood of \$1,000,000. The right of way was laid out across the eastern part of the 20-acre tract, at a distance of about 400 feet west of the Mississippi river, on which had been the levee, and the right of way extended the whole length north and south of this dike. The main portion of the tract was lower than the grade of Hall street, and was in part protected from the high waters of the river by the levee. In the construction of the railroad in pursuance of the stipulation for subways, the company raised its tracks 3 feet in order to give ample head room for the subways. In addition to raising its tracks, the railroad company put in two 35-foot steel bridges, one at Salisbury street and one at the south of the property, one-half of which was on defendant's land, and one-half on Mallinckrodt's. It also left 14-

foot vents at the north end, giving defendant three underground crossings as agreed in the stipulation. Salisbury street runs through the lumber yard from Hall street to the west line of the wharf. The lumber company maintained a gate across Salisbury street at the Hall street end. While the levee on which the railroad was constructed protected defendant's lumber yard on the east and south sides, in the high water of 1892 it became necessary to build temporary levees up to Bremen avenue and west on Bremen avenue. Prior to the construction of the railroad, the defendant lumber company had cut the levee down at the Salisbury street crossing and at the south side of the property to make roads, and it was on these roads the subways were constructed. In seasons of high water they had to be filled. Various and conflicting estimates were given by the witnesses. The experts in real estate on the part of the railroad placed the value of the land taken at from \$4,000 to \$8,000 an acre; but a fair average of their testimony would be about \$5,000 an acre. About 18 months before the suit was commenced the defendant Knapp, Stout & Co. Company gave \$100,000 for the 23¼ acres. Defendant's witnesses placed the value at about \$20,000 an acre. The theory of defendant was that, in addition to the actual appropriation of the 2 acres, it suffered damage to the remainder by reason of being cut off from access to the river; whereas plaintiff's witnesses gave it as their opinion that the location of the railroad right of way through the lumber yard and the increased switching facilities were a benefit from 10 to 40 per cent. to the portion uncondemned. To reduce this benefit, defendant claimed it had a switch connection at the northern line of its property, connecting with all the railways entering St. Louis, and that on Hall street, west of the property, were the terminal or switching railways of St. Louis Transfer Company and the Merchants' Terminal Railway Company, which were bound to connect with the property; but as to this claim it appeared that the switch connection at the northern line was a Wabash switch, which had been granted to one Schulenberg in violation of the laws of this state, and that no connection could be required of the terminal companies without ordinances of the city permitting it, whereas plaintiff's road could be required to connect, because it was not compelled to cross any street or alley to make the connection with defendant's lumber yard. In ordinary stages of water the defendant could haul its lumber from the landing on the east under plaintiff's railroad; but it insists that in extremely high water the railroad would impede it, because it would not have sufficient space to work in, whereas before its construction the lumber could be taken from the rafts on top of the dike. On the other hand, defendant's witness Mr. Durfee testified that when the river was high the com-

pany could only tie up one raft, because the current was too strong, and that the raft must be a small one. The evidence for defendant not only showed the physical conditions before and after the appropriation of the strip, but the court admitted evidence of estimates of the necessity for, and the cost of, readjusting the business to the yard as changed, and the increased expense of transacting the lumber business as the result of the construction of the railroad. The evidence was that they did as large a business after as before the railroad was built, and the court excluded evidence as to whether the defendant's books showed any increase in expenses. The ordinance of the city was in evidence granting the plaintiff railroad the right to enter the city at its northern limit and to occupy certain streets until it reached Franklin avenue, and requiring it to connect with business establishments by switches. The grade of the western wharf line at the foot of Salisbury street at the top of the curb is 106 feet. Other facts in evidence may be noted in the course of the opinion.

E. S. Robert and John H. Drabelle, for plaintiff. Warwick Hough, Clinton B. Rowell, Joseph H. Zumbalen, and John H. Douglass, Jr., for defendant.

GANTT, J. (after stating the facts). 1. The foregoing summary of the evidence will enable us to grasp the points of controversy between the parties to this proceeding. It is first insisted that the circuit court erred in refusing to strike out of the second amended petition of the plaintiff company the allegation of the reservation of two surface crossings over its projected roadbed and track to the defendant lumber company. The ground of this complaint is that it was an effort on the part of the plaintiff railroad to reduce the damages of defendant by providing for some future possible change in the situation of the ground. This court, in *Railway Co. v. Clark*, 121 Mo. 169, 25 S. W. 192, 906, 28 L. R. A. 751, passed upon this exact question, and ruled adversely to defendant's contention. In that case the same argument now made was pressed upon us, but after the most mature deliberation we held that the condemnation of a right of way necessarily gave the condemning company an exclusive easement over the surface of the real estate condemned; and of the claim now made we said: "We are aware there are cases which seem to hold that to allow a company to reserve a right to the owner of the land, when he does not ask it, is to pay him for the land in something other than money; but it must be evident that such reasoning is not sound. The reservation of the easement being made, the damages are assessed in view of the interest thus retained and not condemned. The company pays for what it needs and takes, and the land-

owner is allowed all the damages which he in fact sustains." And we further held that, "If a condemning company proposed to give such a reservation, it should be done in the original or amended petition." The effort to distinguish this case from that by insisting that the time when a grade crossing will be needed is so remote as to be purely speculative is not founded on the facts. The evidence discloses that the grade for the wharf and for Salisbury street had already been fixed in pursuance of a city ordinance, and at the crossing of the tracks of defendant at Salisbury street was at an elevation of 106 feet. Reaffirming the *Clark Case* and the *Stock-Yards Case*, 120 Mo. 541, 25 S. W. 399, we hold the amendment was properly permitted by the circuit court.

2. The objections to the instructions were all considered in *St. Louis, K. & N. W. R. Co. v. St. Louis Union Stock-Yards Co.*, 120 Mo. 541, 25 S. W. 399, and all the emendations then required by this court in that case were made by plaintiff in this case, and the directions given by this court as to the giving of the instructions numbered 11 and 12 in that case were followed in this case by giving those instructions under different numbers in the language dictated by this court. The circuit court also avoided the form condemned in that case, and instructed separately and distinctly upon each proposition by itself. Having conformed to the specific instructions of this court, that court is not to be convicted of error for so doing. As to the length of the instructions, certainly the honors are even. Specific objection is made to so much of the first instruction as is couched in these words: "The market value of the property is not to be determined by the value of the strip in question to the plaintiff, or plaintiff's necessity of acquiring it, nor its peculiar value to defendant. These considerations must in no way be allowed to affect the determination by the jury of the value of the whole property, or of the strip sought to be appropriated by plaintiff in this proceeding." Certainly this is the law, and this instruction met the approval of this court in the *Stock-Yards Case*, 120 Mo. 541, 25 S. W. 399. It is not argumentative. It is a plain direction to the jury that they must exclude, in their estimate of the fair market value of the land, certain considerations which the law excludes, and which a jury of laymen might otherwise deem to be proper elements of damages. Nor was error committed in instructing the jury that they could not consider speculative values. Moreover, the definition of "market value" is in all its substantial features like that given by the defendant in its own instruction on that subject. A condemning company is not chargeable with speculative values. The rule, when not controlled or modified by statute, is that the damages resulting to the landowner from the exercise of the right of eminent domain by a railroad

company should be estimated as of the date of the taking or appropriation. *Mills*, Em. Dom. § 174; *Pierce*, R. R. 209. To allow a jury to speculate on what city property may be worth at some future day would indeed be "a roving commission." As already said, these instructions were gone over in the *Stock-Yards Case*, the errors then made were pointed out and have been eliminated, and they must be considered settled.

3. The third point for reversal is made in this court for the first time during this proceeding. It is leveled at instruction No. 5, given by the court for plaintiff in these words: "The court instructs the jury that the burden of proving by a preponderance of evidence that the Knapp, Stout & Co. Company has sustained damages, as in the other instructions defined, is upon the Knapp, Stout & Co. Company." In order to fully appreciate this point, it must be borne in mind that in the circuit court the defendant, the Knapp, Stout & Co. Company, assumed and was accorded the right to open and close the case, both in the introduction of its testimony and the argument of the cause. In its behalf the court gave an instruction in these words: No. 1: "The court further instructs the jury that although the plaintiff has by law the right to locate its railway over the property of the defendant, and thereby take its property against its will, the law also declares that private property shall not be taken or damaged without just compensation to be paid to the owner; and what in this case constitutes such a just compensation is a question to be decided by your verdict. In passing upon this question, if the jury find from the evidence that the property is damaged, the jury should allow the defendant: First, for the market value of the property taken as it is taken by the plaintiff, as shown by the evidence; second, for such damages, if any, to the remainder of the defendant's said tract of property, caused by the establishment, erection, and maintenance of plaintiff's railway over the defendant's lands, which they may find from the evidence it has sustained. In ascertaining the value of property as taken in this case, the jury is instructed that they are to determine its fair market value on December 22, 1891; that by the market value of property is not meant what could be obtained for it at forced sale, or at a sudden demand for the sale thereof, but the market value referred to is when the man owning the property is willing, but not obliged, to sell it, and the party to whom it is offered is willing, or desires, to purchase the same, but is not obliged to do so; that, in estimating its value for the purposes of this case, the jury should take into consideration all the capabilities and facilities of the property, and all the uses to which it may be applied or for which it is adapted, having regard, not alone to the existing business wants of the community, but also such uses as may be reason-

ably expected in the near future." In another instruction the court put the burden of proving benefits on the plaintiff. Having assumed and obtained the right to show in the first instance the value of its land taken and the damages to the remainder of the tract not taken, and the court having properly at its request placed the burden of proving the benefits, if any, upon plaintiff, it is now too late to complain of a course which it invited. The point must be ruled against it.

4. The fourth proposition advanced by the lumber company for a reversal is the refusal of the court to give instructions Nos. 1 and 2 asked by defendant, which would have authorized the jury to allow defendant the cost of the removal of lumber from the right of way and from the vicinity of the subways, the cost of fencing off the right of way appropriated, and the cost of constructing the subways and repiling lumber. These two instructions not only conflict with each as to the measure of defendant's damages, but are in direct conflict with those asked by defendant and given by the court in its behalf. Surely the circuit court cannot be convicted of error in refusing to give contradictory instructions for any party to a suit. No such practice has ever been approved by this court. But, waiving this, the said instructions did not declare the law. The cases of *Bridge Co. v. Schaubacher*, 57 Mo. 582, and *Railway Co. v. McGrew*, 104 Mo. 284, 15 S. W. 931, do not sustain defendant because, as was pointed out in *City of Kansas v. Morse*, 105 Mo. 510, 16 S. W. 893, referring to *Bridge Co. v. Schaubacher*, supra, "the question there considered was as to whether defendant could have compensation for damages to property not taken, but used in connection with that which was taken. In discussing the measure of damages, it was assumed, not decided, that the defendant had the right to remove the malt house, horse power, pump, and pipe from the property actually taken; for there was no contest between the parties to the suit on that point." In the *McGrew Case*, this court, at page 287, 104 Mo., and page 932, 15 S. W., says: "The land actually taken was of insignificant value. The damages claimed by defendant, and not controverted by plaintiff, was on account of interruption of the mining business of defendant, the expense of readjustment, and the loss while necessarily engaged in making changes." And in *Railway Co. v. Clark*, 121 Mo. 199, 25 S. W. 192, 906, 26 L. R. A. 751, this court states that the above was the theory upon which the *McGrew Case* was tried. We think it is of the utmost importance that the rule of estimating the damages resulting from the appropriation of land in these proceedings should be uniform. It is the settled law of this court that the measure of compensation and damages in cases in which only a part of a tract is condemned, as in the case at bar, is the market value of the land taken for the

right of way, and the damages to the remainder by reason of the railroad running through it, less any benefits that are peculiar to the tract of land arising from the running of the road through it. *Bridge Co. v. Ring*, 58 Mo. 491; *Railway v. Waldo*, 70 Mo. 629; *Railroad Co. v. Story*, 96 Mo. 611, 10 S. W. 203; *Railway Co. v. Baker*, 102 Mo. 553, 15 S. W. 64. Injury to business, loss of profits, inconvenience to the owner, damage to personal property, or the expense of removing it is not to be estimated as a distinct element of damages. In other words, this court has again and again held that, when a part only of a man's realty is taken under condemnation proceedings, "the measure of damages is the difference between what was the fair market value of the whole tract or property before, and its fair market value after, the appropriation, in view of the uses to which the land condemned should thereafter be applied." And this is the general rule in most of the states. *Lewis, Em. Dom.* (2d Ed.) § 464; *Braun v. Railroad Co.*, 166 Ill. 434, 46 N. E. 974; *Railway Co. v. Strickney*, 150 Ill. 362, 37 N. E. 1098, 26 L. R. A. 773; *McMahon v. Railroad Co. (La.)* 6 South. 640. Numerous English cases have been cited by counsel for defendant, but it is sufficient to say that the act of parliament differs materially from ours, in that it allows, not only "full compensation for the value of the lands taken and used," but "all damages sustained by such owners, occupiers, and other parties by reason of the exercise, as regards such lands, of the power of eminent domain." 8 & 9 Vict. c. 20, § 6.

In this connection it is proper that we should consider the position of the learned counsel that the addition of the words "or other property" has modified the old rule in this state. An examination of the statute (section 2734, Rev. St. 1889) will disclose that, with the exception of these words, it is in all respects the same as it was prior to the adoption of the constitution of 1875. We think it is clear that these words in this section had no reference to the words "or damaged" inserted by the convention in section 21 of article 2 of our constitution. No doubt can exist as to the purpose of the words "or damaged." It was not to add new elements to the "just compensation" guaranteed by the constitution when private property was appropriated for public use, whether the whole or a part only was taken; for, if the position assumed by counsel is correct, it would justify consequential damages when the whole is taken, as well as when a part only is appropriated. The history of this change in our organic law is so well known that it seems to be a work of supererogation to again repeat it. Prior to the adoption of the constitution of 1875, this court had uniformly ruled, except in a single case, afterwards overruled, that any damages resulting to an abutting owner from a change of grade of his street by a municipal-

ity was "damnum absque injuria," for which the municipality was not liable, unless the injury could be shown to have resulted from the negligent performance of the work. Such being the law, the convention deemed it inequitable, and inserted these words "or damaged," so as to provide compensation when property was damaged, though not taken, under the circumstances just mentioned. In *Hickman v. City of Kansas*, 120 Mo. 110, 25 S. W. 225, 23 L. R. A. 658, after referring to the old rule, this court, through Brace, J., said: "To uproot this doctrine and provide for compensation when property is damaged, as well as when it is taken, for public use, the eminent domain clause in the constitution of 1865 was amended by the constitution of 1875 to read as quoted; and since it has been considered the settled law in this state that when property is damaged by establishing the grade of a street, or by raising or lowering the grade of a street previously established, it is damaged for public use within the meaning of the constitution." Prior to the above decision, this court, in the case of *State v. City of Kansas*, 89 Mo. 34, 14 S. W. 515, after holding that the rule of just compensation established by the courts under the constitutions of 1820 and 1865 had not been changed by the constitution of 1875, construes the amended instrument in the following language: "It may also be observed that, while the constitutions of 1820 and 1865 only allowed just compensation for private property taken for public use, the constitution of 1875 provided that it should neither be taken nor damaged without just compensation. The addition of the word 'damaged' was evidently designed to provide for a class of cases like the case of *City of St. Louis v. Gurno*, 12 Mo. 414, where a party whose property, though not taken, was damaged for public use, was held to be without remedy or redress; and it is to this class of cases that the words above considered in the second sentence in section 21, art. 2, of our present constitution, peculiarly apply." Nothing more need be added to emphasize our opinion that the addition of the words "or damaged" was not intended to, and did not, affect the rule of compensation in condemnation proceedings, in which either the whole or a part of a piece of property is taken for public use. That rule is the same as to property actually taken, in whole or in part, just as it was before the adoption of the constitution.

5. Error is also assigned upon the refusal of defendant's instruction No. 3: "The court instructs the jury that by the provisions of ordinances numbered 14,078 and 15,713, given in evidence, the Merchants' Bridge Terminal Railway Company must connect by switches and sidetracks its main tracks in Hall street to and with any warehouse, factory, store, lumber, coal, or stock yard, or any commercial or manufacturing establishment, of any individual or corporation located upon defend-

ant's tract of land; but the jury are instructed that such switch tracks cannot cross the plaintiff's railroad as extended over the property of the defendant." Ordinance No. 14-078 provides that the Terminal Company "should, when required, connect its tracks, by switches and side tracks, with any other railroad, depot, warehouse, factory, store, lumber, coal, or stock yard, or depot yards, or any commercial or manufacturing establishment, located adjacent to the railway of said company, but that no switches and side tracks should be allowed along or across any alley, street, or public highway, unless authority be granted by the municipal assembly." The evidence clearly established that the tracks of the Terminal Company are wholly in Hall street, and nowhere touch or run through defendant's 20-acre tract. In *Railway Co. v. Clark*, 121 Mo. 169, 25 S. W. 192, 906, 26 L. R. A. 751, the railroad was adjacent to Clark's land, no street or alley intervened, as does Hall street between defendant's land and the Terminal Railroad, and by the very terms of the ordinance the Terminal Company is not required to connect with defendant's lumber yard, when a street, alley, or other highway intervenes, without authority of the municipal assembly. As no such authority had been obtained, the instruction obviously drew the unwarranted inference, and the court properly refused it.

6. As to the point that the damages (\$21,500) were inadequate, it remains only to say that the question was submitted to the jury under proper instructions, their verdict has met the approval of the circuit court, and so far as we are able to judge the jury awarded defendant no insignificant sum for less than two acres of land in a sparsely-settled portion of the city. Many of the estimates made were utterly unreasonable. The lumber company bought the land for less than \$5,000 an acre, not exceeding 18 months before it was appropriated; and yet the jury awarded defendant over \$10,000 an acre for the same land. We think the verdict was supported by the evidence, and when this is so the verdict will not be disturbed, as it was the province of the jury to pass on the credibility of the evidence and estimate the damages. The judgment in favor of defendant for \$21,500 is affirmed.

The cross appeal of the plaintiff from the refusal of the court to allow it interest on the judgment in its favor for the excess of the money paid into court over and above the compensation and damages finally allowed defendant, and which had been paid over to defendant and ordered refunded to plaintiff, presents one question only. Was it entitled to interest on the sum directed to be refunded to plaintiff? It is urged that this court has decided that the owner of land condemned is entitled to interest on his award by the commissioners, and that the rule ought to work both ways. But this is a misapprehension. We held that when the money was

paid into court, and the railroad proceeded to take possession of the land and build its road, the owner was entitled to take down the money, and for that reason was not entitled to interest. We did hold, in *Railway Co. v. Lewright*, 113 Mo. 660, 21 S. W. 210, that the judgment obtained on the trial anew in the circuit court bore 6 per cent. interest, like all other judgments; but that is a different proposition from the one now urged by plaintiff, to wit, that it is entitled to interest on the excess of the award over and above the amount finally awarded to defendant from the time defendant took down the money. Interest in this state is allowed by statute. No statute allows interest under circumstances like those presented here. The land of defendant was seized in invitum. The law required the money to be put up for its protection while its land was put in possession of plaintiff. Extraordinary power was conferred on plaintiff, and, while it has been compelled to lie out of the use of its money pending the settlement of the amount it should pay, it is simply the price which the statute requires, and no default is traceable to defendant. There never was a time when it was in default until the final judgment was rendered requiring it to refund, and then plaintiff appealed. We are clear that plaintiff is not entitled to interest as claimed, and the judgment must be affirmed on that branch of the case also; and it is so ordered. All concur.

SHORT v. STATE.

(Court of Criminal Appeals of Texas. Feb. 27, 1901.)

CRIMINAL LAW—CONFESSION OF ACCOMPLICE—ADMISSIBILITY.

After the arrest of defendant and K. for stealing a saddle, K. made a confession, in the absence of defendant, in which he stated where the saddle was placed, and the saddle was then found where K. said defendant had left it. *Held*, that the admission of K.'s confession to prove a charge of burglary against defendant constituted reversible error.

Appeal from district court, Haskell county; P. D. Sanders, Judge.

Dave Short was convicted of burglary, and he appeals. Reversed.

D. E. Simmons, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of burglary, and given two years in the penitentiary; hence this appeal.

There is only one assignment of error that deserves notice, to wit, the admission by the court of the confession of Edmund Kellar, an accomplice of appellant in the commission of said offense. To present the question as made in the court below, we will state that the bill shows Edmund Kellar was concerned with appellant in the alleged burglary, and that in

the commission thereof they stole a saddle, which they carried to the camp where they were living, and, apprehending or fearing detection, they buried said saddle near the chimney. After the arrest of the parties, witness Kellar confessed to the officer in whose custody he was, and, in connection with his confession, told him where the saddle could be found, and in pursuance of said confession the saddle was found buried where he stated it to be. Now, on the trial, witness Kellar testified to all these facts involved in the confession; but, in addition to this, the state introduced J. W. Collins, who, over the objections of appellant, was permitted to testify to the confession made to him by said Edmund Kellar. This was objected to on the ground that the confession was made not in the presence of appellant, and he was in no wise bound thereby, and that, if the proof showed he and said Kellar were conspirators in the commission of the offense, the statement or declaration was made after the accomplishment of the conspiracy, and he was in no wise bound thereby. The court, in explaining the admission of this testimony, says, "The confession was admissible because in pursuance thereof the fruits of the crime were discovered," and that the testimony was corroborative of the evidence of the witness Kellar. If Kellar had been on trial, and it had become a question as to whether the confession made by him without warning was admissible, undoubtedly it would have been rendered admissible, regardless of any warning, on the ground that, in pursuance of such confession, the fruits of the crime, to wit, the stolen saddle, was found. But Kellar was not on trial, and the question is, was the confession of Kellar made to the officer admissible against appellant? We fail to see under what principle or rule of evidence such testimony could be held admissible against his accomplice, Short, appellant in this case. The learned judge says it was admitted to corroborate Short. This fact would not render evidence, which would otherwise be illegal, legal testimony. If the explanation means to state that this confession was an independent fact to corroborate the accomplice, and tending to show the guilt of appellant, then we cannot assent to this; for it was no more than a statement of the accomplice himself, involving his own guilt, and not a statement of an independent fact corroborating the accomplice, and tending to connect appellant with the commission of the offense. But it is needless to argue this question. The testimony was clearly not admissible as against appellant, and was illegal testimony, calculated to injure him. No doubt the jury took the same view of this testimony as taken by the judge, and doubtless regarded it as in some way corroborating the accomplice. We have examined the other assignments, but do not regard them as well taken. For the error of the court in admitting the illegal testimony of Kellar before discussed, the judgment is reversed, and the cause remanded.

WELLBORN v. STATE.

(Court of Criminal Appeals of Texas. Feb. 27, 1901.)

CRIMINAL LAW—RECOGNIZANCE—SUFFICIENCY.

A recognizance which fails to state the amount of punishment assessed against the accused, as required by Code Cr. Proc. art. 887, will not support an appeal.

Appeal from Dickens county court; C. A. McKnight, Judge.

W. H. Wellborn appealed from a judgment of conviction. Dismissed.

D. E. Simmons, Acting Asst. Atty. Gen., for the State.

BROOKS, J. The assistant attorney general has filed a motion to dismiss this appeal because of a defective recognizance, in that same fails to state the amount of the punishment assessed against appellant, as required by article 887, Code Cr. Proc. In *May v. State* (Tex. Cr. App.) 49 S. W. 402, and *Johnson v. State* (Tex. Cr. App.) 49 S. W. 504, and various cases since then, following said decisions, we have held that the statement as to the amount of punishment assessed against appellant is a prerequisite to a valid recognizance, and, in the absence of such statement in the recognizance, it is fatally defective. The motion is sustained, and the appeal dismissed.

ZION v. STATE.

(Court of Criminal Appeals of Texas. Feb. 27, 1901.)

UNLAWFULLY CARRYING ARMS—INSTRUCTIONS—HARMLESS ERROR—BURDEN OF PROOF.

1. A conviction in a prosecution for unlawfully carrying a pistol will not be reversed for errors in the charge with reference to the punishment, where the punishment assessed by the jury is the lowest penalty authorized by law.

2. Where the facts constituting the offense of unlawfully carrying arms have been proved, it devolves on defendant to establish the facts on which he relies for justification.

Appeal from Floyd county court; Arthur B. Duncan, Judge.

A. T. Zion was convicted of carrying a pistol, and appeals. Affirmed.

D. E. Simmons, Acting Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of carrying a pistol, and his punishment assessed at a fine of \$25.

Appellant insists that the court committed an error in instructing the jury with reference to the punishment, the charge of the court being under the old law. See Pen. Code, art. 338. In addition to the fine prescribed, the judge also told the jury they were authorized to imprison appellant in the county jail not less than 10 nor more than 30 days. The jury, however, in assessing the punishment, inflicted a fine of \$25, which is the lowest pen-

ality authorized by law. We fail to see how the charge, though erroneous, injured appellant. Under the authority of *Lovejoy v. State*, 40 Tex. Cr. R. 88, 48 S. W. 520, and *O'Docharty v. State* (Tex. Cr. App.) 57 S. W. 657, which are directly in point, the charge not injuring appellant, this case will not be reversed on this account.

It is further contended that the following instruction was erroneous, to wit: "The jury are further instructed that, if in this case the facts have been proved which constitute the offense as charged, it then devolves upon defendant to establish the facts or conclusions on which he relies to excuse or justify the prohibited act." This charge is in accordance with article 52, Pen. Code, and it has been held that it was not improper for the court to give such a charge in a case for unlawfully carrying a pistol. The statute makes the unlawful carrying a pistol an offense complete in itself, and authorizes certain exceptions to be shown as defensive matter. This is in accordance with the construction placed on the statute in *Lewis v. State*, 7 Tex. App. 567. The judgment is affirmed.

COOK v. STATE.

(Court of Criminal Appeals of Texas. Feb. 27, 1901.)

DISORDERLY HOUSE—PROSECUTION—OWNER OR LESSEE—EVIDENCE—SUFFICIENCY.

Defendant's daughter was the owner of a house, and also resided therein. Defendant exercised a certain degree of control, called the house hers, invited men there, let them in and out at the door, rendered the property for taxes, and paid the taxes thereon. She occupied one room in the house, being herself a prostitute, but there was no evidence that she was a tenant or lessee of the premises. Held insufficient to sustain a conviction for keeping a disorderly house.

Appeal from Parker county court; D. M. Alexander, Judge.

Mrs. R. Cook was convicted of keeping a disorderly house, and appeals. Reversed.

Jas. O. Wilson, Martin & Martin, and A. B. Flanary, for appellant. D. E. Simmons, Acting Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of keeping a disorderly house, and her punishment assessed at a fine of \$200. It is only necessary to consider one assignment of error; that is, do the facts sustain the verdict and judgment? The statute concerning the keeping of disorderly houses, under which this prosecution was instituted (article 359, Pen. Code), has been construed, and it is held that the offense of keeping a disorderly house can only be committed by one who is the owner, lessee, or tenant. *Mitchell v. State*, 34 Tex. Cr. R. 311, 30 S. W. 810; *Carlton v. State* (Tex. Cr. App.) 51 S. W. 213; *Sparks v. State*, Id. 1120. The proof in this case shows that the fee of the property was

in Zazle Houghton, a daughter of appellant, who also resided at the house, and there was no proof that showed appellant was lessee or tenant of the premises. To give full effect to the state's evidence on this subject, it showed that appellant, who was the mother of the owner, Zazle Houghton, exercised a certain degree of control or supervision; that she called the house hers, and invited men there, and that she let men in and out at the door; and that she rendered the property for taxes, and paid the taxes thereon. She occupied one room of the house, evidently by sufferance, and, accordingly to the testimony, was herself a prostitute. We do not believe that her occupancy of one room, and the fact that she was a prostitute, constituted her a tenant or a lessee of the house. Under the statute, she must be either the owner, the tenant, or lessee, and, in addition to one of these, she must also keep, or be concerned in keeping, the house as a resort for prostitutes. She may have been concerned in keeping the house, but the proof does not show that she was either the owner, lessee, or tenant of the house in question. Accordingly, the conviction cannot be sustained. The judgment is reversed, and the cause remanded.

ASTON v. STATE.

(Court of Criminal Appeals of Texas. Feb. 27, 1901.)

INTOXICATING LIQUORS—SALE TO MINORS—KNOWLEDGE OF DEFENDANT—CIRCUMSTANTIAL EVIDENCE—INSTRUCTIONS.

1. Where defendant was indicted for selling intoxicating liquor to a minor, a charge that knowledge on the part of the defendant that the person to whom he sold the liquor was a minor was an essential element of the offense, and must be proved, but that such knowledge might be shown by circumstantial evidence, was not objectionable, as on the weight of the evidence, and as an assumption that the facts adduced were sufficient, without positive evidence of defendant's knowledge.

2. It is not error to refuse a requested instruction where the matter submitted by it was fully covered by the charge of the court.

Appeal from Childress county court; W. G. Gross, Judge.

Mose Aston was convicted of selling intoxicating liquor to a minor, and he appeals. Affirmed.

Edward E. Diggs, for appellant. D. E. Simmons, Acting Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted for selling intoxicating liquor to a minor, and his punishment assessed at a fine of \$25.

The court charged the jury that knowledge on the part of defendant that the person to whom he sold the liquor was at that time a minor is an essential element of the offense, and must be proved in order to warrant a conviction; that such knowledge may be proved by circumstances as well as by direct and pos-

itive proof. The latter clause of the charge was excepted to because a charge on the weight of evidence, and an assumption by the court that the facts adduced were sufficient to convict in the absence of direct and positive evidence that defendant knew of the minority of the person to whom he sold. The charge is not subject to the criticism, nor is it the assumption of any fact to tell the jury that the issue may be proved as well by circumstances as by positive evidence.

Appellant requested an instruction that, unless the evidence shows beyond a reasonable doubt that defendant knew of the minority of the purchaser at the time he sold him the intoxicants, they should acquit, and reserved an exception to its refusal. The court fully charged the jury in regard to this matter, and submitted the reasonable doubt, not only in the general charge, but directly in applying the law to the facts. The facts fully sustain the conviction, and the judgment is affirmed.

Ex parte BISHOP.

(Court of Criminal Appeals of Texas. Feb. 27, 1901.)

HABEAS CORPUS—INDICTMENT—DISCHARGE—APPEAL AND ERROR—CRIMINAL LAW—BAIL—BURGLARY—AMOUNT—REVIEW.

1. Where relator in habeas corpus proceedings for release on bail had been indicted for burglary, and a valid indictment was pending against him, on appeal from an order fixing his bail the appellate court cannot discharge him, under Code Cr. Proc. art. 194, providing that the judge or court, after having examined the return and documents attached on habeas corpus, and heard the testimony, shall either remand the party into custody, admit him to bail, or discharge him, provided that no defendant shall be discharged after indictment without bail.

2. Where relator in habeas corpus proceedings for release on bail in his application relied on the illegality of his restraint alone as a reason for his discharge, and the application was not so framed as to submit for determination the question as to whether or not the bail was excessive, on appeal from the order fixing the bail the appellate court cannot pass on the sufficiency or excessiveness of the bail.

3. Where defendant was charged with burglary, bail in the sum of \$250 was not excessive.

Appeal from district court, Dallas county; Charles F. Clint, Judge.

Habeas corpus by Elmo Bishop for release on bail. From an order fixing his bail at \$250, he appeals. Affirmed.

Henry S. Crawford, for appellant. D. E. Simmons, Acting Asst. Atty. Gen., for the State.

BROOKS, J. Appellant sued out a writ of habeas corpus before Hon. Charles F. Clint, judge of the criminal district court of Dallas county. Upon the hearing of said writ, relator's bond was fixed at the sum of \$250. From the ruling of the trial court, relator appeals.

An inspection of the record discloses that relator has been indicted by the grand jury, and that there is pending a valid and legal indictment against him in the criminal district court of Dallas county. Article 194, Code Cr. Proc., provides: "The judge or court after having examined the return and all documents attached, and heard the testimony offered on both sides, shall, according to the facts and circumstances of the case, proceed either to remand the party into custody, admit him to bail, or discharge him, provided that no defendant shall be discharged after indictment, without bail." We notice that relator in his application for bail relies upon the illegality of his restraint alone as reason for his discharge, and same is not framed under the statute so as to submit for determination the question as to whether or not the bail is excessive. This being true, we cannot pass on the sufficiency of the bail, or the excessiveness thereof, but will say, when considered in the light of the charge (i. e. burglary) against relator, we do not think the bail is excessive, but, on the contrary, believe it is quite small. We have construed this statute in *Hernandez v. State*, 4 Tex. App. 425, and *Parker v. State*, 5 Tex. App. 579, and there held this statute is mandatory, and that we have no authority to discharge applicant, where the facts show he has been indicted by a legally constituted grand jury. The most we can do in the premises would be to reduce the bond, if proper showing was made for that purpose. But, as stated above, no effort being made to show the bond is excessive, there remains nothing for us to do but affirm the judgment of the lower court, which is accordingly done. Judgment affirmed.

WOOD v. STATE.

(Court of Criminal Appeals of Texas. Feb. 6, 1901.)

ASSAULT WITH INTENT TO RAPE—SUFFICIENCY OF EVIDENCE—ESCAPE PENDING APPEAL.

Prosecutrix testified that a negro, employed by her husband, came to her window, and inquired if her husband was at home, and, on being told that he was away, asked if she had any fire, and then entered the house, and prosecutrix became frightened, and went into an adjoining room. In about five minutes she saw the defendant coming around the house, and she then left the house, when defendant grabbed her cloak, and tore it from her, and then followed her for a short distance. Defendant testified that he went to the house to inquire after a saddle, and that he went into the room to warm, and that the prosecutrix left the room before he could inquire about the saddle, and that he then looked for her, but she dropped her shawl and ran away, and that he did not touch her or the shawl, and did not follow her. Held not sufficient to support a conviction for assault with intent to rape.

On Rehearing.

Where, pending appeal and prior to rendition of decision reversing conviction, appellant made his escape, and the fact was unknown to the court at the time of its decision, and de-

defendant is still at large, and these matters are made to appear to the court, a motion for rehearing by the state and a motion to dismiss on account of said escape will be granted.

Appeal from district court, Rockwall county; J. E. Dillard, Judge.

William Wood was convicted of an assault with intent to rape, and he appeals. Reversed.

H. D. Wood and G. W. Morris, for appellant. D. E. Simmons, Acting Asst. Atty. Gen., for the State.

DAVIDSON, J. This is a conviction for assault with intent to rape, the punishment being assessed at two years' confinement in the penitentiary. There are several questions suggested, which we deem unnecessary to notice in the view we take of the facts. The prosecutrix testified that defendant (a negro) had been working for her husband five or six years, and on the morning of the alleged trouble came first to her window, and inquired if her husband was at home; being informed he was not, asked if he had gone to Forney; and she then told defendant her husband had gone to Terrell, and she did not know when he would return. Her two youngest children were with her at the time, one 2 and the other 4 years of age, and the oldest child was at school. When witness told appellant her husband had gone to Terrell, he asked her if she had any fire, and she replied by asking him if he had a fire at his house; his house being about 250 yards distant. Without replying, he came around to the door, entered the house, and walked up to the stove. Witness became alarmed, and left the room, and went into the kitchen, an adjoining room, about 10 or 12 feet from the back door of her room. About five minutes subsequently she saw defendant coming around the house, and she started from the kitchen into the yard. As she did so, defendant grabbed her cloak and tore it from her. Her cloak was fastened with a darning needle, and witness screamed and ran. Defendant dropped the cloak, and followed a short distance, and went away to his own residence. Witness returned to her house, and remained there until her husband returned, during the afternoon. She said nothing about it to anybody, except her husband on his return. Defendant testified he went to the house to inquire about his saddle, which had been in the care of and used by the husband of prosecutrix. When prosecutrix told him her husband was not at home, he went in her room to warm. She left the room before he could talk to her about the saddle. After sitting by the stove about five minutes getting warm, he went out and around the house to the kitchen to ask her about the saddle, and she ran away, and dropped her shawl; that he did not touch her or the shawl, and when she ran he turned away and went home. He also testified he had been working for the hus-

band of prosecutrix for about six years under lease and rental contract; was frequently about the house, both when the husband was away and when he was at home; that he was indebted in a small amount to the husband of prosecutrix. It is not necessary to enter into a discussion of the different phases of the statute in regard to assault to rape by force. This has been so frequently done that the whole matter is thoroughly familiar with the bench and bar of the state. It is sufficient to say that the evidence does not fill the measure of the statute from the state's standpoint. Because the evidence does not justify the conviction, the judgment is reversed, and the cause remanded.

On Motion for Rehearing.

(March 13, 1901.)

At a former day of this term the judgment was reversed and the cause remanded. Pending the appeal, and prior to the rendition of the decision, appellant made his escape, and withdrew himself from the jurisdiction of this court, which fact was unknown to this court at the time of its decision. Defendant has not voluntarily returned to the custody of the officers, but is still at large. These matters are made to appear in a legal way, and are the basis of a motion for rehearing by the state, supplemented by a motion to dismiss the appeal on account of said escape. These motions are well taken. The rehearing is granted, and the appeal dismissed.

PATTON v. STATE.

(Court of Criminal Appeals of Texas. Feb. 13, 1901.)

INTOXICATING LIQUORS—SALE TO MINOR—EVIDENCE—ADMISSIBILITY—INSTRUCTIONS.

1. Where the only evidence of the execution of a paper purporting to authorize a liquor dealer to sell liquor to a minor son of the person purporting to sign the instrument is testimony by the minor that the signature looks like his mother's handwriting, but that he cannot positively swear thereto, the instrument is not admissible in a prosecution for the sale of liquors to such minor.

2. A written instrument by a mother, authorizing a liquor dealer to sell liquor to her minor son, is not admissible in a prosecution for such a sale, unless it is shown to have been in defendant's possession at the time of the sale.

3. The refusal to give a requested charge in a criminal case is not error, where an adequate charge is given on the question so presented.

Appeal from Erath county court; L. N. Frank, Judge.

W. T. Patton was convicted of selling intoxicating liquors to a minor, and he appeals. Affirmed.

Daniel & Keith, for appellant. D. E. Simmons, Acting Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted for knowingly selling intoxicating liquor

¹ Rehearing denied March 13, 1901.

to a minor, and his punishment assessed at a fine of \$50, and he appeals.

Appellant excepted to the action of the court in refusing to permit him to introduce in evidence the following writing, to wit: "October 15, 1899. I hereby give my consent to W. T. Patton to sell or give my son John Tudor intoxicating liquor. [Signed] S. F. Tudor." This was objected to on the part of the state, on the ground that there was no proof of the execution of said instrument by Mrs. S. F. Tudor, who was claimed to be the mother of the minor to whom the liquor was sold. The only proof on this point was to the effect that the witness, on examination, said the signature looked like his mother's, but he could not swear to it positively. The court further explained that no sufficient proof of the execution of the instrument was made, nor was it shown to have been in defendant's possession at the time and date of the alleged offense. We think the court was eminently correct on both of these propositions. It is not necessary here to discuss whether a general license from the parent to the saloon keeper to sell the minor on any and all occasions would be the written consent authorized by the statute. Evidently, however, before a written consent would be a protection, it must be proved by better evidence than was offered that the paper was executed by the parent. It must also be shown that the saloon keeper had the written consent at the very time he sold the liquor. However, appellant contends that the affidavit made by S. F. Tudor subsequent to the conviction, and which is used as an exhibit in the motion for new trial, identified the written instrument, and showed that it was executed by the mother of said minor. Appellant should have been prepared with this proof at the time of the trial. At any rate, some diligence should have been used to have the mother of the minor present. However, this affidavit does not relieve the case in any respect in regard to the time when Mrs. Tudor may have executed the written consent. Evidently, if this written consent had been issued prior to the sale of the liquor, the parties knew it, and, if it was true that it was executed before the transaction, no doubt it would have been proven. To the contrary of this, the minor testified on the trial that he never saw the instrument prior to the time of the trial. It appears to us that this is not a fair attempt to show that the saloon man had any sort of written authority at the time he sold the liquor to the minor, and that this authority is an afterthought, entitled to no consideration.

The court gave an adequate charge with reference to knowledge on the part of appellant of the nonage of John Tudor, and it was not necessary to give the requested instruction of appellant on that subject.

An examination of the proof shows the testimony amply supports the verdict. John

Tudor was well known to appellant, who was his uncle. If appellant did not actually know his age, which the relationship would suggest, then the youthful appearance of appellant put him upon notice. *Wuertemburg v. State* (Tex. Cr. App.) 51 S. W. 944. The judgment is affirmed.

LITTLE v. STATE

(Court of Criminal Appeals of Texas. Feb. 27, 1901.)

UNLAWFULLY CARRYING ARMS—EVIDENCE—ADMISSIBILITY—SUFFICIENCY—APPEAL.

1. Bills of exception predicated on questions asked witnesses by the prosecution will be disregarded, where the answers are not shown.

2. Defendant in a prosecution for unlawfully carrying arms claimed he was a traveler going to see his children. *Held*, that evidence offered by him to show that he was confined in jail 21 days before he could see his children was properly excluded.

3. Objections by the accused to the admission of evidence will not be considered when no ground of objection is stated.

4. On a trial for unlawfully carrying a pistol, evidence that defendant drove very fast and was drunk and boisterous on the day of his arrest was admissible to rebut his theory that he was a traveler and authorized to carry arms.

5. The evidence in a prosecution for unlawfully carrying a pistol showed that defendant, in going out into the country to see his children, as he claimed, armed himself with two pistols, became drunk and boisterous, and when arrested was not in the pursuit of his journey. *Held* sufficient to support a conviction.

Appeal from Parker county court; I. N. Roach, Judge.

Will Little was convicted for unlawfully carrying a pistol, and appeals. Affirmed.

D. E. Simmons, Acting Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted for unlawfully carrying a pistol, and his punishment assessed at a fine of \$30, and he prosecutes this appeal.

We cannot consider appellant's first four bills of exception, which appear to be predicated on questions asked of witnesses, but the answers of the witnesses to said questions are not shown. We cannot presume what the witness may have answered to these questions. The bills should be complete in this respect, and then a proper ground of objection should be stated. There is none stated in these bills.

The fifth bill of exceptions is an attempt to challenge the action of the court in refusing to admit testimony offered by defendant to the effect that he had to stay in jail 21 days before he got to see his children. This was excluded, and we think very properly.

The sixth bill of exceptions shows that the witness Harrison, in reply to state's counsel, stated that defendant drove into the town of Millsap on the morning of the alleged offense very fast, and that he drove past the store of witness, and was drunk

and hollaloing and yelling. This was objected to by appellant, but no ground of objection is stated.

Bill of exceptions No. 7 shows that the same character of testimony was proven by the witness Dick. The objection here urged is that it was immaterial and did not pertain to the issues in the case, and was only calculated to raise and produce in the minds of the jury prejudice against defendant. Even if it be conceded that this was a sufficient ground of objection stated, still we believe this character of testimony was admissible in rebuttal of defendant's theory. He appears to have claimed that he was a traveler, and so authorized to carry a pistol. All this character of testimony was admissible for the purpose of showing that he was not at the time engaged in legitimate traveling, but was going to and fro in the town of Millsap, and was bolsterous.

There is nothing in appellant's contention in regard to the argument of the county attorney. So far as we are advised, it was predicated on evidence in the case, and was legitimate argument. Furthermore, no charge was asked expunging it from the consideration of the jury.

We think the testimony is ample to support the verdict. Although the proof showed that appellant was recently from Tennessee, it further showed that after he reached Weatherford, although he had one pistol, he bought another one, and in going out in the country to see his children, as he claimed, he armed himself with two pistols, got on a spree, and evidently went about other matters than going on to the place where his children were said to be living, and when found by the officer was at a house, evidently not in pursuit of his journey; and his conduct at Millsap indicates he was not there for traveling. In our opinion, the evidence sustains the verdict of the jury. The judgment is affirmed.

McHENRY v. STATE.

(Court of Criminal Appeals of Texas. March 6, 1901.)

CRIMINAL LAW — APPEAL — STATEMENT OF FACTS — SUBSTITUTION — INSTRUCTIONS — ACCOMPLICE — CORROBORATION — BURGLARY — EVIDENCE.

1. That a substituted statement of facts on appeal was not substituted in the lower court at the next term after the notice of appeal, as provided by Code Cr. Proc. art. 884, but at the next succeeding term, is not ground for striking out the statement, where appellant used due diligence; the object of the statute being simply to authorize substitution of lost papers pending appeal, and to require due diligence.

2. Due diligence on the part of the convict in filing a statement of facts on appeal was shown where the statement was left with the trial judge for his approval within the time required by law, and he agreed to approve and file it with the clerk

8. Where the jury came into the court room for further instructions, and inquired if an accomplice could be corroborated by circumstantial evidence, and the judge simply replied, "Yes," his failure to charge, as requested by defendant, that the circumstances must come from witnesses outside the accomplice, and tend to connect defendant with the offense charged, was error, though the original charge stated that the testimony of one accomplice could not corroborate another, and that the corroboration must tend to connect the defendant with the commission of the offense.

4. In a prosecution for burglary, evidence that part of the goods shown to have been stolen was given to defendant's brother by an accomplice of the defendant was improperly admitted over defendant's objection, where it appeared that he was not present at the time, and had nothing to do with the transaction.

Appeal from district court, Dallas county; Charles F. Clint, Judge.

Jack McHenry was convicted of burglary, and he appeals. Reversed.

Robt. B. Seay, for appellant. J. C. Roberts and D. E. Simmons, Acting Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of burglary, and his punishment assessed at two years' confinement in the penitentiary; hence this appeal.

The state has made a motion to strike out the statement of facts on two grounds: (1) That the same is a substituted statement, and was not substituted at the next term after the appeal was taken, but at the next succeeding term; (2) it does not appear that the original statement of facts was filed within the 10 days, as required by law. In support of the state's contention, we are referred to article 884, Code Cr. Proc. We do not believe that said article was intended to fix the time for the substitution of lost papers, so as to make it absolutely of the essence of the right to substitute. In some cases it would happen that the loss would not be discovered at the first ensuing term after the appeal was taken. We take it that the object of the statute was simply to authorize the substitution of lost papers pending the appeal, and to require that reasonable diligence should be used in the substitution thereof. In this case it does not appear that appellant was guilty of unreasonable delay in the substitution. We further hold that it reasonably appears from the affidavit that the original statement of facts was filed within the 10 days allowed by order of the court. The judge and attorney both make affidavits that said statement of facts was left with the judge for his approval within the 10 days, and that the judge agreed to approve and file the same with the clerk. While it is not the duty of the judge, but of appellant, to file the statement of facts, yet, where the judge undertakes to do this for appellant, this would constitute sufficient diligence on the part of appellant. *Bigham v. State*, 36 Tex. Cr. R. 453, 37 S. W.

753; *Wright v. State* (Tex. Cr. App.) 44 S. W. 151.

During the trial, and while the jury were out considering their verdict, they came into court, and requested the judge to inform them if the direct evidence of an accomplice in a crime can be corroborated by circumstantial evidence. To this question the judge simply replied, "Yes." Appellant complains that the judge should have gone further, and in that connection have informed the jury of the nature and effect of circumstantial evidence; and, furthermore, that the circumstances must come from witnesses outside the accomplice, and tend to connect appellant with the offense charged. While the judge in his original charge instructed the jury that the testimony of one accomplice could not corroborate another, and that the corroboration must tend to connect appellant with the commission of the offense, still we believe it would have been better, certainly it would have more securely safe-guarded appellant's rights, if, in connection with the response of the court to the jury's question, he had instructed them as requested by appellant. Juries generally are not skilled in matters of law, and have but a limited experience in applying the charge of the court to the facts of cases, and in this instance they may not have felt called upon to look back to the court's charge in order to determine the character of corroboration. Here they appeal to the court on a matter of circumstantial evidence, about which they were not instructed in the original charge, and we think the court in that connection should have instructed them as requested by appellant.

The state was permitted to prove, over appellant's objection, that Henry Nestor, one of appellant's co-defendants, gave to John McHenry, a brother of appellant, a pair of pants, shown to have been stolen in the burglary. This was objected to on the ground that it was after the commission of the alleged offense, and no part of the conspiracy, if conspiracy had been proven, and because appellant was not present and had nothing to do with the presentation of the pants, and, being given to his brother, it was calculated to prove hurtful to appellant, inasmuch as it showed that his brother was the receiver of stolen property. We do not think this testimony was properly admitted. It was *res inter alios acta*, and could not affect appellant.

It is not necessary to discuss the action of the court overruling his motion for continuance, inasmuch as the case will be reversed on other grounds. However, we would remark that appellant appears to have used diligence to secure the witnesses Love and Matasola. Their testimony appears to have been material, and the explanation of the court we do not think was an answer to the application. The judgment is reversed, and the cause remanded.

BAINES v. STATE.

(Court of Criminal Appeals of Texas. March 19, 1901.)

Dissenting opinion. For majority opinion, see 61 S. W. 119.

BROOKS, J. I feel constrained to dissent from the opinion of the majority; for, as I understand the opinion, it changes the law with reference to applications for continuance. If defendant makes application for continuance, diligence being shown, if the absent testimony is material and probably true, same should be granted; otherwise, it should be overruled. However, it appears in this case that a different view is taken. Appellant was tried for assault with intent to murder. The evidence, although circumstantial, was of that conclusive character that it shows beyond a reasonable doubt that defendant is guilty of the attempted homicide. Upon the trial appellant made a motion for continuance for the want of the testimony of an absent witness, by whom he expected to prove an alibi. The court overruled the application. Subsequently on motion for new trial appellant attached an affidavit of the absent witness, stating that he would have sworn to the alibi as set up in the application for continuance. The court, as I understand the opinion, decides that the fact that the absent witness, subsequent to the trial, makes an affidavit that he would swear to the facts as insisted by appellant in his motion for continuance, changes the rule in reference to granting continuances, and in refusing to grant a new trial on the ground of said continuance being overruled. There is no authority in any law book for this proposition. In the opinion of the majority is found the following language: "Where the affidavit of an absent witness has been produced on motion for new trial, showing absolutely that he would testify to the facts set up in the application, we do not think any case can be found where we have assumed the prerogative of saying that the testimony was not probably true. To so hold, it seems to us, would be not only to usurp the functions of the jury, but to announce in advance that the absent witness had committed perjury." In reply to this it is only necessary to say that no decision can be found in any book, decided by any court, holding that the fact that the absent witness makes affidavit to the facts set up in the application for continuance changes the rule in reference to an application for continuance. The only authority cited by the opinion of the majority is *Hull v. State* (Tex. Cr. App.) 47 S. W. 472. That decision has nothing to do with this proposition. It lays down the simple proposition that alibi is material testimony, and in that case it was material testimony. But before us we have a very different case. The evidence is of such a conclusive character as to make a case of circumstantial evidence,

as above said, as strong as any case that can be found in the books. Appellant moves the court to grant him a new trial because of the want of the testimony of an absent witness, whose affidavit he attaches, to the effect he will swear that defendant was not present at the time of the attempted homicide. In *Lillard v. State*, 17 Tex. App. 119, it was strenuously insisted by appellant that the statute giving discretionary power to the trial judge to grant or refuse a continuance, and also discretionary power to grant or refuse a new trial, was unconstitutional and void; the argument advanced by appellant's counsel being that such power deprives the citizen of the right to have compulsory process for his witnesses and of the right of trial by jury. Judge Willson, for the court, said: "We have been much interested in the able brief and argument of counsel for appellant upon this question, and have maturely considered the same. Without entering upon an elaborate discussion of the subject, we will briefly state the conclusion at which we have arrived: (1) The statute claimed to be unconstitutional (Code Cr. Proc. art. 560, subd. 6) does not deprive the accused of the right to have compulsory process for his witnesses (Bill of Rights, § 10), nor does it impair such right. (2) It does not deprive the accused of the right of trial by jury. Bill of Rights, § 15. (3) The legislature has full power to regulate continuances and new trials. There is no provision in the constitution which denies or limits such powers. In the case at bar the accused had compulsory process for his witnesses, and had a trial by a jury. He was not deprived of either of those constitutional rights. We are of the opinion that the court did not err in refusing this application for continuance, nor in refusing to grant him a new trial. Conceding that the absent testimony was material, we think the trial judge was well warranted in holding that it was not probably true. When considered with reference to the evidence adduced on the trial, it could not be reasonably contended that the facts stated in the application for continuance were probably true. There has been no abuse of the discretionary power of the trial judge in this matter, as far as we can perceive from the record before us." With unvarying uniformity the proposition of law announced above has been followed by this court, as well as all the courts of last resort, as far as I have been able to find; and the fact that the absent witness files an affidavit corroborating the affidavit of appellant does not change the proposition that this court must necessarily pass upon the probable truth of the application in the light of the record before us. This position is strengthened by the decision in *Land v. State*, 34 Tex. Cr. 330, 30 S. W. 788, in which the court held: "Where on a trial for robbery a witness for defendant was taken sick and went home, and defendant made a motion to postpone or con-

tinue the case for said witness, in which motion he stated the facts expected to be proved by said witness, which motion was overruled, and defendant again, after conviction, assigned said ruling as one of the grounds of his motion for new trial, held, that the court on appeal will not reverse the judgment on account of the refusal of a postponement or continuance, unless, in connection with the other evidence adduced on the trial, they are impressed with the conviction not merely that defendant might probably have been prejudiced in his rights by such ruling, but that it was reasonably probable that if the absent testimony had been before the jury a verdict more favorable to defendant would have resulted. And held, further, that the evidence being amply sufficient to sustain the conviction, independent of the matters proposed to be proved by the absent witness, the motion for new trial was properly overruled." And again, in *Gallagher v. State*, 34 Tex. Cr. 306, 30 S. W. 557, it was held "that on appeal, where the testimony set out in the application for continuance, considered in connection with the evidence adduced on the trial, appears not probably true, or that, if it had been testified as stated, it is not probable that the testimony would have affected the trial more favorably to defendant, then it was proper for the court to refuse to grant the continuance." Does the fact, then, in the light of this line of decisions (and the books are replete with similar cases), that the absent witness give appellant an ex parte affidavit, swearing to the fact that he would corroborate the appellant's statement in his application for continuance, strengthen the proposition that the application is probably true? How can it? When appellant was arraigned for trial he asked for a continuance for the want of the testimony of the absent witness by whom he expected to prove an alibi. The court overruled the application and heard the evidence; the testimony precluding the truth of this application, showing it was not probably true. That is to say, the testimony showed appellant was guilty beyond any reasonable doubt. Now, then, the court, as I understand the opinion of the majority, hold that, if the absent witness will come up in each instance and swear to the facts appellant states in his application that he expects to prove by said witness, then it would be invading the province of the jury not to grant the continuance. In other words, this court is constrained to reverse every case where a new trial is refused if appellant attaches to his motion for new trial the affidavit of the absent witness, swearing to the facts as detailed in his motion for continuance. This is an innovation, abrogation, change, and perversion of the statute in reference to applications for continuance and motions for new trial. This court should not reverse a judgment on account of the refusal of a postponement or continuance.

unless, in connection with all the other evidence adduced on the trial, it is impressed with the conviction not merely that defendant might not probably be prejudiced in his rights by such ruling, but that it was probable if the absent testimony had been before the jury a verdict more favorable to defendant would have resulted. *Goldsmith v. State*, 32 Tex. Cr. R. 112, 22 S. W. 405; *Hyden v. State*, 31 Tex. Cr. R. 401, 20 S. W. 764; and numerous other cases. In *McAdams v. State*, 24 App. 86, 5 S. W. 826, and *Mitchell v. State*, 36 Tex. Cr. R. 279, 33 S. W. 367, 36 S. W. 456, the rule which should govern trial courts in passing upon an application for continuance, and subsequently upon motion for new trial, was stated by the court as follows: "If there is such conflict between the inculpatory facts and those set forth in the application as to render it improbable that the facts stated in the application are material and probably true, the continuance should be refused, and hence a new trial based thereupon should also be refused. There must, however, not only be such a conflict, but the inculpatory facts must be so strong and convincing as to render the truth of the facts set forth in the application improbable." Now, reverting to the facts of this case, I wish to say that appellant swore in his application he could prove by the witness McCoy that he was not present at the scene of the attempted homicide. In passing upon this application, it must be remembered there is a long line of decisions holding the court would not err in refusing same if the proposed absent testimony is not material or not probably true. Subsequently, on motion for new trial, in the light of the record and the testimony adduced upon the trial, if the testimony is not material or not probably true, this court has uniformly held that the trial court would not err in refusing a new trial. And the fact that the absent witness files an *ex parte* affidavit that he would have sworn as the application for continuance stated he would does not and cannot change the proposition that this, as the court of last resort, must pass upon the materiality and probable truth of the absent witness' affidavit, in conjunction with the motion for new trial and application for continuance. Why not? If 40 witnesses swear to a fact, and it is not probably true, it does not render it any more probably true because 40 witnesses swear to the fact. The fact that appellant and an absent witness swear to a fact that is not probably true does not make it probably true. Nor does it invade the province of the jury, as stated in the original opinion, for this court to pass upon the question; but, under the statutes and decisions, this court has uniformly passed upon, and felt constrained to so pass upon, it. The question of jury or no jury has nothing to do with it. If the application is material and probably true, this court must reverse the judgment. The opinion in

this case stands out without precedent in legal jurisprudence in Texas, and I dissent therefrom.

SPANGLER v. STATE.

(Court of Criminal Appeals of Texas. Oct. 17, 1900.)

CRIMINAL LAW—APPEAL—REVIEW—MURDER—EVIDENCE—WITNESSES—IMPEACHMENT—MANSLAUGHTER—BURDEN OF PROOF—MALICE—SELF-DEFENSE—THREATS—STATEMENT OF COUNSEL—CHARGE—BILL OF EXCEPTIONS—ARGUMENT ON EVIDENCE.

1. On the first trial of defendant for murder, the state claimed that his motive was robbery, and introduced evidence that the deceased had \$170 on her person when killed. Her two sons testified that they reached the body immediately afterwards, and remained with it until it was searched, and no money was found. Another witness testified that he was first to reach the body, and remained with it till after the sons came, and left them alone with the body while he went for an officer. On the last trial the state abandoned the theory of robbery, and introduced no evidence relating thereto, and the sons did not testify. The other witness gave the same testimony as before. Defendant offered to prove by a witness that such testimony was given on the first trial, and also that the sons had no money immediately before their mother was killed, and that soon afterwards they passed bills with blood stains on them. *Held*, that the court properly refused to receive such testimony, since the state had a right to change its theory as to the motive for the killing, and, in the absence of any evidence of collusion between the sons and the other witness in trying to fasten robbery on defendant at the first trial, the testimony had no tendency to impeach such witness, or contradict or explain any evidence which the state had offered.

2. On a trial for murder, the court charged that if there were several causes to arouse passion, whether arising at the time of the killing or not, and though none of them alone would constitute adequate cause, the jury might take into consideration all the facts to determine the issue of manslaughter, and that unless insulting words to a female relative, which defendant claimed were used by deceased, were the real cause of the killing, it would not reduce the offense. *Held*, that the charge was not too restrictive, and did not confine the jury to the provocation at the time of the homicide, nor cut the jury off from consideration of the assault which defendant testified deceased had made on him.

3. Where, on a trial for murder, the court charged as to what constituted manslaughter, and that to convict defendant of that offense the jury must find the necessary facts beyond a reasonable doubt, the charge was not objectionable as changing the burden of proof, and requiring defendant to prove manslaughter beyond a reasonable doubt before the jury could acquit him of murder, though manslaughter is a defense to the charge of murder.

4. On a trial for murder, the court charged "that 'malice,' in its legal sense, denotes a wrongful act done intentionally, without just cause or excuse," and also instructed fully as to express and implied malice and malice aforethought. *Held*, that it was not error to give the general definition quoted, since, if the jury had misunderstood it, they would have been more likely to have found defendant guilty of manslaughter than of murder in the second degree.

5. Defendant admitted killing the deceased by shooting, and claimed self-defense. On his trial for murder the court charged that if he

killed deceased in a sudden transport of passion, aroused without adequate cause, and not in defense of himself, he should be found guilty of murder in the second degree. *Held* not error because the term "malice" was omitted, where the charge was in accord with the proofs, and murder in the second degree and malice had been fully explained in other parts of the charge.

6. Defendant, on trial for murder, claimed self-defense. By the charge the jury were authorized to judge of the character of the attack made by deceased, and of defendant's knowledge, and the character and disposition of the deceased. *Held* not objectionable, as unduly limiting the character of the attack of deceased against which defendant was authorized to defend himself.

7. Defendant, on trial for murder, testified that previously, and at the time deceased was killed, she threatened to kill him if he caused her sons to be indicted, and that he told her he had not; also that immediately before he shot her she drew her pistol, and advanced towards and attempted to shoot him. No one else was present. *Held*, that the charge relating to self-defense was not erroneous, because the court failed to instruct on the doctrine of threats, since the threats proven were conditional, and, if the defendant was to be believed, his right of self-defense was perfect on the acts of the deceased at the time, and the significance of her acts would not be intensified by considering the threats.

8. Where, on a trial for murder, defendant claimed self-defense, and deceased was shot twice, once in front and once behind, one shot being fired immediately after the other, and there being no issue that one shot might be justifiable and the other not, it was not error to refuse to charge that if defendant was justifiable in firing the first shot, and that was fatal, but that the second shot was not fatal, that in such case the firing of the second shot was immaterial in determining whether or not the defendant was guilty of murder, and that, at most, appellant could only be convicted on the second shot of manslaughter.

9. During the argument, at the close of a murder trial, the district attorney stated to the jury that he believed defendant was guilty of murder. No exception was taken to the remark at the time, but subsequently defendant's counsel requested the court to instruct the jury not to consider such remark. *Held*, that though such remark was improper, and should not be permitted, if attention of the court was not called to it at the time, it was not reversible error to refuse such request to charge.

10. The court, on a trial for murder, charged, in reference to self-defense, that "the party would be justified in using all necessary force to protect himself"; also that defendant was authorized to act on the reasonable appearance of danger as it appeared to him at the time, and that in no event was he bound to retreat, or resort to any other means, in order to avoid the necessity of killing his assailant; also that "if the attack on him by the deceased was of such a character as to cause him to have a reasonable anticipation of danger or serious bodily injury, viewed from his standpoint, and he shot and killed deceased, then to acquit him." *Held*, that such charge was not erroneous, as failing to instruct the jury that defendant was authorized to use such force as might reasonably appear to him necessary.

11. On a trial for murder, it is not error to permit a witness, who is not an expert, to testify as to the angle the shot took which made a hole in the floor, since the question is merely one of observation.

12. Deceased lived on a place rented by defendant, and cooked for him and his hands. They had had several quarrels during the two days preceding the homicide, but appeared to be reconciled that morning. The killing occur-

red in the kitchen, while no one was present but deceased and defendant. Two shots were fired, one entering in front near her heart, and the other from the rear. She died immediately after, and defendant went out, reported the killing, and gave himself up. She had used insulting language regarding defendant's female relatives several times, and he claimed she threatened to kill him if he had her sons indicted, and that at the time of the homicide she drew a pistol, and attempted to shoot him, and that he shot in self-defense. *Held*, that a verdict of murder in the second degree was justified.

On Rehearing.

1. Where, in his certificate to a bill of exceptions in a criminal case, the judge states that he allows the same except as to the statements therein as to certain evidence, which are disallowed, because he does not remember such evidence, and the same evidence is set forth in other bills which he has allowed, the several bills should be considered together, and the evidence considered as having been received, since it is evident the judge was mistaken as to its not having been given.

2. On a trial for murder, defendant testified that a large portion of his property was attached on debts which he owed; that he was indebted to deceased's son, and she was pressing him for payment, and he was turning cattle over to her as fast as he could collect any which were not attached. Deceased was then cooking for defendant and his men. Defendant's son also testified that deceased said his mother and sisters were "God damned whores." In arguing to the jury in answer to certain parts of the argument of the state's counsel, defendant's counsel proposed to refer to and comment on this testimony, but was not permitted to do so, on the state's objection that no such evidence had been adduced on the trial, the court stating that he did not remember such evidence. *Held*, that under Bill of Rights, § 10, which guaranties to an accused person the right to be heard by himself or counsel or both, it was not within the power of the court to prohibit defendant's counsel from arguing testimony which had been admitted in the case before the jury, whether the testimony was or was not important, and the court's refusal to permit such argument was reversible error.

Appeal from district court, Clay county; A. H. Carrigan, Judge.

A. A. Spangler was convicted of murder in the second degree, and appeals. Reversed.

Hurt & Stine, J. C. Hodges, J. A. Templeton, L. C. Barrett, Stillwell H. Russell, and W. A. Hudson, for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

HENDERSON, J. This is the second appeal. On the former appeal appellant was convicted of murder in the second degree, and his punishment assessed at confinement in the penitentiary for a term of 50 years, and the judgment was reversed by this court at the Dallas term, 1900. 55 S. W. 326. On the present trial appellant was convicted of murder in the second degree, his punishment being assessed at 15 years' confinement in the penitentiary, and he prosecutes this appeal.

For a full statement of the facts of the case, see the former appeal. Briefly stated: Deceased, a woman, was a tenant of appellant, or, rather, employed by him to cook for the hands on his place. They had some dis-

agreement, and several quarrels, during the two days preceding the homicide, but on the morning of the homicide the evidence tends to show they were reconciled. The killing occurred in the kitchen attached to the residence on the premises, while no one was present but deceased and appellant. Two shots were fired, one entering in front, near the region of the heart, and the other from the rear. Deceased immediately ran out of the kitchen onto the gallery, and fell on the ground, where she expired. Appellant at once left the kitchen, proceeded to the lot, a short distance away, reported the killing, and then went to Henrietta, the county seat, and surrendered. He testified, and his evidence tends to show, self-defense. There is also some testimony by defendant and other witnesses tending to show manslaughter. The state insisted that the offense was murder, and supported its theory by facts and circumstances tending to show that offense.

In discussing the assignments raised, the arrangement thereof as contained in appellant's brief will be substantially followed.

Appellant's bills of exception Nos. 1 and 11 relate to the refusal of the court to permit defendant to prove by certain witnesses what had occurred at the former trial of the case with reference to proof offered by the state tending to show that appellant had killed deceased for the purpose of robbery. In substance, said evidence was to the effect that deceased was in the habit of carrying a large amount of money in her bosom, and that at the time of the homicide she had about \$170 on her person; that after she was killed her body was examined, and the bills were gone. In this connection, it was shown that her two sons, Frank and Walter King (who were not witnesses on this trial), and L. R. Smith, were with the body immediately after the killing until it was examined and the money found missing. It was further offered to supplement this proof with evidence which transpired subsequent to the former trial, to the effect that the King boys had no money before the death of their mother, and that thereafter they passed to certain parties, to wit, Stephen Teal and W. B. Worsham, certain currency bills, which had blood stains, or the appearance of blood stains, on them. The bill also shows that the witnesses Frank and Walter King (sons of deceased) were present and under rule at this trial, but the state did not introduce them as witnesses, and the theory of robbery was not presented or relied on by the state. L. R. Smith, witness on the former trial, was introduced by the state as a witness at the present trial, and the bill shows that in the former trial he was used by the state, and testified, in effect, that immediately after the shooting he went to the body of deceased, and was with the body for a time with Frank King; that together they carried the body from the kitchen into the main house, and laid it on a cot; that, shortly after he and Frank King

went to the body, Frank King went in through the kitchen to the main room, and fixed the cot; that directly he came out, and he and said witness carried the body into the house, and laid it on the cot; that said witness during the time he was in the kitchen, in passing to the room where the cot was situated, was under the observation of witness, and if he touched anything in the room witness did not observe it. This witness also testified that Frank left him with the body, and went for his brother Walter, and in a short while returned with Walter, when he (Smith) left the place to go for the officer, leaving Frank and Walter alone with the body. Appellant also, in this connection, offered to make proof of some of the bills passed to Worsham and Teal, said bills showing appearance of blood stains. All this testimony was, on objection, excluded by the court.

Appellant insists the court committed an error, because he says said testimony was admissible as tending to show a motive on the part of Smith, and thereby affecting his credibility, and it was further admissible as tending to show that the physical facts surrounding the homicide, and existing at the time of the homicide, were changed for the purpose of fabricating testimony, and that such evidence was admissible, no matter by whom the change was made, whether by Smith or some one else. In arguing the first of these propositions, appellant says: The witness Smith was evidently engaged in the conspiracy with the King boys, and his relation to them was either prompted by motive of gain, or a motive to shield them, or to fabricate or suppress evidence which, in either event, would be prejudicial to appellant. Now, in reply to this, we have to say that we have examined the record carefully in order to ascertain if there was any testimony showing witness Smith was engaged with the King boys in the conspiracy either to rob the body of deceased and attribute it to appellant, or, if he was not engaged in such robbery with the King boys, if he afterwards engaged in the conspiracy to fabricate testimony for the purpose of shielding them, and laying the robbery on appellant. We must confess that we fail to find any such testimony. It would certainly be an effectual way of impeaching the credit of Smith, if it should be shown that he entered into a scheme of the character charged against him in appellant's brief; but, in our opinion, the circumstances do not tend remotely to show such conspiracy. It is true he was introduced as a witness on the former trial, and on this trial by the state, but he seems to have testified fairly then and now, and because he was a state's witness affords no reasonable ground that he had entered into a conspiracy to commit a robbery or to fabricate testimony. He happened to be on the place at the time, went immediately to the body, and his acts and conduct there do not suggest that

he had any improper motive in being there; and, instead of excluding the idea that the King boys did not commit the robbery themselves, his testimony afforded them the opportunity to have done so. While he says the body was not disturbed, and no search made during his presence, yet he left these parties with the deceased, which gave ample opportunity to take the money and appropriate it to their use, and afterwards conceal the fact, and by their evidence attempt to lay it on defendant. So there is a failure to show any scheme on his part to exonerate the King boys in this regard, and after this there is no testimony showing that he had anything to do with said money, or that he had any knowledge the King boys had abstracted it from the body. We do not think we are authorized, in the absence of evidence, to effect a witness by mere surmises, and then introduce against him, for the purpose of impeachment, testimony concerning matters with which he had nothing to do. If the King boys had been introduced as witnesses, then this character of evidence would have been admissible for the purpose of impeaching them, but, in the absence of any testimony implicating Smith, it would not render the testimony admissible for the purpose of impeaching him. Furthermore, if the state had relied on the theory of robbery in the perpetration of the homicide on the present trial, and had introduced evidence remotely tending to show that the homicide was committed for the purpose of robbery, then all the evidence concerning said robbery would have been admissible in defense as original evidence. But, as stated before, this theory was not relied on, and it was entirely competent for the state to abandon it, if it desired to do so. Nor does the record in this case disclose any physical circumstances, in connection with the abstraction of the money from the bosom of deceased, that would tend to throw any light on the commission of the homicide or the manner in which it was done. There is no pretense that any one else, save appellant, did the killing; in fact, he admits he did. The location of the wounds is not controverted, and the fact that deceased's dress in front of her bosom was loosened or disarranged when the body was examined by the officers comports with appellant's own testimony that she drew a pistol from her bosom. Moreover, testimony concerning this matter would have nothing to do with the physical objects in the kitchen where the homicide occurred, such as the arrangement of the chairs, their presence or absence from the kitchen, or the finding of the pistol in the kitchen. So, from any point of view, it occurs to us that the court did not err in excluding the testimony as presented in these two bills of exception.

Appellant complains, in his second assignment of errors, that the charge of the court on manslaughter was too restrictive, in that it confined the jury to the provocation at the

time of the homicide. Appellant concedes that the jury was instructed in the eleventh paragraph of the charge to the effect that if there were several causes to arouse passion, whether arising at the time of the killing or not, and although none of them alone would constitute adequate cause, the jury might take into consideration all the facts, etc., to determine the issue of manslaughter. But he insists that, notwithstanding this, the charge was not adequate on account of the peculiar circumstances of this case; that in this case insulting language to a female relative was relied on. But it will be seen, from an inspection of the charge, that this phase of the case was presented to the jury, and there is no controversy but that this insult was used by deceased at the time of the homicide, if defendant's testimony is to be believed, and they were fully authorized to look back to previous provocations of a similar character as intensifying this accusation made at the time. Nor, in our opinion, was appellant, if we review the entire charge, cut off as to this matter of manslaughter from the assault testified to by appellant as then being made on him by deceased. They could look to this and all other matters, and the fact that the court instructed them, in connection with the charge of insulting words, "that, unless the insulting words were the real cause of the killing, it would not reduce the offense." This is the language of the statute on this subject, and, if appellant relied exclusively on insulting words, these must be the real cause of the killing. But, if there were other circumstances in connection with this, in our opinion the charge was sufficiently comprehensive to embrace these other circumstances. We think the charge of the court is in accord with the authorities on this question cited by appellant. See *Bracken v. State*, 29 Tex. App. 367, 16 S. W. 192; *Johnson v. State*, 22 Tex. App. 206, 2 S. W. 606. It is certainly in consonance with the principles of law on this subject. *Miles v. State*, 18 Tex. App. 170. We quote from that case as follows: "Now, while it is true that the provocation must arise at the time of the commission of the offense, and the passion must not be the result of a former provocation, yet in passing upon the sufficiency of the provocation, and on the effects of the passion upon the mind of the defendant, the past conduct of the deceased towards defendant, his threats and bearing, in fact all the facts and circumstances in the case, should be considered by the jury, and acts standing alone may not be a sufficient provocation, but may be ample when it is one of a series of similar acts, or when it has been preceded by an insolent and aggravating course of conduct, whether similar or not to the act committed at the time of the homicide." The court seems to have followed this enunciation of the law; that is, there must be a provocation arising at

the time of the homicide, but the jury were expressly told they could look to all the facts and circumstances of the case as shedding light upon that provocation.

Again, appellant complains of the court's charge on manslaughter, and claims that the charge puts the burden of proof upon appellant to establish his defense of manslaughter beyond a reasonable doubt before the jury will be authorized to acquit him of murder. The argument of appellant, it occurs to us, is more ingenious than sound. He says that manslaughter is a defense to murder, and that consequently the charge of the court applying the law to the facts, which instructed them, in effect, if they believed beyond a reasonable doubt the killing occurred under certain circumstances (agreeing with the definition of manslaughter), to find him guilty of that offense, is shifting the reasonable doubt on the defendant. By analogy, we take it, he would claim that murder in the second degree is a defensive matter to murder in the first degree, and that a charge of the court which instructed the jury they must find the elements which constitute murder in the second degree beyond a reasonable doubt, before they would be authorized to find defendant guilty, would be shifting the rule as to reasonable doubt, because murder in the second degree is a defense against murder in the first degree. The charge complained of was a charge on manslaughter, and it was simply an instruction to the jury that they must believe beyond a reasonable doubt that the evidence showed the elements of manslaughter as defined, before they could convict appellant. Of course, we do not think the jury could have misapprehended this charge, and there is no complaint but that the jury were distinctly told, if they had a reasonable doubt of the guilt of appellant of any grade of felonious homicide, to acquit him. In this connection, we would say we find no fault with reference to the authorities cited by appellant in his able brief, but we cannot agree to their application to the charge in question. While it is true that passion engendered by adequate cause in one sense is defensive matter, yet they are affirmative facts to be proven in order to obtain a conviction for manslaughter; and where self-defense is relied on, as in this case, these facts constituting manslaughter must be proven beyond a reasonable doubt before the jury would be authorized to disregard the plea of self-defense and to convict of manslaughter. They are affirmative facts entering into the definition of manslaughter, and should be proven in order to convict of that offense, and in this connection it does not matter whether the proof comes from the state or appellant.

Appellant complains of the court's definition of "malice." The court gave the stereotyped definition on this subject, to wit, "that 'malice,' in its legal sense, denotes a

wrongful act done intentionally, without just cause or excuse." The court also gave a full charge on express and implied malice and malice aforethought, and it does not occur to us that because of this general definition of malice, as above quoted, the jury were liable to find appellant guilty of murder in the second degree instead of manslaughter. It would appear that, if they misapprehended the charge in this particular, they would be more likely to find appellant guilty of manslaughter.

Nor do we think the charge of the court is subject to appellant's criticism in the fifth paragraph, where "implied malice" is defined. This definition, when taken together, is in accordance with the authorities, and could not have been misunderstood.

Nor does it lie with appellant to complain of the court's sixth paragraph in his charge, wherein the court applied the law of implied malice to the facts of the case, and therein instructed the jury: "If appellant killed deceased in a sudden transport of passion, aroused without 'adequate cause,' as that term is explained, and not in defense of himself, as will be hereafter explained, they will find defendant guilty of murder in the second degree." If appellant killed deceased, which is conceded, if it was culpable homicide, it was done in a sudden transport of passion; and the real issue was, was there adequate cause or not? He, of course, claimed it was done in self-defense. The jury found there was no adequate cause, and it does not occur to us appellant could complain that the jury were restricted in the charge on murder in the second degree to a killing in a sudden transport of passion. Certainly not, when this was in accord with the proof offered. Nor does it matter that in this charge the term "malice" is omitted. Murder in the second degree had already been defined, and malice aforethought stated as an essential ingredient thereof. Implied malice had been defined, and then this charge in paragraph 6 told the jury if the killing was unlawful, and under circumstances to constitute it a killing on implied malice, appellant would be guilty of that offense; that is, they were told that they could infer the malice, which is in accordance with the rule of law on the subject. This was not like the charge in *Shriver's Case*, 7 Tex. App. 454; and the charge in *Kemp's Case*, 13 Tex. App. 561, which is not as clear as that given in this case, was approved by the court.

There is nothing in appellant's eighth assignment of error, as the charge of the court in paragraph 14a did not unduly limit the character of the attack of deceased against which defendant was authorized to defend himself. The jury were distinctly authorized to judge of the character of the attack, and the manner and character of the defendant's knowledge, and the character and disposition of the deceased. This authorizes the jury to

review all testimony bearing on the issue of disposition and character of deceased. This includes her habit of going armed with a pistol, and her disposition to use the same, as also the language used by deceased at the time of the homicide.

It is insisted that the failure of the court, in connection with the charge on self-defense, to predicate a charge on threats, was such error as should cause a reversal of this case. It is true the court failed to instruct the jury on the doctrine of threats in connection with the law given them on self-defense. However, the threat here proven by appellant was conditional in character; that is, deceased had told defendant on the day previous that she would kill him if he had her boys indicted. This was also alluded to in their conversation at the time of the homicide, according to the testimony of defendant. Appellant, however, told her that he had not had her boys indicted. But suppose deceased did not believe him, and concede that the threat was not conditional,—that is, if it was conditional that it was a condition which she had no right to make; in the view we take, the threat would not serve to intensify her conduct and acts at the time of the homicide. If appellant is to be believed,—and there was no testimony outside of his as to her acts immediately connected with the homicide,—she not only drew the pistol on him, but advanced towards him, and attempted to shoot him. In such a contingency, threats would not intensify her conduct, but his right of self-defense was perfect on what she did at the time. The Barnes Case, 39 Tex. Cr. R. 189, 45 S. W. 495, referred to by appellant, does not support appellant. That was a case involving much the same question here presented. Previous threats had been introduced as evidence in the case. When the parties met, a quarrel ensued, and, according to the defendant's theory, the prosecutor shot at appellant. On this issue the court uses this language: "Now, there is no act of the prosecutor, under the appellant's theory, which can be viewed in the light of threats so as to give significance thereto. If appellant's theory be true, he did not need the threats to acquit him. The act of the prosecutor was such as to require no explanation. The prosecutor shot at him without any provocation whatever, and, if the jury did not believe this, there was no theory of the case presented by the evidence in which threats could have figured at all."

It is contended that the court should have given the special requested instruction predicated on the theory that, if appellant was justifiable in firing the first shot, and that same was fatal, but that the second shot was not a fatal shot, that in such case the firing of the second shot was immaterial in determining whether or not the defendant was guilty of murder, that, at most, appellant could only be convicted on the second shot of

manslaughter. According to the view we take of this question, there was no issue predicated on this point. The evidence of appellant places these shots so close together as that if the one was justifiable the other must have been inevitably so, or if the first was not authorized the other was equally so. The witness Folsetter, so far as we have been able to discover, was the only witness, besides appellant, who heard the shots, and he states they were fired in rapid succession. Appellant testified on this point: "That immediately after denouncing him as a black son of a bitch, and that he was raising a lot of bitches, she raised up from her sitting posture, and jerked out a pistol, and threw it down on him, and just as she was in the act of doing that he jerked his pistol out of his pocket and shot her; and she then ran right up to him, and he caught her with his left hand, and wheeled her around, and shot her again as she went. That he did not know where any of the shots struck her. She threw her hands on the table, and then went to the door, and passed out of the house." He further testified: "That after the first shot was fired there was considerable excitement, and she came right at him with the pistol in her hand, and he could see her bulk there, and the second shot filled the room with smoke. As near as he could tell, she threw her hands out at the table, which was the customary place for the red-handled butcher knife, and he thought that she was grabbing at a knife. That he shot Mrs. Whitesides [deceased] because he was afraid she would kill him. That he did not shoot her for what she had said about his family. That he did not shoot her any more, as quick as he saw the danger was over." Now, from this evidence, it seems to us, appellant was as fully authorized to fire the second shot as he was the first shot. That is the reasonable interpretation we place upon his testimony, and we do not think the jury could have done otherwise. It does not matter in this respect which of the shots was fatal. It may be that the first was the fatal shot, and the second shot was, according to the testimony of one of the physicians, not inevitably fatal. The cases cited by counsel on this proposition announce a correct rule of law, but we do not believe they apply to this case.

What we have said above disposes of appellant's special requested charge No. 1, with reference to the right of a defendant to pursue his adversary until all reasonable appearances of danger have ceased. We do not believe the court was required to charge on an unlawful and violent attack upon appellant. If any attack was made on him by deceased, it was a deadly attack, or one which, at least, would cause him to apprehend serious bodily injury, and nothing else.

During the argument of the district attorney, he stated to the jury that he believed defendant was guilty of murder. It does not appear any exception was taken to this re-

mark at the time, but subsequently counsel for appellant requested the court to instruct the jury not to consider said remark, which instruction the court refused to give, and this is assigned as error. In explaining the bill, the court says "that his attention was not called to any such statements at the time they were made, but was first called to his attention by counsel asking the foregoing charge." In *Cooksie's Case*, 26 Tex. App. 72, 9 S. W. 58, referred to by counsel, the court held that certain remarks of counsel were evidently injurious to appellant, and were reversible error. The charge, excluding said remarks from the consideration of the jury, was asked and refused. It is not stated in the case whether any exception was taken at the time to the remarks. *Young's Case*, 19 Tex. App. 536, and *Kennedy's Case*, Id. 618, are also referred to by counsel. In the first-named case, the learned judge who wrote the opinion in *Cooksie's Case* uses this language in regard to the remarks of counsel: "Now, in relation to this matter, we would be inclined to reverse the judgment if counsel for appellant had called upon the court to repress counsel for the state, and this had been refused, and such conduct had been persisted in without reproof. It seems that, when the attention of the court was called to these remarks, Mr. Maxwell had closed his argument." In *Kennedy's Case*, *supra*, counsel for state was invoking public opinion to come to his aid in the prosecution. The learned judge who tried the case, without suggestion from defendant's counsel, on his own motion, promptly stopped the attorney as soon as he attempted to invoke public opinion. The court uses this language, citing the *Young Case*: "While it is true that authors treating upon this subject say that counsel either for or against the prisoner should never express their opinion as to the guilt or innocence of the accused, yet we would hesitate at this day to reverse a judgment because of a violation of this rule." Now, it occurs to us that in fairness, while the objectionable remarks were being made, the attention of the court should have been called to the same, and an opportunity afforded to stop counsel, or, if necessary, reprimand him on account of such remarks, and, in addition to this, a charge should have been asked. As it was, it seems counsel was permitted to go and announce his belief in defendant's guilt to the jury without objection. If the court's attention had been called to the matter at the time, no doubt the expression would have been withdrawn. However that may be, we are advised of no case where merely such expression of counsel's belief in appellant's guilt has been cause for reversing a case. (Of course, this is objectionable, and should not be permitted.) But the cases which have been reversed on account of remarks of counsel have been of a different character, and we do not feel authorized to hold in this case that the expres-

sion of the district attorney to the effect that he believed defendant guilty is reversible error.

We see no error in the fourteenth paragraph of the court's charge on self-defense. Taken as a whole, it expressed a proper rule of law. It is true, in the first part of the charge, the court told the jury that "the party would be justified in using all necessary force to protect himself," etc. The court should have instructed the jury that he is authorized to use such force as may reasonably appear to him necessary. The charge, however, complained of, further told the jury that appellant was authorized to act upon the reasonable appearance of danger as it appeared to him at the time, and that in no event was he bound to retreat or resort to any other means in order to avoid the necessity of killing his assailant. Moreover, in the succeeding paragraph, the jury was instructed: "If the attack on him by deceased was of such a character as to cause him to have a reasonable anticipation of danger or serious bodily injury, viewed from his standpoint, and he shot and killed deceased, then to acquit him; and that if deceased was armed at the time she was killed, and was making such attack on defendant, and if the weapon used by her, and the manner of its use, was such as likely to produce death or serious bodily injury, then the law presumed deceased intended to murder or inflict serious bodily injury upon defendant, and that it was immaterial whether the pistol was loaded or not loaded, or would shoot or not shoot, provided defendant did not know it was unloaded or would not shoot, which latter fact the state must show."

We do not think there was any error in permitting the witness Weldon to state the angle the ball took which made the hole found in the floor. This, it seems to us, was not a question for an expert, but merely a matter of observation. In addition to what has been said, we would observe that this testimony was objected to on the ground that the witness Weldon was not an expert. This, as has been often said, is not a certificate of the judge that he was not shown to be an expert, but merely the assertion of appellant's ground of objection. The bill was not full upon this question.

Appellant complains, in conclusion, that the testimony is insufficient to support the verdict. We have read the record carefully, and we cannot agree to this contention. The facts were before the jury. The court appears to have given a full and fair charge on all the issues presented by the evidence. While there is no positive testimony, aside from that of appellant himself, as to how the killing occurred, yet the circumstances proven were such as to antagonize appellant's defense, and to support the theory of the state to the effect that appellant shot and killed deceased of his malice aforethought, and the jury were warranted in

finding him guilty of murder in the second degree. The judgment is affirmed.

On Motion for Rehearing.

(March 13, 1901.)

This case was affirmed at the Tyler term, 1900, and now comes before us on motion for rehearing. In the motion appellant presents for our consideration, and as a ground for reversing the case, the action of the court in refusing to permit his counsel to argue certain testimony which is embodied in bill of exceptions No. 8. In this motion appellant explains that this matter was not relied on in his brief and argument heretofore filed, because the same was prepared, not from the transcript, but from the original papers in the case, and the bill No. 8 was misplaced, which caused him to lose sight of this question. In the original opinion we followed the brief and argument of counsel for appellant, and did not notice the refusal of the court to hear argument as presented in said bill No. 8. In order to discuss the action of the court, we will here set out the bill in full, as follows: "After defendant, A. A. Spangler, had testified for himself on direct examination, state's counsel, on cross-examination, asked him why he had turned over to Mrs. Whitesides the 'Triangle' cattle, to which he answered: 'I was holding Walter's money for him, and she [deceased] was after me for it, together with what I owed her, and had turned them cattle over on that indebtedness.' 'Q. Did you turn over all you had of that brand at that time? A. Yes, sir. Then, right on top of that, I was attached here. I had got in debt some five or six thousand dollars, and they went and attached about twenty thousand dollars' worth of stuff here to pay off that indebtedness, and then attached all the cattle they could get their hands on, but there was some remnant stuff they did not get their paws on, and as I would get them up I would turn them in to her [deceased].' And after the witness Charley Spangler had testified for the state, on cross-examination he was asked by defendant's counsel the following questions, viz.: 'Q. I will ask you now if you ever heard her [Mrs. Whitesides] say anything about your mother or sisters. A. Yes, sir; she said they were "God damned whores."' And be it further remembered that, on the argument of the case, state's counsel frequently asked why it was, if the deceased was such a bad woman, defendant had left his home and family, and was living on the Leonard place with the deceased; and, in answering such argument, defendant's counsel referred to the fact that he (defendant) had been broken up by attachments; and he proposed to argue the testimony of defendant, Spangler, drawn out on cross-examination by the state, with reference to such attachments, which testimony is above set out; to which proposed argument state's counsel objected, and

61 S.W.—21

insisted that no such evidence had been adduced on the trial, which objections were sustained by the court, and defendant's counsel were not permitted to refer to and argue such testimony; to which action of the court defendant then and there excepted. Thereafter, defendant's counsel, in discussing the character of the deceased, and her animosity towards defendant and his family, began making reference to the testimony of the witness Charley Spangler, which is above set out; whereupon state's counsel again objected to such argument, and insisted that no such evidence had been adduced upon the trial; and the court sustained the objection, and refused to permit such testimony to be referred to in the argument; to which action of the court defendant then and there excepted, and now here tenders this his bill of exceptions to said ruling, and asked the same be approved. The above and foregoing bill is allowed, with this qualification: At the time of the objection to defendant's counsel arguing the matter brought out on cross-examination of defendant, I was busy preparing my charge. I simply told counsel for defendant that I did not remember any of the matters contained in the foregoing bill having been introduced in evidence, and I don't remember it now, and I refused to allow said bill in so far as it states what defendant and his son Charley Spangler said, because I have no recollection of it, and I will not certify to that which I do not know to be correct. [Signed] A. H. Carrigan, Dist. Judge."

The learned judge who tried the case in the court below, in signing the bill of exceptions, starts out as if to explain the same, stating that the bill is allowed with this explanation; and he then goes on to state that he refuses to allow said bill in so far as it states what defendant and his son Charley Spangler said, because he had no recollection of it. If this is not an explanation contradicting the bill, it is at least equivocal. Formerly, it was held that a judge had no right to contradict a bill under the guise of an explanation; that an explanation was one thing, and a contradiction another. *Tyson v. State*, 14 Tex. App. 390; article 1368, Rev. St. However, in *Jones v. State*, 33 Tex. Cr. R. 7, 23 S. W. 793, it seems that if the judge, under the guise of an explanation, contradicts a bill of exceptions, and the party accepts and files the same, it will be considered. If we are to regard the judge's certificate as a disallowance of the bill on the ground that he did not remember the testimony, then appellant insists that we should, in connection with this bill, also consider bill of exceptions No. 2, which shows that the very testimony of the witness A. A. Spangler which the judge refused his counsel permission to argue was admitted over his objections. It occurs to us that it is but common fairness to consider these two bills together. As stated, bill of exceptions No. 2 shows that the testimony of Spangler in ref-

erence to the cattle and the attachment proceeding was drawn out by the state on cross-examination of A. A. Spangler, over the objections of appellant. In bill No. 8 the judge states he does not remember that such testimony had been adduced in the case. Evidently the judge was mistaken as to this. If he was mistaken as to this matter, then it is likely he was also mistaken as to the testimony of Charley Spangler, which he also refused to allow appellant's counsel to argue, because he did not remember it. If we recur to the statement of facts, we find that this testimony was adduced from the witness Charley Spangler. Appellant insisted he had a right to argue all of this, because it had been admitted as evidence in the case, and he claimed that the state had used certain evidence with regard to the defendant, A. A. Spangler, to his detriment, especially that portion of it which showed he had been living with deceased for some time prior to the homicide; and that he desired to use the testimony with regard to the attachment proceeding and the cattle as a reason for his residing with deceased, notwithstanding the character she was shown to have, and notwithstanding quarrels between them. It may be that to some minds the deductions which appellant sought to draw from this testimony would be considered far-fetched, and the argument on this behalf would be lacking in effect. To others, in the condition of the evidence on this subject, the argument may have appeared a sound one, and a complete answer to the state's proposition. This is all a matter of speculation. The only question with which we have to deal is, was this matter in evidence? If so, appellant had a right to use it in argument for every legitimate purpose, and its logic or convincing character was a question solely for the jury. Beyond this, without doubt, the evidence of Charley Spangler was of an important character, and to deny argument upon it was unquestionably a grave infringement of the privilege of counsel. But, as stated before, it is not the importance of testimony which authorizes its use in argument; for we hold it is not within the power of any court or of any judge to prohibit counsel from arguing testimony which has been admitted in the case before the jury. Section 10 of our bill of rights guarantees to an accused person the right to be heard by himself or counsel, or both. In pursuance of this authority of the constitution, the right to be heard by counsel is regarded by courts as a sacred right, and when denied will constitute cause for reversal. *Tooke v. State*, 23 Tex. App. 10, 3 S. W. 782; *Roe v. Same*, 25 Tex. App. 66, 8 S. W. 463; *Reeves v. Same*, 34 Tex. Cr. R. 483, 31 S. W. 382; *Cooley, Const. Lim.* p. 412. In this case we cannot measure the injury sustained. We cannot tell what effect the argument upon this character of testimony would have had upon the jury. We only know that the court

had decided this was legal testimony, and had admitted it in the case, and that appellant had a right to discuss it, and to use it for every legitimate purpose in his argument. This was denied by the court, and for this the judgment must be reversed.

Appellant also strenuously insists that the court should have given a charge on threats in connection with the charge on self-defense. In reviewing this question, we are inclined to the opinion that such a charge should have been given.

In addition, appellant also insists that we review other matters discussed in the original opinion. However, we see no reason to change the views therein expressed. But for the refusal of the court to permit the argument of counsel on the evidence adduced in the case, as shown in bill of exceptions No. 8, the motion for rehearing is granted, and the judgment reversed, and the cause remanded.

McMICKLE et al. v. HARDIN, Mayor, et al.¹
(Court of Civil Appeals of Texas. Dec. 22, 1900.)

MUNICIPAL CORPORATIONS—TAXES—COLLECTION—INJUNCTION—CURATIVE LAWS.

1. Where several suits have been brought to secure judgments for taxes against the property of several owners, such suits should not be restrained at the joint suit of such owners on grounds which would be equally available to each owner as a defense against the tax in the original suit against his property, since matter which will constitute a defense of which a party may avail himself in a suit pending against him cannot be made the ground of an injunction to restrain proceedings in such suit.

2. Under *Stacy's* Civ. St. art. 388, providing that all towns and cities of 1,000 inhabitants or more, which had theretofore attempted to accept the provision of that title, and become incorporated cities, and had exercised the functions of cities, and been recognized as such by the state of Texas, were by that act legalized, and their proceedings validated, a town which had so attempted to incorporate, and so acted, and been recognized, became a legally incorporated city, with full authority to enforce the collection of taxes, though its attempt to incorporate had not been sufficient under the laws existing at the time the attempt was made.

Appeal from district court, Bowie county; J. M. Talbot, Judge.

Action by E. P. McMickle and others against W. C. Hardin, mayor of Texarkana, and others, to restrain the collection of taxes. From a judgment for defendants, plaintiffs appeal. Affirmed.

Robt. R. Lockett and Chas. S. Todd, for appellants. R. W. Rogers and Wm. T. Hudgins, for appellees.

Statement.

RAINEY, C. J. This suit was instituted by E. P. McMickle, A. C. Allen, Richard P. Lumpkin, W. A. J. Smith, and Mrs. S. A. Smith on the — day of March, A. D. 1900.

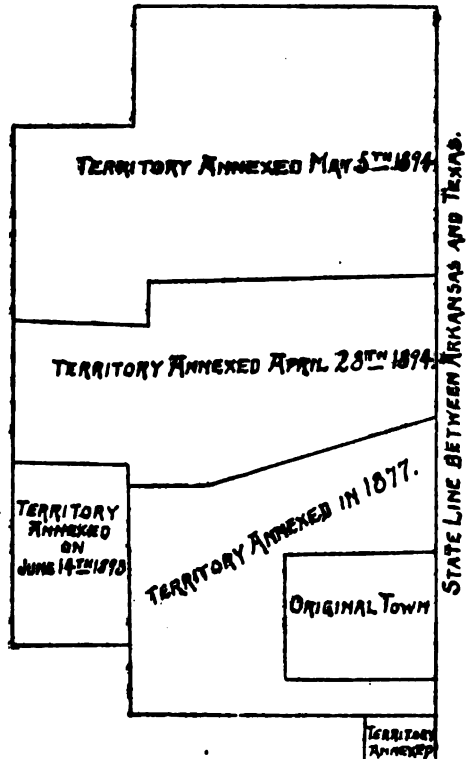
¹ Writ of error denied by supreme court.

praying for an injunction restraining the appellees, W. C. Hardin, mayor, W. E. Estes, assessor and collector of taxes, R. W. Rogers, city attorney, of the town of Texarkana, Tex., and the town of Texarkana, Tex., as a municipality, from the collection of city taxes alleged to have been unlawfully assessed and sought to be collected upon property of appellants, and to restrain appellees from the further prosecution of numerous suits filed by appellees in the district court of Bowie county, Tex., seeking judgment for taxes against the property of appellants. A temporary restraining order was entered herein on the 3d day of March, A. D. 1900, by E. S. Chambers, district judge of the Sixth judicial district, sitting in chambers at Bonham, Tex., and directing the clerk of the district court of Bowie county, Tex., to issue the writs of injunction prayed for by appellants upon appellees giving bond in the sum of \$500. Bond was given and writs were issued on the ____ day of ____, A. D. 1900, restraining appellees from further proceeding to the collection of the taxes or the prosecution of the suits thereafter till final hearing. On the 6th day of April, 1900, upon a full hearing of the law and facts, both having been considered together, a judgment was rendered in the district court of Bowie county, Tex., against appellants and in favor of appellees, dissolving and vacating the restraining order theretofore made, and dismissing the bill, and taxing the costs against appellants.

Conclusions of Fact.

In 1874 the village of Texarkana, Tex., was duly and legally incorporated as a town under the laws then in force regulating the incorporation of towns, and said town corporation was duly administered until January 3, 1877, when the town council, at a regular meeting, by a unanimous vote passed an ordinance containing, among other things, the following: "We, W. B. Russell, mayor, R. W. Rodgers, J. M. Benefield, W. H. Elliott, J. A. Cambell, and Geo. W. Snell, aldermen, of the above-mentioned town and city, incorporated under general laws passed January 12, 1858, regulating the incorporation of towns, on the 12th day of June, A. D. 1874, do hereby unanimously adopt, accept, and reorganize under and by virtue of the act of the general laws passed March 15, A. D. 1875, regulating the incorporation of cities of one thousand inhabitants and over, not in conflict with the constitution of the state of Texas adopted November 23, 1875." At that time the town of Texarkana contained more than 1,000 inhabitants. The ordinance then passed was filed and recorded in the county clerk's office of Bowie county, Tex. At the same meeting, and after the adoption of the aforesaid ordinance, said council proceeded to business by acting on a petition of citizens for the extension of the city limits, which was granted. Said petition was

signed by a majority of the voters of the territory sought to be annexed. Other territory was annexed in the years 1896 and 1894. The proceedings to annex said territory was in conformity to the then existing laws relating thereto. The following map shows the original town, and the territory annexed, and time of annexation. Appel-



lants reside in territory annexed in 1894, and which is not adjacent or contiguous to the territory originally incorporated, being separated therefrom by the territory annexed in 1877. That the 7 suits mentioned in plaintiffs' petition were instituted and are pending in the district court of Bowie county, Tex., to enforce tax liens, and about 50 other similar suits for delinquent taxes against other parties are also pending, as alleged in plaintiffs' petition. That the questions of law as to the legality of said taxes are the same, and are common to each and all of said seven suits. But the other suits are for taxes on property situated in different portions of Texarkana in its original limits and in other portions of the city. But no question is made, as in this case, or answer filed, contesting the validity of the tax liens sought to be enforced. That since January 3, 1877, said corporation has acted and been generally recognized by the state and the public as a city of more than 1,000 and less than 10,000 inhabitants. That plaintiffs have voted for officers of said city at elections regularly and repeatedly held in all the wards, including Wards 5 and 6.

That said Texarkana, Tex., as a city, has issued and floated its bonds in the sum of \$77,000, \$43,000 of which are now outstanding in the hands of purchasers for value. That on the 19th day of October, A. D. 1898, in cause No. 4,177, wherein the city of Texarkana was plaintiff and Chas. R. Korn was sole defendant, pending in the district court of Bowie county, Tex., in which suit the legality of the action of the board of aldermen of the town of Texarkana, Tex., in accepting and adopting the provisions of the act of March 15, 1875, to be incorporated as a city of 1,000 inhabitants or over, and the annexation of the territory adjoining the limits of said town as shown by the minutes of the board of aldermen of said town, which are attached to and made part of the defendants' answer, wherein it was duly pleaded and at issue, the said court by its final decree rendered in said cause did duly adjudicate and determine both of said questions in favor of said city of Texarkana, and adjudge such annexed territory to be an integral part of, and within the corporate limits of, said city of Texarkana, and the property therein situated subject to taxation by said city.

Conclusions of Law.

1. We are of the opinion that plaintiffs were not entitled to the writ of injunction to restrain the proceedings in the suits already instituted against them by the defendants herein. We are aware that our supreme court has held that a number of inhabitants of a municipality may join in an action to enjoin the officers thereof from the collection of an illegal tax. In those cases, however, the injunction proceedings were brought before there were any suits instituted in the courts to enforce collection. In *Gibson v. Moore*, 22 Tex. 611, *Wheeler, C. J.*, broadly states the principle "that matter which will constitute a defense of which a party may avail himself in a suit pending against him cannot be made the ground of an injunction to restrain proceedings in such suit." In *Sumner v. Crawford*, 91 Tex. 129, 41 S. W. 994, *Justice Denman*, in discussing the rule in equity that an injunction will not lie where the plaintiff has an adequate remedy at law, quotes with approval as follows: "It is not enough that there is a remedy at law; it must be plain and adequate, or, in other words, as practical and efficient to the ends of justice and its prompt administration as the remedy in equity,"—citing *Watson v. Sutherland*, 5 Wall. 74, 18 L. Ed. 580; *North v. Peters*, 138 U. S. 271, 11 Sup. Ct. 346, 34 L. Ed. 936. The plaintiffs could have pleaded the matters here urged for relief in the suits then pending against them, and such relief as they are entitled to would be administered as practically and efficiently as in this proceeding. In said case it is further held that under our statute the right to the writ is not limited absolutely to the rules of equity, but should be issued

when, in order to give the relief to which the party is entitled, the restraint of some act is necessary. The plaintiffs having the right to interpose the matters here urged for relief as a defense in the suits pending, it was not necessary for their relief that this proceeding should be instituted. The ground urged in support of the right to bring this suit, that it will prevent a multiplicity of suits, is not sufficient, under the facts, to take this case out of the rule laid down in *Gibson v. Moore*, supra.

2. The attempt of the town council to accept the provisions of the act of 1875, and thereby become a city, was of no effect. *Harness v. State*, 76 Tex. 566, 13 S. W. 535, and authorities there cited. However, we think such attempt was validated by acts of the legislature in 1891 and 1895. See article 386, *Sayles' Civ. St.* The legislature had the authority to authorize chartered towns to accept the provisions of law relating to cities, and thereby become chartered cities. Having such authority, it follows that the validating acts apply to this case, the provisions thereof being sufficiently comprehensive to embrace the attempt to incorporate as a city. Said acts of the legislature not only validated the attempt to incorporate as a city, but also acts done by the council that could have been legally done had such attempt been in accord with the then existing law. The annexing of the territory being in accord with the provisions of the law relating to cities, such annexation also becomes validated by said acts of the legislature. The city of Texarkana has the right to enforce the collection of the taxes, and the judgment is affirmed.

HOUSTON & T. C. R. CO. v. GRAVES.

(Court of Civil Appeals of Texas. Feb. 9, 1901.)

CARRIERS—INJURY TO PASSENGER ON CONNECTING LINE—CONTROL AND OPERATION BY DEFENDANT—PROOF—NECESSITY—DIRECTION OF VERDICT—REFUSAL—JUDGMENT IN APPELLATE COURT—NEW TRIAL—REMANDING CAUSE.

1. Plaintiff was injured while accompanying cattle shipped over connecting lines. *Gen. Laws 1899*, p. 216, authorized the defendant company to purchase the line on which the injury occurred, and provided that in case of such purchase the agreement should be filed with the secretary of state. There was no evidence that such an agreement was ever filed, or that a sale had been consummated, or that the defendant was the lessee of the connecting line, or was operating or controlling it. *Held*, that it was error to refuse to direct a verdict for defendant, as there was no evidence of its liability for the injury.

2. Where it appeared that the matter of defendant's liability for the injury complained of was not fully developed on the trial, the court of civil appeals, on reversing a judgment for plaintiff, will not render judgment for defendant, but will remand the cause for a new trial, though the record as presented failed to show any liability on defendant.

Appeal from district court, Tarrant county; W. D. Harris, Judge.

Action by E. E. Graves against the Houston & Texas Central Railroad Company. From a judgment in favor of plaintiff, and from an order denying a new trial, defendant appeals. Reversed.

W. T. Burns, for appellant. Capps & Can-
tey, for appellee.

HUNTER, J. The plaintiff, E. E. Graves, in first amended original petition, filed May 17, 1900, alleged that he was employed by R. H. Brown to assist in looking after and caring for a shipment of cattle en route from Bellevue, Clay county, to Calvert, in Robertson county; that said shipment was made over defendant's line of road between the points last named; that while said cattle were being transported over defendant's line of railway, at or near the town of Waxahachie, the agents and employes in charge of said cars stopped the train over a high trestle with a steep embankment, which embankment was almost perpendicular; that the caboose was stopped over a smooth surface near said embankment; that at the time named it was night, and very dark; that while train was thus stopping the agents and employes of defendant in charge of said train informed plaintiff that cattle were down in front part of train, and that plaintiff had better go forward and get them up; that he was in danger of losing said cattle unless he got them up; that plaintiff had no knowledge of said trestle or the said embankment; plaintiff started forward, and, as the surface of the ground was smooth at the place where he got out of the caboose, he supposed and had reason to believe that the same condition of affairs existed for the entire length of the train; that in going forward, and without fault upon his part, he fell headlong down said embankment, a distance of 30 feet, severely and dangerously injuring himself. The Houston & Texas Central Railroad Company answered by general demurrer, and special exceptions and general denial, and by special answer and plea, to the effect that plaintiff went forward without the knowledge of defendant, or any of its employes, and that his injuries, if any, were caused solely and alone by plaintiff's want of care in the premises. Trial was had on June 5, 1900, and verdict rendered for the plaintiff in the sum of \$950, and the defendant has appealed.

The evidence of Mr. H. Helland was to the effect that the injury occurred on the line of the Ft. Worth & New Orleans Railroad Company, and that he was vice president and manager of that company, and there was no evidence contradicting this statement, or in any other way establishing that the injury was caused at a place or on any railroad owned or controlled or operated by the appellant. The only evidence tending to establish

such fact was by the appellee, who stated: "We shipped the cattle from Bellevue to Calvert. I had a pass on the road over the Ft. Worth & Denver to Ft. Worth, and then over the Houston & Texas Central to Calvert. In going over the Central, the train was heavily loaded. We left Ft. Worth at half past 9 o'clock. We got twelve miles this side of Waxahachie at 3 o'clock in the morning," when the accident and injury occurred upon which the suit is based.

The record fails to disclose any liability on the part of appellant. As far as the evidence goes, it proves that the injury occurred on a road of a different name, and it is not shown that the appellant was either the owner or lessee of said road, or was operating or controlling it, or was in any manner connected therewith. The legislature in 1899 passed an act empowering and authorizing the appellant to purchase the Ft. Worth & New Orleans Railroad, and in case of such purchase to file the agreement of sale with the secretary of state (Gen. Laws 1899, p. 216), but there is no evidence before us that such a purchase was ever consummated. The special instruction to the jury to find for appellant should therefore have been given, and for the error in refusing to give the same the judgment is reversed.

We are asked to render the judgment here, but we think from the evidence in the record that in all probability this branch of the case was not fully developed, and we, therefore, in the exercise of the discretion vested in us, order that the cause be remanded for a new trial.

NOBLE v. WILDER.

(Court of Civil Appeals of Texas. Feb. 23, 1901.)

BREACH OF CONTRACT—MEASURE OF DAMAGES—INSTRUCTIONS.

1. In an action for breach of contract, the court charged that if the jury found that defendant had a lease on the building in controversy, and in consideration of the payment of \$250 he relinquished his claim and interest under the lease to the plaintiff, and that the subletting was agreed to by the owner of the building, and that the defendant broke the contract, and in violation thereof assumed possession and control of the building, they should find the sum of \$250 as damages for the plaintiff, unless they found further that he had abandoned his interest in the building, in which case they should find for the defendant. *Held*, that the instruction was erroneous, since, the amount of damages not having been agreed on by the parties in the contract or otherwise, the amount thereof should have been left to the jury.

2. In an action for breach of contract the court charged that if the jury found that the defendant, in consideration of \$250, relinquished his interest in a lease of the building in question to the plaintiff, and agreed that he would not resume business in the building during the year 1900, and that he violated the contract and resumed business in the building, they should find for the plaintiff, as damages additional to the sum paid by him for defendant's rights under the lease, such amount as

the evidence showed defendant had received as profits, if any, since the time he resumed possession of the premises, not to exceed the amount for such damage sought to be recovered. *Held*, that the instruction was erroneous, in fixing the amount of consequential damages, since the damages, if any, would be the loss sustained by the plaintiff, and not the profits made by the defendant.

Appeal from district court, Parker county; D. M. Alexander, Special Judge.

Action by George Wilder against D. C. Noble for breach of contract. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Martin & Martin and G. A. McCall, for appellant. J. M. Richards and R. L. Stennis, for appellee.

HUNTER, J. We adopt the statement of this case made by the county judge in his charge to the jury, which is as follows: "In this case the plaintiff, George Wilder, sues the defendant, D. C. Noble, alleging that he paid to defendant the sum of \$250 in consideration of the transfer and relinquishment to him of all of defendant's right and interest in the lease of a certain store building for the year 1900, which contract, he alleges, was approved or acquiesced in by the owner of the building, W. R. Woodhouse. Plaintiff further alleges that defendant has breached his contract, whereby he has been damaged in the sum of \$250. He further alleges that defendant agreed, in consideration for said \$250, that he would not sell groceries in said building during the year 1900, and alleges that, in violation of said contract, defendant on or about February 26, 1900, took possession of said building, and has since said time been selling groceries in said building, and drawn plaintiff's trade, whereby he has been damaged \$100 per month, aggregating \$500. Defendant denies plaintiff's allegations, and alleges that, if plaintiff ever had any right to said house, that he voluntarily abandoned it, and further that, if plaintiff ever had any lease to said house, that said building was destroyed by fire on January 7, 1900, whereby said lease contract was terminated." The evidence tended to establish the contract as alleged by the appellee, and the breach thereof; and the evidence of the amount of damages was conflicting and uncertain, but uncontradicted as to the amount paid to Noble by Wilder as a consideration for the agreement to vacate the premises and for a transfer of the lease thereon. Verdict and judgment went for the plaintiff below, and the defendant has appealed to this court.

On the trial the court charged the jury as follows: "(3) Now, if you believe and find from the evidence that defendant or defendant, with others, had a lease on the building in controversy for the year 1900, and that,

in consideration of the payment by plaintiff of \$250 for himself and others, he relinquished his claim and interest in said lease contract, and agreed to surrender possession of said building to plaintiff, Wilder, for the year 1900, which subletting was agreed to or acquiesced in by W. R. Woodhouse, the owner of the building, and you further find from the evidence that defendant, Noble, has breached said contract, and, in violation thereof, assumed possession and control of said building, you will find for plaintiff, as damages, the sum of \$250, upon this phase of the case, unless you should further find from the evidence that plaintiff had abandoned his claim or interest in said building; and in this connection you are charged that plaintiff would not of necessity have to occupy said building as a grocery store, but such abandonment must have been an abandonment of all plaintiff Wilder's claim to the lease of said building. Should you find from the evidence that plaintiff, Wilder, had so abandoned his claim to the said lease contract, and had no intention of further using or claiming said house for the year 1900, then, in that event, you will find for defendant, Noble. (4) Should you further find from the evidence that at the time of making said contract with Wilder, if you find such contract existed, Noble agreed, as part of the consideration for said \$250, that he would not resume business in said house during the year 1900, and you further find that Noble violated said contract and resumed business in said building, then you will find for plaintiff, as additional damages, such amount as the evidence may show defendant Noble has received as profits, if any, since February 26, 1900, not to exceed the amount sought to be so recovered."

Error is assigned to paragraph 3 of said charge, and we think it must be sustained. The action is one to recover damages for the breach of a contract on the part of Noble to surrender the storehouse and premises to Wilder, and not to do business therein during the year 1900, and the amount of damages was not agreed upon or otherwise liquidated by the parties in the contract or otherwise; hence the amount thereof should have been left to the jury under the allegations and evidence.

The fourth paragraph is erroneous (though no error is assigned thereon) in fixing the amount of consequential damages which might be recovered by Wilder at the amount of the profits Noble made in the business he carried on in the house during the year 1900. We think, on this phase of the case, the damages, if any, would be the loss sustained by Wilder, not the profits made by Noble. For the error in the third paragraph of the charge, the judgment is reversed and the cause remanded.

WESTERN UNION TEL. CO. v. RICE.
(Court of Civil Appeals of Texas. March 13, 1901.)

TELEGRAPHS AND TELEPHONES—FAILURE TO DELIVER MESSAGE—JUDGMENT SUSTAINED.

Where, in an action for failure to deliver a telegram announcing the death of plaintiff's daughter, the facts showed the defendant's negligence in the delivery, and that the plaintiff would and could have been present at his daughter's funeral if the message had been delivered promptly, a judgment of \$750 in favor of plaintiff will be sustained.

Appeal from district court, Fannin county; E. S. Chambers, Judge.

Action by John Rice against the Western Union Telegraph Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Wilkins, Vinson & Batsell and Geo. H. Fearons, for appellant. J. C. Meade and Taylor & McGrady, for appellee.

FISHER, C. J. This suit was instituted in the district court of Fannin county on November 2, 1899, by John Rice against the Western Union Telegraph Company, for damages in the sum of \$1,000 for mental suffering claimed to have been sustained by him on account of the alleged negligence of the defendant company in transmitting and delivering a certain telegraphic message filed in the defendant's office at Klondike, Tex., on August 22, 1899, addressed to S. E. Roberts, Bonham, Texas, reading, "Virginia is dead, send Mr. Rice word," signed, "W. B. Adair," whereby plaintiff was prevented from attending the funeral of his daughter, who was the Virginia mentioned in the message. The defendant answered by general demurrer and general denial. The case was tried before a jury on February 28, 1900, and resulted in a verdict and judgment for plaintiff for \$750. The facts in the record are substantially in accord with those pleaded by the plaintiff, and we find that the evidence is sufficient to support the judgment of the trial court, and that the appellant was guilty of negligence in failing to promptly deliver the telegram, and that, if it had been promptly delivered to the party to whom it was addressed, the appellee could and would have been present at the funeral of his daughter.

We cannot agree with the appellant in its first assignment of error. The testimony there complained of was admissible.

If it could be conceded that the remarks of counsel complained of in the second and third assignments of error were improper, we do not think they were of such a reprehensible character as would require a reversal of the judgment.

In disposing of the fourth and fifth assignments of error, we take occasion to say that the evidence on the principal questions raised in the case, as well as the amount of the verdict, is sufficient to support the judgment. We find no error in the record, and the judgment is affirmed. Affirmed.

MISSOURI, K. & T. RY. CO. OF TEXAS v. BALL.

(Court of Civil Appeals of Texas. March 6, 1901.)

APPEAL—ASSIGNMENT OF ERROR—ACTION AGAINST CARRIER—BREACH OF CONTRACT—DAMAGES.

1. An objection that the verdict is contrary to the evidence, when not specifically raised by motion for new trial, cannot be made the basis of an assignment of error.

2. Where complaint alleges that plaintiff's wife, being a white woman, was refused permission to ride in the car for white people, and forced to ride in the negro coach, evidence that when plaintiff placed his wife and children in the negro coach, and found they were in the wrong coach, he had no time to change them, and his wife requested the conductor to find them seats in another car, and he failed to do so, whereby she was compelled to remain in the negro coach, did not constitute a variance, as such compulsion amounted to a refusal to allow her to ride in the car for white people.

3. Where a carrier compelled a white woman to ride in a negro coach, it violated its contract, and for such breach is liable for the mental pain and humiliation suffered as the direct result of the breach, though unaccompanied by physical injury.

4. Damages for the humiliation caused by profane language used by the negroes in the presence of plaintiff's wife cannot be recoverable, where it is not shown that the misconduct of the negroes was known to the carrier's conductor.

5. Verdict for \$1,000 damages for compelling plaintiff's wife, a white woman, to ride in the negro coach for 60 miles, is excessive.

Neill, J., dissenting.

Appeal from district court, Dallas county; Richard Morgan, Judge.

Action by Edwin Ball against the Missouri, Kansas & Texas Railway Company of Texas. Judgment for plaintiff. Defendant appeals. Affirmed on conditions.

T. S. Miller and Marshall & Thomas, for appellant. T. E. Conn and Moroney & Love, for appellee.

NEILL, J. This suit was brought by the appellee, Edwin Ball, to recover from appellant actual and exemplary damages alleged to have been sustained by the former by the treatment of the railway company to plaintiff's wife, A. P. Ball, while a passenger on one of its trains. The following are the allegations in appellee's petition upon which he seeks to hold the appellant liable: "That said A. P. Ball was and is a respectable white woman; that, in violation of the law and of its said contract, said defendant company refused the said A. P. Ball and children permission to ride in a car provided for white people, and forced her to ride from Dallas to Hillsboro, in Hill county, a distance of about sixty-six miles, in a car provided for negroes, which car contained a number of negroes, who during the whole trip, on said 3d day of January, were drinking some kind of intoxicating liquor, using loud and vulgar language, making offensive remarks concerning plaintiff's said wife, and using unseemly familiarities with each other, and frequently

addressing insulting remarks to her, to her great annoyance and discomfort; that, by reason of said conduct, the said A. P. Ball was greatly pained, wounded, and injured in body and mind, to her damage and injury in the sum of five thousand dollars actual damages, wherefore plaintiff prays for process for judgment for five thousand actual and for one thousand dollars exemplary damages; that defendant had, in utter violation and reckless neglect of its public duty, been running coaches containing disorderly people between Dallas and Hillsboro, Texas, ever since the 1st day of November, 1895; that during said time defendant failed and refused to provide for the preservation of good order in said coaches; that during all of said time the defendant was in the habit of placing respectable white ladies in said disorderly coaches, and subjecting them to the insults and annoyance of their disorderly occupants." The appellant answered by a general denial, and specially pleaded that, if appellee's wife rode in a coach provided for negroes with colored passengers, she did so from her own choice, and was not compelled to do so by appellant or any of its agents; and by pleading the statute of limitations of two years, in averring that more than that period had elapsed from the time of the injury until the issuance and service of the citation. The case was tried without a jury, and judgment rendered in favor of appellee for \$1,000, from which it has appealed.

The undisputed facts are that on the 3d day of January, 1898, appellee purchased tickets for his wife and three children, who are white people, entitling them to first-class passages, in cars provided for their race, over appellant's line of road from the city of Dallas to Galveston. After purchasing the tickets, he accompanied his wife and children on the train, and having carried them on the coach running to their destination, and failing, on account of that car being too crowded, to procure seats for them, appellee was told by appellant's conductor that they would have to go in the forward cars. He then went forward with his wife and children into the other cars, but was unable to find seats for them. In his efforts to find room to seat his wife and children, he continued forward until they entered the coach designed for negroes. He did not observe that it was the car provided for colored people until he got inside with his wife and children. Then the train started, and, not having time to remove them from that car and leave the train with safety, he told his wife, as soon as the conductor came in, to have him change her and the children to another car, and, leaving them, he got off the train. Shortly afterwards the conductor came in the car, and appellee's wife told him she did not want to ride in the car for negroes, and he promised her that he would come in and move her and her children into another car when they reached the next sta-

tion. Having failed to move her and the children when the train arrived at the next station, as he had promised, she again asked the conductor to change her to another car, which he promised to do at the next stopping place. After this she never saw the conductor any more until the train reached Hillsboro. She also told appellant's porter two or three times that she wanted to get into a car for white people, and did not want to ride in the negroes' car. The porter also promised to assist her and the children in getting into another car. But he, like the conductor, failed to render the promised assistance. She was afraid to attempt to go from one car to another with her little children while the train was in motion, without assistance, and so informed the conductor and porter. There were a good many stopping places between Dallas and Hillsboro. She remained in the negroes' car until the train arrived at Hillsboro, where all the passengers were required and offered an opportunity to change cars. There were a good many negroes in the car while appellee's wife was in there, some of whom were smoking and using profane language. Mrs. Ball was rendered very uncomfortable, and was much humiliated by being thus compelled to ride in said car, and by the conduct of the negroes in there.

Conclusions of Law.

1. It is contended by the appellant that there is a variance between the allegations in appellee's petition and the proof offered on the trial, in that he alleged his wife was refused permission to ride in the car for white people, and forced to ride in the negro coach, while the proof only shows that appellant's conductor failed to assist his wife to change from the colored coach to the one provided for white people. In our opinion, it is a sufficient answer to this contention to say that it was not raised by appellant in the court below by its motion for a new trial. The rule is that an objection that the verdict is contrary to the evidence, when not specifically called to the attention of the court by motion for a new trial, will be deemed as waived, and cannot be made the basis of an assignment of error on appeal. *Jacobs v. Hawkins*, 63 Tex. 4; *City of Ysleta v. Babbett* (Tex. Civ. App.) 28 S. W. 702; *Clark v. Pearce*, 80 Tex. 150, 15 S. W. 787. If, however, the question were properly raised, we would not be prepared to say that the proof is not reasonably sufficient to establish the substance of the issue raised by the pleadings. The coaches provided for whites were so crowded that appellee could not find seats for his wife and children in them. In his effort to find such accommodations as was appellant's duty to provide for its passengers, appellee carried his wife and children in the negroes' car. When he found they were in the wrong coach, he did not have time to change them and get off the train

with safety. He relied upon its conductor's finding seats for them and changing them to a car provided for white passengers. This was, without being requested, the conductor's duty. This duty, though requested by appellee's wife, he failed to perform. Through his failure to perform this duty, she and her children were compelled to remain in the negro coach, and such compulsion amounted to a refusal to allow them to ride in a car provided for white people.

2. Again, it is contended that the judgment is not supported by the evidence, because it is not shown that appellee's wife sustained any damages by reason of having to ride in the negro car. The proposition advanced to support this contention is that damages are not recoverable for mental distress or humiliation unaccompanied with physical pain or suffering. In not seating appellee's wife and children in a coach provided for white people, and compelling them, on that account, to ride in the negro car, appellant violated its contract, and failed to discharge its duty as a common carrier, and for the breach of contract and neglect of duty is liable for such damages as it ought to have reasonably anticipated would flow therefrom. That damages for mental pain, anxiety, distress, or humiliation suffered, if the direct result of appellant's failure or neglect to perform its duty, may be recovered, though unaccompanied with physical injury, pain, or suffering, is now too well settled in this state to admit of question. *Railway Co. v. Armstrong*, 93 Tex. 31, 51 S. W. 835, and authorities cited; *Railway Co. v. Perkins* (Tex. Civ. App.) 52 S. W. 124. To withhold from a white lady the right to ride in a coach such as the law requires to be provided for her race, and to compel her and her children to ride in one occupied by negroes, for whom, under the law, it was provided exclusively, constitute such a violation of law and breach of duty as render a common carrier of passengers liable in damages for such discomfort and humiliation as are proximately caused from such breach of duty.

3. The majority of the court is of the opinion that damages for such humiliation as was caused by profane language used by the negroes in the presence of appellee's wife are not, under the facts in this case, recoverable, because it is not shown that such misconduct of the negroes was called to the attention of or known to appellant's conductor, it being such as could not have been reasonably anticipated by the appellant or its servants in control of the train. The writer, however, is of the opinion that, as the act of appellant in compelling appellee's wife to remain in the negro coach was a violation of the law, it is liable for all the consequences of such violation, whether it could have reasonably foreseen them or not.

4. There are no facts in the record which

tend to support appellant's plea of limitations.

5. The court is of the opinion that the judgment is grossly excessive, and that a judgment for \$100 will be full compensation for all the damages sustained. Therefore, if appellee will, within 12 days from this date, enter in this court a remittitur of \$900, the judgment will be affirmed; otherwise, it will be reversed, and the cause remanded.

BRENCK v. EASTERN MFG. CO.

(Court of Civil Appeals of Texas. March 13, 1901.)

SALE—EVIDENCE—ADMISSIBILITY OF COLLATERAL AGREEMENTS.

A provision in a contract of sale that it should not be affected by any parol agreement has no application to a collateral written agreement stating the terms under which the goods were sold, and signed by the salesman of one of the parties, since it is a part of the contract.

Appeal from Robertson county court; Tom M. Taylor, Judge.

Action by M. C. Brenck against the Eastern Manufacturing Company. From a judgment in favor of defendant, plaintiff appeals. Reversed.

J. Felton Lane, for appellant.

FISHER, C. J. We are of the opinion that the court erred in the ruling complained of in appellant's first assignment of error. The written agreement offered in evidence by the appellant, signed by the salesman, Calloway, was a part of the contract of purchase; and the court should have admitted it upon the issue of failure of consideration, or breach of the contract concerning the sale of the goods. The instrument signed by appellant did not deny the power of the agent to enter into an additional written contract stating the terms under which the goods were sold. There is an expression in the contract signed by the appellant to the effect that it should not be affected or controlled by any parol or verbal agreement, but that provision has no application to the paper offered in evidence as signed by the salesman, Calloway; for it was in writing, and, under the facts and circumstances, became a part of the entire contract.

The weight of the testimony seems to be consistent with the contention of appellant as urged in his second assignment of error; but, however, as to the question there raised, as well as that presented in the third assignment of error, we express no opinion, in view of the fact that the case will upon the facts be tried again.

For the error of the court as complained of in the first assignment of error, the judgment will be reversed, and the cause remanded. Reversed and remanded.

BOWERMAN v. POPE et al.

(Court of Civil Appeals of Texas. Jan. 26, 1901.)

SCHOOL LANDS—APPRAISEMENT—APPLICATION TO PURCHASE—SUFFICIENCY—AWARD—VALIDITY—DIRECTION OF VERDICT—ERROR.

1. Plaintiff filed an application to purchase a certain tract of school land in H. county, on August 20, 1897, and the land was awarded to him on August 21st. *Held*, that the fact that the commissioner of the general land office on August 27, 1897, approved a reappraisal at \$1 per acre of all school lands in H. county, "which appeared on the market," did not constitute a reappraisal of the land awarded plaintiff, since it was not on the market on August 27th.

2. Where school land had been appraised at \$2 per acre, an application by plaintiff to purchase it at \$1.50 per acre conferred no right on plaintiff to an award of the land.

3. Where school land had been appraised at \$2 per acre, the fact that it appeared on the books of the land office without appraisement, and that it was understood that land which was unappraised was on the market at \$1.50, did not validate an application to purchase it at that price.

4. The school land in controversy had been appraised at \$2 per acre in October, 1887, and there was recorded in the general land office a certificate that it had been reappraised in August, 1897, at \$1.50, and plaintiff was subsequently awarded the land under an application to purchase it for \$1.50 per acre, dated September 3, 1897. Defendant, an adverse claimant, contended that the date in plaintiff's application was a forgery. *Held*, that it was error to direct a verdict for defendant, since the question of the genuineness of the date was for the jury.

Appeal from district court, Hall county; G. A. Brown, Judge.

Action by W. H. Bowerman against R. O. Pope and another. From a judgment in favor of defendants, plaintiff appeals. Reversed.

J. K. Duke and W. M. Pardue, for appellant. H. E. Deover and Plemons & Veale, for appellees.

CONNOR, C. J. This is a contest between adverse claimants of section 108, block 2, of public free school lands in Hall county, surveyed by the Texas & Pacific Railway Company. Each party claims said section as "additional" land to his home section; appellant claiming the E. $\frac{1}{2}$ of section 100 as his home or base section. Appellant claims his said home section under two applications to purchase, one of date August 20, 1897, and one bearing date September 3, 1897. On the latter date appellant also appears to have made application to purchase section 108 in controversy. Appellee Pope claims section 108 as assignee of one J. R. Gracey, and also by virtue of an application to purchase the same by him made on November 22, 1899. The E. $\frac{1}{2}$ of section 100 and section 108 were awarded to appellant, who was plaintiff below. After the introduction of the evidence, the court charged the jury that "in this case you will find and say by your verdict that the plaintiff take

nothing by this suit." The verdict was so returned, and from the judgment in appellees' favor this appeal has been prosecuted.

In illustrating the conclusion reached by us, it will not be necessary to consider the assignments in their order, nor, indeed, to state all of the facts. We think it sufficient to say that, while appellant's title to his home section appears to be insufficient in so far as dependent on his application of August 20, 1897, he nevertheless shows application, affidavit, obligation, and payment in regular form, bearing date September 3, 1897, which is prior in point of time to the proceedings under which appellees claim. It is insisted that the evidence shows this latter date to be a forgery, the true date being erased. The evidence on this issue was sharply conflicting, and the issue was evidently one for the jury.

Appellant's application to purchase the E. $\frac{1}{2}$ of section 100 on August 20th was insufficient, in that the evidence shows that this section had been appraised at \$2 per acre October 29, 1887, and we think it clear no reappraisal was ever shown to have been made prior to the date of this application. This application, the obligation, and payment were made on the basis of \$1.50 per acre. An offer of \$1.50 per acre for land appraised at \$2 per acre is insufficient, and did not authorize an award. See *Gracy v. Hendrix* (Tex. Sup.) 51 S. W. 846. The fact that on August 23, 1897, the commissioner of the general land office approved the recommendation of the commissioners and county judge of Hall county classifying the lands described in the list attached to the recommendation as dry grazing lands, and appraising them at the price of \$1 per acre, cannot be held to be a reappraisal of section 100. The award under the application of August 20th was made to appellant on August 21, 1897, and said approval of the commissioner of the general land office was adopted only "on all of such lands as appeared on the market." The E. $\frac{1}{2}$ of section 100 having been sold on the 21st, as stated, it therefore did not "appear on the market"; the commissioner having notified the county clerk of Hall county, August 21, 1897, of the award to appellant, and directing said county clerk to insert the name of the purchaser and the date of the sale on the list of unsold land for that county. Nor is the invalidity of appellant's application of August 20th remedied by the fact that section 100 then appeared upon the books of the land office without appraisement, and that it was "understood" that all land so appearing on the books without appraisement was on the market at \$1.50 per acre, in accordance with the minimum price fixed for dry agricultural land by the act taking effect August 20, 1897. Section 100, having been duly appraised at \$2 per acre, remained on the market at that price until a reappraisal had been duly made. No such effect

can be given the act of the legislature mentioned, nor an indefinite understanding, by whomsoever entertained. It follows that the peremptory charge of the court was correct, so far as it related to the title claimed by appellant under said application of August 20, 1897.

While it is not very clear from the record that appellant's home section has in fact ever been reclassified or reappraised, there appears in the record a certificate of the commissioner of the general land office to the effect that section 100 remains upon the books of that office under the classification of dry grazing land, and appraised at \$1 per acre, and that such classification and appraisement is, in effect, in that office. This, together with the fact that appellant was awarded the land here mentioned under his application bearing date September 8, 1897, tends to show a reappraisal. If this be true, and if appellant's subsequent application to purchase the E. ½ of section 100 and section 108 in controversy is prior in time to that of appellees' application, he would be entitled to recover, other essentials concurring. In this condition of the record the issue of forgery appears probably material, and therefore should not have been taken away from the jury by the instruction of the court. Other questions need not be considered, but for the error indicated in the peremptory instruction the judgment is reversed, and cause remanded for a new trial.

LOVEJOY v. TOWNSEND et al.

(Court of Civil Appeals of Texas. Feb. 20, 1901.)

APPEAL-STATEMENT OF FACTS-CONCLUSIONS OF LAW-LANDLORD AND TENANT-LEASE-PROVISIONS-REPAIRS-EVIDENCE.

1. Where on appeal there is no statement of facts to test the correctness of the court's findings, they will be accepted as established by the testimony.

2. Where in a lease the landlord contracted to repair and keep the roof in repair, the fact that when the lease was made the roof was in a defective condition did not relieve the landlord from liability for damages accruing to the tenant from such condition.

Error from Rockwall county court; E. D. Foree, Judge.

Action by J. L. Lovejoy against Townsend & Tipton. From the judgment the plaintiff brings error. Affirmed.

N. O. Edwards and Garnett, Smith & Merritt, for plaintiff in error. L. D. Stroud, for defendants in error.

JAMES, O. J. There is no statement of facts. The judge's conclusions of fact are that Townsend & Tipton rented of Lovejoy one of the lower floor storerooms of a two-story rock building for a dry-goods business; that Lovejoy, in his contracts with the several tenants of said building, including the

one in question, "expressly reserved the exclusive possession and control of, and the obligation to repair and keep in repair" the roof of, the building; that the roof became out of repair by reason of Lovejoy's negligence during the term of this lease, by reason of the margin of the tin roof becoming and being allowed to remain loose and detached from the wall, so that a strong wind, accompanied by lightning and rain, loosened the roof and rolled it back, uncovering about half the building over Townsend & Tipton's store, and damaging their goods; that this storm was not such a casualty but that precaution against the same might and should have been provided, by the exercise of reasonable precaution and prudence on the part of plaintiff; that the damage was not due to or caused by the act of God, but proximately by the neglect of plaintiff; that the condition of the roof was unknown to defendants, and was known or ought to have been known to plaintiff. The action was brought by Lovejoy for rent, and defendants, by cross action, asked for damages alleged to have been sustained by them from said occurrence, and the latter were allowed by the court. In a supplemental finding of facts the court found that the roof was in substantially the same condition at the time of the injury as it was when Tipton & Townsend rented the store, and that the proof showed that the roof was fastened and attached to the building by the usual and customary methods, and that such attachments and anchors had become insecure at the time of this event.

The first assignment of error is that the court erred in refusing, at appellant's request, to find a certain conclusion of law. If the judge's conclusions of law are erroneous, they may be revised in the appellate court on proper assignments.

The second assignment is that the court erred in holding the landlord liable, because this is contrary to the conclusions of fact, in that the findings show the injury was caused by an act of God, or because they further show that the premises were in substantially the same condition when the lease was made as when the injury happened, and because they further show that the roof was fastened and attached to the building by the usual and customary methods. A person is not excused for an act of God where his own negligence is a concurrent cause of the injury. *Philleo v. Sanford*, 17 Tex. 227. The court found here that this injury was not caused by an act of God, but that the landlord's negligence was the proximate cause. Without a statement of facts to test the correctness of these findings, we must accept them as being what the testimony established. It is entirely immaterial in this case whether or not the roof was in this defective condition at the date of the lease. We have the court's finding that by the terms of the lease the landlord expressly contracted to repair and keep in repair the roof. This obligated him to p'

it in repair if unsafe when the lease was entered into, and if he was negligent in this, as the court has found he was, he is liable. *Miller v. McCardell* (R. I.) 33 Atl. 445, 30 L. R. A. 682. The court did not hold, as stated in the third assignment, that there was an implied warranty by the landlord of the tenantable condition of the premises. On the contrary, it found that by the contract the landlord expressly agreed to repair and keep in repair the roof.

What we have said necessarily disposed of all of the assignments against plaintiff in error. Affirmed.

BALL v. HINES.¹

(Court of Civil Appeals of Texas. Feb. 13, 1901.)

JUSTICES OF THE PEACE — JURISDICTION — JUDGMENT — REMITTITUR — EFFECT ON APPEAL.

1. A contract provided for the clearing of 37½ acres, and for every acre left uncleared defendant forfeited \$5 in liquidated damages, and also for failure to complete a house within a certain time he forfeited \$100. In an action before a justice, plaintiff claimed \$15 for failing to build the house, and for failure to clear the land \$182.50. The complaint did not allege the number of acres that had not been cleared. Held insufficient to show a fictitious credit, in order to give the justice court jurisdiction.

2. Where judgment is obtained before a justice, plaintiff can remit any part of the amount in open court before the appeal is perfected, whatever may be his motive in making the remittitur.

3. Where plaintiff, on recovering judgment in a justice court, remitted a certain amount, the remittitur applied to the judgment, and not to the claim, and on trial de novo in the county court he can demand the whole of his claim.

Appeal from Collin county court; J. H. Faulkner, Judge.

Action by B. F. Hines against T. E. Ball. Judgment was rendered for plaintiff before a justice, and defendant appealed to the county court. From a judgment in that court for plaintiff, defendant again appeals. Affirmed.

J. M. Pearson and L. C. Clifton, for appellant. John Church and Abernathy & Beverly, for appellee.

FLY, J. This suit originated in a justice's court, where appellee sought a judgment on an account for \$197.50, and obtained judgment for the full amount claimed by him. The cause was appealed to the county court, where appellee obtained judgment for \$150.

The account sued on was as follows:

"T. E. Ball, to B. F. Hines, Dr.	
"To damages in failing to clear 37½ acres of land, and put same in state ready for cultivation, as per written contract dated 29th September, 1897, land to be ready 1st March 1898....	\$182 50
To damages for failure to build house as required by contract.....	15 00
	<hr/> \$197 50"

¹ Rehearing denied March 13, 1901.

It was urged by appellant, both in the justice's court and county court, that as appellee was claiming damages as to the whole 37½ acres of land, and the contract provided for liquidated damages in the sum of \$5 an acre, appellee could not, by reducing his claim \$5, reduce the total amount sued for to a sum within the jurisdiction of the justice's court. The case of *Burke v. Adoue*, 3 Tex. Civ. App. 494, 22 S. W. 824, 23 S. W. 91, is cited sustaining the contention of appellant. In that case it was held that where the sum is fixed, and is beyond that which the law has authorized the court to adjudicate, the plaintiff should not be permitted to enter a fictitious credit in order to give the court jurisdiction. Whether the doctrine announced in that case is correct or not we are not called upon to say, as a reference to the contract referred to in the account does not fix any sum to which appellant is entitled, but the amount of recovery was dependent upon the proof. The principle of the case cited would certainly not apply to a case where the damages are not fixed. *Telegraph Co. v. Durham*, 17 Tex. Civ. App. 310, 42 S. W. 792.

In the contract it is provided that for each and every acre of the 37½ acres left uncleared and not made ready for the plow on March 1, 1898, Ball should forfeit and pay to Hines the sum of \$5 as liquidated damages. Appellee does not in his account specify the number of acres left uncleared, but alleges that Ball had not cleared the 37½ acres, and it may be inferred from the amount claimed that he admitted the clearing of 1 acre of the 37½ acres. We are of the opinion that this case cannot be brought within the purview of the case of *Burke v. Adoue*, above cited. The contract set out that a certain sum was to be paid for each acre of the land that was not prepared for cultivation by March 1, 1898, and in view of the fact that the land had already been rented and was to be put in cultivation when cleared, and what damages would arise by nonperformance of the contract would be uncertain, we conclude that it was the intention of the parties that the amount named should be liquidated damages, and not a penalty. *Durst v. Swift*, 11 Tex. 273; *Collier v. Betterton*, 87 Tex. 440, 29 S. W. 467; *Mills v. Paul* (Tex. Civ. App.) 30 S. W. 558. It follows that the court did not err in construing the contract as to clearing the land to be one for liquidated damages, and appellant cannot complain of the court construing that part of the contract as to the house to provide for a penalty, as the ruling could not have injured him. The amount provided for a failure to complete the house was \$100, but appellee chose to treat that part of the contract as providing for a penalty, and sued for only \$15 for infraction of that part of the contract, and no ground of complaint can be urged by appellant because the court treated that part of the contract as providing for a penalty. The charge is not open to the criticisms urged

against it by appellant, and it was not error to refuse the special charges requested.

In the justice's court appellee recovered judgment for \$197.50, but, immediately after obtaining judgment, he, in open court, entered a remittitur for \$50. It was contended by appellant in his motion to retax the costs in the county court that the remittitur was not noted on the docket until after the appeal bond was filed in the justice's court, but this was contradicted by the witnesses of appellee, and the county court found against appellant. Appellee had the power to remit any part of the amount recovered by him by announcing it in open court before the appeal was perfected, and then it was the duty of the justice of the peace to note such remittitur on the docket, and, if he made such note after the appeal bond was filed, it did not affect the validity of the remittitur. What may have been the motives inducing the remittitur was not a proper subject of inquiry. The amount of \$50 was remitted, reducing the amount recovered in the justice's court to \$147.50. The amount recovered in the county court, after deducting the offset allowed appellant, was \$150, and the costs were properly assessed against appellant.

Appellee's remittitur in the justice's court was applied to his judgment, and not to his claim, and on a trial de novo in the county court he had the right to demand the whole of his claim. Appellant made no effort to establish his offset in the justice's court, and appellee was justified in making a remitter of a sum to meet an offset that apparently was being held in reserve to fix the costs of the county court on him. The judgment is affirmed.

TEXAS LAND & CATTLE CO., Limited, v. HEMPHILL COUNTY et al.

(Court of Civil Appeals of Texas. Jan. 19, 1901.)

TAXATION—RECOVERY OF TAX PAID—JUDICIAL NOTICE—DETERMINATION—ILLEGAL VALUATION—PROCEEDINGS REGULAR ON FACE—JUSTIFICATION OF TAX COLLECTOR—COUNTY NOT LIABLE FOR STATE TAXES—STATUTES—JUDICIAL NOTICE OF TAXATION RATE—COLLATERAL ATTACK.

1. In an action against a tax collector to recover taxes paid on an alleged illegal valuation, it was not error for the court to sustain a demurrer to the complaint, where the proceedings were regular on their face, and the tax rolls were in due form, and had issued from the proper authority, as such proceedings justify the collector in his acts.

2. Under Rev. St. arts. 5157, 5159, requiring a tax collector to give bond to the state officers for the collection of state taxes, and articles 5210, 5211, prescribing independent reports of the two remittances and collections, an action could not be maintained against a county for the recovery of state taxes paid on an alleged illegal valuation of the property, as the county was charged with no duty relating thereto.

3. Where the petition, in an action against a county to recover taxes paid on an alleged illegal assessment of property, did not separate the amounts paid for state and county taxes, the court could take judicial notice of the rate

of taxation fixed by general law for state purposes, and thereby determine the amount of county taxes due, in controversy, for the purpose of determining the jurisdiction of the county court.

On Rehearing.

In an action against a county and the tax collector to recover taxes paid on an alleged illegal valuation of the property, it was error for the court to grant a recovery for the county taxes paid, since such action was a collateral attack on the judgment of the commissioners' court fixing the value of the land.

Appeal from district court, Hemphill county; B. M. Baker, Judge.

Action by the Texas Land & Cattle Company against Hemphill county and others. From a judgment in favor of the defendants, plaintiff appeals. Affirmed.

H. E. Hoover, for appellant. C. N. Hammond and Browning & Madden, for appellees.

CONNER, C. J. The appellant, the Texas Land & Cattle Company, Limited, instituted this suit in the district court of Hemphill county, Tex., on the 15th day of March, 1900, against Hemphill county and W. R. Boyd, as tax collector of said county, to recover the sum of \$511.60, the taxes alleged to have been illegally assessed against appellant on the tax rolls of Hemphill county for the year 1899, and paid by plaintiff, under protest, to the said W. R. Boyd, tax collector, on January 31, 1900. The defendants appeared, and filed their original answer, consisting of general and special demurrers to the petition, all of which were by the court sustained. Appellant declining to amend, judgment of dismissal was duly entered on May 15, 1900, from which judgment appeal has been duly prosecuted; the action of the court on the ruling on said demurrers and in dismissing the suit being duly assigned as error.

The petition is very similar to the petition in the case of Johnson v. Holland (Tex. Civ. App.) 43 S. W. 71, which may be looked to in aid hereof. With sufficient detail and form, it set out the circumstances of the case, and of the acts constituting the illegal and fraudulent character of the tax sought to be recovered. For the purpose of this case, we think it sufficient to say that, in substance, the petition declared that the 80,400 acres of land described therein, and owned by appellant, had, by the commissioners' court of Hemphill county, sitting as a board of equalization, been illegally, arbitrarily, and fraudulently assessed at a value of \$42,774 greater than the fair cash value of said land on January 1, 1899, and greater in that amount than the value at which it had been duly rendered for taxation in behalf of appellant; by reason of which it was alleged that the tax demanded of appellant, and paid by it under protest, was greater in the sum of \$511.60 than it should have been. The tax rolls and all other proceedings were regular, the sole ground of attack

being the alleged fraudulent augmentation of value as stated.

We are of opinion that the petition is insufficient to show a right of recovery as against appellee Boyd. It is true it has been held that the collection of augmented or imposed taxes fraudulently assessed, as alleged, may be enjoined. *Johnson v. Holland*, supra. It is also true that such fraudulent imposition of taxes will constitute a good defense to a suit brought in the name of the state and the tax collector for the recovery of such taxes. *Mann v. State* (Tex. Civ. App.) 46 S. W. 652. But the case before us is to be distinguished from the cases referred to, in that this is a suit for the recovery of taxes paid, and it appears from the petition under consideration that the tax rolls and proceedings by virtue of which appellee Boyd acted in the premises were in form regular and legal on their face. In such cases the rolls constitute entire justification as to the tax collector for the acts he was commanded to do by such process, including, of course, the receipt of all taxes shown by such rolls to be due. See *Cattle Co. v. Beard*, 80 Tex. 490; 16 S. W. 312. It may be said that from the report of the case just cited we would not be justified in assuming that the tax there mentioned had been fraudulently assessed as here charged, and that in this particular the cases should be distinguished. The doctrine is there announced, however, in general terms, that "in all cases in which the process under which a collection of a tax is made is in the form prescribed by law, and issued by proper authority, the better rule is that the collecting officer is exempt from liability to the taxpayer, who should seek relief from the state, county, or municipality on whose account the tax was collected." This rule was applied by the supreme court of Massachusetts in the case of *Cone v. Forrest*, 126 Mass. 97, and by the supreme court of Arkansas in *Saunders v. Simmons*, 30 Ark. 276, in cases of alleged fraudulent assessments, as in the case before us, except that in the Arkansas case it was intimated that the suit would lie against the tax collector if it be shown that the illegal tax yet remained in his hands, and had not been turned over to its further custodians. This limitation, however, and which is here urged, seems to have been expressly repudiated by the Board Case, as will be seen from the criticism therein made of the case of *Hardesty v. Fleming*, 57 Tex. 390; to which might be added that, after the collection, the collector is required by the law, under penalties, to make collection, and promptly report and remit all taxes collected by him to the state and county treasurers, without excepting cases in which suits, however promptly filed, may be instituted for the recovery thereof. Rev. St. arts. 5162, 5169, 5211. The rule declared in the case of *Cattle Co. v. Beard* was followed by this court in the unreported case of *Anderson v.*

Hardin, in an oral opinion by Justice Stephens, rendered on January 8, 1898. That was a case in which it was alleged that certain cotton in transit at the compass at Clarksville, and owned by others, had been illegally assessed as the property of *Anderson & Co.*, and said company sought to recover of said collector the tax, in the sum of \$202.50, alleged to have been paid under duress. It was held that, "as the tax roll seems to have been regular on its face, if the property was not assessable appellant mistook his remedy in suing the tax collector on his bond." Writ of error was refused by the supreme court. 98 Tex. 654. So that while authority to the contrary may perhaps be found in the text books and decisions of other states, and while some of our own earlier decisions may be apparently or in fact in conflict therewith, we nevertheless think we must now hold as the settled rule of law on the subject in this state, supported by the better reason and weight of authority, that in cases where the proceedings are regular on their face, and the tax rolls are in due form, and have issued from the proper authority, they constitute absolute justification to the tax collector for the collection and receipt of taxes shown thereby, and he will not be required to go behind such proceedings, and determine, at his peril, such matters de hors the record as might have the effect of invalidating the assessment. It follows that the demurrers herein were properly sustained, so far as they relate to the appellee Boyd, and that as to him the suit was properly dismissed.

The question remains, however, whether, as alleged, a cause of action exists against Hemphill county. That taxes illegally or fraudulently imposed and involuntarily paid may be recovered from the county or municipality on whose account collected is well settled. See authorities hereinbefore cited, and *Taylor v. Robinson*, 72 Tex. 364, 10 S. W. 245; *City of Galveston v. Snyder*, 39 Tex. 237; *Baker v. Panola Co.*, 30 Tex. 87; *City of Marshall v. Snediker*, 25 Tex. 400; 2 Desty, Tax'n, p. 797. In aid of the court's ruling, it is insisted that the action is, in effect, a collateral attack upon an order or judgment of a court having jurisdiction to increase values of property rendered for taxation, and that, therefore, the suit cannot be maintained. This contention, while perhaps plausible, we think must be overruled as contrary to the effect and spirit of the authorities hereinbefore cited. We think it clear that Hemphill county cannot be required to account for that part of the alleged illegal tax collected and held by Boyd, tax collector, for and on state account. The rate of taxation for state and public free school purposes is fixed by general law, and for that purpose the intervention of the commissioners' court is not necessary. The tax collector is required to give bond as prescribed to the state

² Memorandum.

officers for the faithful performance of his duties in the collection of state taxes, and another and like bond to the county officers for the county tax. Rev. St. arts. 5157, 5159. His reports and remittances of taxes collected on account of the state and of the county are likewise independent of each other. Rev. St. arts. 5210, 5211. Hemphill county was not authorized to collect or receive any part of such state tax, was charged with no duty relating thereto, and should not be required to account therefor. Hemphill county, however, can be legally charged for such part of said tax as Boyd collected or received for account of said county. While the separate interests in the fund are not explicitly stated in the petition, nor the rate of taxation for county purposes given, as fixed by the commissioners' court for the year in question, we nevertheless must judicially know that applying the rate of taxation fixed by general law for state and public free school purposes to the \$42,774 of fraudulent values charged, and subtracting the result from the \$511.60 for which appellant sues, a sum within the general jurisdiction of the county court remains, and of which the district court of Hemphill county has jurisdiction; the general jurisdiction of the county court of Hemphill county, under the constitution, having been taken therefrom, and conferred upon the district court. See Gen. Laws 1895, pp. 95, 116, and Act March 25, 1891.

Appellant company having shown by its pleading that it was entitled to part of the relief sought, we conclude that there was error in dismissing the suit, and that as to Hemphill county the judgment should be reversed, and the cause remanded for a trial in accord with the views herein expressed, the judgment as to appellee Boyd being affirmed; and it is so ordered.

On Motion for Rehearing.

(March 9, 1901.)

The proposition that appellant's suit, as alleged, constitutes a collateral attack upon the order or judgment of the commissioners' court of Hemphill county, fixing the value of appellant's land, has been pressed with great force; and on reconsideration we are unable to distinguish this case from the case of Cattle Co. v. Roberts, by this court, reported in 27 S. W. 737, where the same question was involved, and where it was determined in favor of appellees' contention here. In view of this decision, and of the fact that a writ of error was refused in that case, we conclude we must now hold that this suit constitutes a collateral attack upon the judgment of the commissioners' court mentioned, and that in this form of action the value of appellant's land as there fixed is conclusive against it. It follows that we were in error, in so far as we held otherwise, and that the motion for rehearing should be granted, and the judgment of the district court affirmed; and it is so ordered.

SOLOMON v. MOWRY et al.

(Court of Civil Appeals of Texas. Feb. 2, 1901.)

TRESPASS TO TRY TITLE—COMMUNITY PROPERTY—SALE—PAYMENT OF COMMUNITY DEBT—BURDEN OF PROOF.

Community property of plaintiff's father and mother was sold by the father as survivor of the community. Plaintiff subsequently claimed a one-half interest in it as the heir of her mother. Defendant, a subsequent grantee, contended that the land was sold by plaintiff's father to pay the community debt. Held, that an instruction that the burden was on defendant to show, not only that a community debt existed and that the land in controversy was sold by the survivor to pay it, but also that the sale was in good faith, was erroneous, in compelling defendant to show good faith in the sale.

Appeal from district court, Cooke county; D. E. Barrett, Judge.

Action by Lula Mowry and another against Henry Solomon. From a judgment in favor of plaintiffs, defendant appeals. Reversed.

Eldridge & Gardner, for appellant. Culp & Giddings, for appellees.

STEPHENS, J. The case is thus correctly stated by appellant: This is a suit by Lula Mowry, joined by her husband, W. P. Mowry, against Henry Solomon, in an action of trespass to try title to an undivided one-half of 53½ acres of land out of the T. J. Rusk survey, in Cooke county, Tex. Defendant answered by plea of not guilty, limitations, and improvements in good faith. Plaintiffs and defendant claim title to said land through a common source, viz. under a deed from G. W. Moore and wife to J. H. Haggard. Plaintiff Lula Mowry claims one-half said land through her mother, Samantha Haggard, deceased, wife of said J. H. Haggard, plaintiff Lula Mowry's father. Defendant claims under a deed from said J. H. Haggard to Nancy Haggard, and by chain of title from said Nancy Haggard down to defendant. Said J. H. Haggard had a right to sell all said land to pay community debts of himself and said Samantha Haggard. The case was tried before a jury, and verdict and judgment was rendered in favor of plaintiff for an undivided half of said 53½ acres of land.

The main issue was thus submitted to the jury in the second paragraph of the court's charge: "If you find from the evidence that the deed of the land by J. H. Haggard to his mother, Nancy Haggard, was a bona fide transaction, and if at said time the \$328 note to Moore was unpaid, and if you believe that said sale to Nancy Haggard was made for the purpose of paying off said \$328 note, then you will find for defendant, and in that event it would not be necessary for the purchaser to see that the money so paid was applied to the payment of said note. But, in order for defendant to recover under this section of the charge, the burden is upon defendant to show that said sale was bona fide, and that said \$328 note was unpaid at the time said sale

was made, and that said sale to Nancy Haggard was made for the purpose of paying off same." This charge distinctly placed upon appellant the burden of proving not only that a community debt existed, and that the land in controversy was sold by the survivor in community for the purpose of paying it, but also that such sale was bona fide. For thus requiring appellant to show that the sale was bona fide error is assigned to the charge. The burden of proof was properly laid on appellant to show the existence of a community debt, and, as no complaint is made of the charge because it placed the burden on him of showing that the sale was made to pay it, we may assume, for the purposes of this appeal, that the burden was on him to show this fact also, but certainly the law required no more of him. If there was an element of fraud in the sale vitiating it, the burden was on appellees to show that fact. *Cage v. Tucker's Heirs* (Tex. Civ. App.) 37 S. W. 180. See, also, opinion on second appeal (not yet officially reported), 60 S. W. 579. Besides, if the community debt, which was a lien on the land, remained unpaid, and the sale was really made to pay it, the testimony in this case can hardly be said to have raised any issue of fraud in the transaction; hence it was misleading to require appellant to further show that the sale was bona fide. If the sale was not real, but only colorable, that phase of the issue was covered by the next paragraph of the charge, reading: "If said sale was a sham, then the same would in no manner affect the rights of plaintiff." The two paragraphs, read together, amounted to an instruction to the jury to find against appellant, although they should find the existence of the community debt, and that the sale was really made to pay it, unless it was further shown by him that the sale was bona fide. The law arising upon the facts of this case did not warrant such a charge, and for this error the judgment is reversed, and the cause remanded for a new trial.

GOLDSTEIN v. SHERMAN, S. & S. RY. CO.
(Court of Civil Appeals of Texas. Feb. 20, 1901.)

CARRIERS—LOSS OF GOODS—LIABILITY OF CONNECTING CARRIER.

Where goods are consigned over several connecting lines from a point outside the state, and are lost before they come into the state or into the possession of the last connecting carrier, the latter is not liable therefor, either at common law, or under Rev. St. art. 331a, making each of several connecting carriers who have recognized, acquiesced in, or acted on a contract for a through shipment of goods between points in the state liable for the loss thereof.

Appeal from district court, Marion county; J. M. Talbot, Judge.

Action by H. Goldstein against the Sherman, Shreveport & Southern Railway Company to recover the value of goods lost in

carriage. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

Geo. T. Todd, for appellant. L. S. Schluter, for appellee.

NEILL, J. This suit was brought by appellant against the appellee in the justice's court to recover the value of certain goods shipped from Chicago, Ill., to Jefferson, Tex., and consigned to appellant. In the justice's court judgment was had by the plaintiff, but upon appeal to the district court the defendant obtained judgment. The trial court, before whom the case was tried without a jury, found the following facts: (1) That a shipment of goods, including the bale lost, was an interstate shipment. (2) That the goods were delivered by plaintiff's wife to the Chicago, Burlington & Quincy Railway Company, at Chicago, Ill., on or about September 2, 1899, and that the shipment included three boxes and one bale of clothing. (3) That the bale of clothing was never received by appellee, nor ever delivered to or received by the Missouri, Kansas & Texas Railway Company of Texas; that said bale was short at Ray, the transfer station of the Missouri, Kansas & Texas Railway and the Missouri, Kansas & Texas Railway of Texas, near the state line; and that said bale was short at Greenville. (4) That said bale was lost before the shipment reached the state of Texas, the same having been handled by three different roads before it reached appellee. In explanation of these findings, we will say that the evidence shows that the Chicago, Burlington & Quincy Railway Company, the initial carrier, connects with the Missouri, Kansas & Texas Railway Company at Hannibal, Mo.; that the latter connects with the Missouri, Kansas & Texas Railway Company of Texas at Ray, in Grayson county, Tex., just inside the state; and that the Missouri, Kansas & Texas Railway of Texas connects with the appellee's road at Greenville, Hunt county, Tex. The bill of lading contained a stipulation limiting the liability of the connecting carriers to three respective lines of road.

The findings of the trial judge are fully sustained by the evidence in the record. It is too plain for argument that article 331a, Rev. St., has no application to the character of shipment disclosed by the evidence in this case. It is equally clear that no other judgment than the one appealed from could be lawfully rendered upon the evidence disclosed by the record. Therefore it is affirmed.

NEW YORK LIFE INS. CO. v. ORLOPP.
(Court of Civil Appeals of Texas. Feb. 2, 1901.)

INSURANCE—LIFE POLICY—LAW OF OTHER STATE—CONSTRUCTION OF POLICY—RENEWAL—LAPSE OF RENEWED POLICY—NONPAYMENT OF PENALTY.

1. Laws N. Y. 1892, c. 690, § 92, prohibits any life policy not issued on monthly or week-

ly payments, or being a term policy of one year or less, from being declared forfeited or lapsed for nonpayment of premiums, unless notice is given at least 15 days before it is payable. A life policy provided that it should be governed by the laws of New York, and it was regularly declared lapsed for failure to pay a premium, but was afterwards reinstated on a payment of a part of the premium and the execution of notes for the balance, which contained a provision that all benefits should be forfeited if the notes were not paid at maturity. The notes were not paid when due, but notice of their maturity was not given to the insured, and he afterwards tendered the amount of the notes and future premiums, which was refused by the company. There was no evidence of the construction placed on the statute by the New York courts. *Held*, that the beneficiary could recover on the policy, since the acceptance of the notes and cash constituted a renewal of the policy, which could not be lapsed without notice to insured of the time when the notes became due.

2. The renewal contract did not change the policy to a term policy, and hence it was not relieved from the operation of the statute.

3. Where a life policy provides that it shall be construed and governed by the laws of another state, the statutes applicable are considered as part of the written contract.

4. Where a life policy provides that it shall be construed and governed by the laws of a foreign state, the provisions of a statute applying thereto cannot be waived by the parties.

5. Where a life policy provides that it shall be construed by the laws of a foreign state, and a statute of such state is established in an action on the policy, but there is no evidence showing the construction placed thereon by the court of last resort of such state, the refusal of the court to follow such construction is not in violation of Const. U. S. art. 4, § 1, requiring full faith to be given by each state to the public acts, records, and judicial proceedings of other states.

6. Rev. St. 1895, art. 3071, making life insurance companies failing to pay a loss within the time specified in the policy after demand therefor liable to a 12 per cent. penalty and reasonable attorney's fees for the collection of such loss, is not in violation of the fourteenth amendment to the United States constitution, when applied to a foreign insurance company, as denying such company the equal protection of the laws.

Appeal from district court, Tarrant county; W. D. Harris, Judge.

Action on a life policy by Elizabeth Orlopp against the New York Life Insurance Company. From a judgment in favor of plaintiff, defendant appeals. Modified and affirmed.

West & Smith, for appellant. Henry M. Chapman, Thomas J. Powell, and Ross & McLean, for appellee.

HUNTER, J. This suit was brought by appellee, as administratrix of the estate of Harry A. Orlopp, on the 14th day of December, 1898, to recover of appellant on two life insurance policies,—one for \$4,000, the other for \$3,000,—both dated May 9, 1893, issued on the life of the said Harry A. Orlopp, and payable to his executors, administrators, or assigns upon the death of the insured, and for reasonable attorney's fees, and 12 per cent. damages, as provided in article 3071, Rev. St. Tex. The amount of premium on the first was \$112, and that on the second

was \$84, due and payable on the 1st day of May of every year in advance; and it was stipulated in said policies that, if said annual premiums were not paid by or before said day, said policies should lapse and become void, and all payments made thereon should be forfeited to the company. It was also stipulated that the said contracts or policies should be construed and governed by the laws of the state of New York. The first premiums were paid May 1, 1893, but the premiums due May 1, 1894, were not paid; and the policies, by reason thereof, under the terms of the contracts, lapsed and became void; the company having given the notices required by section 92, c. 690, Laws N. Y. 1892. On August 7, 1894, Harry A. Orlopp applied to the company to reinstate his policies, paying to the company one-fourth of each premium, and executing his two notes for the balance, each due November 1, 1894, and furnishing a health certificate as required by the company. A renewal certificate was issued by the company and sent to its local agent at Ft. Worth, where Orlopp resided, but was never delivered to Orlopp, for the reason, as the local agent testified, that it was the custom of the company not to deliver such certificates until the notes were paid. The company accepted the cash, notes, and health certificate, and afterwards, at maturity, sent the notes to a bank in Ft. Worth for collection on November 1, 1894; and they were presented to Orlopp and their payment demanded on the day of their maturity, and Orlopp failed to pay them. On April 20, 1895, Orlopp wrote the secretary of the company, in New York, offering to pay the notes; and the secretary on April 22d answered that it would be necessary to furnish another health certificate, and send check for amount of notes, \$146, and \$7.30, accumulated interest, before the policies could be reinstated. Orlopp refused to furnish another health certificate. He tendered and caused to be tendered the regular annual premiums for 1895, 1896, 1897, and 1898, on May 1st of each year, which were declined and returned by the company upon the ground that the policies were lapsed and void; and on June 22, 1898, Orlopp died. Proofs of death were waived by the company by refusing to furnish blank forms upon which to make such proofs, the policies requiring proofs to be made according to the company's forms.

The appellant company pleaded and proved the New York statute, setting it out in its answer, and claimed forfeiture of policies for failure to pay premium due May 1, 1894, and for failure to pay the notes; while plaintiff pleaded a reinstatement of the policies, and a failure on the part of the company to give notice under the statute of the due date of the notes, etc. The appellant proved the statute as follows: "Sec. 92. Nonforfeiture of Policy without Notice. No life insurance corporation doing business in this state shall declare forfeited or lapsed, any policy her-

after issued or renewed, and not issued upon the payment of monthly or weekly payments, unless the same is a term insurance contract for one year or less, nor shall any such policy be forfeited or lapsed by reason of non-payment, when due, of any premium, interest or installment or any portion thereof required by the terms of the policy to be paid unless a written or printed notice stating the amount of such premiums, interest or installment or portion thereof due on said policies, the place where it should be paid, the person to whom it is payable shall be mailed and addressed to the person whose life is insured or the assignee of the policy, if notice of the assignment has been given to the corporation, at his or her last known post office address, postage paid by the corporation or by an officer thereof or person appointed by it to collect such premiums, at least fifteen days and not more than forty five days prior to the day when the same is payable. The notice shall also state that unless said premium, interest or installment or portion thereof then due shall be paid to the corporation or to a duly appointed agent or person authorized to collect such premiums by or before the day it falls due, the policy and all payments thereon will become forfeited and void except as to a surrender value or paid up policy as in this chapter provided. If the payment demanded shall be made in the time limited therefor, it shall be taken in full compliance with the requirements in the policy in respect to the time of payment, and no such policy shall in any case be forfeited or declared forfeited or lapsed until expiration of the thirty days after the mailing of such notice. The affidavit of any officer, clerk or agent of the corporation, or of any one authorized to mail such notice, that the notice required by this section has been duly addressed and mailed by the corporation issuing such policy, shall be presumptive evidence that such notice has been duly given." But it did not plead or offer in evidence any decision of the courts of New York construing said statute, nor otherwise allege or offer to prove what construction had been given it by the courts of that state. The notes executed for part of the premiums due May 1, 1894, were in the following form: "Pol. 535.-985. New York, May 1st, 1894. Six months after date, I promise to pay to the order of the New York Life Insurance Company sixty-three dollars, at City National Bank, Fort Worth, Texas, value received, with interest at the rate of five per cent. per annum. This note is given in part payment of the premium due May 1st, 1894, on the above policy, with the understanding that all claims to further insurance, and all benefits whatever, which full payment in cash of said premium would have secured, shall become immediately void and be forfeited to the New York Life Insurance Company if this note is not paid at maturity, except as otherwise provided in the policy itself. \$63. [Signed] H.

A. Orlopp." The case was tried by the court without a jury, and judgment rendered for appellee for the full amount of the policies, less the amount due on the two notes, and less the premiums for 1895, 1896, 1897, and 1898,—the court refusing to give judgment for the 12 per cent. damages on the ground that the said article of the Texas statute was in violation of the fourteenth amendment to the constitution of the United States,—and the appellant brings the case here for revision. The appellee has also filed a cross assignment of error to the court's action in refusing to render judgment in her favor for the 12 per cent. damages allowed by the Texas statute; the court having sustained a demurrer to the claim for damages and attorney's fees as claimed under said statute.

There are but two questions involved in this appeal. The first is raised by appellant, and is whether, under the provisions of the New York statute above quoted, it was necessary to give the insured notice when the notes fell due, in order to entitle it to declare the contracts forfeited. The other is raised on appellee's cross assignment of error, and is whether article 3071 of our Revised Statutes, imposing a penalty of 12 per cent., and the payment of reasonable attorney's fees, on life and health insurance companies doing business in this state, for failure to pay a loss, is in violation of the first section of the fourteenth amendment to the constitution of the United States?

In determining the question raised by appellant we are compelled to construe the New York statute quoted, and declare the meaning of the contract, reading the statute as a part of it. To do this involves only the well-known rule which requires the courts to declare the legal effect of a written instrument put in evidence, because such statute becomes a part of the written contract, and must be construed as such, with these differences, however: (1) The requirements of such a statute cannot be waived by the parties; and (2) the statute ought, perhaps, to receive the same construction by the courts of another state as is given to it by the courts of last resort in the state where it was enacted. This rule is based, it is said, upon that section of our federal constitution which declares that "full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state." Const. U. S. art. 4, § 1. These "public acts, records and judicial proceedings" of one state are facts to be alleged and proved in the courts of another state; and, where any public act of a state has received any peculiar construction by the courts of that state which is relied on in the courts of another state, it is incumbent upon the party insisting upon such peculiar construction to plead and prove the same, like any other fact. *Lloyd v. Matthews*, 155 U. S. 222, 15 Sup. Ct. 70, 39 L. Ed. 128; *Chicago & A. R. Co. v. Wiggins Ferry Co.*, 119 U. S. 616, 7 Sup. Ct.

398, 30 L. Ed. 519; *Hanley v. Donoghue*, 116 U. S. 1, 6 Sup. Ct. 242, 29 L. Ed. 535. So that in this case we are not only not required to look to the decisions of the courts of New York to ascertain how they have construed this statute, but we are not authorized to do so; for that would be deciding this question of fact upon evidence not in the record, and not pleaded by the parties.

Appellant's counsel have read in argument to us, and have cited in their briefs, the opinion of the court of appeals of New York in the case of *Conway v. Insurance Co.*, 140 N. Y. 79, 35 N. E. 420, and also the case of *Banholzer v. Insurance Co.*, 77 N. W. 295, and 78 N. W. 244, decided by the supreme court of Minnesota, following the decision in the New York case; both seeming to hold that where notice, under that statute, was given of the due date of the annual premium, etc., and a part of it is paid, and a note like the one in this case is given for the balance, no notice is necessary of the due date of the note, before forfeiture may be declared by the company. But in the Minnesota case, as appears from the first decision, that learned court, it seems, would have decided the point the other way (that is, that such notice on the note was necessary), had it not considered the question settled by the New York case; and, on motion for rehearing, Mr. Justice Cady dissented, maintaining that that part of the New York case relating to notice was mere dicta, and said: "By every sound rule of interpretation, the letter of the statute of New York applies to a case where the time of payment of an installment of the premium has been extended, and clearly such a case is within the spirit of the statute, and notice should be given of the time when the installment as thus extended will fall due." In the report of the *Banholzer Case* it does not appear affirmatively that the peculiar construction given the statute by the New York court was pleaded or proved; but we infer both, as the court felt bound to follow that decision, even against the views, it seems, of four out of five of its members, as indicated by Justice Mitchell in the original opinion. We therefore decline to consider the New York case, except as matter of argument, and, considered in that light, it is not satisfactory on the point involved. Indeed, the distinguished jurist who wrote the opinion seems to have based the decision of the case on another point,—the authority of the agent to accept the note and extend the time of payment of the premium,—holding that he had no such authority. It was not, therefore, necessary to decide whether notice of the due date of the void note was required, or whether the statute applied to such cases, and this question the learned judge did not discuss.

The renewal contract did not change the policies so as to constitute them contracts for term insurance, and hence not subject to the statute. See *Insurance Co. v. Smith* (Tex. Civ.

App.) 41 S. W. 680, and authorities there cited; *Insurance Co. v. Statham*, 98 U. S. 24, 28 L. Ed. 789.

We come, then, to consider the terms of the statute just as if they were literally printed in the policies, as we are required to consider and construe any other written contract, except, as it was proved to be the statute law of New York, its provisions are mandatory and cannot be waived by the contracting parties. See *Insurance Co. v. Hill* (C. C. A.) 97 Fed. 263, 49 L. R. A. 127; *Society v. Clements*, 140 U. S. 226, 11 Sup. Ct. 822, 35 L. Ed. 497; *Hicks v. Insurance Co.* (C. C. A.) 60 Fed. 690. And we first conclude that the policies sued on lapsed, and all benefits thereunder were forfeited, on May 16, 1894; that being 30 days after the mailing of the notice to the insurer, which mailing the evidence shows to have been done on the 14th day of April, 1894. And we also conclude that the acceptance by the company of one-fourth of the May, 1894, premiums in cash, and the two notes due November 1, 1894, for the balance of said premiums, amounted in law to a reinstatement or renewal of the policies, with an extension of the time of payment on three-fourths of the premiums to November 1, 1894. We cannot escape the conclusion that these notes were given for a portion of the May, 1894, premiums; and, if we are correct in this conclusion, the statute applies to this extended portion of the premiums, the same as it did to the whole premiums before the notes were executed. The language is: "No life insurance corporation * * * shall declare forfeited or lapsed any policy hereafter issued or renewed * * * nor shall any such policy be forfeited or lapsed by reason of nonpayment, when due, of any premiums, interest or installments, or any portion thereof, * * * unless" the notice prescribed therein is given "at least fifteen days, and not more than forty-five days, prior to the day when the same is payable," etc. These policies were "renewed" policies, and a portion of the premiums, by the terms of the renewal contract made in August, 1894, became due on November 1, 1894; and no notice of the due date, or that a forfeiture would ensue if payment was not made at maturity, was ever given on these "portions" of the premiums. Hence no lapse of the policies or forfeitures followed the failure to pay the notes at maturity, and the tender of the amount due upon the notes, and of the succeeding annual premiums for the years 1895, 1896, 1897, and 1898, kept the policies alive and in full force until the death of the insured. The administratrix, therefore, was entitled to recover the full amount of the policies, less the unpaid premiums, as adjudged by the district court.

This brings us to consider the cross assignment of error, which is as follows: "The court erred in not rendering judgment for plaintiff and against defendant for twel-

per cent. statutory damages." The learned judge had sustained a special exception to the claim of plaintiff for the damages and reasonable attorney's fees allowed by article 3071 of our Revised Statutes in cases like this, and in his conclusions of law takes occasion to express his judicial views on the unconstitutionality of the article in question, as follows: "(3) That the claim for attorney's fees and damages for the nonpayment of the policy is unconstitutional, and is an unreasonable and unconscionable penalty placed on an insurance company for daring to avail itself of the privilege of litigating its rights, or what it conceives to be its rights, in the courts of the country. [Signed] W. D. Harris, Judge." The statute under consideration is as follows: "In all cases where a loss occurs and the life or health insurance company liable therefor shall fail to pay the same within the time specified in the policy, after demand made therefor, such company shall be liable to pay the holder of such policy, in addition to the amount of the loss, twelve per cent. damages on the amount of such loss, together with all reasonable attorney's fees for the prosecution and collection of such loss." The exception which his honor sustained urged that the article was in violation of the fourteenth amendment to the constitution of the United States, and that is the contention of appellant's counsel here. The last clause of section 1 of said fourteenth amendment provides that "no state shall deny to any person within its jurisdiction the equal protection of the laws." This court on April 25, 1894, in the case of *Insurance Co. v. Walden*, 28 S. W. 1012, was the first to decide the constitutional question here presented in favor of the validity of the statute. The next decision was by our supreme court, on May 10, 1894, in the case of *Insurance Co. v. Chowning*, 28 S. W. 982, where Justice Brown fully discussed the question, citing numerous federal decisions bearing thereon, and upheld the validity of the statute. The question again came before this court January 30, 1897, in the case of *Casualty Co. v. Allibone*, 39 S. W. 632; and this court again sustained the constitutionality of the statute, notwithstanding the decision of the supreme court of the United States in *Railroad Co. v. Ellis*, 17 Sup. Ct. 255, 41 L. Ed. 666, denouncing a somewhat similar statute of Texas, relating to railroads, as being in violation of the said fourteenth amendment, was urged as authority for holding this statute void for the same reason. But Justice Stephens, speaking for the court, said: "A late decision of the supreme court of the United States [citing the *Ellis Case*] construing a somewhat analogous statute of this state, and reversing the decision of our supreme court approving its validity, may be at variance with the cases just cited [the *Walden* and *Chowning Cases*], but, until it is expressly so held either by our own supreme court or that of the United

States, we will adhere to the decisions already made." A writ of error was denied by our supreme court in this case on April 29, 1897, when Chief Justice Gaines said: "As to the constitutional question, we agree with the court of civil appeals in holding that it is distinguishable from that passed upon by the supreme court of the United States in *Railroad Co. v. Ellis*, 17 Sup. Ct. 255, 41 L. Ed. 666." *Casualty Co. v. Allibone*, 40 S. W. 399. The same question was on May 3, 1897, again decided by this court, in the case of *Insurance Co. v. Smith*, 41 S. W. 680; the court being pro tempore composed of the Honorable W. P. McLean, the Honorable A. M. Carter, and the writer (Chief Justice Tarlton and Justice Stephens being disqualified), when the validity of the statute was again sustained in the original opinion, though on motion for rehearing the two special judges concluded, upon the authority of the *Ellis Case*, to overrule their original opinion delivered by Special Judge Carter, and also to expressly overrule by name all the decisions of this court and of our supreme court above cited. The writer, however, dissented upon the ground that the statute in question was valid as being an enactment by the legislature in the exercise of one of the reserved rights of the states, commonly called the "police power of the states"; insisting that the legislature had the right to provide the terms upon which foreign corporations of that class might do business in this state, and, that being a valid exercise of such power and right, the statute formed a part of the contract of every life and health insurance company issued and made in Texas since the date of its enactment in 1874. 41 S. W. 687. Thus stood the question until November 21, 1899, when it again arose in the circuit court of appeals of the United States for the Fifth circuit, sitting at New Orleans, in the case of *Association v. Yoakum*, 98 Fed. 251, where McCormick, Circuit Judge, speaking for the court, says: "The fourth assignment is that 'the court erred in rendering judgment for 12 per cent. damages upon \$5,000, and also for \$750 for attorney's fees, for the reason that such charges constitute a penalty upon the defendant for defending this litigation, and discriminate against it, and are consequently contrary to law and unconstitutional.'" He then takes up the history of the article in question as shown by the legislative enactments, and by the decisions of our supreme court and of this court on its constitutionality, and also enters into an extended review of the general character of life insurance companies and their manner of doing business, and refers to the very technical decision of our supreme court in the case of *Fitzmaurice v. Insurance Co.*, 84 Tex. 61, 19 S. W. 301, and to the decision of one of our courts of civil appeals in the case of *Hutchison v. Insurance Co.*, 39 S. W. 325, in which our supreme court refused a writ of error. Mr. Circuit Judge McCormick, after

a severe arraignment of such companies as to their manner of doing business, referring to the statute in question, concludes his able opinion as follows: "It does not discriminate against some and favor others, but, though limited in its application, does, within the sphere of its operation, affect alike all persons similarly situated. It seeks to subserve the general interest of the public. It must be sustained. Whatever may be the sound conclusion as to the unqualified validity of this Texas statute, we hold that the fourth assignment of error in this case is not well taken, on the ground that the state had the right to prescribe the terms upon which foreign corporations may do business there. 'Insurance companies established by charter from one state have no natural right to carry on business in any other state, and permission to do so is a privilege for which the payment of a substantial sum as licensee may be required.' Tied. Lim. p. 281. As articles 3071, 3072, c. 3, tit. 58, Rev. St. Tex., were in force at the time the Yoakum policy was written, these provisions were assented to by the contracting parties, and were written into the contract." Without adopting Judge McCormick's nervous rhetoric as set out in his opinion in that case, we may derive instruction from the facts he recites, and thus more plainly see, as expressed in the dissenting opinion of the writer aforesaid, "that the legislature of Texas, in the exercise of this great residuum of power still left in the people of the states, had the right to enact the statute in question, discriminating against this character of business, and that good reasons, founded in sound state policy, existed therefor, and that therefore the statute is not in contravention of the fourteenth amendment to the constitution of the United States, but is valid and binding as part of the contract sued on in this case, and that the appellee ought to recover the 12 per cent. damages as prescribed by the statute, the same as if it were written in the face of the policies." The supreme court of the United States, in passing upon a somewhat analogous statute of Kansas, in April, 1899, declared the same doctrine. Railroad Co. v. Matthews, 174 U. S. 96, 19 Sup. Ct. 609, 43 L. Ed. 909. See, also, Railway Co. v. Humes, 115 U. S. 512, 6 Sup. Ct. 110, 29 L. Ed. 463; Barbler v. Connolly, 113 U. S. 27, 5 Sup. Ct. 357, 28 L. Ed. 923. It appears, therefore, that, with the exception of the special court aforesaid, every court, both state and federal, which has had occasion to pass upon the validity and constitutionality of this statute, has, in a regular line of decisions, running back to April, 1894, found it reasonable, constitutional, and valid, and has upheld it as a legitimate exercise of the legislative power of the state to regulate its own internal affairs. The judgment of the district court will therefore be reformed so as to give judgment in favor of appellee, in addition to her recovery on the policies, 12 per cent.

on the amount of said judgment, to be added thereto; the whole to bear interest at the rate of 6 per cent. per annum from February 10, 1900, the date of the district court judgment herein. And the judgment thus reformed is affirmed.

STEPHENS, J., disqualified and not sitting.

McCORD-COLLINS COMMERCE CO. v.
STERN et al.

(Court of Civil Appeals of Texas. Feb. 18, 1901.)

JUDGMENT—MOTION TO VACATE—APPLICATION—FORM OF MOTION—DEMURRER—DELAY IN FILING—WAIVER.

1. Plaintiff's application to have a judgment dismissing his cause of action for failure to prosecute set aside alleged an agreement with defendants' counsel under which the case should have been continued on request of plaintiff's counsel, who was prevented from attendance in court by sickness, and that defendants' counsel, through mistake, had the case dismissed, and also showed a good cause of action against the defendants. Service of this application was accepted by counsel for the defendants. The application was not filed until seven months after the dismissal of the case. *Held* error for the court to sustain a demurrer on the ground of delay in filing such application, since the application, though in form a motion for a new trial, was a suit to have the previous judgment set aside.

2. Where plaintiff, after learning that his case had been dismissed for failure to prosecute by reason of a mistake of defendants' counsel, filed an application to have the judgment set aside, which was accepted by defendants' attorneys, who indorsed thereon an agreement that the matter might be presented by motion, plaintiff's delay in filing the application after learning of the dismissal of the case was waived by the defendants' agreement indorsed on the application.

Appeal from district court, Wise county; J. W. Patterson, Judge.

Action by the McCord-Collins Commerce Company against Stern, Lauer, Shohl & Co. From a judgment in favor of the defendants, plaintiff appeals. Reversed.

Samuel T. Camp and Morgan Bryan, for appellant. W. S. Essex, for appellees.

STEPHENS, J. The suit of appellant against appellees was dismissed for want of prosecution at the November term, 1898. July 11, 1899, an application was filed to set aside the judgment of dismissal. July 2, 1900, this was demurred to, and the demurrer sustained, because of the delay in filing and presenting the same. From the judgment on the demurrer dismissing the application to set aside the previous judgment, this appeal is prosecuted.

The sufficiency of the application as an equitable showing in the nature of a motion for new trial, filed after the adjournment of court for the term, we, perhaps, need not consider, since it does not seem to have been questioned in the court below, and is not questioned here. But the application seem

to have been treated as a motion merely, and as such was dismissed for not being filed and presented sooner. If it was properly so treated, the disposition made of it must be approved. *Lightfoot v. Wilson* (Tex. Civ. App.) 82 S. W. 331, and cases there cited. In form it was a motion in the original case, but in substance it was an appeal to the equitable powers of the court to grant relief, notwithstanding the adjournment of the court for the term in which the judgment was rendered. It set up an agreement with counsel for appellees under which the case should have been continued on the request made by counsel for appellant, who was prevented by sickness in a remote city from being present when the case was called for trial, and alleged that at the instance and through mistake of one of appellees' counsel, who acted in ignorance of the agreement, the case was dismissed instead of continued, and, besides excusing the failure of appellant and its counsel to learn of the dismissal till long after the adjournment, showed a meritorious cause of action against appellees. Service of the application was accepted by counsel for appellees, who agreed that the matter might be presented by motion to be heard at a subsequent term of the court, and that the same might be continued without prejudice. The sufficiency of this service, or the power of the attorneys to accept service, does not seem to have been questioned. If it should be contended that the acceptance or waiver of service was not made after the suit was brought, as provided in article 1349 of the Revised Statutes, the answer filed by counsel for appellees constituted an appearance for them so as to dispense with the necessity for the issuance and service of citation upon them, as provided in article 1242, *Id.* We assume, of course, that the attorneys had authority to file this answer. If, then, the application contained all the substantial requisites of an original petition in the nature of a motion for a new trial, such as may, under our system of procedure, be filed after it is too late to file the statutory motion, and as appellees waived citation or made such appearance as was the equivalent of service of citation, we see no good reason why they should not have been required to treat the application as a suit brought against them to have the previous judgment set aside. To deny appellant relief in such case merely because the application was filed ostensibly as a motion in the original case would be to allow form to prevail over substance, to the defeat of justice, which would be a reproach to any enlightened system of jurisprudence. See, in this connection, the opinion of our supreme court in *Johnson's Adm'rs v. Cheney*, 17 Tex. 339. As to the delay complained of after appellant learned that it was too late to file a motion for a new trial, counsel for appellees appear to have waived that by the agreement indorsed on the application. Because the court erred in sustaining exceptions to the application the

judgment is reversed, and the cause remanded for further proceedings in accordance with this opinion.

LAWRENCE v. TEXAS CENT. RY. CO.
(Court of Civil Appeals of Texas. Feb. 2, 1901.)

MASTER AND SERVANT—ASSUMPTION OF RISK—INCOMPETENCY OF FELLOW SERVANT—LIABILITY OF MASTER FOR NEGLIGENCE OF FELLOW SERVANT.

1. A servant, injured through the negligence of an incompetent fellow servant, is not precluded from recovering by the fact that he could have known of the fellow servant's incompetency by the use of ordinary care, since he is entitled to assume that the master will not require him to work with an incompetent man.

2. The rule that a servant cannot recover for injuries received in the employment of the master, if he has equal facilities with the master for ascertaining the dangers of the employment, is not applicable to an injury received through the negligence of an incompetent fellow servant.

3. *Sayles' Civ. St. art. 4560f*, providing that a railroad company shall be liable for injuries received by an employé while operating its cars, locomotives, or trains, through the negligence of another employé, though the latter is a fellow servant, does not render such company liable for an injury received by a section man engaged in unloading a car, and injured by the negligence of a fellow servant, since they are not operating such car.

Appeal from district court, Erath county; Lee Young, Special Judge.

Action by William Lawrence against the Texas Central Railway Company for injuries received while in the employ of defendant. From a judgment in favor of the defendant, the plaintiff appeals. Reversed.

Wynne, McCart & Bowlin and J. E. McCarty, for appellant. L. W. Campbell, for appellee.

HUNTER, J. Appellant was a section hand in the employ of appellee, when he with his section gang were ordered by the foreman to unload a car of cross-ties which had been set out on a side track, it appearing to be a part of his duty as a section hand to perform this kind of service when so ordered. Flippen and another section hand were inside the car throwing out the cross-ties, while appellant and another section hand were picking them up, and bearing them a few feet away from the track, and stacking them. Flippen had been working with appellant and the section gang for about three months, but, it seems, was considered a new man. Several times while unloading the car Flippen was cautioned to be careful, that he was liable to hurt some one, and, while appellant and his companion were taking hold of a tie, Flippen threw off one on top of the one appellant had hold of, and it mashed or cut off his thumb. There was evidence tending to prove that Flippen was a reckless, careless, incompetent man, and by reason thereof a dangerous man to work with, and that the foreman of the

section gang knew it, and this suit for damages was based upon that theory. The defense was that the plaintiff, with full knowledge of the incompetency of Flippen, and the danger of working with him, remained in the service of the company, and thereby assumed the risk of injury; also that the injury was caused by the act of a fellow servant, and that defendant is not, by reason thereof, liable. There is some evidence also in the record tending to prove that appellant, before the injury, knew of Flippen's incompetency, though he denies it.

On the trial of the cause, the court, among other things, charged the jury as follows: "(8) A fellow servant assumes all the risks ordinarily incident to the business in which he is engaged, and, when he has equal facilities with the master or vice principal for ascertaining the danger incident to the labor in which he is engaged, he is held by the law to have assumed a risk incident to his employment. (9) Again, if the alleged fellow servant Jim Flippen was in fact reckless, negligent, dangerous, and incompetent, and if plaintiff was injured by the negligence of said Flippen, yet if you find from the evidence that the plaintiff knew, or by the use of ordinary care could have known, the reckless, negligent, and incompetent character of said Flippen, then the plaintiff would not be entitled to recover, and you will find for the defendant."

The assignments to these charges must be sustained, and so, also, must be the fourth assignment. If a servant know of the reckless character of a fellow servant, or of his incompetency, whereby it becomes dangerous to work with him, he assumes the risk of longer working with him. He need not inquire or investigate as to the competency of any fellow servant. He may rely upon the diligence of the master, and assume that he will not put him to work with an incompetent man, nor put an incompetent man to work with him. Hence it was error, as held in the cases below, to charge the jury that if, "by the use of ordinary care, the plaintiff could have known of Flippen's incompetency, he could not recover." *Railway Co. v. Crenshaw*, 71 Tex. 340, 9 S. W. 262; *Railway Co. v. Johnson*, 89 Tex. 519, 35 S. W. 1042; *Id.*, 90 Tex. 304, 38 S. W. 520; *Railway Co. v. Hannig*, 91 Tex. 351, 43 S. W. 508; *Railway Co. v. Eberheart*, 91 Tex. 321, 43 S. W. 510.

What we have said here will also indicate the error in the charge to the effect that, "if the servant had equal facilities with the master for ascertaining the danger incident to the labor in which he is engaged, he is held by the law to have assumed the risk of such danger." This rule, it seems, does not apply in cases like this, where the injury is alleged to have been caused by the incompetency or recklessness of a fellow servant, but only to cases where the physical surroundings make the danger as obvious to the servant as to the master. *Railway Co. v. Lempe*, 59 Tex. 19.

Appellant's counsel insist that the company

is liable for the injury although the section hands engaged in unloading the car were fellow servants with him, because, it is insisted, they were, while unloading the car, engaged in the business of operating it, within the meaning of article 4560f, Sayles' Civ. St. We think not. The unloading of a car by section hands is not operating it. For the errors in the charge as above indicated, the judgment is reversed, and the cause remanded for a new trial.

GULF, C. & S. F. RY. CO. v. PORTER.

(Court of Civil Appeals of Texas. March 13, 1901.)

CARRIAGE OF LIVE STOCK—FOOD—DELAY IN SHIPMENT—INSTRUCTIONS—ISSUES AND PROOF.

1. A verdict for an amount justified by the testimony in a suit against a railroad company for damages to cattle in transportation will not be disturbed on the ground that the jury might have rendered a verdict for a less sum.

2. A railroad company receiving cattle for shipment is bound to transport them to their destination in a reasonable time, and cannot excuse delays in transportation on the ground that its regular trains did not connect in time to avoid delay.

3. Averments, in a petition in a suit against a carrier for damages to cattle in transportation, to the effect that defendant bound itself to transport them in as good condition as possible, that they were damaged when delivered to plaintiff at their destination, and that, if they injured themselves because they were unruly, it resulted from defendant's failure to provide proper pens and water, are sufficient to support a charge authorizing a recovery for defendant's neglect to furnish feed and water.

4. Plaintiff's evidence that injuries to his cattle during transportation were due to want of feed and water is admissible under defendant's answer, averring that the cattle injured themselves because they were wild and vicious.

Appeal from Hill county court; J. B. Reynolds, Judge.

Action by J. N. Porter against the Gulf, Colorado & Santa Fé Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

B. K. Goree and J. W. Terry, for appellant. Wear, Morrow & Smithdeal, for appellee.

COLLARD, J. Suit in the county court by J. N. Porter for alleged damages to stock cattle while being carried by defendant from Ballinger to Blum, Tex., October 9, 1899; alleging that the cattle were not carried in reasonable time, and that they were often jarred and knocked down by rough handling and switching, were confined in muddy pens, unnecessarily unloaded at Brownwood, and six head so badly injured that they were killed or abandoned on the way. Answer by general demurrer, general denial, and special answer that the cattle had been carefully and expeditiously handled, but that they were thin and weak when received, and unruly and vicious, and that, if injured, the injury resulted from their own condition and fighting propensities; that it was necessary

to unload them at Brownwood, to make connection with defendant's train to Temple. Defendant also pleaded that it was stipulated in the contract of shipment that the cattle were not to be transported in any specified time, and that plaintiff assumed all risks of injury to the cattle resulting from their disposition, and, further, that plaintiff agreed to take care of the cattle en route, and if they were injured it was due to the negligence of plaintiff to properly care for them. Plaintiff replied by demurrer and general denial, and specially that any agreement of plaintiff not to hold defendant liable for injuries to the cattle arising from its own negligence is void, and that if the cattle were unruly and were maimed it resulted from want of proper care of defendant to provide proper pens and water. Verdict and judgment for plaintiff for \$518.55, from which defendant has appealed.

The court instructed the jury that, if injuries to the cattle resulted from the condition or disposition of the cattle, plaintiff would not be entitled to recover; and appellant contends that it was shown by a preponderance of the evidence that at the time of the shipment the cattle were poor and weak, and that plaintiff, notwithstanding, loaded them on the cars for a trip of nearly 300 miles; and that defendant was, therefore, not responsible. The shipment consisted of 60 cows and heifers, 20 two year old steers, and the rest yearlings, or "coming yearlings," except 2 bulls,—128 head in all. The testimony of plaintiff showed that the cattle were damaged on the trip at \$8 per head, or over \$1,000, though plaintiff sued for only \$6 per head,—\$768. He recovered \$518.55,—an amount less than that sued for, and an amount less than would have been warranted by the testimony. It is not the province of the court to determine the true amount of damages the jury should have allowed. The law leaves that question with the jury, and unless the verdict should be apparently excessive the court should not interfere. In this case we could not do so. Testimony adduced by the plaintiff shows that he bought the cattle in the country about 80 miles from Ballinger. They were stock cattle, and in good condition,—not crippled or bruised. He drove them to Ballinger, and "they stood the trip nicely." They were loaded on defendant's local freight, and carried 75 or 80 miles, to Brownwood, where they were held in muddy pens 16 or 17 hours without sufficient feed and water, and were then reloaded and carried to Temple on a mixed train,—a long, tiresome trip,—all day and night going the distance, about 100 miles; the train making frequent stops, having the effect to worry the cattle and knock them down. They were not fed at Temple, remained there 4 hours, and were then carried to Blum on defendant's road, being 8 or 9 hours on the way. On arrival at Blum they were in bad condition,—skinned up and

muddy; all skinned more or less. Six of the cows died during the shipment, and three after they were unloaded and received at Blum. Of the six that died on the way, three were left at Brownwood, one died while being unloaded, and two others were killed in the pens at the same place. Plaintiff testified: "They were put in the Santa Fé stock pens at Brownwood, and they were in bad shape. It had been raining, and they were muddy. The cattle were put in three pens, and the company's employes gave the cattle three bales of hay to each pen, or nine bales to the 128 head of cattle. They filled the troughs in the three pens and went away. I went to the pens about daylight on the morning of the 28th, and the cattle were very restless. There was just a little water in the bottom of the troughs. They were crowded around the troughs, all trying to get it. Some of them were down, and some of them had been hooked over in the troughs. I hunted up the agent, and asked him to put more water and feed in the pens. In the course of an hour he came to the pens, and turned on more water in the trough, and put nine more bales of hay in the pens. * * * The cattle quieted down when they were watered and fed. The cattle were watered at the creek, as they were driven into Ballinger on the evening of the 26th. They had no water from that time until they got the water at Brownwood." Dave Schley testified for plaintiff that he knew the cattle. " * * I saw them about two days before they were shipped. They were average cattle,—neither fat nor poor. They were in as good flesh as any cattle in that country. I helped to drive them to Ballinger." M. W. Brigham, witness for plaintiff, testified that he knew the cattle: "I helped to drive them. It took about a day and a half to drive them from the pasture to Ballinger. They were not very troublesome in driving. They were quiet. Their condition was very good when they got to Ballinger. They were stock cattle. The cattle were in good shape." J. H. Spreadman, witness for plaintiff: "I know the bunch of cattle in question, and saw them when they arrived at Blum. * * * The cattle were in pretty bad shape,—in bad condition. Some of them were dead, some were down, some had their necks crooked around." The witness thinks that there were none dead among the yearlings. T. R. Gannaway, witness for plaintiff, testified that, in the condition they were in at Blum, they were worth from \$10 to \$12 per head, and such a lot of cattle in average flesh would have been worth an average of \$18 to \$20 per head,—the cows, about \$26 per head. There was testimony adduced by defendant to the effect that the cattle were poor and in bad condition on arrival at Ballinger, and were worth much less than the estimate made by plaintiff's witnesses. We cannot say the verdict was unsupported by the testimony, as to failure of defendant to carry the cattle in a rea-

sonable time, nor that it was excessive in amount. The verdict was not for as much as the testimony of plaintiff would have warranted. These questions were for the jury to determine, and while they might have rendered a different verdict, for a less amount, it was their province to decide the matters, and we cannot disturb the finding.

Appellant contends that the delays were absolutely necessary, especially at Brownwood; that the cattle were carried on as soon as the regular trains arrived. Defendant received the cattle for shipment, and it was its duty to transport them in a reasonable time. If the trains did not connect in time to avoid the delay, it cannot claim immunity from the consequences on that ground. It does not appear that the cattle were injured or famished for water, as claimed by defendant, on arrival at Ballinger. They were watered the evening before arrival. Porter testified that they stood the trip nicely and were in good condition. It was the morning after they were put in defendant's pens that they were restless for want of water and feed, and as soon as they were fed they quieted down. The jury might well have concluded that it was the want of water and sufficient feed that caused them to be restless and hook and crowd one another, and not because of their being wild and unruly.

2. Appellant complains that the court submitted as an element of recovery the issue as to whether the cattle had been properly fed and watered. The petition shows that "when the cattle were delivered to plaintiff at Blum they were in bad condition, being bruised and drawn, and were greatly damaged and injured." It is also averred that "defendant agreed and bound itself to transport the same as expeditiously as possible, and in as good condition as possible." These allegations are sufficient to admit proof of the cause of the drawn and damaged condition, and that defendant failed to comply with the obligation to carry the cattle in as good condition as possible; and under the issue so made it might be shown that they were not fed and watered. Plaintiff distinctly alleged that if the cattle were unruly it resulted from, and was caused by, the failure to provide proper pens and water. The averments were sufficient to predicate a charge by the court authorizing a recovery from neglect of defendant to furnish feed and water.

3. The testimony as to want of feed and water was also admissible upon the issue made by defendant that the cattle were wild and vicious, and so from these causes they injured themselves. There was proof that when they were fed and watered they quieted down. So the proof of want of feed and water was also admissible upon the issue made by defendant.

4. The charge of the court and the charge given at request of defendant were as favorable to defendant as they should have

been, and it was not error to refuse other instructions asked by defendant. It was correct to refuse defendant's requested charge to the effect that if it were necessary to unload the cattle at Brownwood, in order to comply with the law that cattle shall not remain loaded upon cars longer than 28 hours without feed and water, and if they were held for that purpose, and to connect with a regular train, then there could be no recovery for the alleged delay. It is clear that the cattle were not held at Brownwood as long as they were to comply with the law as to feeding and watering; nor could defendant be excused for such delay on the ground that the delay was to secure the further shipment by the regular train.

It is not necessary to express our views as to other assignments. We have considered every issue in the case as presented in appellant's brief, and find no error requiring reversal. We believe the judgment of the lower court should be affirmed, and it is so ordered. Affirmed.

GILLEAN et al. v. CITY OF FROST.

(Court of Civil Appeals of Texas. Feb. 6, 1901.)

TRESPASS TO TRY TITLE—DEDICATION—EVIDENCE—SUFFICIENCY—ISSUES—MATERIALITY—NECESSARY PARTIES—DECLARATION OF TRUST—ACCEPTANCE OF DEDICATION—CITY—CREATION SUBSEQUENT TO DEDICATION—LIMITATIONS—OPERATION—JUDGMENT—PARTIES INCLUDED—TAX ON DEDICATED PROPERTY—PAYMENT—EFFECT.

1. B. owned 150 acres of land, through which a railway was built, and on the establishment of a station on B.'s property he divided all the land into lots and blocks, except 7 acres, which he laid out as a park, and 30 acres covered by a lake. The lots were sold on the representation that the park and lake were to be the property of the public. B. recorded a plat of the town, in which the park and lake were designated, and the property was used by the public as a park. *Held*, that the evidence was sufficient to show a dedication of the park and lake to the public.

2. A railway company, in building its road, erected a wall across a creek forming a lake. The owner of the property subsequently laid it out into town lots, which he sold on the representation that the lake should belong to the public, and deeded the land beneath the lake to the railway company, and the right to use the water for railroad purposes. The lake was used by the inhabitants of the town as a public park. Subsequently the original owner's grantee asserted title to it, fenced it, and charged admission. *Held* that, in an action of trespass to try title by the city, the questions whether the public knew that the railroad erected a dam and formed the lake and whether the city was bound by the deed to the railway company were immaterial, since there was no conflict in the use of the water by the railway company and the use of the lake by the city as a public park.

3. A lake was formed by a railway company erecting a wall across a creek in constructing its road, and the owner deeded the land beneath the lake so formed to the railway company, with the right to use the water for railway purposes. Subsequently the owner dedicated the lake to the town which had grown up around it for a public park. *Held*, that the railway company was not a necessary party to

an action of trespass to try title, brought by the town against a subsequent grantee of the owner, since the company was in no way interfering with the public's use of the lake, and was not concerned in the litigation.

4. An owner dedicated a tract of land and a lake to a city for a public park, and subsequently deeded the land beneath the lake to a railway company, with the right to use its waters for railway and such other purposes as would benefit the railroad or the city and its business. *Held*, that the deed to the railway company did not declare a trust in the company in favor of the city, but was merely declarative of a benefit already set apart to the people of the city.

5. Where an owner of land divided part of it into lots with reference to a park and lake, which he declared was for the use of the public, the immediate use of the property by the public as a park constituted an acceptance of the dedication.

6. Where an owner of land laid it out in lots with reference to a park and a lake, and represented to purchasers of the land that the park and lake were to be dedicated to the public, and the property was immediately used as a public park, it was not necessary that the town which subsequently developed around the lake should have been created at the time of the dedication in order to enable it to assert title to the property as dedicated to the public.

7. An owner of property divided it into lots, and dedicated a lake and park on it to the public. A town grew up around the lake, which used the property as a public park. Subsequently the owner deeded all of his property remaining unsold to a land company, subject to certain privileges, one of which recognized the right of the public to use the lake and park. The land company conveyed title to defendant, subject to all the privileges granted by the owner to the land company. *Held*, that defendants' deed was not sufficient to set the statute of limitations in operation as against the rights of the public to use the property as a public park, since it did not purport to convey any rights antagonistic to the public.

8. An owner dedicated a lake and park to the public, and the property was used by a city which had grown up around it as a public park. Defendant claimed the property under a deed executed in 1892, and fenced the property, and charged admission. *Held*, that an attempt by defendant in 1896 to rent the property of the city was a sufficient recognition of the city's title by dedication to prevent the running of the statute of limitations prior to that date.

9. *Sayles' Ann. Civ. St. 1897, art. 3351*, provides that no persons shall acquire title by occupancy or adverse possession to any part or portion of any street or grounds which have been dedicated to the public use of any town or city. *Held* that, where an artificial lake had been dedicated to the public use of a city, a third party cannot acquire title to it by adverse possession, since the word "grounds" is comprehensive enough to include an artificial lake.

10. Where a city brought an action of trespass to try title to a park and lake which had been dedicated to the city as a public park, subject to the rights of the citizens to use the waters of the lake for manufacturing and other purposes, it was error, on rendering judgment for the city, to also adjudge that the city should not deprive the defendants "or other persons" of the proper and reasonable consumption of water from the lake, since the city obtained judgment as representing its citizens, and no "other persons" except defendants had any interests to be protected.

11. Where defendant asserted title to a park and a lake after they had been dedicated to the public, the fact that he paid taxes on the property to the city in which the property was located did not impair the rights which the pub-

lic had acquired by dedication, or confer any rights on defendant, and hence did not estop the city from asserting the rights which its citizens had acquired by the dedication.

Appeal from district court, Navarro county; L. B. Cobb, Judge.

Trespass to try title by the city of Frost against J. A. Gillean and others. From a judgment in favor of plaintiff, defendants appeal. Modified.

Simkins & Mays, for appellants. Frost, Neblett & Blanding, for appellee.

FLY, J. This suit was instituted by the appellee against J. A. Gillean and W. C. Gillean to try title to land in the western part of the town of Frost, known as the "Lake," containing 32 acres of land, and the "City Park," containing 7 acres of land. They pleaded general denial, and nonjoinder of parties plaintiff, not guilty, and limitation of three, five, and ten years, and prayed that their warrantors, W. B. Jones and R. A. Mitchell, J. A. Tullos, L. A. Morgan, and J. H. Galbreath be made parties defendant, and that, in case of their eviction, they have judgment over against them. The case was tried by the court without a jury, and judgment was rendered "that the plaintiff, the city of Frost, do have and recover possession of said premises from the defendants for the benefit of the public use for all purposes and uses as a pleasure and recreation grounds, said lake being a part and parcel of said premises, and to be used in connection with said park; and said premises shall be held and controlled and its use regulated by said municipality, plaintiff herein, for all purposes of recreation, pleasure, diversion, and entertainment, the full possession of the surface thereof being adjudged and decreed to the plaintiff; and that such use in the plaintiff shall not deprive the defendants or other persons from the proper or reasonable consumption of water from said lake." It was further decreed that the Gilleans take nothing by their cross action as against any of the other defendants except W. B. Jones, against whom they recovered judgment for \$240. In 1887 the St. Louis, Arkansas & Texas Railway Company was built, and passed over a tract of 150 acres of land off the Noah Kessiah survey in Navarro county, owned by Bryan T. Barry. A station was located on the land, and the land was surveyed into blocks, lots, streets, and alleys, and a certain piece of land containing about 7 acres was designated as the "City Park," and lying adjacent to it there was another designation of the "Lake," containing from 30 to 50 acres of land. In passing across Barry's land a creek was crossed by the railroad, which, by an agreement between the railroad company and Barry, instead of being crossed by a bridge, was crossed on a solid embankment, which dammed up the creek, and flooded the land, and formed the lake. After the lake had been formed by the dam across the creek, late in 1887 a public

sale of the lots into which the land had been subdivided took place. The sale was superintended by Barry, and maps of the proposed town, which was named Frost thereon, were distributed among the numerous persons who were present to buy. On those maps the streets, blocks, lots, and the city park and lake were designated, and during the sale it was repeatedly declared by the auctioneer and Barry that the lake and park were for public use. Afterwards private sales were made by Barry, and in each of them the right of the citizens to the use of the lake and park was held out as an inducement to purchase. On April 17, 1888, Barry executed a deed to the railway company, in which was the following recital: "In consideration of \$2.50, and for the benefits to accrue to me and my property by the erection and maintenance of a lake of water, herewith sketched, situated at Frost, a station on the Corsicana & Hillsboro branch of the Cotton Belt Railway in Navarro county, I convey [the land covered by the lake], with leave to overflow it with water for the supply and use of said company in the operation of its railway, and such other uses and purposes for the benefit of said company and its property, and also for the benefit of the town of Frost and its business, as they may desire to put same to from time to time. It is understood, however, that the citizens of the town who purchase lots from me, and to whom I may, from time to time, give my written consent thereto, shall have the right to use water for manufacturing purposes out of said lake, so as not to reduce the quantity of water for the immediate and prospective use of the railway company for all the purposes of their use. On failure for a year to maintain the lake, the use of the land shall revert to me and my heirs, and this conveyance stand for naught. To have and to hold the premises, with all rights, appurtenances, and privileges, to the said railroad, its heirs and assigns, forever. I also reserve the right to stock said lake with fish, and to use same to angle therein, so as in no way to interfere with said uses of said railway company." The town increased in population. The lake was stocked with fish, and it and the park were used by the people as a place of public resort, and use of them was untrammelled until some time in the latter part of 1892 or early part of 1893, when W. B. Jones, who was in possession, charged an admittance to the lake and park. He had prior to that time fenced the premises in controversy, over the protest of many citizens. In December, 1889, Barry executed a deed to Mitchell, Morgan, and others, composing a land company, conveying property described as follows: "All that certain land situate at Frost, in Navarro county, in one body, and out of one survey, to wit, the Noah Kessiah survey, and described in two parcels, as follows: 'One hundred and thirty acres, * * * being the same land subdivided in-

to lots and blocks and upon which the town of Frost is situated, except the lots in certain blocks which I have conveyed to various parties, and two lots in block 16, for school purposes, * * * and subject to the conveyance of the right of way reservation, depot grounds, section house, and pond of water, and water privileges heretofore made by me to the St. Louis, Arkansas & Texas Railway Company. * * * It being my intention to hereby convey the lots and land and privileges connected therewith owned by me on the said Noah Kessiah survey." In 1890, W. B. Jones erected waterworks, using the lake for a water supply, having rented the lake and park from the land company. In October, 1892, the land company, by quitclaim deed, conveyed the lake and park to Jones. The park and lake were fenced by Jones after his purchase. On June 7, 1893, the town of Frost was incorporated, the lake and park being within the corporate limits, as well as all the 150 acres that had been subdivided and platted by Barry. The plat of the town of Frost was placed on record in Navarro county in 1887. On March 24, 1890, W. B. Jones conveyed to John A. Gillean the city park and the lake, including the machinery and appliances described as "waterworks." In 1893, Jones endeavored to lease the property from the citizens of Frost, but failed. This was done after he had been advised by his attorney that he had no title to the land. Jones paid taxes on the premises after he bought them. The evidence established conclusively that the park and lake were dedicated to the public use. It was clearly the intention of Barry, the owner of the land, to set apart for the public use the lake and park. This intention was evidenced by the division of the land into blocks, lots, streets, and alleys, and reservation of the lake and park on the plat, which was duly recorded, and by his repeated declaration that they were reserved for the public use, and the public made use of the property. *Oswald v. Grenet*, 22 Tex. 94; *Lamar Co. v. Clements*, 49 Tex. 347; *Railway Co. v. Sutor*, 56 Tex. 496; *Ramthun v. Halfman*, 58 Tex. 551; *Wolf v. Brass*, 72 Tex. 133, 12 S. W. 159; *City of San Antonio v. Grandjean*, 91 Tex. 430, 41 S. W. 477, 44 S. W. 476; *Dill. Mun. Corp.* § 645. Not only did Barry, by preparing and recording the plat, and by repeated declarations, set apart the premises to the public use, but in the deed afterwards made to the railroad company he recognized the dedication, and, in effect, withheld it from being interfered with by the grantee. Whether, at the time the dedication was made, it was known to the public that the railroad company had erected the dam and created the lake, and that the dedication was incumbered with the use by the railroad company of the water, and whether the city of Frost is bound by the deed to the railway company, cannot figure in this case, because there is no conflict between the citi-

zens of Frost and the railway company. It was not interfering with the public in their use of the lake, and was in no way concerned in the litigation between the appellants and appellee, and was not, therefore, a necessary nor proper party to the suit. The deed cannot, by reasonable construction, be held to declare a trust in the railway company in favor of appellee, but is merely declarative of a benefit already set apart to the people of the town. Immediately after the dedication of the premises to public use, the inhabitants of the town entered upon the use of it, and continued its use until they were interfered with by appellants; and such use constituted an acceptance. As said by the court in *Wolf v. Brass*, above cited: "It is sufficient if there has been some act or declaration upon the part of the owner of the fee indicating unequivocally his purpose to dedicate, and the public has used the property for the purposes to which the act or declaration of the proprietor indicates it was his intention to dedicate it." And in the case of *City of San Antonio v. Grandjean*, 91 Tex. 430, 41 S. W. 477, 44 S. W. 476, it is said: "Yet we understand the authorities to agree that, if the tender be unequivocal, and the easement be used by the public, even without formal acceptance by the proper authority, the dedication becomes irrevocable." There is authority for the proposition that, as against the owner of the fee, a dedication of land for streets and highways may be complete without any act or acceptance on the part of the public, but, in order to charge a city with the duty to repair, or make it liable for damages sustained by a defect, there must be an acceptance by the proper authorities. *Price v. Inhabitants of Town of Breckenridge* (Mo. Sup.) 5 S. W. 20; *Cook v. Harris*, 61 N. Y. 448; *Holdane v. Trustees of Village of Cold Spring*, 21 N. Y. 474. The doctrine of dedication as applied to streets has been extended to public squares, and the fact of dedication is established in the same way in both cases. Dill. Mun. Corp. § 644.

It was not necessary that the corporation should have been created at the time of the dedication, but it would pass to the corporation when it was created. *City of Llano v. Llano Co.*, 5 Tex. Civ. App. 132, 23 S. W. 1008; *Price v. Inhabitants of Town of Breckenridge*, above cited; *Mayor, etc., of New Orleans v. U. S.*, 10 Pet. 662, 9 L. Ed. 573; *Pawlet v. Clark*, 9 Cranch, 292, 3 L. Ed. 735. The owner could not reclaim the premises while awaiting the existence of a grantee capable of taking it, if it remained in public use. There was, however, no attempt upon the part of Barry to reclaim the premises, but, on the other hand, he at all times recognized the right of the public, both in deeds executed by him, and in his other acts and conversation. Title to the lake and park was never claimed by any one until in 1896, when Jones failed to obtain a lease from the citizens.

In the deed from the land company to W. B. Jones the title conveyed was subject to all privileges granted by Barry to the land company, and it was provided that he was not to charge exorbitantly for water, or to refuse water for manufacturing or other purposes. A reference to the deed from Barry to the land company discloses this recital: "This deed is made subject to the conveyance to the right of way reservation and depot grounds for the section house, and also for the pond of water and water privileges heretofore made by me to the St. Louis, Arkansas & Texas Railway Co." In the last conveyance referred to, the right of the public in the lake is recognized. The deed from the land company therefore did not attempt to convey any rights to Jones antagonistic to those named in the conveyance from Barry to the railway company. That deed did not, therefore, of itself start the statute of five years' limitation, and it was not until after the incorporation of Frost that any claim was set up by Jones adverse to the use by the public of the premises; and even as late as 1896 Jones recognized the claims of the citizens to the premises by endeavoring to obtain a lease of them.

We do not agree with the contention of appellant that a lake could not be dedicated to the public use, and we are of the opinion that within the provisions of article 3351, *Sayles' Rev. Civ. St. 1897*, would be included a body of water dedicated to public use. It cannot be doubted that an artificial pond or lake would be comprehended under the term "grounds" used in the statute. The dedication of the park and lake was made at one and the same time, one being adjacent to and forming with the other one property set apart to public uses, and it is conceded that if the lake was smaller than the park, and included in it, the dedication could take place; but we do not think the relative sizes of the two can exercise any influence on the designation, because, as before stated, if the whole premises were covered with water, the dedication would attach.

The suit was instituted by the appellee to recover the premises for itself, and it was decreed to the appellee to be held for certain purposes; but the judgment went further, and adjudged that appellee should not deprive appellants "or other persons" of the proper or reasonable consumption of water from the lake. Who the other persons are that are to be protected does not appear in pleadings or evidence. The city of Frost obtained judgment as representing its citizens, and there should have been no judgment protecting the people it represented from its aggressions. There was in the case no one's interests to be protected against it except the parties it had sued, and no adjudication as to the rights of others not parties should have been made.

The assessment and collection of taxes by the municipality did not impair the rights ac-

quired by the dedication, and did not confer any rights on appellants. The city could not, by deed, have conferred any right on appellants antagonistic to the dedication; and it would seem clear that the assessment and collection of taxes, nor any like act, could have more extensive powers than a deed by the city. The dedication was to the public, and the corporation acted as the trustee of the public in the preservation of the rights made to the public, and no acts of the corporation could estop it from performing its duty to the public in maintaining the rights the public had acquired by the dedication. *Rhodes v. Town of Brightwood* (Ind. Sup.) 43 N. E. 942. The judgment will be reformed so as to eliminate the words "or other persons," and affirmed.

On Motion for Rehearing.

(March 13, 1901.)

While there is testimony to sustain the finding of this court that the deed to the railroad company was executed after the sale of the lots, it is a matter of small importance as to whether it was or not. The suit is not as to what rights the railroad may have, but as to what the rights may be of a person claiming under Barry, who dedicated the park and pond to public uses. Appellant can have no other or higher rights than were conveyed to his vendors by Barry. If Barry had dedicated the pond and park to public uses, he could not have given to his vendees any rights antagonistic to those public uses. Barry swore that he did not sell the lake or park to any one. We adhere to the ruling that the attempt to obtain a lease of the premises from the people of Frost was a recognition of their right to lease. "A single slip of acknowledgment by the defendant" of the title of the inhabitants of Frost is fatal to the plea of limitation. *Wood, Lim. Act. p. 692; Railway Co. v. Speights* (Tex. Sup.) 60 S. W. 659. The motion is overruled.

CLARK v. McKNIGHT.¹

(Court of Civil Appeals of Texas. Jan. 12, 1901.)

APPEAL—EVIDENCE—RECORD—PUBLIC LANDS
—COMMISSIONER'S CERTIFICATE—PURCHASE OF ADDITIONAL LAND.

1. Where the bill of exceptions to the introduction of several amended classifications and appraisements of certain public lands in evidence failed to set out the land commissioner's certificate, stating that one of the two pieces of such land "was classified and appraised at two dollars per acre, and has never been changed," and that the other "has never been classified nor appraised," which was the ground of the objection to the admission of such evidence, the question was not before the court on the record.

2. Where it appeared from the statement of facts in a case on appeal that certain classifications and appraisements of certain public lands had been duly made, and it did not appear from the record that certain affidavits and applications for the purchase of such lands

were not in conformity with such classifications and appraisements, the objection that such applications and affidavits were not in conformity with any legal classification and appraisement could not be sustained, since the classification and appraisement set out would be assumed to be legal.

3. Under Rev. St. art. 4218s, providing that a settler on public lands shall have the right to buy additional sections, notwithstanding any lease thereof, except a section on which there are improvements to the value of \$200, a refusal to admit evidence that a lessee's assignor had improved land purchased from the state before it was forfeited to the state to the extent of \$1,500, and after such forfeiture but before he leased such land from the state to the extent of \$200, was not error, in the absence of a showing that such improvements were in the nature of personality, since otherwise they would become unavailing, under the statute, as vesting in the state on forfeiture or in the absence of a lease.

4. Rev. St. art. 4218f, authorizes the sale of public lands which have been classified, to actual settlers. Article 4218s provides that any actual settler on any such lands shall have the right to buy not more than three additional sections of strictly pasture lands lying within a radius of five miles of the land occupied by him, "notwithstanding any lease thereof, * * * except a section on which there are improvements to the value of \$200." *Held*, that the court properly directed a verdict for one suing for title and possession of additional lands under the statute, where the evidence established that such person was an actual settler on section 42, and that section 6, the land involved, was duly classified and appraised, and lay within five miles of section 42; that such person complied with the statutory requirements as to application, payment, etc., and it did not appear that the lessee of section 6 had placed or acquired improvements on such land to the value of \$200.

Appeal from district court, Childress county; G. A. Brown, Judge.

Action by J. B. McKnight against S. J. Clark. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Stovall Johnson and Theodore Mack, for appellant. Edward E. Diggs, for appellee.

CONNOR, C. J. This suit was instituted by appellee in the district court of Childress county on the 21st day of September, 1899, to recover of appellant the title and possession of state school land section No. 6, block No. 9, surveyed by the Houston & Great Northern Railway Company. The petition was in the usual form of petitions in trespass to try title, to which appellant, Clark, interposed the plea of not guilty. Appellee, McKnight, was the owner of, and an actual settler upon, section No. 42, block 9, state school land, of the same surveys, situated within a radius of five miles of the section in controversy, and as such claimed title and right to the latter by virtue of his application and obligation to purchase the same as additional lands, made on July 5, 1899. Appellant, Clark, claimed as the assignee of one W. R. Harvey, who on August 4, 1898, had leased said section 6 from the state for the term of five years, and whose lease had been duly filed and recorded in Childress county August 6, 1898. After the introduction of the evidence the court peremptorily instructed

¹ Writ of error denied by supreme court.

the jury to find for the plaintiff, McKnight, which the jury accordingly did; and appellant, Clark, duly brings this cause before us on appeal from the judgment in McKnight's favor, assigning errors to the several proceedings below as hereinafter stated.

The first and third assignments of error question the court's action in admitting the classification and appraisal of appellee's home section, No. 42, and the classification and appraisal of section 6, the additional land applied for by him, on the ground, substantially, that it appeared from the certificate of the commissioner of the general land office to said classifications and appraisements that section 42 "was classified and appraised at two dollars per acre, and has never been changed," and that section 6 "had never been classified nor appraised." The second and fourth assignments are dependent on the first and third; it being therein insisted, in substance, that appellee's applications and obligations did not conform to any legal classification and appraisal. The materiality of the questions thus presented are, of course, apparent, but the difficulty in a determination thereof in appellant's favor lies in the fact that the record fails to sustain the objection made. The bills of exception taken by appellant to the introduction of this testimony fail to set out the appraisements and classifications in question, or the certificate thereto mentioned in his objections; and, as evidenced by the statement of facts, it appears that prior to 1897 section 42 was duly classified as dry agricultural land, and appraised at \$2 per acre, and so remained until August 20, 1897, when the appraisal was "changed to \$1.50 per acre, in conformity to the minimum price fixed by the act of 1897 for sale of agricultural school lands," and on September 16, 1897, was "reclassified as dry grazing land," and that section 6 had likewise been classified as dry agricultural land, and appraised at \$2 per acre November 30, 1887, and so remained until August 20, 1897, "when the price was changed to \$1.50 per acre, as per minimum fixed by act of 1897," and so remained until April 18, 1898, when the north one-half of section 6 "was reclassified as dry grazing land, and appraised at \$1.00 per acre." In this state of the record we must assume, in aid of the court's action, that the reclassification and appraisements mentioned were duly made; and, it not appearing that appellee's applications, affidavits, etc., were not in conformity therewith, said assignments from 1 to 4, inclusive, are all overruled.

It appears from the evidence that sections 42 and 6 had been sold under the act of 1887, and acts amendatory thereof, and afterwards duly forfeited by the commissioner of the general land office for nonpayment of interest due the state for the year ending August 1, 1894; and appellant offered to prove by W. R. Harvey, under whom he claims, that said Harvey owned said section 6 at the time of its said forfeiture, and then had thereon improvements of "more than the value of fifteen hundred dol-

lars," and that said Harvey after said forfeiture "had put on the said land" improvements of "more than the value of two hundred dollars." The rejection of this evidence is made the basis of appellant's fifth assignment of error. The trial judge, in explanation of the bill of exceptions taken to the exclusion of this testimony, says "that the witness Harvey stated, in connection with the proof offered, that the improvements made by him after the forfeiture was made prior to the leasing of the land from the state, and was not made while he was the lessee thereof from the state." The state of the proof as it appears in the statement of facts was: "Some little improvements was put on this section [section 6] by Harvey after he leased from the state and some were put on it by defendant [Clark] after his purchase from Harvey, and prior to plaintiff's application to purchase; but the improvements were of little value." Appellant's contention is, in substance, that the forfeiture of the sale to Harvey declared by the commissioner did not divest him of the improvements thereon then owned by him, and that appellant, by assignment of Harvey's lease afterwards taken out, acquired title thereto. In the case of *Sims v. Wright*, 56 S. W. 110, the court of civil appeals for the Fourth district, in an opinion by FLY, J., held that the declaration of forfeiture by the commissioner of the general land office cut off all equities of the purchaser. Without wishing to be understood as approving this decision in its broadest sense, we nevertheless think and have distinctly indicated that improvements placed on school lands by a purchaser of such character as to become fixtures will pass to the state on legal forfeiture of the contract of purchase, together with the land of which they constitute a part. See *Shelton v. Willis* (Tex. Civ. App.) 58 S. W. 177. If appellant desired to defeat appellee's application to purchase section 6 by reason of improvements placed thereon by Harvey, and thus bring himself within the spirit, perhaps, of the second clause of the exception contained in article 4218a, Rev. St., the burden was upon him to show that such improvements were of such a character, or had been placed on said section by Harvey with such intent and under such circumstances, as to show their personal character, and that the same did not vest in the state at the time of the forfeiture shown, nor at the time placed thereon by Harvey, but that, on the contrary, such improvements duly passed to him (appellant) as the owner. *Shelton v. Willis*, supra. No evidence of such tendency was offered, so far as we are able to judge from the bill of exceptions or statement of facts, and hence we are unable to say that appellant has legal ground of complaint in the rejection of the evidence offered in the bill.

In the remaining assignment it is insisted that the court erred in peremptorily instructing the jury to return a verdict for appellee. We think this assignment, also, must be overruled. The evidence admitted of no other finding. It established appellee's ownership of

and actual residence upon said section 48; that section 6, involved in this suit, was state school land, duly classified, appraised, and placed upon the market for sale, and within a radius of five miles of appellee's home section; that appellee made due application to purchase the same, which, with the obligation and first payment required by law, was properly forwarded and deposited with the proper state officers. The right to recover was thus established, notwithstanding the existence of the lease interposed by appellant; it not appearing that he had placed or acquired improvements thereon of the value of \$200. Rev. St. arts. 4218f, 4218s (Gen. Laws 1897, p. 184). Finding no error in the proceedings, the judgment of the district court is affirmed.

FT. WORTH & D. C. RY. CO. v. GILSTRAP.
(Court of Civil Appeals of Texas. Feb. 18, 1901.)

RAILROADS—MASTER AND SERVANT—INJURY TO SECTION HAND—NEGLIGENCE—INSTRUCTIONS—PLEADING—TRIAL—SUBMISSION OF ISSUE TO JURY.

1. Where a section hand knew that no steps had been taken to warn him and his co-laborers of approaching trains in time to permit the clearing of the track, and heard an approaching train in time to have cleared the track and escaped all danger, an instruction that if he was injured by the negligence of an acting foreman, in not taking proper steps to notify him of approaching trains in time to clear the track, he could recover against the railroad company, was error.

2. In a suit against a railroad company for injuring a section hand, an instruction that, if such hand was injured by his foreman's negligence in leaving no one in control of the plaintiff and his co-laborers during his absence from them, he could recover, was not supported by a pleading that plaintiff's injury was occasioned by the negligence of his foreman in directing his gang to work on the track without making arrangements to notify them of the approach of trains in time to clear the track.

3. In a suit against a railroad company for injuring a section hand, the contention that plaintiff should recover notwithstanding error in the charge, on the ground that he was injured in an effort to save life and property, by removing a car and timbers from the track, where such removal was necessary, and he acted without rashness, cannot be maintained in the absence of a proper submission of such issue to the jury.

Appeal from district court, Wise county; J. W. Patterson, Judge.

Action by H. M. Gilstrap against the Ft. Worth & Denver City Railway Company. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Stanley, Spoons & Thompson, for appellant. R. E. Carswell and Booth & Morton, for appellee.

CONNER, C. J. H. M. Gilstrap, appellee, September 16, 1899, filed his original petition, and on May 31, 1900, his amended petition, asking for damages in the sum of \$15,000 for personal injuries received by him August 12, 1899, while in the employ of defendant as a

bridge and track repairer. He was a member of a gang of five men engaged in pushing a small push car, loaded with heavy timbers, along the main track of the railway, when he heard the whistle of an approaching freight train, then out of view, and running at a high rate of speed. In obedience to the order of John Wales, a fellow workman, alleged to have been left in charge of the gang by Case, the regular foreman, he continued to push said car further along the track, and to unload the same, and clear the track of said car and load. Plaintiff alleged that the train was approaching rapidly, and if the cars and timber had not been removed the train would have been derailed, and great loss of life and destruction of property would have resulted; that plaintiff knew this, and stuck to his duty till the timbers and cars were removed, when he, in attempting to escape from the approaching engine, was struck by one of the timbers and injured; and that he was without negligence. He alleged that said accident and consequent injuries were occasioned: "First. By the negligence of defendant [appellant] in failing to furnish said bridge gang with enough men to enable the foreman to put out guards to stop approaching trains and enable the gang to clear the track for their passage. Second. The negligence of the foreman, Case, in charge of said gang, in directing it to proceed to such work without making arrangements to notify it of the approach of trains in time to enable it to clear the track for their passage. Third. The negligence of acting foreman, Wales, in proceeding with said work and setting plaintiff to the same without taking proper steps to apprise him of the approach of trains in time to enable the track to be cleared for their passage. Fourth. The negligence of defendant and its employes in charge of said train and its track in failing to apprise plaintiff and said bridge gang of the approach of said train in time to enable them to clear said track without danger to themselves. That said train was running out of its schedule time to pass the point where the gang was at work. That it was scheduled to pass at 11 p. m., and in fact passed the next morning at 7. That plaintiff was not aware that it had not passed or that any train was due, and was himself exercising due care." Appellant answered by general demurrer, general denial, contributory negligence of plaintiff, and that if there was any negligence it was that of plaintiff's fellow servants and company employes, for whose negligence defendant was not liable, and that the injuries were the result of risks assumed by plaintiff in entering and remaining in the service of defendant, and ordinarily incident and arising out of the work he was engaged to perform, and if there were any dangers attendant upon the manner of doing said work, or in any other matter alleged, that the danger was patent, open, visible, and known to plaintiff, who, with such knowledge, continued in the serv

ice, and thereby assumed all dangers resulting from the alleged grounds of negligence. There was a jury trial, resulting in a verdict and judgment for appellee in the sum of \$3,000, from which this appeal has been prosecuted.

The evidence shows that on the day alleged appellee was in the employ of the appellant railway company as one of a gang of seven men engaged in building and repairing bridges; that one A. S. Case was foreman of the gang, with power to control and direct the men; that on August 11th Case took two of the men and went to another point to put up some bridge signals, leaving five of the men at work at the place of the injury. Before leaving, Case gave directions what to do during his absence to Wales, one of the gang. The evidence was conflicting as to whether Wales was appointed by Case (as it seems Case was empowered to do) to assume control and direction; but, whether so or not, there was evidence tending to show that Wales did so assume control, and that on the next morning the gang loaded four heavy bridge timbers, 12x12 inches, and 14 feet long, on a small push car, and were pushing it along the main track towards a point where such timbers were to be used. While it was so engaged, and when within about 10 feet of a bridge, about 100 feet long, on the route they were going, they heard the whistle of a freight train approaching at a speed of 20 or 25 miles an hour. The train was then out of view around a curve, several hundred yards. No flagman had been stationed, nor had other means been employed to warn approaching trains of obstructions on the track. Appellee testified that had they at once begun to unload the timbers and remove the push car, as he then suggested should be done, there would have been plenty of time to have done so without injury, but that Wales ordered one of the men to go back and flag the train, and the remainder to push the car along and over said bridge, which was accordingly done, whereupon appellee and others hastily removed the car and timbers from the track,—not in time, however, to avoid the train coming in contact with one of the timbers, by reason of which, as the evidence tends to show, appellee was injured as alleged.

The court submitted but two grounds of recovery. In its main charge were given definitions of negligence, ordinary care, and fellow servants, and charges upon assumed risks and contributory negligence; and it submitted the following instruction as a ground of appellee's recovery, to wit: "(2) If you find and believe from the evidence that at the time of the plaintiff's injury, if he received any injury, that John Wales was acting as foreman; and if you believe the said Wales had been intrusted by the defendant company with the authority of superintendence, control, or command of plaintiff and his co-laborers, or had been intrusted with authority

to direct plaintiff and his co-laborers in the performance of any duty; and if you believe the said Wales had received such authority from A. S. Case, the regular foreman of the defendant's bridge gang; and if you further believe from the evidence that the said Wales, while acting as such foreman, directed the plaintiff and others working with him to proceed with the work they were then engaged in, without taking proper steps to notify the plaintiff and his co-laborers of approaching trains in time to enable the track to be cleared in time for their passage; and if you believe such failure to take steps to so notify the plaintiff and his co-laborers was negligence on the part of the said Wales, and that the plaintiff by reason thereof was hurt and injured as charged in his petition; and if you believe the plaintiff himself was not guilty of negligence that caused or contributed to his injury,—you will find for the plaintiff such damages as you believe he has sustained by reason of such hurt and injury." Upon request of appellee the court also gave the following special instruction, to wit: "Gentlemen of the Jury: You are instructed that if you believe from the evidence that A. S. Case, the defendant's regular foreman, was absent at the time the plaintiff received his injuries, if any, and that he failed to leave any one in control of plaintiff and his co-laborers, and that John Wales assumed control of the men, and that it was negligence in said Case to leave said men without some one to guide and control and protect them, and that plaintiff was injured by the negligence of said Wales concurring with the negligence of said Case, and that plaintiff was not guilty of contributory negligence which caused or contributed to his injury, then you will find for the plaintiff." These charges are assailed in the twelfth and seventeenth assignments, and we are of opinion that both assignments must be sustained. In our judgment, the evidence did not warrant the submission of the issue presented in the second paragraph of the court's main charge, and appellee's petition did not support the issue presented in the special charge quoted. The evidence failed to show negligence on the part of those operating the freight train mentioned, and no such issue was submitted. If it be assumed that there was negligence, under the circumstances, in failing to have out flagmen or danger signals to warn approaching trains, and that the proof thereof supported the charge of negligence in failing to "take proper steps to notify plaintiff and his co-laborers of approaching trains in time to enable the track to be cleared, * * *" nevertheless the evidence is undisputed that appellee knew that no such steps had been taken, and he expressly states that he heard the approaching train in time to have cleared the track and escaped all danger. He testified: "I knew on this occasion that no flag had been put out, and that no flagmen had been stationed to warn

approaching trains, and knew that a train was liable to come from either direction at any minute. * * * We did not unload it [the push car] when we first heard the train, because Mr. Wales told us to push up to the other end of the bridge. * * * I first heard the train whistle some distance away, and then it whistled again just before it got to us,—I should say, the other side of Cowan switch [about 200 yards]. * * * I asked Wales if we had not better throw the car off before we got to the bridge, and he said, "No;" to put it across the bridge. If we had put the car off where we were when we first heard the train whistle, we could have done it very easily, and no one would have been hurt. * * * Two of us jerked the car off as far from the track as we could. Ward and White had quit us. If they had stuck to their post, I think we would have got everything off all right." In view of this evidence, the issue submitted in the main charge was immaterial. Not only so, but, with full knowledge of the facts relied upon as constituting the negligence charged, and with notice of the approaching train in ample time to have avoided all injury, appellee had no right of recovery on this ground, and the charge to the contrary was erroneous. We think a consideration of the record makes it equally apparent that the special charge quoted should not have been given. It is not pretended that appellee's petition in direct terms charges "negligence in said Case to leave said men without some one to guide and control and protect them." Appellee, however, cites the second ground of negligence charged by him as hereinbefore quoted, and insists in argument that "the charge that Case put the men to work without making arrangements to notify them of the approach of trains in time to enable them to clear the track embraces the charge that he did not put some person in charge of the men, with directions to so order the work that passing trains would not be subjected to danger of wreck." We think this contention hardly maintainable, particularly in view of the allegations of appellee's petition. Early in the recitation of the wrongs charged he alleges "that on the 13th day of August, 1899, said foreman [Case] was away on other business, but, before leaving said gang, directed them fully as to their work for said day, what they should do and how they were to proceed about it, and constituted and appointed one John Wales, one of said gang, as foreman during his absence, and directed the members of the same to work for that day under his direction and superintendence. * * * That at 7 o'clock on the morning of August 12, 1899, said gang, including plaintiff, according to the instructions of the foreman, Case, and under the direction and superintendence of said Wales, went about its day's work. * * * The negligence of Wales, as acting foreman, in failing to take the proper steps to notify appellee of approach-

ing trains, is made the third ground upon which appellee seeks a recovery; and his theory of the case generally, both in the pleading and evidence, is that Wales was the authorized acting foreman of the gang at the time of the accident. We therefore conclude, if in any event such negligence on the part of Case could be considered as a proximate cause of appellee's injuries, that the court committed error as assigned, because of appellee's failure to plead the ground of negligence therein submitted.

Appellee also insists, in effect, that the errors, if any, in the charges of the court are immaterial, on the ground that appellee is to be protected in an effort to save life and property by removing the push car and timbers from the track, if he acted without rashness, and it appeared reasonably necessary to do so; citing *Railway Co. v. Langendorf* (Ohio Sup.) 28 N. E. 172, 13 L. R. A. 190; *Eckert v. Railway Co.*, 43 N. Y. 502 et seq.; *Shear. & R. Neg.* § 186; and other authorities. While there was evidence tending to show that a failure to remove the car and timbers might have caused the wreck of the freight train, and consequent loss of property, and perhaps of life, yet no such ground of recovery was submitted, if raised by the pleadings; and we think it evident from what has been stated that the proposition, if maintainable,—which we do not consider it now necessary to discuss,—is so involved with other issues raised by the evidence as to require its submission to the jury under appropriate instructions. For the errors in the charge of the court discussed, the judgment will be reversed, and the cause remanded for a new trial.

HUBER v. EGNER.¹

(Court of Appeals of Kentucky. March 22, 1901.)

ASSIGNMENT OF NOTE—SET-OFF—NOTICE OF ASSIGNMENT.

1. Mortgage coupon notes, payable to a payee named therein "or bearer," are subject in the hands of an assignee to any set-off or counterclaim which existed in favor of the maker at the time he received notice of the assignment.

2. The maker is entitled, as against the assignee, to plead as a set-off the amount of a time deposit which he made with the payee after the assignment, where the certificate of deposit became due before he had notice of the assignment.

3. Defendant was entitled to plead as a set-off an amount wrongfully withheld by the payee at the time defendant borrowed the money for which the notes sued on were executed.

Appeal from circuit court, Jefferson county, chancery division.

"Not to be officially reported."

Action by Henry Huber against M. N. Egner on promissory notes. Judgment for plaintiff for only a part of his claim, and he appeals. Affirmed.

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

J. W. S. Clements, H. H. Gecke, and S. J. Bolderick, for appellant. Clayton B. Blakey and McKinley Boyle, for appellees.

GUFFY, J. The defendant in this action executed to the German-American Title Company his notes for the total sum of \$1,000, dated 29th of July, 1895, due in three years; interest to be paid semiannually, for which coupons were attached. A mortgage was executed to secure the payment of said notes. The notes were made payable to said company or bearer. These notes were assigned soon after their execution to the plaintiff, and, not having been paid, this suit was instituted to enforce the payment. The defendant pleaded, in effect, a set-off or payment of \$250, which was properly denied by reply. The court below allowed the defendant credit for the \$250; hence this appeal.

The right of defendant to plead a set-off or counterclaim against such notes as those in controversy has been repeatedly sustained by this court, and it is not now controverted in appellant's brief; but it is contended that the \$200 was not a demand due to defendant, now appellee, at the time of assignment, or at time of notice thereof, and that the \$50 was left with the company as agent of appellee.

So far as the \$50 is concerned, it seems from the proof that it was wrongfully withheld from appellee at the time he borrowed the money for which the notes were executed; hence it was available as a set-off or counterclaim.

The \$200 was deposited with the company after the assignment of the notes, and a six-months certificate of deposit taken; but according to the testimony of appellee, not contradicted by any witness, the certificate was due before he had notice of the assignment. Hence it could be pleaded. *Graham v. Tilford*, 1 Metc. 115; *Walker v. McKay*, 2 Metc. 295.

It is argued for appellant that appellee must have known of the assignment before the certificate became due, but that reasoning cannot prevail against the direct testimony of appellee. It would have been quite easy for the assignee to have notified the obligor of the assignment. Good business methods seem to suggest such a course, and, besides, it would be no more than fair to the obligor. Judgment affirmed.

TAYLOR et al. v. ROULSTONE et al.¹

(Court of Appeals of Kentucky. March 19, 1901.)

WITNESSES—ATTORNEY AND CLIENT—PRIVILEGED COMMUNICATIONS.

Where an attorney represented both parties to a controversy, information which he obtained from them in the joint presence was not

privileged in a subsequent controversy between them.

"Not to be officially reported."

Petition for rehearing. Denied.

For former report, see 60 S. W.: 367.

O'REAR, J. The conclusions in the principal opinion, as well as those of the chancellor below, are stated to be based largely upon the testimony of George Doniphan, an attorney who represented Mrs. May D. Bradford in the settlement with her father-in-law, the decedent, L. J. Bradford, and it is shown that L. J. Bradford said to him, "You can be attorney for both of us in this matter." It is argued in the petition for rehearing that the relationship of attorney and client was thus established between Doniphan and the decedent, and that under subsection 5, § 606, Civ. Code, the attorney was incompetent as a witness against decedent's estate. This subsection is: "No attorney shall testify concerning a communication made to him, in his professional character, by his client, or his advice thereon, without the client's consent." This section is merely declaratory of the common-law rule on this same subject. It has been frequently held that, where the attorney represented both parties to the controversy, his information obtained from them in the joint presence was not privileged in a subsequent controversy between the former clients. See cases cited in note on page 565, *Best, Ev.* Nor is the question an open one in this state. In *Rice v. Rice*, 14 B. Mon. 418, this court said: "As the communications were made to an attorney, who was acting at the time as the legal adviser of the parties, it is clear that he would not be permitted to disclose them in any controversy between them and a third person. But does this rule apply in this case? Here the controversy is between the parties themselves, and the attorney is under the same obligation to both of them. The matter communicated was not in its nature private, as between these parties, who were both present at the time, and consequently, so far as they are concerned, it cannot, in any sense, be deemed the subject of a confidential communication made by one, which the duty of the attorney prohibited him from disclosing to the other. The reason of the rule has no application in such a case. The statements of parties, made in the presence of each other, may be proved by their attorneys, as well as by other persons, because such statements are not in their nature confidential, and cannot be regarded as privileged communications. The testimony of the attorney was therefore properly admitted in the case." A question very similar to the one at bar was raised in the case of *Haydon v. Easter* (Ky.) 24 S. W. 626, and we then held the attorney was competent as a witness, and was not disqualified by supposed interest on

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account of any unpaid fee in the transaction. It follows that the witness Donalphan was clearly competent in this case. Petition overruled.

LIST v. JACOBY.¹

(Court of Appeals of Kentucky. March 19, 1901.)

PASSWAYS—ADVERSE USE—CHANGE OF LOCATION.

Plaintiff having used a passway over defendant's land for more than 40 years, it will be presumed that the use has been as a matter of right, though the location of the passway has been changed from time to time by mutual assent of the parties.

Appeal from circuit court, Henry county.

"Not to be officially reported."

Action by Sarah H. Jacoby against John L. List for an injunction. Judgment for plaintiff, and defendant appeals. Affirmed.

W. W. Turner, for appellant. John D. Carroll, for appellee.

O'REAR, J. The question presented on this appeal is whether appellee, and those under whom she claims, has acquired a right of passway over appellant's land in Henry county, near North Pleasureville, as an appurtenant to her two tracts of 6 and 12 acres, known as the "Vannice Land." Appellee and those under whom she claims have exercised, without molestation, for a period of more than 40 years, the right to pass over the land in question to the Pleasureville and Defoe turnpike road, until in 1899, when appellant for the first time forbade her and her servants and tenants using the passway for vehicles. She thereupon brought this suit, and obtained an injunction restraining the threatened obstruction. It is argued for appellant that, inasmuch as he changed or shifted the location of the passway at various times by mutual consent or assent of the parties, appellee's use and consequent right was thereby merely a permissive one. We held the contrary in *Talbott v. Thorn*, 91 Ky. 420, 16 S. W. 88, and again in *Johnson v. Clark* (Ky.) 57 S. W. 474, and *Faulkner v. Duff* (Ky.) 20 S. W. 227. The judgment below, having followed the doctrine announced in these cases, is affirmed.

HOWARD v. WHITAKER.¹

(Court of Appeals of Kentucky. March 19, 1901.)

FORCIBLE ENTRY AND DETAINER—SUFFICIENCY OF POSSESSION.

To entitle one to maintain a proceeding of forcible entry it is sufficient that the entry was within his boundary, though not within his inclosure, actual possession not being necessary.

Appeal from circuit court, Breathitt county.

"Not to be officially reported."

Proceeding of forcible entry by W. J. Whitaker against L. D. Howard. Judgment for plaintiff, and defendant appeals. Affirmed.

J. J. O. Bach, for appellant.

BURNAM, J. The appellee, W. J. Whitaker, caused a warrant for forcible entry to be issued against the appellant, L. D. Howard, and Anderson Whitaker. Neither party having demanded a jury, a trial was had before a justice of the peace, who dismissed the warrant as against Anderson Whitaker, but adjudged the defendant, Howard, guilty of the forcible entry complained of, and that he make restitution of the premises. Howard traversed the findings of the magistrate, and brought the case before the circuit court, where a trial before a jury resulted in a verdict and judgment in favor of Whitaker. From that judgment Howard appeals to this court.

It appears from the evidence that appellee had been in possession of the premises for many years; that his daughter had lived on the land for several years as his tenant, but that she had left a few months before appellant took possession, having first, however, turned over the possession to her father. The land was not in the inclosure of appellee, but was within his boundary. Appellant offered to prove that before he took possession, and put up his distillery, he obtained permission from the daughter and former tenant of appellee to do so. This testimony, however, was excluded from the jury, and it is one of the grounds relied on for reversal in this court. At the conclusion of the testimony the court instructed the jury "that if they believed from the evidence that plaintiff was in possession of the premises, and that defendant entered upon them against his will or consent, and put up a distillery thereon, that they should find for the plaintiff; and that, unless they so believed, they should find for the defendant." It is complained that this construction was erroneous and misleading, because it did not require the jury to believe that appellee was in the actual possession of the land at the time the entry was made. It is not necessary, to enable one to maintain an action for forcible entry, that he should reside on the land in contest, or that it should be inclosed or cultivated. See *Brumfield v. Reynolds*, 4 Bibb, 388; *Henry v. Clark*, Id. 426; *Wall v. Nelson*, 3 Litt. 395; *Chiles v. Stephens*, 1 A. K. Marsh. 334. The bare entry by appellant within the lines of appellee without his consent is, in the contemplation of the law, a forcible entry, for which he was entitled to restitution; and the instruction complained of correctly stated the law. There is no testimony which conduced to show that either Anderson, Whitaker, or Mrs. Russell, the children of appellee, had any authority from him to authorize appellant to take possession of the land in

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

contest, and the court properly excluded these statements from the jury. Judgment affirmed.

GREIG et al. v. DICKSON.¹

(Court of Appeals of Kentucky. March 19, 1901.)

COMPROMISE—CONSTRUCTION OF AGREED JUDGMENT—SETTLEMENT OF ALL DEMANDS AGAINST TESTATOR'S ESTATE—REMOTE CONTINGENT INTEREST.

An agreed judgment in an action by an executor to settle his testator's estate, by which each of the legatees accepted a certain sum in full of his legacy "and in full of all demands" against testator's estate, was a settlement only of the specific legacies named in the will, and did not include an interest in the residue of the estate, which depended upon the death without bodily heirs of a child who was then only 8 years old.

Appeal from circuit court, Lyon county. "Not to be officially reported."

Action by Samuel Garrett, executor of Robert A. Dickson, against John Dickson and others, for a settlement of the estate of plaintiff's testator. Judgment in favor of S. F. Dickson, intervener, and Mary Greig and others appeal. Reversed.

Molloy & Utley, for appellants. S. Hodge and W. S. Pryor, for appellee.

BURNAM, J. The will of Robert A. Dickson, deceased, was duly probated in the Lyon county court in 1875. He bequeathed \$300 to his father, and \$300 to each of his six brothers and sisters, and provided that the residue of his estate should be held in trust for the benefit of his wife, Fanny Dickson, and his daughter, Robbie, then about 8 year old,—the wife to have the income of the estate for her support and maintenance, and education of the daughter, as long as his wife lived or remained unmarried; that, in the event of the widow's death or remarriage, the property was to be held in trust for the benefit of the daughter as long as she lived, and she was to receive only the income; at her death the property was to pass to her bodily heirs, if she had any; if not, it should go to his brothers and sisters, if they were alive, and, in the event of the death of any of them, to their heirs. Samuel Garrett was appointed executor of the will, and trustee of the estate devised to the wife and child. He accepted the trust and qualified as required by law. Within 12 months after the death of the testator, the widow, who is the appellee on this appeal, renounced the provision made for her by the will, and claimed dower. In 1877 the executor instituted a suit in the Lyon circuit court, making the widow, the infant, and the legatees named in the will defendants, for the purpose of settling the estate; alleging that it would be necessary to sell the Caldwell, Lyon, and McCracken county bonds held by him as executor, and two

small lots located in Eddyville, which were described in the petition, to pay off the specific legacies and the cost of administering the estate. And an order was entered, pursuant to the prayer of the petition, authorizing the executor to sell the Caldwell and Lyon county bonds held by him; and at the May term, 1879, he filed a report showing that the proceeds of the sale of the bonds had aggregated \$1,910 in cash, which he was directed to invest in United States government bonds for the benefit of the estate of decedent, subject to the future order of the court. At the same term of the court at which this order was entered, John and James Dickson, Alice Ferguson, and Mary Hays, brothers and sisters of decedent, entered their appearance in the action, and claimed the legacy of \$300 devised to each of them by the will of the testator, and recited that their father, Andrew Dickson, another of the legatees, had died since the death of the testator, and asked the court to set aside the order directing the investment of the funds in the hands of the executor, and for an order directing the executor to pay over to them the amount of their legacies, with interest thereon from one year after the death of testator. Upon the filing of this answer and motion, the attorney of appellee, S. F. Dickson, and of the guardian of the infant, Robbie Dickson, filed an affidavit declaring the purpose of the guardian to prosecute an appeal from the order of the county court admitting testator's will to probate, and stated that all of the legatees were nonresidents of Kentucky,—three of them residents of Scotland,—and that, if the proposed payments to the legatees were made, the interest of the infant would be in danger. Shortly after the filing of this answer and affidavit, and on the same day,—June 3, 1879,—an agreed judgment was entered by the parties; and the construction of that judgment is the point of difference between appellee and appellants on this appeal.

The part of the judgment which it is necessary for us to consider on this appeal is as follows, viz.: "It is adjudged by the court that Andrew Dickson was the father of Robert A. Dickson, deceased, and was alive at the death of said Robert A. Dickson; that the defendants John and James Dickson were brothers of said Robert A. Dickson, and were both alive at the time said Robert A. Dickson died, and that the defendants Alice Ferguson and Mary H. Hays were sisters of the said Robert A. Dickson, and were alive at the date of his death; and that under the will of said Robert A. Dickson the said Andrew Dickson and the defendants James Dickson, John Dickson, Alice Ferguson, and Mary H. Dickson are legatees, and as such are entitled to \$300 each. But, by consent of said John Dickson, James Dickson, Alice Ferguson, and Mary H. Hays, it is adjudged that said

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Samuel Garrett, out of the funds in his hands as executor of the estate of Robert A. Dickson, deceased, do pay to J. A. Cartwright, as their attorney, for them, the sum of \$680, being \$170 for each of said legatees; and, by the further consent of said John Dickson, James Dickson, Alice Ferguson, and Mary H. Hays, it is adjudged that said executor, out of the funds in his hands, pay to John D. Lester, as the statutory guardian of said Robble Dickson, and for her use and benefit, the sum of \$695; that these several payments shall be in full of the legacies of each of the following named persons, to wit, John Dickson, James Dickson, Alice Ferguson, and Mary H. Hays, and in full of all demands they, or each of them, may have against the estate of said Robert A. Dickson, deceased, including their share of the said legacy in favor of Andrew Dickson, deceased." The residue of the funds on hand were applied to the costs of administering the estate and to the claim of the widow. The appellant Agnes Raffin was not made a party to this agreed judgment, but she subsequently received from the executor \$250, and executed to him the following receipt: "Chicago, Ill., Sept. 8, 1879. Received of Samuel Garrett, executor of James A. Dickson, deceased, \$250.00, in full of all my distributable share, and every demand, interest, or claim of whatsoever kind that I have in the estate of said decedent, and against said Garrett as administrator or executor of the aforesaid. In testimony whereof, I, as one of the legatees, hereunto set my hand to the above writings. [Signed] Agnes Raffin, Legatee. James W. Raffin, Her Husband." Elizabeth Morrison, the remaining sister of decedent, was not made a party to the suit or agreement, and the claim of her only heir at law to a full interest in the estate is not controverted. After the entry of the compromise judgment the interest of the infant was held in trust, in accordance with the provisions of the will, until she died, on the 26th of August, 1894, without leaving any children surviving her. After her death the case was reopened, and the trustee asked for a settlement of his accounts, and that the property of the trust estate be distributed to the persons entitled thereto. At this juncture appellants entered their appearance, and claimed that under the will of Robert A. Dickson, deceased, they were entitled to all of the unsold realty which had been devised to his daughter during her life, and the proceeds of that portion of the trust fund which remained in the hands of the trustee. Thereupon the mother intervened, and pleaded that by the agreed judgment, and the receipt executed by Mrs. Raffin, these parties had surrendered all claim to the trust estate, and that, as her daughter had died intestate and childless, the property belonged to her, as her heir at law. The judgment of the trial court sustained the contention of the moth-

er, except as to the only heir of Mrs. Morrison, and this court is asked to reverse that judgment in so far as F. S. Dickson is concerned.

To understand what was settled by the agreed judgment entered in 1879, it is necessary that we recall the issues involved in the proceeding in which it was entered. The purpose for which that suit was instituted by the executor was to settle his accounts, and to procure a judgment of the court authorizing a sale of enough of the bonds and real estate of decedent to pay the special legacies devised by the testator to his brothers and sisters, all of whom were nonresidents of Kentucky, and three of whom lived in Scotland. The appearance of these legatees in that proceeding was entered by powers of attorney, which were filed in the case at the time, and which are copied in the record. They are substantially alike, and in effect authorize the attorney named therein to receive the legacies due them from the executor of their deceased brother, and, upon his failure to pay, to institute suit therefor, and to compromise, settle, and agree in respect thereto as the nature, circumstances, and exigencies of the case shall require, and generally to perform every act necessary to be done in the premises. The only interest in the estate of the decedent which they had a right to demand, sue for, or claim at that time was the specific legacy of \$300 devised to each of them. No question of their contingent interest in the trust estate devised to his daughter was put in issue by the pleadings in the case. The interest was a remote one. The daughter was only 8 years old, and their interest in this property was contingent upon her dying childless. There is no suggestion in the agreed judgment that it related to anything except their claim for the specific legacy devised to them, unless the words, "in full for all demands that they, or each of them, had against the estate of Robert A. Dickson, deceased," may be said to cover it. The remote interest of appellants in the trust property devised by testator to his daughter could not properly be called a demand against his estate,—certainly not one which could have been asserted at that time. And there is nothing in the powers of attorney given to the lawyers who represented them which authorizes them to take any steps with reference to appellants' interest in this property, and if, as a matter of fact, they had undertaken to compromise or dispose of their interest in this property, their acts would not have been binding and enforceable as against appellants; but we think it is manifest from the terms of the judgment itself that it was only intended to cover the interest then due appellants under the will, and the only compromise made was the compromise of their right to have paid to them the full amount of the specific legacies. The receipt subsequently executed b

Mrs. Ruffin to the executor certifies this conclusion. It only purports to accept the \$250 in full of her claims against the estate and the executor thereof. There is no reference whatever to her interest in the trust property of the daughter, and it was not intended to and does not cover such property. As appellee renounced the provision made for her in the will, and elected to claim her interest in the estate under the statute of descent and distribution, she thereby forfeited all interest in the trust estate, and that, at the death of Robbie Dickson, passed, under the will of her father, to his brothers and sisters or their descendants. For the reasons indicated, the judgment is reversed, and the cause remanded for proceedings consistent with this opinion.

McQUINN v. McQUINN.¹

(Court of Appeals of Kentucky. March 19, 1901.)

DOWER—FORFEITURE BY LIVING IN ADULTERY.

Under Ky. St. § 2133, providing that, if the wife voluntarily "leave her husband," and live in adultery, she shall forfeit all interest in his estate, unless they afterwards become reconciled, and live together as husband and wife, the wife, by living in adultery in the husband's home during his enforced absence, forfeits her right to have either homestead or dower.

Appeal from circuit court, Breathitt county.
"To be officially reported."

Action by C. B. McQuinn against Catherine McQuinn to cancel a deed and to quiet title to land. Judgment allotting homestead to defendant, and plaintiff appeals. Reversed.

J. J. C. Bach and S. H. Patrick, for appellant.

O'REAR, J. Jerre McQuinn died in 1897, while confined in the Eastern Kentucky Lunatic Asylum, leaving no issue, and intestate. His father (appellant) is his sole heir at law, and appellee, Catherine McQuinn, is his widow. On January 25, 1889, he was found by an inquest in the Breathitt county court to be a lunatic, and was ordered sent to the asylum for the insane, but it appears he was not actually incarcerated till 1891. On September 9, 1889, he executed to appellee a deed purporting to convey to her all his property, real and personal, including choses in action. The descriptive part of the deed relating to the real estate says merely, "All the land I now own in Breathitt county." The recited consideration was \$100 paid and love and affection. This suit was brought March 3, 1898, by appellant, as heir at law of Jerre McQuinn, to have the foregoing deed canceled, and his title to the land quieted; he alleging that the deed was executed while the decedent was of such unsound mind as to be incapable of contracting, or knowing

his property, or the nature of the instrument he was executing; that the \$100 consideration was not paid; and that the execution of the deed was procured by the fraud and undue influence of appellee over the mind and conduct of the decedent. The petition further charged, in anticipation of appellee's claim for dower or homestead in the land if the deed should be canceled, that she had abandoned him, and lived in adultery with one "bad Tom Smith," and was so living at the time of her husband's death. Appellee's answer attempted to deny the allegation of the unsound condition of her husband's mind at the time of the making the deed, but it did not traverse the finding of the inquest, nor plead that the deed was executed at a lucid interval. Nor does her answer sufficiently deny the adultery charged, but it is clearly proven, whether properly traversed or not. In addition, she pleaded that the land in controversy was worth less than \$1,900 at the time of her husband's death, at which time she alleges she was occupying it as a homestead. The reply charged that neither the husband nor the wife was occupying the place as a homestead at the time of his death, because he was then, and for some five or six years previous had been, confined in the asylum at Lexington, an incurable, confirmed lunatic, and she was at the time of his death confined in the Kentucky state penitentiary under a life sentence for the murder of Dr. Rader in 1895. For this same murder her paramour, Smith, was hung. She further pleaded that her money and property had in part paid for the land in controversy, and that the conveyance by her husband in 1889 was in consideration of this fact. She alleged that she had paid fully \$500 towards the consideration.

The proof establishes the following state of facts to our entire satisfaction: The land was not paid for in any part by property or means of the wife. The husband, Jerre McQuinn, was not of sound mind on the 9th of September, 1889, when the deed was made to appellee; and, furthermore, its execution was procured by her fraud and undue influence upon him. She had lived in open adultery with Tom Smith for some months immediately before their arrest for the murder of Dr. Rader, and so lived at the home place of McQuinn, the husband, he being then confined in the asylum for the insane at Lexington, Ky. The husband having continued at the asylum a lunatic inmate until his death, she having been since her arrest, until his death, in confinement in jail or the penitentiary, there was no reconciliation between them, or condonement. The circuit court (held by a special judge) decided that the husband was mentally unsound when the deed was executed, and in his opinion incorporated in the judgment announced that he was unable to determine what part, if any, of the consideration was paid upon the land by the wife (though it is nowhere suggested

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

that there was ever an agreement between McQuinn and wife, or with anyone for her, that he would so invest the money for her, but based his judgment upon the idea that, inasmuch as the wife had not "eloped," or left her husband, and lived in adultery, she was not barred, and he canceled the deed, and adjudged her the whole of the land for her life, as a homestead in lieu of dower. We concur in the finding of the facts,—at least in the conclusions thereon apparently reached by the trial judge; but cannot willingly concede the legal proposition announced as to the effect of the adultery. We may say that the learned trial judge is not without authority for his position, but we incline to the opinion that authority equally as weighty, and supported by a juster spirit and clearer reasoning, point us to the opposite conclusion. The Kentucky statute on this subject is as follows: "Sec. 2183. If the wife voluntarily leave her husband and live in adultery, or if the husband voluntarily leave his wife and live in adultery, the party so offending shall forfeit all right and interest in and to the property and estate of the other, unless they afterwards become reconciled and live together as husband and wife." It gives us pleasure to find a comparative dearth of authority in this state, and but little in this Union, upon the question involved, as such absence speaks for the rare occurrence of cases involving a construction of this and similar statutes. The statute in question is fashioned after, and is a very close imitation of, the statute 13 Edw. I. c. 34, commonly called the "Statute of Westminster II.," enacting that, if a wife elope from her husband, and continue with an adulterer, she shall be barred of her dower, unless her husband willingly, and without coercion of the church, reconcile her, and suffer her to dwell with him. At that period it was the fiction of the law that a married woman had no will of her own while in the presence or under the dominion of her husband, and that so long as she was upon his estate or within his manor she was presumably under his dominion, and therefore could not yield consent to an unlawful use of her person. It is not so strange, therefore, that some cases may be found construing the original statute which held that there must be an actual elopement, or leaving of the husband's home and estate, coupled with subsequent adultery, to bar the adulteress of dower. It would have been, indeed, a surprising, as well as an unfortunate, evidence of the law's impotency, had not a more liberal and more rational view and construction of the statute been evolved. At first we find, if the wife be detained against her will, but subsequently, while away from her husband, live in adultery, she was barred. Co. Litt. 32b. Then it was held that there need not be a continuing absenting of herself from the husband's premises. Said Lord Coke: "Albeit she doth not continue to remain in

avowtry with the adulterer, yet, if she be with him, and commit adultery, it is tarrying within this statute." Id. And later Chief Justice Tindal, in *Hetherington v. Graham*, 6 Bing. 135, said: "It is contended on the part of the demandant that each part of the description of the offense contained in the act must be taken to be cumulative; so that the dower is not barred unless the wife has left her husband willingly with the adulterer; has gone away with him, and has also continued with him. Whilst on the part of the tenant it is insisted that it is sufficient to bring the case within the statute if she has of her own consent left the society of her husband, and, after she has so left him, committed the act of adultery. And the court is of the latter opinion. It may be admitted, as the fact is, that in all the ancient precedents the leaving of the husband by the wife is stated to have been 'with the adulterer.' But we think this is not conclusive on the point; for, as there can be no doubt that the case is within the statute where all the circumstances concur, so the pleader would, of course, insert them where the facts of the particular case warranted the insertion. And, on the contrary, there is direct authority that all the circumstances mentioned in the statute need not concur in form, provided they do so in substance." 2 Co. Inst. 435. Further departing from the original construction given the act as seemed to be required by a strict adherence to its phraseology, Lord Coke said (2 Inst. 436) that, if the wife leave her husband's house of habitation, it is an elopement, within the statute. "Though she remain with the adulterer in any of the lands or manors of her husband," he observes, "yet she shall be barred of her dower by this breach, without the husband's free reconciliation, albeit it hath been otherwise holden; and the reason that they yielded is because it is no elopement, whereas it appeareth before that that the words of 'reliquerit' and 'ablerit' are not of the substance of the bar of dower, but the adultery and the remaining with the adulterer, as is above said; and albeit she and the adulterer remain within any of the land or manors of the husband, yet (the words being 'si uxor reliquerit' and 'ablerit') she hath left and gone from her husband in that case, which is a personal offense." The Virginia statute contained in the Revision of 1819 is in these words: "If a wife willingly leave her husband and go away and continue with her adulterer, she shall be barred forever of action to demand her dower that she ought to have of her husband's land, if she be convicted thereupon, except," etc. 1 Rev. Code 1819, p. 404. In *Stegall v. Stegall*, 2 Brock. 256, Fed. Cas. No. 13,351, which arose under this statute, the wife refused to accompany her husband to his abode, claiming in error that he was already married to another, and a separation ensued. She then contracted a second marriage, living and cohabiting with

the second husband. In denying her dower in the estate of her first husband, Chief Justice Marshall said: "So far as respects that part of the provision which relates to the wife's willingly leaving her husband, I think it is satisfied by any separation which is voluntary on her part; and I think any separation voluntary which is not brought about by his act, or by any restraint upon her person." "The words, 'and go away and continue with her adulterer,'" the chief justice continued, "would, I am much inclined to think, be satisfied by an open state of adultery, whether the woman resided in the same house with the adulterer or in separate houses; whether in her own or a friend's house or his." The reason of the statute must have been to insure the fidelity of the spouse to the marital vows, and to prevent their open breach in that manner that would not only violate their obligation, but bring open shame upon the name and family. The tendency of treatment of this question, both by statutory and judicial action, is seen to have been to meet this spirit of the statute's enactment. "Abandonment," as used in our statute relative to divorce, has been construed by this court to mean the refusal by the spouse to recognize and contribute to the marital relation for a period of one year, although the parties slept beneath the same roof. *Evans v. Evans*, 93 Ky. 516, 20 S. W. 606. So, a wife may "voluntarily leave her husband, and live in adultery," by voluntarily adopting the adulterous relation in the husband's enforced protracted absence from his home, though she continue to reside thereat. It should detract nothing from her offense, and add nothing to her rights, that she has boldly received the libertine into her husband's home in his absence, and befouled his couch, while dishonoring his name and shaming their holy relation. The judgment is reversed, and cause remanded, with directions to enter judgment for appellant, setting aside and canceling the deed to appellee of date September 9, 1889, and denying appellee dower or homestead in the land mentioned.

LA RUE v. REID et al.¹

(Court of Appeals of Kentucky. March 19, 1901.)

VENDOR AND PURCHASER—DEFICIT—SALE IN GROSS.

Where a tract of land was described in a deed to the purchaser as containing "120 acres more or less," when in fact it contained only 98 acres, the purchaser is not entitled to damages on account of the deficit; both parties understanding that the sale was in gross, and there being no fraudulent misrepresentation.

Appeal from circuit court, Henderson county.

"Not to be officially reported."

Action by T. C. La Rue against George L. Reid and another for deceit. Judgment for defendants, and plaintiff appeals. Affirmed.

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

Montgomery Merritt, for appellant. Yeaman & Yeaman, for appellees.

O'REAR, J. Appellee sold appellant a tract of land for \$1,900, and conveyed it by deed, with covenant of special warranty, reciting, after the description of the boundary, which stated the courses, but not distances, that it contained "120 acres, more or less." Appellant has brought this action for deceit, alleging that appellee knowingly and fraudulently misrepresented the quantity, there being actually only 98 acres of the land. It is further charged by appellant that nothing was said in the bond, signed by Reid before the execution of the deed, concerning warranty, and appellant did not know till after his deed was recorded that it contained the clause of a special warranty only. Appellant sued for damages claimed to be the value of the deficit in the acreage named. An issue was joined on the foregoing allegations, and further appellee pleaded that the sale was in gross, by boundary, and without reference to quantity. The circuit court dismissed the petition, and adjudged appellee his costs. Hence this appeal.

The evidence satisfactorily establishes that the sale was in gross, and without reference to quantity, and was so understood by both parties to the transaction. There is no proof of deceit or fraudulent misrepresentation. The judgment is affirmed.

JEWELL v. BARNES' ADM'R.¹

(Court of Appeals of Kentucky. March 19, 1901.)

WILLS—PRECATORY TRUST.

Where testator and his brother had for many years been engaged as partners in the jewelry business, and testator contemplated that the business would be continued by his widow and his brother as partners, the expression by testator in his will of the desire that his friend J. "be retained in the employ of the firm on such liberal terms as his long and faithful service entitle him to," did not create a precatory trust; and the widow, having bought the brother's interest in the business, is under no obligation to keep J. in her service.

Appeal from circuit court, Jefferson county, chancery division.

"To be officially reported."

Action by Robert M. Jewell against the Louisville Trust Company, administrator of C. P. Barnes, and another, to enforce an alleged trust. Judgment for defendants, and plaintiff appeals. Affirmed.

E. E. McKay, for appellant. Harris & Marshall, for appellees.

HOBSON, J. Appellant, Robert M. Jewell, filed this suit against the appellees, the Louisville Trust Company, as the administrator with the will annexed, and S. S. Barnes, the residuary devisee, of C. P.

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

Barnes deceased. The court below sustained a demurrer to his petition, and, he failing to plead further, dismissed the action. The only question on the appeal is, therefore, did the petition state a cause of action?

It was alleged in the petition that C. P. Barnes was at the time of his death, and had been for many years theretofore, engaged in business as a jeweler, with his brother, J. B. Barnes, under the firm name of C. P. Barnes & Co.; that the business was a large one, and C. P. Barnes became a wealthy man; that in the year 1877, when appellant was a small boy, the deceased took him into his employ and treated him as if he had been his own son, often promising him an interest in the business; that appellant started with a small salary, which was increased from time to time until the death of the deceased, when he was receiving \$20 a week; that the deceased died, leaving a will which was duly admitted to probate, and by the seventh clause of the will the testator provided for him in the following language: "I desire that my friend Robert M. Jewell be retained in the employ of the firm on such liberal terms as his long and faithful service entitle him to." It is also alleged that on February 23, 1896, within a month after the death of the testator, against his protest, his salary was cut down from \$20 to \$15 a week, and three years later, on February 26, 1898, to \$13.50 a week; that about two months after this, without fault on his part, he was discharged, against his protest, and had been unable to earn anything like \$20 a week from the time of his discharge to the filing of the suit; that appellees were running the store with great profit, and it was incumbent on them, under the will, to keep him in their employment at \$20 a week; that his wages for the time amounted to \$4,780, and he had only received \$3,045.70, leaving a balance due him of \$1,734.30; that C. P. Barnes was the owner of a larger interest in the firm than his brother, J. B. Barnes, and by his will gave to his brother enough of his holdings in the firm to make the brother and the testator's widow, appellee S. S. Barnes, equal partners in the business; that they continued the business under the same firm name from the death of the testator, on February 5, 1895, until May 19, 1897, when the brother, J. B. Barnes, sold out his interest in the firm to the widow, appellee S. S. Barnes; and that she has continued the business under the name of C. P. Barnes & Co. It will be observed that the brother, J. B. Barnes, is not sued. The suit is brought against the personal representative and the widow, as residuary devisees. It will be also observed that, although appellant's salary was cut down to \$15 soon after the testator's death, he continued with the firm and continued to accept the salary that was paid him; and things remained in this shape until after J. B. Barnes sold out, and appellee S. S. Barnes took charge of the

business in her own right, after the dissolution of that firm, and appellant continued to work for her and to accept the reduced salary from her until he was discharged by her something like a year afterwards.

It is insisted for appellant with great earnestness that the will creates a precatory trust in his favor, and that he is entitled under the will to his wages at \$20 a week. The will does not fix the salary that appellant is to receive if retained in the employ of the firm, nor does it require that he shall be retained. The language imports no more than an expression of the testator's desire, and the clause was, no doubt, put in this shape so as not to embarrass the devisees in the management of their affairs. The will contemplated that the brother and wife of the testator, as a firm, would continue the business; and to this firm the testator expressed the desire that it would retain appellant in its employ on such liberal terms as his long and faithful service entitled him to. The amount of compensation is expressly left to the firm, and no desire is expressed as to anything that should be done after that firm went out of business. The suit here is not against that firm, and, if this action can be maintained, the clause in question will amount, in substance, to a charge of an annuity upon the widow, appellee S. S. Barnes, in favor of appellant, unless she quits the business. The testator clearly intended no such result. In *Shaw v. Lawless*, 5 Clark & F. 129, the testator expressed his "particular desire" that the devisee, when he received the property, should continue L. "in the receipt and management thereof, and likewise employ and retain him in the receipt, agency, and management of the rents," at the usual fees allowed to agents, for this reason, as expressed in the will: "He having acted for me, since I became possessed of said estate, fully to my satisfaction." It was held that no precatory trust resulted. Among other things, the lord chancellor said: "All cases upon a subject like this must proceed on a consideration of what was the intention of the testator. Now, the first observation that strikes one with reference to that matter is that during the life of the testator Lawless was his agent. But then he was agent only during the testator's pleasure, and by the terms of the will the testator desired that he should continue in the agency. Is that desire to be considered a command? If so, for what length of time is he to continue? * * * If Lawless is the equitable incumbent to the amount of one-twentieth part of the income of the estate, he has a clear interest in the residue, for he might take one-twentieth part of the residue; he might file a bill in chancery in order to control the application of the residue, and claim to be absolutely invested in what he is entitled to receive, namely, this one-twentieth part." So, here, if the clause in question created a precatory trust, appellant would have been

entitled to maintain a bill in equity to protect his rights and prevent the firm from taking any steps that might imperil his annuity. Such a right might render the estate of the devisee materially less valuable, and make appellant, to no small extent, the real beneficiary under the will. The case above referred to was followed in *Foster v. Elsley*, 19 Ch. Div. 518, and *Finden v. Stephens*, 22 Eng. Ch. 142. See, also, *Perry, Trusts*, § 123. The firm composed of the widow and the brother were not required to continue the business. They might close it out at pleasure. If they had sold to a stranger, clearly no trust would have attached in favor of appellant to the assets in their hands received from the sale. When the brother sold to the widow, he was acquit of all responsibility. It was not the testator's purpose to create a permanent charge on the corpus of the estate in the hands of the devisees; and the widow after her purchase was under no obligation to keep appellant indefinitely in her service, regardless of the amount of business she did, or other circumstances affecting her interest. Judgment affirmed.

DELKER et al. v. CITY OF OWENSBORO et al.¹

(Court of Appeals of Kentucky. March 19, 1901.)

MUNICIPAL CORPORATIONS—DUTY OF TAX COLLECTOR TO COLLECT STREET ASSESSMENTS—LIABILITY OF SURETIES—COMMON-LAW BOND.

1. Street assessments are "taxes," within Ky. St. § 3412, making it the duty of the tax collector of a city of the third class to collect "all taxes" levied by the city; and the sureties in the tax collector's bond are liable for such assessments collected by him.

2. A tax collector's bond, binding him to perform all duties required of him "by law or ordinance," though not good as a statutory bond to the extent that it binds the collector to perform duties required only by ordinance, is good as a common-law bond as to such duties, and therefore sufficient to bind the sureties for street assessments collected by the principal pursuant to an ordinance imposing upon him that duty, whether or not such assessments be regarded as taxes.

Appeal from circuit court, Daviess county.
"Not to be officially reported."

Action by the city of Owensboro and others against John G. Delker and others on an official bond. Judgment for plaintiffs, and defendants appeal. Affirmed.

Little & Little, Geo. W. Jolly, and R. A. Miller, for appellants. J. D. Atchison, for appellees.

O'REAR, J. A. M. C. Simmons was elected collector of taxes for the city of Owensboro for the year 1895, and executed bond, with appellants and another as his sureties. He was elected under section 3412, Ky. St., applicable to cities of the third class: "The council shall elect at their first regular meet-

ing in April, in each year, a collector of taxes, whose duty it shall be to well and faithfully collect, account for, and pay over to the city treasurer all taxes levied by the city, and who shall hold his office for one year, and until his successor shall be elected and qualified." The bond executed by Simmons and appellants as sureties is as follows: "We * * * bind and obligate ourselves to the city of Owensboro that the said A. M. C. Simmons shall well and faithfully perform all duties required of him by law or ordinance while holding the office or position or performing the duties as collector of taxes of said city." By virtue of the foregoing election, and qualification under the bond named, Simmons was given for collection on behalf of the city its tax list for the year 1895, amounting to something over \$80,000, including penalties and interest, but not including railroads or corporation franchise taxes, and not including "omitted lists" (that is, the list of persons omitted of assessment by the assessor, but subsequently listed by the tax collector); nor did it include "back taxes" (that is, taxes delinquent in former years, but relisted with the collector for collection); nor did it include street and pavement improvement assessments. Items under each of the heads stated above were listed with the collector for the year 1895, which he collected. In April, 1896, he prepared and submitted to the council a report purporting to show a complete settlement of his "tax-book" liabilities, which was approved, and the council voted him a "quietus." It was discovered that the collector had failed to include the franchise taxes of some \$2,600, collected for that year, and this sum he and his sureties paid. Shortly afterwards an expert accountant was employed by the city, who, with a representative of the collector, one of his sureties, went over the books of the collector, and from them and the records accessible in his office and the office of the city clerk ascertained that there was a further "shortage" of some \$2,173.64, whereupon the collector executed, and the sureties took from him, a mortgage (though, perhaps, more of a deed in form) to certain real estate in the city of Owensboro to indemnify them against loss by reason of their suretyship. This suit was then brought by the city on the bond set out above, alleging particularly the items under each head claimed to have been collected by the collector and not paid over to the city; also charging that the settlement was not a complete nor correct settlement, and setting forth the particulars constituting the errors relied on. The aggregate of these items was the \$2,173.64 above named. It is argued by the sureties that a demurrer to the petition should have been sustained, because the law did not impose on the collector the duty of collecting the street and pavement assessments mentioned. Such assessments are generally denominated "taxation," and so called by the text writers and

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

courts. If correctly so regarded, then they were expressly included in the terms of the collector's duties. But the terms of the bond in this case are broad enough to cover them if not taxes, for these items were by "ordinance" made collectible by the tax collector, and so committed to his hands. The bond would, therefore, be good as a common-law bond, even if not as a statutory bond. The case was, on appellant's motion, transferred to equity, they having put in issue the numerous items constituting the sum total sued for; and the chancellor found the amount due the city for the year in question to be \$1,008, for which judgment was rendered against Simmons and the sureties. His judgment is fully sustained by the proof.

It is earnestly argued that the accepting of the settlement and the voting of the quietus constitute a complete bar. The cases of *Boyd v. Randolph*, 91 Ky. 472, 16 S. W. 133; *Com. v. Tate*, 89 Ky. 587, 13 S. W. 117; *Id.* (Ky.) 33 S. W. 405; and *Wade v. City of Mt. Sterling* (Ky.) 33 S. W. 1113,—are conclusive of the contrary doctrine. The "quietus" was but a receipt for the money paid, and the city was not barred of its action to recover for nonpayment of other sums admittedly owing it by the collector for the same term.

Other points made in briefs have been carefully considered, but not deemed material to a correct determination of this case. The sureties undertook to the city of Owensboro that the collector would collect all money that might be payable to him by virtue of that office for the year 1895, either by law or ordinance, and that he would account for it to the city. He has collected the money adjudged against him by virtue of the law and ordinances, and has not paid it over. The judgment is affirmed, with damages.

BUSH et al. v. GRANT.¹

(Court of Appeals of Kentucky. March 19, 1901.)

MASTER AND SERVANT—INDEPENDENT CONTRACTORS—LIABILITY OF OWNER OF DEFECTIVE MACHINERY USED BY CONSENT OF HIS SERVANT—CONTRIBUTORY NEGLIGENCE—PEREMPTORY INSTRUCTION.

1. Where the servants of independent contractors engaged in repairing a building used an ash lift belonging to the owners of the building for the purpose of removing dirt from the basement, the owners are not liable for an injury to a servant of the contractors resulting from a defect in the lift, though it was used with the consent of their engineer in charge of the machinery in the building, they being under no obligation to furnish any appliance.

2. The injured servant was guilty of contributory negligence in standing upon the heavily loaded lift for the purpose of removing an obstruction caused by negligent loading, as the lift was not designed or ordinarily used for heavy loads, or for the transportation of passengers.

3. Where the facts show unmistakably that the injury complained of resulted from an act of plaintiff which in law was negligence, a peremptory instruction for defendant is proper.

Appeal from circuit court, Jefferson county, law and equity division.

"Not to be officially reported."

Action by John P. Grant against S. S. Bush and C. A. Parker to recover damages for personal injuries. Judgment for plaintiff, and defendants appeal. Reversed.

Clarence Dallam, for appellants. Suter & Solinger, for appellee.

O'REAR, J. S. S. Bush and C. A. Parker were the owners of an office building in Louisville, and contracted with the Whitney Artificial Stone Company to make a concrete floor in the basement of it. The stone company employed appellee and others in the course of the work, appellants having no supervision or charge of the workmen or of their conduct. There was no provision in the contract for the use of an ash lift which appellants had had constructed and were operating in the building, designed and used solely for the purpose of lifting ashes and cinders from the basement to the street. This lift, or elevator, had a platform, some 2 feet 10 inches by 3 feet, hoisted by wire cable one-half to three-fourths of an inch in diameter passing over a drum or spool, and under the platform, so that by operating a winch or windlass by hand the platform, with its contents, were hoisted to the street above. Two tin cans about 16 to 20 inches in diameter by 8 feet high were used to hold the ashes and cinders, and when so filled the weight upon the lift was from 200 to 300 pounds. There was also a stairway, convenient in location, and suitable in structure, leading from the basement to the upper floor and street. The stone company's foreman asked appellant's engineer, who had charge of the machinery in the basement of the building, how he could get some debris, sand, etc., from the basement. The engineer responded that he could use either the stairway or the ash lift. On December 10, 1898, some days after the conversation above related, the stone company's foreman directed some of its workmen engaged in removing debris left from its work contracted for as above stated to remove same by loading it into the ash cans, and hoist it by the lift, then to be removed from the street. Appellee had been engaged for a short while on that day in filling the cans and operating the lift, and was then ordered to go up to the pavement, and receive the cans as they came up. One load of sand or ashes became caught in the opening in the pavement,—the shute left for the lift,—and appellee endeavored to loosen it by reaching down for it with his hands. Failing in this, he got onto the lift, which, under his added weight, gave way by the breaking of the cable supporting it, precipitating appellee to the bottom of the basement, resulting in injuries to his ankle, and probably other parts of his person. He su-

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

appellants upon the facts stated, resulting in a verdict and judgment in his behalf. The case comes here for review upon alleged errors noticed below.

The trial judge instructed the jury upon the assumption that appellants were compelled to have had the ash lift in reasonably safe condition for the purpose for which it was constructed and used, and that, if it was not so, and that fact was known to appellant or their employes or servants, then they were liable to appellee in damages, provided he was not also negligent in the act resulting in his injury. If such be the law, then we think the case was fairly submitted to the jury, unless appellee's own negligence is shown to have caused or contributed to the injury. It is conceded that the stone company was an independent contractor, having the right to employ its own help, and adopt exclusively its own methods in doing the work contracted for. Neither it nor its servants were under the control of the lot owners. We cannot see that there was any privity or relation between the owners and the employes of the contractor. These employes were not the owners' servants, did not look to them for either compensation, direction, or protection. Nor did the owners owe them any duty, save to refrain from purposely or knowingly injuring them. The rule that the master is liable to the injured servant (when he is liable) because of defective appliances furnished him is based upon the idea that the master owes the duty in conscience to the servant to furnish him reasonably safe tools and appliances to do that which he has engaged him to do. But in this case the relationship of master and servant does not attach, and therefore the reason of the rule cannot apply. It is not enough to show that the employe engaged upon another's premises is injured. It must be shown in addition that he was injured in the course of his employment, not by reason of his own or his fellow servants', but by reason of his master's, negligence, and that master in this case the owner; that the master has neglected to do something necessary which the relation of the parties made it his duty to do, the said neglect resulting in the injury complained of. The owners in this case had not engaged to furnish the appliance used, and in the use of which the injury occurred. They were under no obligation to furnish any appliance. The workman had no right to look to them to furnish it, and could not have relied upon any supposition that they would do so or that any furnished was impliedly guarantied to be a reasonably safe or fit one. Here the owner could neither direct the injured employe what to do or what not to do, and, if the owners had attempted to prevent his doing what his foreman directed, the latter's orders alone would have been the employe's authority. Certainly the doctrine of respondeat superior has

never been carried so far. If A. loans B. a defective piece of machinery with knowledge of the defect (a defect of which B. could learn by reasonable diligence), and if B. employ C. to operate the machine, resulting, without C.'s fault, in his injury by reason of the defect, who, under the recognized principles of law governing such cases, is liable to C. for his damages? B. is the only one under a duty to furnish, and the one who did furnish, the implement, and it matters not whether it was his or another's. He engaged to his servant that it was fit for the use to which it was to be put, and the servant had the right to look to him, and him only, to make good that obligation. So here, even if the lift was used by the stone company's servants with the knowledge and consent of appellant's servants, the privity and corresponding legal obligations of master and servant did not exist between the owners of the building and the contractor's servants, but between the contractor and its employes alone. These principles are supported by the following: *King v. Railroad Co.*, 66 N. Y. 181, 23 Am. Rep. 37; *Carter v. Berlin Mills Co.*, 58 N. H. 52, 42 Am. Rep. 572; *Railway Co. v. Farver*, 111 Ind. 195, 12 N. E. 296, 60 Am. Rep. 696; *Gorham v. Gross*, 125 Mass. 232, 28 Am. Rep. 224; *Engel v. Eureka Club* (N. Y. App.) 32 N. E. 1052, 33 Am. St. Rep. 692; *Hilliard v. Richardson*, 3 Gray, 349; *Robinson v. Webb*, 11 Bush, 474; *Bailey, Mast. Liab.* p. 467. There was conflict of evidence whether the lift was loaded on this occasion with ashes or sand, but the preponderance of evidence and probability seems to be that it was sand. If sand, then the lift was subjected to about twice the weight for which it was designed to be used when appellee undertook to release the lift from its obstruction. This obstruction was caused solely by the improper and careless loading of the lift by appellee's fellow workmen. The prudent and safe manner to have relieved the difficulty was simply to have hauled the workman below having charge of the winch, a distance of some 12 or 15 feet, and directed him to lower the lift and readjust the cans. To add his own weight of some 160 pounds to the already heavily loaded elevator, not designed nor used for great weights, or to transport passengers, was a voluntary and unnecessary assumption by the workman of a risk which he had no right to assume was required by his employment. Having elected for his own or fellow workman's convenience to assume an unnecessary risk by subjecting the lift to an extraordinary and unusual use, the result of the accident must be attributed to his own, and not the master's, negligence. *Bailey, Pers. Inj.* §§ 142, 524; *Felch v. Allen*, 98 Mass. 572; *Jayne v. Coal Co.* (Mich.) 65 N. W. 971. Ordinarily, the question whether the injury was caused solely by the defendant's negligence, or was contributed to by plaintiff, should be left to

the jury; but, where there is no conflict of evidence as to the manner of the injury, and when the facts show unmistakably that the injury resulted from an act of the plaintiff, which in law is in itself negligence, the court should not submit the question to the jury. For the reasons indicated, the peremptory instruction asked by the appellants should have been given. Judgment reversed, and cause remanded, with directions to set aside the judgment and verdict, and grant appellant a new trial under proceedings not inconsistent herewith.

McARTHUR et al. v. PRESTON et al.¹
(Court of Appeals of Kentucky. March 19,
1901.)

EQUITY—LACHES—DELAY IN ENFORCING
MORTGAGE.

Where, prior to the execution of a mortgage, the mortgagor's attorney had, in violation of his trust, taken to himself the title to the mortgaged land which he held for the mortgagor, the chancellor will not, after the lapse of 40 years, during all of which time the attorney and his heirs have been in possession, enforce the mortgage as against the heirs, the claim being a stale one, and no adequate excuse being given for the delay in bringing suit, the petition failing to allege when or to what extent the mortgagee sustained any loss by reason of the transaction on account of which the mortgage was executed to indemnify him.

Appeal from circuit court, Bath county.

"Not to be officially reported."

Action by J. M. McArthur and others against Wickliffe Preston and others to enforce a mortgage lien. Judgment for defendants, and plaintiffs appeal. Affirmed.

Robert Walker Hunn, for appellants.
Thornton & Kerr, for appellees.

HOBSON, J. This action in equity was filed on July 18, 1898, by J. M. McArthur, Samuel T. Miles, Mary Jannette Miles, his wife, and Ben Beall, as plaintiffs, against Margaret Davie, George M. Davie, Wickliffe Preston, Carry Thornton, Robert Thornton, William Draper, and Susan Draper, defendants. It was alleged in the petition that on May 5, 1860, Ben Duke Beall, the father of plaintiff Ben Beall and Mary Jannette Miles, in consideration that the plaintiff McArthur might thereafter sustain loss by having to pay the amount of the purchase money of land purchased by Ben Duke Beall of Robert Wickliffe as agent of Ramsey's heirs, mortgaged to McArthur by deed the land in controversy for the purpose of securing McArthur from such loss, stipulating that if there was any land left after satisfying the liability to McArthur he should convey it to plaintiffs Ben Beall and Mary Jannette Miles. It was also alleged that the loss to McArthur in the transactions referred to was never fixed definitely between the parties, but that it would amount to the sum of \$15,000, in-

cluding the interest and expenses attendant upon the transaction. It was further alleged in the petition that Robert Wickliffe had taken possession of this land as attorney for Ben D. Beall under an employment made in November, 1836, but had caused the land to be conveyed to him in his own rights about the year 1854 in violation of his trust, and that he had since held the land, and it had descended from him to his children and heirs at law, among whom were the parties named as defendants. All the heirs at law of Robert Wickliffe were not made defendants to this action. The petition is on its face an effort to foreclose a mortgage made in 1860 on land to which Robert Wickliffe then had the legal title, and of which he and those claiming under him had then and have since had possession. The court below dismissed the action, and the plaintiffs have appealed.

It is necessary to consider but one reason for sustaining the chancellor's judgment. The claim is stale. The title to this land was litigated and determined by this court in *Preston v. Beall* (Ky.) 19 S. W. 175, and this action is only an effort to try again the title to the land which was there determined adversely to appellants by means of this old mortgage executed in the year 1860. Speaking of a case not so strong as this, in *Badger v. Badger*, 2 Wall. 94, 17 L. Ed. 838, the court said: "In such cases courts of equity, acting upon their own inherent doctrine of discouraging for the peace of society antiquated demands, refuse to interfere where there has been gross laches in prosecuting the claim, or a long acquiescence in the assertion of adverse rights. Long acquiescence and laches by parties out of possession are productive of much hardship and injustice to others, and cannot be excused but by showing some actual hindrance or impediment caused by the fraud or concealment of the parties in possession, which will appeal to the conscience of the chancellor. The party who makes such an appeal should set forth in his bill specifically what were the impediments to an earlier prosecution of his claim; how he came to be so long ignorant of his rights, and the means used by the respondent to fraudulently keep him in ignorance; and how and when he first came to a knowledge of the matters alleged in his bill; otherwise, the chancellor may justly refuse to consider his case on his own showing, without inquiring whether there is a demurrer or formal plea of the statute of limitations contained in the answer." The same principles were announced by this court in *Mitchell v. Berry*, 58 Ky. 619; *Farrow v. Farrow*, 45 Ky. 482; *Helm's Ex'r v. Rogers*, 81 Ky. 568.

It will be observed that the petition fails to allege when McArthur sustained any loss by reason of the payment of the purchase money referred to, or what amount he paid. No adequate excuse is given for the long delay in bringing suit upon the mortgage executed nearly 40 years before the petition was

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

filed; and it is apparent from the petition that during all this time the land was held by Wickliffe and those claiming under him. The chancellor will not aid those who have slept upon their rights until death has closed in eternal silence the mouth of the adversary, and a great lapse of time has rendered the facts difficult of proof by those who have succeeded him in interest. Judgment affirmed.

O'REAR, J., not sitting.

CRENSHAW v. CRENSHAW.¹

(Court of Appeals of Kentucky. March 19, 1901.)

PARTNERSHIP—JOINT PURCHASE OF LAND—CONTRIBUTION—INTEREST—LIEN—HOMESTEAD.

1. Where plaintiff and defendant purchased land jointly, and immediately divided it, in an action for an accounting as to the sums respectively paid by them, and for contribution, it was proper to allow each party interest on the payments made by him from the time they were made, as the rule of commercial partnerships not to allow interest on advances made by partners does not apply.

2. As there were two tracts of land purchased at different times, it was error to give plaintiff a lien on defendant's share of both tracts for the entire balance found due plaintiff on account of the overpayment by him of his share of the purchase price of both tracts, as the two transactions should be kept separate, and plaintiff given a lien only on defendant's share of each tract for the overpayment by plaintiff of his share of the purchase price of that tract.

3. Defendant was entitled to a homestead in his share of the tract first purchased as against the amount due by him on account of the second purchase.

Appeal from circuit court, Metcalfe county.
"Not to be officially reported."

Action by James G. Crenshaw against Henry A. Crenshaw for an accounting and for contribution. Judgment for plaintiff, and defendant appeals. Reversed.

Duff & Richardson, for appellant. W. L. Porter, for appellee.

BURNAM, J. In January, 1869, appellant, H. A. Crenshaw, and the appellee, James G. Crenshaw, purchased from one Edmund Duff a tract of 238 acres of land in Metcalfe county at the price of \$1,145.73, for which they executed their joint note, due on the 21st day of December, 1869, bearing interest from date until paid, and for which a renewal was executed on the 19th of January, 1880, for the balance found due thereon, then amounting to \$681.60. On the 27th day of January, 1873, the same parties purchased from one Franklin a tract of 110 acres of land at the price of \$634.25, of which amount \$285 was paid in cash, and the joint note of the purchasers was executed for the balance, \$349.25, due two years after date, and bearing interest from date until paid. This note was afterwards assigned by Franklin to the execu-

tor of Edmund Duff. After their purchase, the lands were divided between the parties, each taking possession of the part allotted to him in the division. On the 18th of October, 1894, this suit was instituted by appellee, in which he alleged that he had paid largely in excess of one-half of the purchase price of the lands so bought, and that there still remained a large amount of the purchase money due to the executor of Edmund Duff; and asked for an accounting of the sums respectively paid by the defendant and himself, and for a contribution of the amount that he had paid thereon in excess of appellant; that the lands be equitably divided, and that he should be given a lien upon the portion allotted to appellant for the excess so paid by him. The defendant (appellant here), by his answer, denied that appellee had paid more than his proportion of the purchase money on the lands so bought, or that he was entitled to subject any portion of the land which fell to him in the division to the payment of such alleged excess. The case was referred to the master commissioner, and a great deal of evidence taken upon the disputed questions of fact. In his report he found that there remained unpaid on the 1st day of June, 1898, after giving all of the credits paid by both plaintiff and defendant, on the first tract of land, \$379.04; and that at the same date there remained unpaid on the 110-acre tract, bought in 1883, \$140; and that appellee had paid, including interest calculated up to the 1st day of June, 1898, on both tracts of land, \$826.34 in excess of the amount paid by appellant. Numerous exceptions were filed to this report, chiefly based on the method adopted in calculating the interest, which were overruled, and the plaintiff given judgment for \$413.17 against appellant, being one-half of the excess in payments made by him on their joint purchases; and he was adjudged a lien upon that part of the property set apart for appellant, and the master commissioner was directed to sell, subject, however, to a lien in favor of Duff's executor for the balance due him on the purchase money. From that judgment this appeal is prosecuted.

It is first insisted for appellant that the judgment is erroneous in that it allowed interest on the several payments made by the parties from the date thereof, it being insisted that plaintiff and defendant were partners in these transactions, and that neither was entitled to interest on money advanced by him and used in the partnership business, without express agreement on the part of the other party to pay interest. This undoubtedly is a well-settled rule when applied to commercial partnerships, but has no application to this case. While the purchase of the lands was joint, they were immediately divided, and each party separately controlled and farmed the portion allotted to him, and the method of calculating interest adopted by the trial court seems unobjectionable.

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

Another ground of complaint is that the judgment appealed from subjects the land purchased in 1869 for the balance found due appellee for excess of payments made by him on the tract of 110 acres purchased in 1883, and that the land purchased in 1883 was likewise bound for the balance of the debt due on the land purchased in 1869; in other words, appellee is given a lien upon both tracts of land for the aggregate amount of the balance found due him on both tracts, without regard to how this balance originated. The evidence shows that these were distinct and separate transactions, and the only lien appellee has upon the land purchased in 1869 is for the balance found due him on that transaction. In the same way he is entitled to a lien on the land purchased in 1883 for the balance found due him on that purchase as against appellee, and appellant is entitled to a homestead in the tract purchased in 1869 as against balance due appellee upon the purchase of 110 acres made in 1883. We perceive no other error in the record, and for this reason alone the judgment is reversed, and the cause remanded for proceedings consistent with this opinion.

**SABEL et al. v. PLANTERS' NAT. BANK
OF RICHMOND, VA.¹**

(Court of Appeals of Kentucky. March 15, 1901.)

**ATTACHMENT—PROPERTY IN POSSESSION OF
PLEDGE—CONSTRUCTIVE POSSESSION—
DELIVERY OF BILL OF LADING.**

Property in possession of a pledgee cannot be levied on under attachment for the pledgor's debts, and therefore, where a bank discounted a draft for the price of goods, to which a bill of lading for the goods was attached, the goods, upon the refusal of the consignees to receive them, could not be levied on under attachments in favor of the consignor's creditors, being in the constructive possession of the bank as pledgee, and so such attaching creditors cannot require the bank to look to other property upon which it has a lien for the payment of its debt.

Appeal from circuit court, Jefferson county, chancery division.

"To be officially reported."

Action by M. Sabel & Sons against Chalkley & Co. Judgment sustaining claim of the Planters' National Bank of Richmond, Va., to attached property, and plaintiffs appeal. Affirmed.

Alfred Selligman, for appellants. Arthur M. Rutledge, for appellee.

HOBSON, J. B. D. Chalkley & Co., who are merchants at Richmond, Va., received an order from L. Marx & Bro., merchants at Louisville, Ky., for 10 bales of dry hides. Chalkley & Co. shipped the hides to Louisville, and took a bill of lading consigning the hides to their own order. They then drew a draft on Marx & Bro. for \$1,735.66, the

amount for which the hides were sold, and sold the draft to the appellee, the Planters' National Bank of Virginia, with the bill of lading attached. At the foot of the bill of lading was this indorsement: "L. Marx & Bro. to be notified." The bank forwarded the draft, with the bill of lading attached, to its correspondent at Louisville for collection on its own account, having paid Chalkley & Co. the amount of it, less the discount. When the hides reached Louisville, Marx & Bro. refused to receive them on the ground that they did not come up to the sample; and while the hides were lying in the railroad depot they were attached by M. Sabel & Sons for a debt due them by Chalkley & Co. as the property of Chalkley & Co. The bank intervened in the suit, setting up the foregoing facts, and claiming the hides. It was shown by the evidence that Chalkley & Co. were customers of the bank, and deposited with them; that the amount paid for the draft was credited to their account, and checked out by them soon thereafter; but it also appeared that they deposited other money with the bank from time to time, and when the proof was taken had a balance to their credit as large as the amount of the draft. The court below adjudged the hides to the bank, and it is insisted by appellants that this was error, for the reason that the bank had only a lien on the hides to secure the amount due, and that, having in its hands other funds of Chalkley & Co. sufficient to cover the amount of the draft, it should, as between it and the attaching creditor in this state, who had a lien only on the hides, be compelled to look first to the funds already in its hands to protect itself. In other words, it is insisted that the doctrine should be applied that a creditor having a lien on two funds, one of which is covered by a junior lien, will be required to exhaust as against the junior lienholder the fund not covered by his lien before resorting to the other fund. On the other hand, it is insisted for the bank that it has legal rights to which this equitable doctrine does not apply. The question is not without difficulty, and its proper solution depends upon the rights acquired by the bank under its contract and by appellants under their attachment. In *Pettit v. Bank*, 67 Ky. 338, this court, after showing that actual or constructive possession of the property pledged is essential to the existence of a pledge, said, in a case somewhat similar to this: "But, to constitute a valid lien by a pledge of property, it is not necessary that the legal title should be transferred, as in the case of a mortgage; on the contrary, the title generally remains in the pledgor. 2 Para. Cont. p. 113. The question is not, therefore, whether the deposit of the bills of lading was effectual to pass the legal title to the cotton, but whether it was a constructive or symbolic delivery of the cotton. By the law merchant, bills of lading are, to a certain extent, treated as negotiable instru-

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ments. In the hands of the original owner they generally represent his title to the property, at least until it comes to the possession of the consignee; and under certain circumstances the owner may, by his mere indorsement of a bill of lading, pass to a purchaser the absolute property for which it is given." This case was followed in *Douglas v. Bank*, 86 Ky. 176, 5 S. W. 420, where the validity of a pledge created by the delivery of a bill of lading was upheld. These cases are in accord with the current of authority. See *Coleb. Coll. Sec.* §§ 379, 380; *Jones, Liens* (2d Ed.) 824; 12 Am. & Eng. Enc. Law, p. 243. The evidence does not show that the bank bought the hides. It simply took the bill of lading to secure the draft to which it was attached. The only interest the bank had in the matter was the payment of the draft, and to secure it in this the 10 bales of hides were pledged, and symbolically delivered to it by the delivery of the bill of lading. The hides did not sell for enough to pay the draft. It remains, therefore, to determine what rights, if any, appellants acquired in the hides by the levy of their attachment. In *Drake, Attachm.* § 245, the rule is thus stated: "A fundamental principle is that an attaching creditor can acquire no greater right in attached property than the defendant has at the time of the attachment. If, therefore, the property be in such a situation that the defendant has lost his power over it, or has not yet acquired such interest in or power over it as to permit him to dispose of it adversely to others, it cannot be attached for his debt. Thus a chattel pawned * * * is not attachable in an action against the pawnor." To same effect, see *Am. & Eng. Enc. Law* (2d Ed.) 231. This rule was recently followed by this court in *Newman v. Mantle*, 58 S. W. 783. Under these authorities, the hides, being in the constructive possession of the bank as pledgee, could not be levied upon under the attachment of appellees. They therefore acquired, by their attachment, no valid lien upon the property; and it was properly restored to the pledgee, from whom it had been wrongfully taken. Under facts substantially similar to those before us, the same question was recently determined by the supreme court of West Virginia in *Neill v. Produce Co.*, 23 S. E. 702, and by the supreme court of Missouri in *Scharff v. Meyer*, 34 S. W. 858; and in both cases the superior right of the bank was upheld. We have been referred to no contrary authority on the precise question, and this ruling seems to us both sound and reasonable. A large part of the commercial business of the country is now done by means of bills of lading attached to drafts, as in this case; and, if the purchaser of such paper must take it subject to attachments, executions, or the like, against the original owner, the value of such paper for commercial purposes would be entirely destroyed. As the hides did not sell for enough to pay

the draft, and there was no garnishment of the pledgee, the right to reach by garnishment any balance of the proceeds of the sale of the property after the payment of the debt is not presented. Judgment affirmed.

JACKSON-VANARSDALL DISTILLING CO. v. MOORE.¹

(Court of Appeals of Kentucky. March 15, 1901.)

PLEADING—VARIANCE—HARMLESS ERROR IN ADMITTING EVIDENCE—INCOMPETENT EVIDENCE BROUGHT OUT BY APPELLANT ON CROSS-EXAMINATION.

1. Where plaintiff sought to recover the price of whisky barrels alleged to have been sold to defendant distilling company in July, 1891, and the evidence showed a contract by which plaintiff was to furnish barrels to defendant for use during the season of 1891, and that defendant continued to make whisky during the month of July, 1891, during which the barrels for the price of which plaintiff sued were furnished, there was not a material variance.

2. The error in permitting a witness to state that she thought that a wagon loaded with barrels was going to defendant's distillery was harmless, as the jury could not have given any weight to the statement; it appearing from the cross-examination of the witness that she had no personal knowledge as to the matter.

3. The court having rejected an account book offered by plaintiff as evidence, defendant cannot complain of evidence as to what the book contained which he brought out upon the cross-examination of plaintiff as a witness.

Appeal from circuit court, Mercer county.

"Not to be officially reported."

Action by D. L. Moore, surviving partner, against the Jackson-Vanarsdall Distilling Company, to recover the price of goods sold to defendant. Judgment for plaintiff, and defendant appeals. Affirmed.

Thompson & Wilson, for appellant. W. C. Bell, for appellee.

PAYNTER, C. J. This action was instituted by the appellee against the appellant, and in the petition it is averred that during the month of July, 1891, the defendant purchased, under contract, from the firm of H. Paller & Co., of which firm the appellee is the surviving member, 140 whisky barrels, at the price of \$2.20 each, aggregating the sum of \$308, which were delivered on the promise and agreement by defendant to pay the firm the price stated on August 1, 1891. The answer denies that in the month of July, 1891, or afterwards, it purchased or received under contract or otherwise from the plaintiff 140 whisky barrels, or other barrels, at the price of \$2.20 per barrel, or at any other price; but it is also averred that prior to July 1, 1891, it purchased and received from Paller & Co. a certain number of whisky barrels, including the 140, the price of which is here in question; that on July 1, 1891, it had a full and complete settlement with H. Paller & Co., which settlement included the 140 barrels; that on that day it executed its note for \$528

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

in full satisfaction of the price of the barrels which had been delivered. It was further averred that the contract under which the barrels were delivered was made in the month of February, 1891.

Counsel for appellant urges for reversal, first, that there was no evidence that there was a contract to furnish barrels in July, 1891. We understand the contention of counsel to be that, where a plaintiff declares upon a contract, he must prove it as alleged. It is true that this must be substantially done. It is averred in the answer that the plaintiff and defendant made a contract in February, 1891, by which the plaintiff was to furnish the defendant whisky barrels at the price stated. The testimony shows that the plaintiff had a contract with the defendant by which he was to furnish appellant whisky barrels for use during the season of 1891, and the evidence shows that it continued to make whisky during the month of July, 1891. The answer admits that the barrels delivered to it were under the contract between the parties, and the only issue, under the pleadings, is as to whether they had been delivered prior to July 1, 1891, or during that month. The answer simplified the question at issue. The evidence offered by plaintiff did not tend to support a cause of action other than that alleged in the petition. The jury heard the testimony as to whether the barrels were delivered in July, and it necessarily found that they were, or a verdict would have been returned for the defendant. The instructions which the court gave the jury properly submitted to it the question for its determination, and we do not think its finding can be said to be palpably against the weight of the evidence.

The firm of H. Pailer & Co. used a wagon with a large bed for the purpose of hauling barrels to the appellee. On the trial of the case Mrs. Pailer was permitted to state that she saw the wagon, loaded with barrels, passing from the shop towards the turnpike running to Harrodsburg, and she thought they were going to Vanarsdall's distillery. It is urged that the court erred in allowing her to state that she thought they were going to Vanarsdall's distillery. On cross-examination the witness said she did not know where the wagon went, nor did she know of the barrels being delivered to the defendant. The statement of the witness as to what she thought did not tend to show that the barrels were delivered, and, while it was error to permit her to make that statement, still it was not prejudicial to the defendant. Besides, her cross-examination showed that she had no personal knowledge as to where the wagon went, or whether the barrels had been delivered to defendant; hence the jury could not have given any weight to the expression of her thought. Many errors occur on the trial of cases which do not prejudice the substantial rights of the party against whom they are committed.

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It is urged that the court erred in admitting a certain account book as evidence, containing a charge of the 140 barrels to the defendant in July, 1891. D. L. Moore, surviving partner, was introduced as a witness for himself, and testified that he had searched for the books of the firm, but stated that he had only one which contained the account of barrels delivered to the defendant, and offered it in evidence, and the court excluded it. On cross-examination the defendant asked the witness to point out the items showing the charges against it for the delivery of the barrels, including those in suit. The question as to what the books showed was brought out by defendant on cross-examination, and it cannot now be heard to complain.

There were no errors which occurred during the trial prejudicial to the rights of the appellant, and as a properly instructed jury has returned a verdict against it, and which is not palpably against the weight of the evidence, we must affirm the judgment, which is accordingly done.

MAREE v. INGLE et al.

(Supreme Court of Arkansas. March 2, 1901.)

PRINCIPAL AND SURETY — CONTRACTOR'S BOND—ALTERATION—DISCHARGE OF SURETY—PAYMENT BEFORE DUE.

1. Where plaintiff made the last payment to a contractor for erecting a house one day before the day stipulated therefor in the contract, there was no alteration of the contract which would release the sureties on the contractor's bond from liability on a claim for a mechanic's lien.

2. Where a building contract provided for payment where no notice of lien had been served on the proprietor, or the contractor showed, if required, that the property was free from liens or claims for work or material, it being optional with the proprietor to pay the contractor while there were claims unpaid, such payment did not change the contract, thereby releasing sureties on the contractor's bond.

Appeal from circuit court, Sebastian county; Styles T. Rowe, Judge.

Suit by Tony Maree against A. J. Ingle and another, sureties on a contractor's bond. From a judgment in favor of defendants, plaintiff appeals. Reversed.

Dewitt Bros., contractors, entered into a contract with appellant by which they agreed to furnish all material, labor, etc., and build a cottage for appellant, in Ft. Smith, Ark., for the sum of \$1,000, to be paid in five installments; the last payment of \$333.34 to be paid when the building was completed, and after the expiration of 10 days from such completion, and when the drawing and specifications had been returned to D. C. Wurtz, architect. The contract provided that the building was to be completed on or before June 30, 1898, under a penalty of \$5 a day after that date until completed. It also provided, in each case of said pay-

ments, that no notice of lien had been served on the proprietor, and the contractor shall show, if required, at the time of making any or final payment, by his affidavit, by certificate from clerk of record office, or by lien releases or otherwise, as required by lien law, that the property is free from all liens or claims against the premises or the said contractor for work or materials furnished on said work. Appellees executed their bond to appellant in the sum of \$1,000, conditioned for the faithful performance of said contract by Dewitt Bros. Dewitt Bros. constructed the cottage, and were paid the contract price, the last payment being made on July 9, 1898. Some time after the completion of the cottage, and after appellant had paid Dewitt Bros. the \$1,000, the Van Buren Lumber Company filed a lien on the cottage for lumber and other material furnished by said company to Dewitt Bros., and used by them in the construction of said cottage, brought suit to foreclose the lien, obtained a decree, and were proceeding to subject the cottage to the satisfaction of the lien, amounting, with costs, to \$449.75, when appellant, to save the cottage from sale, executed a stay bond, and suspended the execution of the decree. He thereupon brought this suit against the appellees, as sureties on said bond, for said sum of \$449.47. One of the defenses set up by appellees was that they were discharged as sureties on said bond because appellant had deviated from the contract in making the last payment to Dewitt Bros. before it was due and payable by the terms of said contract, and that appellees had been discharged by acts of appellant and the contractor in derogation of contract. Another defense set up by the appellees was that appellant, as owner of the cottage, had paid over money to the contractor before all laborers and mechanics employed on same and all material furnishers had been paid for work done or material furnished in building said cottage, as required by section 18, Mechanic's Lien Law (Acts Leg. 1895, p. 225). Appellant was the only witness. He testified that he made the last payment on July 9, 1898, which was Saturday; that prior to that date he had advertised in the Ft. Smith News-Record for all persons who had bills for labor or material against the cottage to present them to him by July 9, 1898; that on Saturday, July 9, 1898, he and Dewitt Bros. had a settlement, and in this settlement appellant assumed the payment of certain small bills that had been presented to him in answer to his advertisement, amounting to the sum of \$140.45, and for the balance that they found to be due Dewitt Bros. he gave his check in the sum of \$222.95; that at the time they were making this settlement Dewitt Bros. told appellant that they owed the Van Buren Lumber Company for material used in the cottage \$90, and that when appellant paid them they would go over and pay that bill; that the

said check for \$222.95 is dated July 9, 1898, and was given by appellant to Dewitt Bros. on that date in payment of balance due them under the contract. The small bills, aggregating \$140.45, that appellant had assumed to pay, were paid by him on July 13, 1898. Appellant testified that the cottage was completed on June 30 or July 1, 1898,—was not positive which of these days it was, but that it was one or the other. Possession was delivered to him on July 9, 1898. At the close of appellant's testimony, the court stated that upon the evidence of plaintiff, showing that he had, in less than 10 days after the completion of the house, settled with Dewitt Bros., and paid them the full amount of balance due under the contract (less certain outstanding bills, which he agreed to pay), defendants were discharged from liability, and gave a peremptory instruction to the jury to return the verdict for defendants.

F. W. Jamison, for appellant. Mechem & Bryant, for appellees.

HUGHES, J. (after stating the facts). It is settled in this court, as well as elsewhere, that a material or substantial change in a contract releases sureties in a bond given to secure the performance of the contract. O'Neal v. Kelley, 65 Ark. 550, 47 S. W. 400. In Benjamin v. Hilliard, 23 How. 165, 16 L. Ed. 518, it is said in reference to the release of sureties by alteration of a contract that "there must be another contract substituted for the original contract, or some alteration in a point so material as, in effect, to make a new contract." Was there an alteration in the contract in the case at bar? The only deviation from it was that the proprietor paid the contractors one day before the last payment should have been made, according to the contract. The building had been completed, and there were \$333.34 due to be paid on the contract the day after it was paid to the contractors. Upon settlement, the proprietor assumed several bills for materials that had not been paid, amounting to \$140.45; thus leaving a balance due of \$192.89, which was paid to the contractors while there was outstanding the unpaid bill of \$449.75 for materials that had been furnished for the erection of the building, for which the material man was entitled to have a lien declared upon the building. It follows, therefore, that the sureties were injured only to the extent that they were deprived by the premature payment of the \$192.89 that should have been paid upon the lumber bill for \$449.75. This amount the proprietor should have held as a security or protection pro tanto to them against liability upon their bond. The principle is that "when, by the act of the creditor, the surety has been deprived of the benefit of a fund for the payment of a debt, and a contract by which a surety is bound is not changed, he is only discharged to the extent that he is injured,

as in such case it is the fact that he is injured that entitled him to a discharge." *Foster v. Gaston* (Ind. Sup.) 23 N. E. 1095; *Cochran v. Baker* (Or.) 56 Pac. 641; *Pickard v. Shantz* (Miss.) 12 South. 544. There was no alteration of the contract in this case. This construction is in accord with reason and justice, and is supported by the decisions.

We are of the opinion that it was optional with the proprietor to pay the contractor while there were claims for material and labor unpaid, and that this did not change the contract. "Nor were the sureties released by the fact that plaintiff failed to retain money to pay liens that might be filed, although authorized by the contract to do so. One of the purposes of the bond was to relieve plaintiff from looking after such claims." The court erred in instructing the jury peremptorily to return a verdict for the defendants. The judgment is reversed, and the cause is remanded for further proceedings not inconsistent herewith.

MOORE v. IRBY.

(Supreme Court of Arkansas. Feb. 23, 1901.)
TAXATION—SALE—REDEMPTION BY MINOR—RIGHT TO REDEEM.

1. Where the state acquires land at a tax sale, while Sand. & H. Dig. §§ 4596, 6615, authorizing a minor to redeem land from such sale within two years after attaining his majority, is in force, the right of a minor to redeem cannot be taken away by a subsequent act of the legislature.

2. Sand. & H. Dig. §§ 4596, 6615, authorizing a minor to redeem land from a tax sale at any time within two years after attaining his majority, is not limited to a redemption from the state before the latter had disposed of the land, by section 4641 as amended by act of March 7, 1895, such section only providing the manner in which lands sold for taxes may be redeemed before they are disposed of by the state.

Appeal from Desha chancery court. Watson district; James T. Robinson, Chancellor.

Action by Mattie E. Moore, as next friend of Stephen W. Irby, against Albert Z. Irby, to redeem certain lands sold at a tax sale. From a decree in favor of the defendant, plaintiff appeals. Reversed.

J. W. Dickinson, for appellant. F. M. Rogers, for appellee.

BUNN, C. J. This is a petition by the appellant, as next friend of said minor, to the Watson district of the Desha chancery court, to redeem the lands therein named (tendering all taxes, penalties, and costs) from a forfeiture for the nonpayment of the taxes of 1889, and sale made thereunder to the state, and to remove cloud upon title. Demurrer was interposed by the defendant, Albert Z. Irby, to the complaint, and this demurrer was sustained, and, on failure of plaintiff to plead over or amend, the complaint was dismissed for want of equity, and the plaintiff appealed to this court. Mrs. Bettie Irby, mother of said minor, Stephen

W. Irby, and also of Annie M. Perkins, a daughter by another husband, died intestate on the 21st day of November, 1881, seised and possessed of the lands in controversy, and leaving surviving her the said children as her only heirs at law. Annie M. Perkins died intestate in 1894, not having arrived at her majority, and without issue, and Stephen W. Irby became the sole owner of said lands by inheritance from his mother. The plaintiff, Mattie E. Moore, a sister of Bettie Irby, after the latter's death, took charge of and reared said children, both then of tender years, and continued to pay the taxes on said lands for them until 1889, when, for want of means, she was unable to do so further, and thus for the nonpayment of the taxes of 1889 said lands were forfeited to the state, and so certified by the clerk of said county. The general assembly passed an act, which was approved on the 14th April, 1893, organizing the Red Fork levee district, and therein donated the lands in the district which had been previously forfeited for the nonpayment of taxes, and the lands in controversy were included in this list. Subsequently the Red Fork levee board sold the land to Albert Z. Irby, the defendant in this case, and it is charged in the complaint that he is the uncle of Stephen W. Irby, and had full knowledge of all the facts, and that the lands belonged to his nephew.

The only question in the case is the right of the minor to redeem the land. Section 6615, Sand. & H. Dig., which is a section of the act of 1883, under which was the forfeiture and sale of the lands in controversy, provides that "all lands, town or city lots, or parts thereof, which may hereafter be sold for taxes at delinquent sale, under the laws of this state, may be redeemed at any time within two years from and after the sale thereof, and all lands, city or town lots belonging to insane persons, minors or persons in confinement, and which have been or may hereafter be sold for taxes, may be redeemed within two years from and after the expiration of such disability." It appears from this that, notwithstanding the lands had been certified to the state, the minor's right to redeem continued until two years after he should come of age. The right of redemption in minors is reiterated in section 4596, Sand. & H. Dig., in the chapter devoted to the disposition and management of state lands; the only restriction in that chapter being section 4601, which says its provisions shall not apply to town or city lots that have been disposed of by the state. The state acquired its right to the land subject to the minor's right to redeem under the law in force at the time, and this right of the minor could not be divested by any subsequent act of the legislature.

But the defendant contends that section 4641. Id., as amended by act approved March 7, 1895, cuts off the right of redemption, where the state has disposed of the land

That section, as amended, does not declare that the right of redemption ceases when the state has disposed of the land, but, in connection with sections following, only provides the manner in which proceedings for redemption shall be had before the commissioner of state lands, while the lands still belong to the state. It does in no way affect rights already fixed by law as to the right itself and the title. The amendment, contained in the act of 1895, of section 4611, Sand. & H. Dig., does make this change, and none other, to wit, that, while the original law (section 4641) restricts the right of redemption to the owner, the amendatory act extends the right to the owner's heirs and assigns. The decree is reversed, and the cause remanded, with directions to overrule the demurrer to the petition, and to enter a decree in accordance with this opinion.

BATTLE, J., absent.

YOUNG v. GAUT et al.

(Supreme Court of Arkansas. Feb. 23, 1901.)
 PLEADING—BILL OF EXCEPTIONS—SUFFICIENCY—FILING—EVIDENCE—APPEAL—COUNTERCLAIM—FAILURE TO REPLY—MOTION FOR JUDGMENT—CONFLICTING EVIDENCE—LIQUIDATED DAMAGES.

1. Where the evidence was taken by a stenographer by agreement of counsel, and a transcript thereof by the stenographer was offered as a bill of exceptions by the defendant, approved as such and ordered filed by the court, and was deposited with the clerk within 90 days, such transcript was a sufficient bill of exceptions.

2. Where a bill of exceptions was delivered to the court clerk for the purpose of being filed within 90 days of the trial, the omission of the filing mark would not be proof that it was not filed.

3. Where there was no reply to defendant's counterclaim, but she neglected to move for judgment because of such omission, the omission cannot be taken advantage of on appeal.

4. Where there was conflict in the testimony, the trial court's finding will not be disturbed on appeal.

5. Where a contract provided that a house should be completed by a certain date, and that five dollars should be forfeited as liquidated damages for each day's delay thereafter, and there was unnecessary and unwarranted delay in completing the house, it was error to disallow such liquidated damages.

Appeal from circuit court, Washington county, in chancery; Edward S. McDaniel, Judge.

Action by Gaut & Cardwell and another against S. J. Young. From a judgment in favor of plaintiffs, defendant appeals. Reversed.

On the 5th day of April, 1898, the appellees, Gaut & Cardwell and the Phillips-Deaver-Johnson Lumber Company, filed their complaint in the Washington circuit court against the appellant, Mrs. S. J. Young, alleging that on August 10, 1897, Gaut & Cardwell had entered into an agreement with Mrs. S. J. Young, in writing, to build for her

a dwelling on lot No. 8 in block No. 1, city, in accordance with certain plans and specifications prepared by one H. I. Goddard, at and for the sum and price of \$1,785; that they had complied fully with the terms of their said written contract in all essential particulars, "except where otherwise directed or prevented by the defendant." Gaut & Cardwell allege extra work and labor performed to the value of \$198.05, and Phillips-Deaver-Johnson Lumber Company allege that they have, "at the request and with the knowledge of the said Gaut & Cardwell and the said Mrs. S. J. Young," furnished material, etc., and paid money, to the amount of \$1,359.91; and plaintiffs allege a total expenditure of \$2,254.91, and admit payment to the extent of \$892.50. And plaintiffs ask for a judgment against the defendant in the sum of \$1,362.41, and that same be declared a lien upon the said lot and building. And plaintiffs file as exhibits copies of the contract, bond, and accounts stated. On May 10, 1898, the defendant (appellant) filed her answer and cross complaint, admitting the execution of the contract and the accepting of the bond, but denying that the plaintiffs Gaut & Cardwell, "or any one for them," had complied with the contract as alleged. Denied that said building had been completed according to contract, or accepted by the supervising architect, H. I. Goddard, or by defendant. Specifically alleges noncompliance with the contract on the part of the plaintiffs, and denies any indebtedness whatsoever. And for cross complaint the defendant (appellant) alleged the making of the contract with Gaut & Cardwell, and that she accepted a bond executed by said Gaut & Cardwell, with said Phillips-Deaver-Johnson Lumber Company as sureties, in the sum of \$2,000, conditioned for the faithful performance of said contract. Alleges that said Phillips-Deaver-Johnson Lumber Company "acted throughout as parties in interest, as contractors, and have assumed authority at all times as contractors, and that they have assumed to be, and have held themselves out as being, the real parties in interest, as contractors as well as sureties"; that, by the express terms of the contract, said building was to be completed by December 1, 1897, with a forfeit of \$5 a day "as liquidated damages" for each day thereafter; and that she is entitled to the sum of \$800 for a delay of 160 days. Defendant alleges that she obtained possession of the house "by legal process" on the 5th day of April, 1898, having made demand, under article 7 of the contract, for possession on March 21, 1898, and possession having been refused by plaintiffs, to her special damage in the sum of \$100. Admits \$34.50 of plaintiffs' bill for extras, and denies \$173.35. Alleges certain specific deficiencies, amounting to \$310.67½. Denies the right of the firm of Phillips-Deaver-Johnson Lumber Company to file and enforce a lien against said premises, for the reason that they are "in truth and in fact parties

contractors as well as sureties," and alleges special damages for said wrongful filing in the sum of \$200. Denies that said Phillips-Deaver-Johnson Lumber Company were ever requested to furnish any lumber and material or pay any money as alleged in complaint, but alleges that whatever lumber and material they furnished, or money that they paid, was furnished or paid "at their own instance and request, as parties contractors as well as sureties." Defendant alleges a total damage of \$1,410.67½, and asks a judgment therefor, and for her costs. There was no reply made to the said answer and cross complaint. After much testimony on both sides was heard by the court, the chancellor made substantially the following finding of facts and decree: That Gaut & Cardwell, as contractors, with Phillips-Deaver-Johnson Lumber Company, as sureties, had contracted with the defendant (appellant) to build a house as per contract, plans, and specifications introduced in evidence, and to complete same by December 1, 1897, at and for the sum and price of \$1,785. Finds that the contract and bond were executed on August 10, 1897, and that the building was to be completed according to the said contract, and the plans, drawings, and specifications made by H. I. Goddard, architect. "That said dwelling was not tendered as completed, by said Gaut & Cardwell, contractors, until March 21, 1898, and that at said time said dwelling was not completed according to contract in all particulars." The court then gives the defendant (appellant) possession, with costs; her separate suit for possession having been consolidated with this action. The court then allows the contractors \$100 for extra work, which, with contract price, made a total of \$1,885. The defendant (appellant) was "entitled to a credit or offset of \$150 for damages in delay and work," which, with the \$392.50 previously paid, made a total credit of \$1,042.50, and "she now stands indebted to said contractors, Gaut & Cardwell, in the sum of \$842.50, as balance in full of amount due from her under said contract." The court further finds that four parties are lien creditors, their claims aggregating \$148.33. Directs defendant (appellant) to pay said liens out of the balance due on contract price, and to pay the residue unto Phillips-Deaver-Johnson Lumber Company. That Gaut & Cardwell are indebted unto Phillips-Deaver-Johnson Lumber Company in the sum of \$1,359.91, and after receiving the said sum of \$694.17 from Mrs. Young, appellant, are entitled to a judgment against Gaut & Cardwell for \$665.74. The balance (\$842.50) due from Mrs. Young (appellant) is declared a lien on the building in controversy. That \$100 of same may be paid by conveying the certain lot of land referred to in contract. The plaintiffs (appellees) to pay all the costs in the suit for possession; otherwise, each party pays their own costs, and the court costs are divided. Whereupon

the defendant (appellant) offered her bill of exceptions, and prayed an appeal to the supreme court, which appeal was by the court granted.

E. B. Wall, for appellant. J. V. Walker, for appellees.

HUGHES, J. (after stating the facts). The plaintiffs' attorney contends that there is no bill of exceptions, and that there is no showing in the record that what purports to be a bill of exceptions was ever filed. The evidence appears to have been taken by a stenographer in the presence of the court by agreement of counsel, and deposited with the papers, and recognized by the court as the evidence in the case and a part of the bill of exceptions, whereupon the court made the following order: "And now comes said defendant, Mrs. S. J. Young, and presents to the judge of said court this her bill of exceptions, comprising all the evidence introduced in this cause, which is signed, sealed, and made a part of the record herein, this the 25th day of July, 1898. E. S. McDaniel, Judge." This bill of exceptions transcribed by the stenographer, as to the evidence, as per agreement, as we understand, was approved and ordered filed by the court, and was deposited with the clerk within 90 days; and, while the record is awkwardly presented in the transcript, we think it sufficiently identifies and shows the evidence, and that it was filed in apt time. When it was delivered to the clerk within time, the omission of the filing mark would not be evidence that it was not filed, if it was delivered for the purpose of being filed. *Case v. Hargadine*, 43 Ark. 144.

There was no reply to the defendant's counterclaim, and counsel for defendant contends that, by reason of the fact that her counterclaim was not answered, the appellant should have had judgment. But it does not appear that the appellant moved for judgment because of the failure to answer her counterclaim, wherefore she cannot take advantage of it here. By failing to move for judgment for the want of answer, and going into trial, she must be held to have treated the issues as made. *Gibbs v. Dickson*, 33 Ark. 107; *Winters v. Fain*, 47 Ark. 496, 1 S. W. 711.

As there is conflict in the testimony as to the character of, and deficiency in, the work, we will not disturb the finding and decree in this behalf. But we think the evidence, by a decided preponderance, tends to show an unnecessary and unwarranted delay in completing the building according to contract, and that by the use of proper diligence the contractors could have completed the building within the time they contracted to do it. It is true, there were some alterations in the plans, and in some of the materials to be used in the building, which were provided for in the contract; yet no additional time was asked, or seems to have been con-

plated, by reason of these alterations, which were inconsiderable, and need not have caused any delay beyond the time fixed and agreed upon for the completion of the building. The contract was entered into on August 10, 1897, and the house was, according to its stipulations, to be completed by December 1, 1897, with a forfeiture of \$5 a day, as "liquidated damages," for each day's delay thereafter. The appellant got possession of the house on the 7th of April, 1898, and it was not then completed in all particulars, as found by the court. There was, therefore, a delay in completing the house of 128 days after December 1, 1897, for which, in our judgment, the appellant was entitled to an allowance of \$5 per day as liquidated damages,—in aggregate, \$640. It may be that appellees made a hard bargain, and built the house for less than it was worth; but, if this be true, we cannot change their contract, nor can we relieve them of the consequences of their failure to comply with it. "While courts of equity afford relief against penalties, they will not relieve against liquidated damages." *Williams v. Green*, 14 Ark. 315; *Lincoln v. Granite Co.*, 56 Ark. 384, 19 S. W. 1056.

The decree is affirmed, save as to this item of liquidated damages that should have been allowed the appellant; but as to this the judgment is reversed and remanded, with directions to the court below to modify the decree in accordance with this opinion.

ST. LOUIS, I. M. & S. RY. CO. v. FAIST et al.
(Supreme Court of Arkansas. Dec. 1, 1900.)

EVIDENCE—CROSS-EXAMINATION—IMPEACHING WITNESS—PRIOR AFFIDAVIT—READING TO JURY—MOTION TO INTRODUCE—TIME—APPEAL—RECORD—OBJECTIONS—SPECIFICATION—SUFFICIENCY.

1. Where, on appeal, the record showed that on the cross-examination of a witness he was shown an affidavit which he admitted having signed, and his attention was called to certain parts of the writing, and such parts were read to him, and the parts of the affidavit which the cross-examiner afterwards sought to introduce were set forth in the record, and designated by quotation marks, and the record stated that defendants asked to be allowed to read to the jury those parts of the affidavit to which attention had been called, the record sufficiently showed the parts of the writing which the court refused to allow to go to the jury.

2. Where only certain parts of an affidavit made by a witness were contradictory to his testimony on the stand, it was not necessary to offer the whole of the affidavit in evidence for the purpose of impeaching the witness.

3. Where, on the cross-examination of a witness, he was examined on the contents of an affidavit, but no motion was made that the same be read to the jury until after the subsequent cross-examination of another witness, it was not error to refuse to allow the affidavit to be read, there having been no motion at the proper time.

4. Where it is sought to impeach a witness by showing contradictory statements in an affidavit made by him, it is for the trial court to determine whether there is any evidence of a con-

tradictory nature; and, if there be, the question is then for the jury.

5. Where, on the cross-examination of a witness, his attention was called to an affidavit made by him, containing statements contradictory to his testimony on the stand, and he had acknowledged his signature, and testified that the statements were taken down by another, but that he did not make the contradictory statements in the affidavit, it was error not to allow the alleged contradictory statements to be read to the jury.

6. A contention that the refusal to permit the affidavit to be read to the jury was proper, because the cross-examiner did not offer the testimony of the party before whom the affidavit was made, or other witness, to support the affidavit, was not well taken, since, by admitting the signature, the witness must be considered *prima facie* as having made the statements therein contained.

7. Where, on the cross-examination of a witness, his attention was called to certain parts of an affidavit made by him, and he was cross-examined thereon, and the court refused at that time a motion to have such parts go to the jury, it was not incumbent on the cross-examiner to again offer the affidavit on opening his case.

8. Where the issue was whether plaintiff's mill had been set on fire by sparks from defendant's locomotive, and a witness testified that the portion he first saw burning was the west end of the main lumber shed, and an affidavit made by him stated that when he first discovered the fire all of the west end of the mill was in flames, and the west end of the lumber shed was within 20 feet of the railroad track, and there had been no fire at all about that part of the property during the day, but the west end of the mill was 100 feet from the railroad track, and nearer to the engine house of the mill, where there had been a fire on the day of the night of the alleged setting fire, there was a material variance between the testimony and the affidavit sufficient to entitle defendant to have the writing go to the jury for the purpose of impeachment.

9. Where, on the cross-examination of a witness, he was examined as to certain statements in an affidavit made by him, but the cross-examiner neglected to move at that time that the statement go to the jury, but after the cross-examination of the next witness, who was also examined as to an affidavit by him, the cross-examiner requested that both affidavits go to the jury, a contention that it was not error to refuse the request as to the affidavit of the latter witness because it was joined with the request to read the affidavit of the former witness, as to which the request was not in proper time, was without merit, the affidavits not being joint, and the request being for two specific things having no connection.

Battle and Riddick, JJ., dissenting.

Appeal from circuit court, Saline county; Alexander M. Duffie, Judge.

Action by B. Faist & Co. against the St. Louis, Iron Mountain & Southern Railway Company. From judgment in favor of plaintiffs, defendant appeals. Reversed.

Dodge & Johnson, for appellant. J. M. Westbrook, D. M. Cloud, and Murphy & Mahaffey, for appellees.

WOOD, J. This suit was brought by B. Faist & Co., a firm composed of B. Faist and others, to recover damages for the burning of a mill and other property, alleged to have been negligently caused by sparks from an engine of the railway company. There was a judgment in favor of plaintiff

for \$17,622.25, from which this appeal was taken.

On the trial, witness Ulmer testified, among other things, "that he saw the passenger train go north, and that it was throwing fire as they usually do, and it was all going over towards the mill. The air was carrying it from the track towards the mill. The train was throwing fire enough to set anything afire like they do in the daytime. The sparks looked to be as big as the end of your finger." On the cross-examination of this witness he was shown an affidavit, and the record as to what took place concerning it is as follows: "Q. Is that your signature? A. Yes, sir. Q. You signed that, didn't you? A. Yes, sir. Q. You swore to it before Mr. Mashburn, notary public, didn't you? A. Yes, sir. Q. Didn't you state in that connection, 'I didn't see any sparks flying from the engine?' A. No, sir; I did not. Q. You signed that statement, didn't you? A. No sir; I didn't know about that. Q. You signed that? A. Yes, sir. Q. Was that read to you when you signed it? A. The man that wrote that out read it to me. I couldn't read it. Q. He read it to you? A. I didn't tell him, though, that I didn't see no sparks. Q. You saw that statement, 'I saw no sparks flying from the engine?' A. No, sir; I didn't tell him any such thing. Q. It is there, isn't it? Can you read? A. No, sir; I didn't say any such thing at all. Q. This statement was taken down, or at least a statement was taken down, and read over to you, and you signed it? A. He read it over, but I know that wasn't in it when he read it over. I know that much. Q. Did you know you signed that statement? A. Yes, sir; that is my handwrite. Q. Did you sign it before Notary Public Mashburn? A. No, sir; I signed it in the depot. Q. Didn't you swear to it? A. Yes, sir. Q. Did you go before him and swear to it? A. Yes, sir." Witness Hendricks testified, among other things, that he was awake when the passenger train came north, and noticed the sparks being thrown out from the locomotive as it passed. They were of unusual size, and seemed to be a great many. He did not notice any fire at the mill before the passing of the train. Noticed the fire some time near 2 o'clock, after the passenger train had gone north. The record shows the witness was asked this question, to wit: "Well, when you noticed the mill burning, what portion of it was burning?" The answer was as follows, to wit: "The west end; what I call, from where I live, the west end of the main lumber shed. It had burned the entire west end of the main lumber shed. This was afire, and had burned to halfway up the east end." On cross-examination of this witness the record shows the following: "Q. Didn't you state to Mr. Faulkinbury, when he took your statement, that the first you knew of that fire the whole west end of the mill was

afire? A. No, sir. Q. You made a statement to him? A. Yes, sir. Q. You never said a word about these sparks from the engine at that time? A. He didn't ask me at that time. Q. You made no statement about it? A. Yes, sir; I made a statement in regard to the sparks on the train. Q. You think now you made a statement to him? A. I know I did. Q. Didn't you state to him, and wasn't that statement taken down in writing, that, 'When I first discovered the fire, all of the west end of the mill was in flames, and it burned very rapidly all over the entire building; so fast nothing could be saved,'—signed by G. T. Hendricks? Is that your signature? A. Yes, sir. Q. Didn't you make that statement? A. I did not. Q. Did you sign this? A. I did. Q. Was it read over to you? A. No, sir. Q. Did you ask it to be read over to you? A. No, sir. Q. Did he take the statements as you made them? A. He took it down as I made them. (Defendant here asked to be allowed to read to the jury those parts of the affidavits of A. B. Ulmer and G. T. Hendricks to which attention had been called, but the court refused to allow same to be read, to which refusal the defendant saved its exceptions.)"

Does the record raise the question as to whether or not the trial court erred in refusing to permit to be read to the jury those portions of the affidavits or written statements of witnesses Ulmer and Hendricks to which their attention had been called? Such question was treated as raised in the original brief of counsel for appellee. There is no intimation or suggestion there that the record does not properly raise the question. But upon a careful reading of the transcript by one of the judges of this court it was suggested that there might be some question as to whether the bill of exceptions really presented the alleged error of the ruling of the court below in rejecting the parts of the affidavits offered in evidence, so as to call for the judgment of this court upon such ruling; whereupon the matter was deemed of such importance that the propriety of a brief upon the point by the respective counsel was suggested, and accordingly briefs have since been prepared. We must determine, therefore, in limine, whether the question is raised. The record shows that each of the witnesses was shown an affidavit or written statement, which he admitted having signed. The attention of each witness was called to certain parts of the writing which he had signed, and those parts were read to him by the appellant's counsel, and he was asked if he did not make that statement. The parts of the affidavit which counsel desired to introduce are set forth specifically in the record, and designated by quotation marks, as the parts taken from the affidavit which the witness had signed. Then, when the record recites that defendant "asked to be allowed to read to the jury those parts"

the affidavits of A. B. Ulmer and G. T. Hendricks to which attention had been called," it certainly sufficiently designates and sets forth the testimony that was offered, and which the court refused to allow to go to the jury. It does not appear that there were any other parts of affidavits to which the attention of the witnesses had been called. Useless repetition is to be avoided. After identifying parts of the affidavits offered in evidence by quotation marks (setting them forth verbatim), it would have been an idle waste of words and space to have repeated them. Unless we close our eyes, it would be impossible for us not to read from the above record the precise parts of the affidavits of the respective witnesses that were offered and refused. The record, then, meets the requirement of the rule that, where the alleged error consists in the admission or rejection of evidence, such evidence must be set out in the bill of exceptions. It must be remembered that the purpose in view was the impeachment of these witnesses by showing that they had made statements different from their present testimony. It was unnecessary, therefore, and would have been manifestly improper, to offer the whole of the affidavit in evidence, when only portions of it were contradictory of the witness' present testimony. Only such parts as were contradictory of his present testimony were relevant on the question of impeachment. Section 2960, Sand. & H. Dig. It was not claimed that the whole of the affidavit was contradictory. Appellant was not seeking to establish by the affidavits, as original evidence, any fact involved in the main issue. No question as to the contents of the affidavits was involved. Only the question of the credibility of the witness was raised. It was the province of appellant to offer only those parts of the affidavits which it conceived to be contradictory. If appellee had contended that there was no inconsistency in the statements, past and present, of its witnesses, when their respective affidavits were considered as a whole, then its province and duty was to object specifically to the reading of a part of the affidavits only, and to call for the reading of the whole. 1 Greenl. Ev. §§ 201, 462b; *Railway v. Artery*, 137 U. S. 507, 11 Sup. Ct. 129, 34 L. Ed. 747. The record discloses no such objection and demand of appellee. Therefore it is only necessary for the record to identify those parts of the affidavits which appellant asked to read in order to raise the question of the correctness of the ruling of the circuit court in refusing such request.

Having determined that the record calls for a review of the ruling of the trial court, the next question is, did the court err? It is a well-established rule that, when a witness has testified to material facts on the trial of a cause, any acts done or declarations made by him which appear to be inconsistent with his statements on the stand are competent

by way of contradiction, and to enable the court or jury trying the case to ascertain what weight should be given to his testimony. *Handy v. Canning*, 166 Mass. 107, 44 N. E. 118. As witness Ulmer testified that when he saw the train go north it was throwing fire, which was all going towards the mill, and was throwing fire enough to set anything afire, and that the sparks emitted "looked to be as big as the end of your finger," his testimony was exceedingly important in establishing the plaintiff's case; and as he had, previous to the trial, signed an affidavit which contained the statement, "I didn't see any sparks flying from the engine," it was patent that there was a palpable contradiction between the statement contained in his affidavit and the testimony he gave upon the trial upon the most material point in the case. The statement contained in the affidavit was, therefore, clearly competent, and should have been admitted, if offered at the proper time. "According to the ordinary rule of proceeding in such cases," says Greenleaf, "the writing is to be read as the evidence of the cross-examining counsel in his turn when he shall have opened his case; but, if he suggests to the court that he wishes to have it read immediately, in order to form certain questions upon its contents, after they shall have been made known to the court, which otherwise could not well or effectually be done, that becomes an excepted case; and for the convenient administration of justice the writing is permitted to be read as part of the evidence of the counsel so proposing it, subject to all the consequences of its being considered." 1 Greenl. Ev. § 463. The supreme court of Minnesota, discussing a question of this kind, said: "If a party desires to show the contents of a paper, and to cross-examine upon it, he must, if the writing be admitted, introduce it as a part of his cross-examination." *O'Riley v. Clampet*, 53 Minn. 539, 55 N. W. 740. The rule of practice which generally obtains is to require the party who desires to impeach a witness by prior contradictory written statements to simply lay the foundation on cross-examination by showing the witness the writing, and asking if he signed it; then to abide his turn for the introduction of his own proof, before offering the writing in evidence. *State v. Stein*, 79 Mo. 330; *Romertze v. Bank*, 49 N. Y. 577. But, as shown by Prof. Greenleaf and the other authorities supra, the exception, for the convenient and orderly administration of justice, is to have the writing, where the signature is admitted, read then and there to the jury, provided a cross-examination upon the contents is desired, and suggested to the court; for this gives the witness the opportunity then and there to make such explanation as he may desire, and it obviates the necessity of calling him again upon the stand should a cross-examination upon the contents be desired. The exception is quite as well established as

the rule itself. But there is no exception unless the cross-examiner suggests to the court that he desires to cross-examine the witness while on the stand as to the contents of the writing. Here the counsel proceeded, on cross-examination, without interruption or interference by the court, to cross-examine witness Ulmer on the contents of his affidavit. No more forcible suggestion of a desire to cross-examine on the contents of the writing could have been made than by proceeding to do that very thing. The fact that it was done is tantamount to permission asked and leave granted for so doing. As a matter of fact, however, counsel for appellant did not offer to read the portions of Ulmer's affidavit while he was on the witness stand and being cross-examined, but postponed the request to read from his affidavit until the close of the cross and redirect examination of witness Hendricks. This was out of time as to Ulmer, and the reasons for allowing the writing to be read during the cross-examination therefore did not exist in his case. It cannot be said that the trial court, having a large discretion as to the order in which evidence shall be admitted, which will not usually be controlled by this court, in any manner abused his discretion in not permitting the reading from the affidavit of Ulmer at this juncture of the proceedings. Appellant, having neglected to avail itself of the rule allowing the writing to be read during the cross-examination of the witness, might well be denied the privilege of injecting it during the cross-examination of some other witness. When appellant's time came to introduce its evidence, it did not make the request to have the alleged contradictory writing read, which would have been in order. As the trial court had no opportunity, therefore, to rule upon the question when presented in due and proper time, no error is shown. We are to presume that, if the request had been seasonably made, it would have been granted. It follows from what we have said that the court should have permitted the reading of the alleged contradictory statement from the affidavit of the witness Hendricks, provided there is any statement whatever in it legally sufficient to warrant a jury in finding that such statement is inconsistent with his testimony on the trial. Primarily, the lower court must determine whether there is any evidence at all of a contradictory nature. If there be, the question is then for the jury, and the alleged contradictory evidence should be admitted.

On the trial, witness Hendricks was asked, "Well, when you noticed the mill burning, what portion of it was burning?" The answer was: "The west end; what I call, from where I live, the west end of the main lumber shed. It had burned the entire west end of the main lumber shed. This was afire, and had burned to half way up the east end." The part of the affidavit set out in the rec-

ord which appellant asked to read to contradict the witness is as follows: "When I first discovered the fire, all of the west end of the mill was in flames, and it burned very rapidly all over the entire building; so fast nothing could be saved." Witness, when asked if he did not make the above statement, answered, "I did not." He had just acknowledged, however, his signature to the writing which contained the above statement. He said, also, that Faulkinbury took down the statements as he made them. Having admitted signing the writing containing the alleged contradictory statement, it was then a matter for the jury to determine as to whether the writing contained the statement at the time witness signed same or not. If the writing which he signed really contained the alleged contradictory statement at the time he signed it, and same was not misread to the witness when he signed it, then his present testimony was in direct conflict with the prior written statement, and such contradiction would tend strongly to impeach him. It is argued that, as the witness admitted that the alleged contradictory statements were in the affidavit when presented to him on the witness stand, but denied that they contained such statements, or that such statements were read to him when he signed the affidavit, therefore the ruling of the circuit court was proper, because appellant did not offer the testimony of the party before whom the affidavit was made, or other witness, to support the affidavit. The failure to make such proof might have lessened the weight to be attached to the contradictory statements, but it could not affect the competency of such evidence. By admitting the signature to the writing, the witness must be considered, *prima facie*, at least, as having made the statements therein contained; and his denial of any knowledge of the alleged contradictory statements, or that they were in the writing when he signed same, was itself contradictory of what he had just admitted, and thus raised a question vitally affecting his credibility which was the point of inquiry. If the writing bore no evidences of alterations or interlineations, and appeared as having been written all at the same time, in the same hand, etc., what better evidence could there have been tending to show the contradiction of the witness' present testimony? But how could the jury know about this without an inspection of the writing? The writing having been excluded, appellant, if it had desired, could not thereafter have been allowed to introduce the one who wrote it, and the officer who administered the oath, to show that the writing did, indeed, contain, at the time it was signed and sworn to, what it now contains, and thus corroborate and strengthen the proof of contradiction. The court, after having permitted cross-examination on the contents of the writing, and then, when same was offered at the proper time, having excluded

must have done so for the reason that he considered such writing irrelevant or incompetent. Without any suggestion to the contrary, appellant had the right to assume, under the circumstances, that such was the view of the court, and hence it was not incumbent upon it to again offer it when it had opened its case. Furthermore, there is a variance between the statement in the writing offered in evidence and that made by the witness upon the stand as to the portion of the property he first discovered on fire. This difference was sufficient to entitle appellant to have the writing put before the jury for the purpose of impeaching him. It at least made it a question for the jury to say whether or not this witness was impeached by contradictory statements. The plaintiff was endeavoring to show that the mill and property were fired by a spark from defendant's engine. The testimony of Hendricks tended to show that the portion he first saw burning was the west end of the main lumber shed. When asked what portion of the mill he first saw burning, he answered, to quote his exact language: "The west end; what I call, from where I live, the west end of the main lumber shed. It had burned the entire west end of the main lumber shed, and had burned to half way up the east end." This testimony was well calculated to make the jury believe that the fire originated in the west end of the main lumber shed. This lumber shed was situated, according to the scale of distance on the plat made part of the record, within some 15 or 20 feet of the railroad track where the train had passed. There had been no fire at all about that part of the property during that day, and from the direction of the wind, the amount and size of the sparks, and the proximity of this lumber shed to the railway track, the jury might well have concluded that, if the fire originated in the lumber shed, the sparks from the engine produced it. Indeed, this would have been the most natural conclusion from the testimony of witness Hendricks, conceding it to be true; and it was very material. On the other hand, if the fire originated at the west end of the mill, which was some 80 or 100 feet from the railroad track, and nearer to the kilns, and nearer to the shaving house and engine house of the mill, where there had been fire on the day of the night of the fire, then there was less probability that the fire originated from the engine of the railway, and more reason for the contention of the railway company that the fire originated in some other way than by a spark from its engine. Now, the witness stated simply in the affidavit that, "When I first discovered the fire, all of the west end of the mill was in flames, and it burned very rapidly all over the entire building; so fast nothing could be saved." This statement was without explanation or qualification, and might have been taken by the jury as meaning the "west end of the mill," and not the "west end of

the main lumber shed"; the two being entirely different. So that the jury might have concluded that there was a decided contradiction of the witness on a most material point. The court therefore erred in not permitting the reading of the alleged contradictory statement. Nor can we say, as matter of law, that because the witness admitted signing the affidavit, and admitted on the stand that the affidavit contained the contradictory statement, therefore appellant was not prejudiced by the ruling. By not permitting it to be read as evidence, the jury were prevented from examining the writing. The appellant was deprived of the right to have it considered as evidence in the case, and its counsel could not refer to or discuss it in their argument. All of this was exceedingly important to appellant, and the ruling of the court refusing it was prejudicial error.

The contention that the court did not err in refusing the request to read from the affidavit of Hendricks because it was joint with the request to read from the affidavit of Ulmer is not well taken. The authorities cited to show that, where any part of the evidence is admissible, a general objection is not available, are not applicable here; for, although the request of appellant to be permitted to read from the affidavits of each of these witnesses was made at one and the same time, it was a request for two separate and specific things, the one having no connection with the other. The attention of the court in the request was called to each specific affidavit that appellant desired to read from by name. The court could not have been misled, and must have known that in refusing the request it was passing upon the admissibility of each one of the affidavits for the purpose of impeachment. The affidavits were not joint. They could not be read at the same time. The court should, therefore, have admitted the one properly offered and rejected the other. We find no other error, but for this the judgment must be reversed, and the cause remanded for a new trial.

BATTLE and RIDDICK, JJ., dissent.

McWILLIAMS v. BONNER.

(Supreme Court of Arkansas. Feb. 23, 1901.)
EJECTMENT—CHANGE OF TITLE—DEEDS—EXCEPTION TO DEED—RES ADJUDICATA—EVIDENCE.

Where, in ejectment, plaintiff claimed under a tax deed, and defendant excepted to the deed on the ground that it had been held by the supreme court that tax sales made on a certain day were void, and that the deed showed on its face that it was made in pursuance of a sale on that day, it was error to sustain the exception, it appearing that in the suit relied on extraneous evidence had been received in order to determine what day the statute intended the sale should be made on, and, the proper day still being a matter of calculation, based on extraneous evidence, the finding of facts in the other case and the judgment therein did not

preclude inquiry into the facts of the case at bar.

Appeal from circuit court, Arkansas county; James S. Thomas, Judge.

Action by one McWilliams against one Bonner. From a judgment in favor of defendant, plaintiff appeals. Reversed.

George C. Lewis, for appellant. James A. Gibson and John F. Parke, for appellee.

BUNN, C. J. This is a suit in ejectment by appellant against appellee in the Arkansas county circuit court for the recovery of the N. E. $\frac{1}{4}$ of section 26, township 4 S., of range 2 W., in Arkansas county. The plaintiff's claim of title is founded upon a clerk's tax deed executed and acknowledged on the 28th day of September, 1897, in which it is recited, among other things, that at a tax sale of lands for the taxes of 1868, made on the 2d of August, 1869, one Thomas J. Davidson became the purchaser of said land for the taxes, penalty, and costs assessed against it, he being the best bidder for the least portion of the same, bidding for the whole tract, said sale having been commenced on the first Monday in August in said year 1869, and received his certificate of purchase accordingly, which he afterwards assigned and transferred to plaintiff, McWilliams. Plaintiff also alleged that he had paid the taxes on said land every year from 1868 to 1890, inclusive, and for the year 1895; that defendant was in wrongful possession; wherefore he prayed judgment for the recovery of the land, and for damages, and in the alternative for his outlay in paying said taxes and the purchase money, etc. The defendant answered, denying the validity of plaintiff's said deed, alleging that a sale on the said 2d day of August, 1869, was null and void, and setting up title in himself by reason of his purchase at a subsequent tax sale, to wit, in 1892, for the taxes of 1891, and a confirmation of the same. With his answer defendant files his exceptions to the plaintiff's said deed, as follows, to wit: (1) Because there was no law authorizing the levy of taxes for the year 1868 on said land; (2) because there was no law authorizing the levy of taxes in the year 1869 for the taxes of 1868 on said land; (3) because there was no law authorizing the sale of said lands on the 2d of August, 1869; (4) because the sale of said land on the 2d day of August, 1869, for the taxes of 1868, was without warrant or authority of law, and was void ab initio.

The general revenue act of July 23, 1868, provided for the assessment and collection of the taxes for that year. The act of February 19, 1869, provided for extending the time for the taxing officers to make up their lists, give notice, and make sales after said lists were adjusted by the court. There does not seem to be any serious contention that these statutes did not authorize the levy of taxes for the year 1868. The real contention raised by the exceptions to plaintiff's deed is that the same shows on its face that the sale in pursu-

ance of which it was made was made on the 2d day of August, 1869, and that this court, in the case of Boehm v. Porter, 54 Ark. 605, 17 S. W. 1, held that tax sales made on that day were null and void. In that case it was an issue of fact whether the sale made on that day was legal, and after taking testimony the court held that it was not a legal sale. The act of February 19, 1869, contained provisions which rendered it impossible to determine as a matter of law what was the proper day for tax sales, and, in order to determine that question, evidence extraneous to the recitals of the tax deed was necessary. That evidence was taken, and upon it the court in that case based its findings and judgment. In the case at bar the issue is one of law, made by an exception to the deed, and the question is, is or is not the deed good on its face? If it is, the exception should have been overruled, and, if not, it should have been sustained. The deed is good on its face. The finding of facts in another case, and judgment thereon, does not preclude further inquiry into the facts in this case. Whether or not the 2d of August was the proper day is still a matter of some calculation, based upon extraneous evidence, and the case should have been permitted to progress to a settlement of the issues of fact made by the complaint and answer, since it does not seem to be admitted by the defendant that the 2d of August was not the proper day for the sale. Reversed and remanded, with directions to overrule the exceptions and proceed to trial on the complaint and answer and evidence.

BATTLE, J., absent.

BROWN v. ENNIS et al.

(Supreme Court of Arkansas. March 2, 1901.)

HOMESTEAD—SALE ON EXECUTION—PURCHASE MONEY.

Where plaintiff purchased land, and assumed as part of the price a debt of the seller to a third person incurred in the purchase of a horse, and executed his note therefor to such third person, the payee thereof may collect it by selling the land under execution, though it is the maker's homestead, since, as the note was given for part of the price, the homestead is not exempt under Const. art. 9, § 3, providing that a homestead is subject to the lien for the purchase money.

Appeal from circuit court, Scott county; Styles T. Rowe, Judge.

Suit by Martha Ennis and W. H. Ennis against S. C. Brown to restrain the sale of a homestead under an execution. From a decree in favor of plaintiffs, defendant appeals. Reversed.

Leming & Hon, for appellant. G. S. Evans, for appellees.

BATTLE, J. Is the land constituting the homestead of W. H. Ennis and Martha Ennis exempt from sale under the execution is-

sued upon the judgment recovered by S. C. Brown against W. H. Ennis?

The constitution of this state ordains: "The homestead of any resident of this state, who is married or the head of a family, shall not be subject to the lien of any judgment or decree of any court, or to sale under execution, or other process thereon, except such as may be rendered for the purchase money, or for specific liens," etc. Const. art. 9, § 3.

In *Acuman v. Barnes*, 66 Ark. 442, 51 S. W. 319, it was held that "money borrowed for the purpose of buying a home, and so used, is purchase money, within the exception to article 9, § 3, of the constitution of 1874, exempting homesteads; and in case of the destruction of the residence by fire the borrower cannot hold the insurance money due on a policy taken by him for his own benefit exempt from seizure on process of garnishment or execution for the debt due the lender."

In *Farnsworth v. Hoover*, 66 Ark. 367, 50 S. W. 865, the facts, in part, are as follows: On August 23, 1890, one Daily and wife owned a certain tract of land, and executed a mortgage thereon to secure a note given by them to the Lombard Investment Company for a \$500 loan. On November 12, 1892, Daily and wife sold the land to one Donaldson for \$1,800, "subject to the \$500 mortgage in favor of the Lombard Investment Company." On December 21, 1892, Donaldson executed a mortgage on the property to Hoover & Bros. for \$728, subject to the Lombard mortgage. In April, 1893, A. Farnsworth purchased the land from Donaldson for \$2,000, paying \$800 in cash, and executing his note for \$1,200. In the summer of 1894, Donaldson, learning that Farnsworth would be unable to pay his note at maturity, assisted him in negotiating a contract with Hoover & Bros., to which Donaldson and Farnsworth were parties. By this contract Hoover & Bros. undertook to purchase the Lombard mortgage. Donaldson and wife were to execute a warranty deed to Farnsworth, and surrender his note for the \$1,200; and Farnsworth was to execute his notes to Hoover & Bros. for the aggregate amount due on the Donaldson and Lombard mortgages. Hoover & Bros. purchased the Lombard mortgage. In December, 1894, Farnsworth executed his notes to Hoover & Bros. for the amount due on the mortgages. Donaldson and wife conveyed the land to Farnsworth, and Farnsworth and wife executed a mortgage to secure Farnsworth's notes. Mrs. Farnsworth did not join her husband in the granting clause of the mortgage, nor did she release her homestead in the body of the mortgage, nor did she acknowledge the execution of the same, and in the acknowledgment release and relinquish her homestead rights in the land. At the time she and her husband executed the mortgage, they resided on the land as their homestead. Afterwards an action was brought by Hoover & Bros.

against Farnsworth and wife to foreclose the mortgage, and the defendants pleaded, among other things, that it was void, because the wife did not join in the execution of the mortgage; and the question arose, this being true, was not the mortgage, nevertheless, valid, it being given to secure the purchase money for which the land mortgaged was sold? In discussing this question the court said: "The court found that the mortgage from Farnsworth and wife was valid. Sand. & H. Dig. § 8718, provides: 'No conveyance, mortgage or other instrument affecting the homestead of any married man shall be of any validity, except for taxes, laborers' and mechanics' liens, and the purchase money, unless his wife joins in the execution of such instrument, and acknowledges the same.' The contract between Donaldson, Farnsworth, and Hoover & Bros., by which Donaldson and wife were to execute a warranty deed to Farnsworth, and Farnsworth was to execute his notes to Hoover & Bros., as set forth in statement of facts, however circuitous the method, was tantamount to an advancement by Hoover & Bros. to Farnsworth of the purchase money to the amount of these mortgages; for, according to the agreement, it was only by paying off these mortgages that Farnsworth was to get his warranty deed from Donaldson to the land. The execution of the mortgage from Farnsworth to W. G. Hoover & Bros. to secure the amount of these mortgages, simultaneously with the execution of the deed from Donaldson to Farnsworth, was in reality nothing more nor less, in effect, than a mortgage to secure the purchase money. It was, in legal effect, the same as if Hoover & Bros. had taken the deed to themselves from Donaldson, and then conveyed the land to Farnsworth, and taken a mortgage back to secure the amount of the Donaldson and Lombard mortgages, which represented the purchase price Farnsworth was to pay for the land."

In the case before us, W. H. Ennis executed his note, payable to S. C. Brown, for \$85 of the \$500 which he agreed to pay one Bodiford for the land he (Ennis) purchased from Bodiford. This note was received by Brown in payment of a note which Bodiford had executed to him for a horse. The fact that the note of Ennis was used to pay a note which was given for a horse did not change its consideration. If it did, how was the \$85 which Ennis agreed to pay for the land satisfied? The \$85 was set apart for the payment of the Bodiford's indebtedness to Brown, and was appropriated to that purpose by Ennis executing his note to Brown for that amount. Eighty-five dollars of the purchase money for the land has never been paid. Bodiford caused it to be transferred to Brown to pay his indebtedness, and Brown is seeking to collect it by selling the land under execution. He is entitled to do so. The land, although it is the homestead of

Ennis and his wife, is not exempt. *Bank v. Hensley*, 62 Ark. 398, 35 S. W. 1104.

So much of the decree of the circuit court as directs the clerk to issue a supersedeas is reversed, and the cause is remanded, with instructions to the court to modify its decree in accordance with this opinion.

BURGAUER v. PARKER.

(Supreme Court of Arkansas. Feb. 23, 1901.)

HOMESTEAD—OCCUPATION AFTER JUDGMENT RENDERED—SUBSEQUENT EXECUTION.

Where a lot was first occupied as a homestead by a judgment debtor after rendition of the judgment, and an execution on such judgment was subsequently issued, but before the expiration of the judgment lien, the lot was subject to be sold to satisfy the judgment.

Appeal from Garland chancery court; Le-land Leatherman, Chancellor.

Action by E. Burgauer against D. F. Parker. From a decree in favor of defendant, and from an order denying a motion to quash a supersedeas, plaintiff appeals. Reversed.

The appellant, E. Burgauer, on January 25, 1896, obtained a judgment and decree against D. F. and Laura J. Parker, in the Garland chancery court, for the sum of \$4,301.07, and for the sale of certain lands (if the judgment should not be paid in four months) which had been conveyed by the said defendants to Charles D. Greaves, as trustee, for the benefit of Burgauer, by their deed of trust bearing date April 28, 1894, which deed secured an original debt of \$5,000, and interest at 10 per cent, payable semiannually. The judgment was not personal against Laura J., wife of D. F. Parker, and was to be satisfied, as to her, out of the lands ordered sold by the decree. It was a personal judgment against D. F. Parker. The lands having been sold, the commissioner of the court, on April 15, 1897, entered a "credit on the within judgment and decree of the sum of \$3,907.65, being the amount received by me as such commissioner, less the costs herein and taxes accrued up to date of sale of said lands, the purchase price being \$4,000, and the costs herein \$43.60, and taxes \$48.75." Prior to November 1, 1897, an execution issued on this judgment against D. F. Parker for the deficiency. The sheriff made levy on part of lot 8, block 105, in the city of Hot Springs; parts of lots 4 and 6, in block 96; and part of lot 12, block 105; and the same were advertised for sale on November 22, 1897. Prior to the day of sale Parker filed his claim for a homestead, and the clerk issued a supersedeas. On November 22, 1897, the lots, other than part of lot 8, block 105, were sold by the sheriff, but the proceeds of sale were not sufficient to satisfy the execution, and on the same day Burgauer filed in the chancery court his response to the claim of Parker for exemptions and homestead. The response to the claim of Parker for homestead denied

that he was the owner of the lot so as to enable him to claim it as a homestead; denied that he could lawfully claim it as a homestead; denied that he could lawfully claim it as exempt from sale under article 9 of the constitution; stated that the lien of his judgment rendered on January 25, 1896, was superior to the claim of homestead, and that, on the date of the rendition of the judgment, the lot had not been impressed with the character of a homestead by Parker or any of his family, and on said date he made claim of other lands for his homestead. Prayer that Parker be denied the right of homestead, and that the lands be sold under the execution as directed, etc. The property in controversy was owned by M. D. Parker, mother of appellee, who died March 13, 1895. By her will this lot and other lands were devised to appellee, M. J. Rice, and M. F. Parker, to be divided equally. This particular lot was occupied by J. W. Parker, husband of the testatrix, and his daughter, Mrs. Rice, until his death, November 18, 1895, and Mrs. Rice continued her residence there until January, 1896. It was leased by the appellee, as executor of his mother's will, to J. W. Brock, from January, 1896, for more than five months. After this it was leased to G. E. Evans until December 20, 1896. It was leased to S. W. Vaughan from March or April, 1897, to the time appellee moved there, in September, 1897. For several years prior to the time appellee moved to this property he had been living at No. 1014 Central avenue, in Hot Springs, in block 96. He was living there at the time of his mother's death. The title was in his wife's name. He had charge of all property devised by his mother's will until the time of the sale by the probate court to pay debts or the partition between the heirs. In September, 1897, by agreement among the devisees under the will, the unsold lands were appraised, and a partition deed was executed by them on September 27, 1897, by which appellee received conveyance of the lands in controversy. Soon thereafter he moved on the lands. "I entered into possession at once after the execution of the deed of partition, and I entered with the intention, and so stated at the time, of a homestead." "It was understood by the heirs at the time of the partition deed, and I so stated, that I had taken it for the express purpose of a homestead, at its appraised value, and I never had or enjoyed any of the lands of my father or mother up to that time as a homestead." The chancellor made the following findings of fact: That E. Burgauer, the plaintiff herein, recovered judgment against defendant, D. F. Parker, on January 25, 1896, for the sum of — dollars, and a decree was also rendered in his favor foreclosing a deed of trust given to secure the indebtedness sued upon, which property embraced in said deed of trust was sold under order of the court to satisfy such decree, and failed to bring the full amount

of the same; that an execution was issued for the amount remaining due, which was levied upon the property in question, to wit, part of lot 8, in block 105, in the city of Hot Springs, Garland county, Ark., and upon one or two other lots. The court finds that the mother of D. F. Parker died on March 14, 1895, and his father died November 18, 1895, and that his mother and father had lived on the property now claimed as a homestead by said D. F. Parker up to the time of their death, and for many years prior thereto; that his mother, Margaret Parker, died possessed of said lot and other property in the city of Hot Springs, which was devised under the will of said Margaret D. Parker to the said son, D. F. Parker, and to others who obtained said property by such devise at her death as tenants in common, each holding his or her undivided interest or share until partitioned. The court also finds that the said property was partitioned among the heirs of said Margaret Parker, and each owner was conveyed his or her proportional part by a deed of date September 27, 1897; that said D. F. Parker obtained and was deeded for his part or interest in his mother's estate the said lot (part of lot 8, in block 105), which he claims as a homestead herein, and other real property; that he at the time determined to claim it (said lot 8) as his homestead, and in a few days thereafter moved on and occupied it as such; that said deed of partition was placed on record before the levy of the execution herein, and that said D. F. Parker occupied and claimed it as a homestead at the time of the said levy; that R. Burgauer, the plaintiff, insists that the lien of the judgment and decree rendered in this court on January 25, 1896, is superior to the homestead of the defendant, D. F. Parker, in the land claimed, and that at said time Parker made claim of other land for a homestead; and the court finds from the evidence of said Parker that the place or places lived on by him for several years prior to his living on said lot 8 were not claimed by him as a homestead. The court also finds, as a matter of fact, that the said D. F. Parker has been a resident of the state and the head of a family for several years prior to, and at all times since, the rendition of the judgment and the decree herein, and that he has not claimed a homestead in any real property at any time since the rendition of said judgment and decree, except in the property in question; that the cash value of the homestead claimed herein is \$2,500. Also the following declarations of law: "(1) The court concludes, as a matter of law, that a resident of the state and the head of a family, who has no other homestead, and who acquires real property by descent or devise under the last will and testament of a parent (and not by purchase), as tenant in common with other heirs or devisees of same parent or ancestor, shall be entitled to a homestead in the portion of such real prop-

erty allotted and deeded to him as his share or portion under a partition of the entire property among the owners thereof, provided he claims at the time of the partition a homestead in the part so set apart and deeded to him, and also occupies it as such in a reasonable time thereafter, as against the lien of a judgment or decree rendered against him after the property has descended to him, and before partition, and against the lien of an execution issued on such judgment, and levied on the property claimed as a homestead after the same had been set apart and deeded to such judgment debtor, after a partition among the owners, and after the same had been claimed and occupied as a homestead by such judgment debtor. (2) That, in order for said D. F. Parker to claim and hold a homestead in the real property acquired from his mother by devise in common with other of her children and devisees, it was not necessary for him to enter upon any portion of such real property before the judgment was rendered in favor of said Burgauer against him; that he had a reasonable time after the partition of the property among the heirs and devisees to claim a homestead in a portion of the same set apart to him under the partition, and to move on and occupy the same as a homestead; and the court is of the opinion that he did move on the said property claimed by him as a homestead within a reasonable time after the same was set apart to him under the partition among the heirs and devisees of his mother, and that his right of homestead in it is superior to the lien of the judgment of the said Burgauer which was rendered after the death of the mother of said D. F. Parker, and prior to the partition of the property, and also superior to the lien of the execution which was issued on such judgment, and which was levied on the property in question after said D. F. Parker had occupied it as a homestead. It is therefore considered, ordered, and adjudged and decreed by the court that the said D. F. Parker is entitled to a homestead in the part of said lot 8, block 105, claimed and occupied by him as such, as against the said judgment and execution lien of said Burgauer; that the motion to quash the supersedeas be overruled, and that the said D. F. Parker have and recover of and from the said Burgauer all his costs herein expended; to which findings, rulings, judgment, and decree of the court the said Burgauer excepts, and prays an appeal to the supreme court, which is granted."

Greaves & Martin, for appellant. John M. Harrell and Cockrill & Cockrill, for appellee.

HUGHES, J. (after stating the facts). We are of the opinion that there is error in the decree of the chancery court in this case, for which it must be reversed. As the judgment in favor of the appellant was rendered before the lot in controversy was occupied as a

homestead, and execution on the judgment was levied upon the property before the lien of the judgment had expired, it was subject to be sold to satisfy the same. The occupation of it subsequent to the rendition of the judgment, an execution upon which had been levied upon before the judgment lien had expired, did not relieve it from the lien, though the occupation was prior to the levy of the execution. *Simpson v. Biffie*, 63 Ark. 299, 38 S. W. 345; *Reynolds v. Tenant*, 51 Ark. 84, 9 S. W. 857. The decree is reversed and remanded, with directions to quash the superseas.

BATTLE, J., absent.

McKENNON v. ST. LOUIS, I. M. & S. RY. CO.

(Supreme Court of Arkansas. Feb. 23, 1901.)

EMINENT DOMAIN — RAILROADS — RIGHT OF WAY—APPROPRIATION—REMEDY OF OWNER —STATUTES — COMPENSATION — EXCLUSIVENESS OF REMEDY—EJECTMENT.

1. Sand. & H. Dig. § 2734, declares that, whenever any corporation authorized to appropriate private property shall appropriate real estate, the owner shall have an action for damages. Section 2735 provides the measure of recovery in such an action, and section 2736 requires the court to include in the judgment an order condemning the property to the public use to which it shall be appropriated. Held that, where a railroad appropriates land for a right of way within the prescribed limits, the owner may not bring ejectment for damages, the remedy given by section 2734 being exclusive.

2. Whether land appropriated by a railroad company as a part of its right of way within the six-rod limit, as prescribed by Sand. & H. Dig. § 6175, is necessary to the use and operation of the road, is a matter to be determined by the company.

3. Where a railroad appropriates land for a right of way more than six rods in width, as authorized by Sand. & H. Dig. § 6175, the owner can recover the excess in ejectment.

Battle, J., dissenting.

Appeal from circuit court, Johnson county; William L. Moose, Judge.

Action by A. M. McKennon against the St. Louis, Iron Mountain & Southern Railway Company. From a judgment in favor of defendant, plaintiff appeals. Reversed.

On the 8th day of August, 1898, appellant filed his complaint in the Johnson circuit court against appellees, alleging, in substance, that he is the owner of and entitled to the possession of land 25 feet in width on each side of the right of way of the Little Rock & Ft. Smith Railroad passing through the S. E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$, section 7, township 9 N., range 28 W., of which appellee is in the wrongful and unlawful possession, and prays a recovery of said lands and damages, and states in the complaint his chain of title. At the May term of this court, 1899, a trial was had without answer, it being agreed and understood that the same might be filed after the trial, the purport of

it being at the time stated; and now, it not having been filed, and not appearing in the transcript, it is agreed that it may be filed here, and treated as a part of the transcript. This answer says that the strips of land sought to be recovered are a portion of its right of way in Johnson county, Ark., and that appellee has been using said strips of land as a portion of its right of way for more than 20 years; and that early in the year 1893, at a time when appellee was inclosing its right of way through that portion of Johnson county where these lands and other contiguous lands lie, it inclosed these two strips of land as a portion of its right of way; and that since that time appellee has maintained these strips of land, along with other lands, as a portion of its right of way; that said strips are absolutely necessary to the complete and successful operation of its line of road, and are necessary to give it the right of way authorized by the statutes of the state; and that they knew of no adverse claim of appellant to said strips until the suit was brought. The answer further says appellant is prohibited from maintaining his action in ejectment to recover these lands by the laws of this state. On the trial A. M. McKennon testified as follows: "I am the plaintiff in this action, and the owner of the land for the recovery of which this action is brought. I bought the same from E. T. McConnell on the 31st day of March, 1893. The lands lie near the railroad track, and were inclosed by defendants some time during the month of June, 1893. The railroad company's right of way through the forty-acre tract of which this land is a part is only fifty feet in width, the land sued for being two tracts or parcels lying adjoining said right of way on either side, each tract being twenty-five feet in width. The former owners of the land had cultivated up to defendants' right of way. While owned by E. T. McConnell, who was defendant's land agent, he cultivated it up to a ditch at the foot of the dump of the roadbed. The right of way of defendants along the track is 100 feet on the lands adjoining the tract in controversy, and when defendants fenced in the road the fence was made the same distance from the track on my land that it was where defendants had a 100-foot right of way; and this is the only use to which the land in controversy has been put by defendants. The rental value of this land is four dollars per acre per year. Estimating the damages in this way, I have been damaged in the sum of eighteen dollars for the last three years, there being an acre and a little more than a half of the land." He then read his title deeds. This was all the evidence in the cause. The court, upon motion of appellee, instructed the jury to find a verdict for it, to which appellant at the time excepted. After verdict, appellant filed his motion for new trial

setting up as grounds that the verdict is contrary to law, contrary to the evidence, and that the court erred in instructing the jury to find for the defendant, which motion the court overruled, and appellant excepted, prayed an appeal to the supreme court, which was granted, and subsequently filed bill of exceptions, time having been given him; and now, since his case is here, the foregoing is a correct statement of it.

Jordan E. Cravens, for appellant. Dodge & Johnson and Oscar L. Miles, for appellee.

HUGHES, J. (after stating the facts). It seems that the appellee, the railroad company, without seeking to purchase or have the land in controversy condemned for the purpose of enlarging its right of way, wrongfully, and without pursuing the method prescribed by the statute to obtain this land as an addition to its right of way, entered upon it, and inclosed it with a fence, and thus appropriated it to the use of the railroad company as a part of its right of way. The appellant might have prevented this action upon the part of the railroad by suing out an injunction, as the law provides that "private property shall not be taken, appropriated or damaged for public use without just compensation therefor made." Section 22, art. 2, Const. 1874; *Organ v. Railroad Co.*, 51 Ark. 255, 11 S. W. 96. The statute provides (subdivision 3, § 6175, Sand. & H. Dig.) that the railroad company shall have power "to purchase and by voluntary grants and donations receive and take, and by its officers, engineers and agents enter upon and take possession of and hold and use such lands and real estate, and other property, as may be necessary for the construction and maintenance of its roadbed and stations and other accommodations necessary to accomplish the object for which the corporation is created, but not until the compensation to be made therefor, as agreed upon by the parties, or ascertained as hereinafter provided, be paid to the owner or owners thereof, or deposited as hereinafter directed unless the consent of such owner be given to enter into possession." It is not contended that the statute was complied with. But, if the railroad had taken and appropriated what it needed for its right of way within the limits of the statute fixing the right of way at six rods (subdivision 4, § 6175, Id.), could ejectment be maintained for the land taken and appropriated to use for its right of way? We think the question is settled by the statute. Section 2734 (act approved April 11, 1893): "Whenever any corporation authorized by law to appropriate private property for its use shall enter upon and appropriate any property, real or personal, the owner of such property shall have the right to bring an action against such corporation in the circuit court

of the county, in which said property is situated, for damages for such appropriation at any time before an action at law or in equity for the recovery of the property so taken, or compensation therefor, would be barred by the statutes of limitations." We understand that when property is taken by a railroad company within the limits of its right of way as defined by the statute, and appropriated for its use and its right of way, it becomes such, and cannot be recovered in ejectment, though the owner may recover damages under the above statute; and that the remedy provided by the statute is exclusive. *Railroad Co. v. Turner*, 31 Ark. 494. This property was fenced as part of the right of way of the railroad, June 10, 1896, and this suit was brought the 8th of August, 1898. So it seems that between these dates—a period of over five years—no action was taken to restrain the railroad company from the use of this land, which they had appropriated for their right of way. Whether this land so taken and appropriated by the company was necessary to the proper use and operation of their road was a matter to be determined by the company, as we understand,—within the limits of the right of way, six rods wide, as defined by the statute. *Croley v. Railway Co.* (Tex. Civ. App.) 56 S. W. 615; *Railway Co. v. Petty*, 57 Ark. 359, 21 S. W. 884. We think the above-quoted section of the statute (2734), in connection with sections 2735 and 2736, pretty clearly show that in such a case as this the remedy of the appellee is a suit for damages, and not ejectment for the land. Section 2735 is as follows: "The measure of recovery in such action shall be the same as that governing proceedings by corporations for the condemnation of property." Section 2736: "Proceedings instituted under this act, shall be governed by the rules of pleading and practice prescribed for the government of proceedings in the circuit court. The defendant shall have the right to bring in all parties, having or claiming an interest in the property in controversy, and the court shall make the proper orders of the distribution of the compensation recovered in the action among such parties, as may be entitled thereto, and shall include in the judgment in said proceedings an order condemning said property for the public use to which it may have been appropriated." But it appears in this case that the railroad company took one foot over six rods of the land they inclosed and appropriated. This was one foot more than they were authorized by the statute to take, the width of their right of way being defined by the statute as six rods, or ninety-nine feet. For this reason the judgment in this case is reversed, and the cause is remanded for further proceedings.

BATTLE, J., dissents.

DAVIS v. LANIER et al.

(Supreme Court of Texas. March 25, 1901.)

MORTGAGES—FORECLOSURE—PARTIES—EXECUTION—PURCHASER—ABSENCE—EFFECT—TRESPASS TO TRY TITLE.

1. Where mortgaged land was sold under an execution against the mortgagor prior to the foreclosure of the mortgage, and the deed recorded, but the purchaser was not a party to the foreclosure, the executrix of the mortgagee, who purchased at the foreclosure sale, cannot recover in trespass to try title against those claiming under the execution purchaser, since the title of such purchaser was not affected by the foreclosure suit.

2. Where, on appeal to the court of civil appeals, the judgment rendered therein was the only one that could have been rendered under the evidence, a writ of error will not be granted to review it, even if the court erred in the reason for its judgment.

Application for writ of error to court of civil appeals of First supreme judicial district.

Trespass to try title by Camilla G. Davis against Howard S. Lanier and others. Judgment of the court of civil appeals (60 S. W. 1018) reversing a judgment in favor of plaintiff. Application for the writ of error refused.

Stevens & Marshall, for applicants.

GAINES, C. J. It appears from the evidence adduced upon the trial of this case that when George W. Davis (whose title the applicant for the writ of error has) obtained a judgment foreclosing his mortgage on the land in controversy it had been sold under execution as the property of the mortgagor, and one Wharton Branch (whose title the defendants have) had become the purchaser, and had caused his deed to be recorded. Branch was not made a party to the foreclosure suit. Branch had no actual notice of the mortgage. But, even if he had notice, either actual or constructive, he at least acquired by his purchase the legal title to the land subject to the lien of the mortgage. It is clear that, since Branch was not made a party to the suit of foreclosure, his title was not affected by the foreclosure sale. *Bradford v. Knowles*, 86 Tex. 505, 25 S. W. 1117, and cases cited. If Branch had bought after Davis brought suit to foreclose, then, being a purchaser pendente lite, the rule as to him would have been different. It does not appear from the statement of facts that the foreclosure suit was instituted before Branch purchased, and we think the burden was upon the plaintiff to show the fact, if, indeed, it was a fact. It is, therefore, obvious that the plaintiff, under the title shown by the evidence, was not entitled to recover, although Branch may have had constructive notice of the mortgage when he purchased the land. For this reason we do not find it necessary to pass upon the question whether the record of the mortgage—the records having been burned, the purchase having been within four years from the time of the burn-

ing, and the mortgage not having been recorded again within that period—was notice to Branch. Even if the court of civil appeals erred in holding that it was not notice, the judgment is the only judgment that could have been properly rendered under the evidence, and the application for the writ of error is therefore refused.

HALL v. WHITE.

(Supreme Court of Texas. March 25, 1901.)

SCHOOL LANDS—SETTLEMENT—MISTAKE—STATUTES—CONSTRUCTION—RULE OF PROPERTY.

1. Where defendant applied to purchase school land, and in good faith settled and built a house on land near to and which he believed to be that which he applied for, and on discovering his mistake moved his house on the right land, he did not lose his right to the land by such mistake, and plaintiff's application to purchase the land, made after the mistake was corrected, should be refused.

2. Where, after a decision of the supreme court construing the terms of a statute, the statute is amended, but the terms so construed were re-enacted without change, it should be presumed that the legislature, in the new law, intended to adopt the construction placed on the old law by the court, and the court should adhere to such construction, especially when it has become a rule of property.

Error to court of civil appeals, Third supreme judicial district.

Action by D. C. Hall against H. M. White. From a judgment of the court of civil appeals (59 S. W. 810) reversing a judgment in favor of plaintiff, plaintiff brings error. Affirmed.

Allison & Walters and J. K. Rector, for plaintiff in error. Leigh Burleson, Rector & Brown, and N. A. Rector, for defendant in error.

GAINES, C. J. This suit was brought by the plaintiff in error to recover of defendant in error a section of school land. The trial was without a jury, and resulted in a judgment for the plaintiff. Upon appeal, the court of civil appeals reversed the judgment of the trial court, and rendered judgment for the defendant.

The trial judge did not file his conclusions of fact and law, but the court of civil appeals in their opinion state the facts as follows: "On August 3, 1898, appellant filed his application in due form, as required by law, in the general land office, to purchase the land in controversy (section 14), and made the payments as required, and on the same day executed his obligation for the deferred payments, as required by law. On August 3, 1898, the land was awarded to the appellant by the commissioner of the land office. The land in controversy is situated in a large pasture owned by Mr. Gibbons. The appellant was ignorant of the boundaries of the survey in question, and he requested Mr. Gibbons, who claimed to be familiar with the lines and boundaries of the survey, t

point the same out to him, so that he could locate thereon and take actual possession, as required by law; and at the time of making his application, and prior thereto, Mr. Gibbons did, as requested, point out what was supposed to be the land in controversy, and the appellant in good faith went upon the land as pointed out by Mr. Gibbons, at the time truly believing that he was in possession of survey 14. That he in good faith remained in possession of the land pointed out by Mr. Gibbons, under the bona fide belief that he was in actual possession of the land he intended to purchase,—that is, survey No. 14. About July 18, 1899, the appellant for the first time ascertained that he had made a mistake in locating and settling upon survey No. 14; that the place pointed out by Mr. Gibbons as being upon that survey, and the place where he had erected his house, was not on survey No. 14; and that, immediately upon discovering such mistake, he moved on to survey 14, and took actual possession of the same. Thereafter the appellee, Hall, made his application to the commissioner of the land office to purchase survey No. 14, and accompanied the same with a tender of the payments and obligations required by law, but the commissioner refused to award him the survey, and his application was rejected." In conclusion they say: "It is clear from the facts as stated that a mistake was made by the appellant in his effort to take actual possession of the land purchased by him, and that that mistake was corrected before the appellee made his application to purchase." And, after referring to the case of *Thomson v. Hubbard* (Tex. Civ. App.) 53 S. W. 843, the court further say: "We there, following the rule announced in *Chancy v. State* (Tex. Sup.) 19 S. W. 710, held that this mistake would not invalidate his title, and such we understand to be the rule announced in the latter case. There is no question of innocent purchaser by the opposing party asserted in this case, nor did he acquire, or attempt to acquire, any right prior to the time that the appellant corrected the mistake; that is, by moving upon, and taking actual possession of, the land awarded to him by the state."

When we granted the writ of error, we were of opinion that the real point decided in the case of *Chancy v. State* was that when a purchaser settles upon a section of school land, as appears by the official survey, the settlement will be good, although a corrected survey may show that his settlement was not within the true boundaries of the section, and that the announcement "that if the settlement was made in good faith, at a point near the line, but on another survey, under the belief, well founded, that it was on the land purchased, then this ought not to defeat the right of the purchaser or one holding under him," was not called for in the disposition of that case. We now think we were in error in that conclusion. We infer

from the statement as made in the opinion in that case that, while the testimony was conflicting, there was evidence tending to show that the settlement was not upon the land either as originally surveyed or as shown by the corrected survey, and that also there was evidence from which the jury could find that, in either event, the settlement was made in good faith. The judgment was reversed, and the cause remanded for a new trial, and, for the guidance of the trial court, it was appropriate to announce in the opinion the law as applicable to any state of facts which might be found by the jury under the testimony. The decision of the point is therefore authoritative, and announces a rule of property which ought not to be set aside unless clearly wrong. Besides, since the decision holding that a settlement in good faith near the land sought to be purchased may be an actual settlement, within the meaning of the law, was announced, the provisions of the statutes with reference to the sale of school lands to actual settlers have been repeatedly amended and re-enacted, and the words "actually settle" have been retained without other words to modify their meaning. In such case the rule is that it should be presumed that the legislature in the new law intended to adopt the language of the old, with the construction placed upon it by the court. We conclude that the judgment of the court of civil appeals is correct, and it is therefore affirmed.

SAN ANTONIO REAL-ESTATE, BUILDING & LOAN ASS'N v. STEWART.

(Supreme Court of Texas. March 21, 1901.)

MORTGAGE — LIMITATION OF ACTIONS — INSTALLMENTS—DEFAULT—WAIVER.

1. Where several notes, maturing one each month, are secured by a mortgage, which provides that on default in the payment of any three notes all the remaining unpaid notes shall become due, on such default limitations begin to run against the entire debt.

2. Defendant borrowed money of plaintiff, and executed 72 notes therefor, one payable each month, secured by a mortgage providing that, on default as to any three notes, all the remaining unpaid notes should become due. The first three notes, due in 1894, were not paid until several months thereafter. For more than a year thereafter defendant each month promised to pay all arrears, and finally paid the three notes first delinquent. He never refused to pay until just before suit commenced to foreclose on March 1, 1900. *Held*, that though limitations commenced to run in March, 1894, against the entire debt, the subsequent grant of further time, and the payment of the notes then in default, warranted a finding that the parties had mutually waived the default, and agreed to treat the contract as though no default had occurred.

Certified questions from court of civil appeals of Fourth supreme judicial district.

Action by the San Antonio Real-Estate, Building & Loan Association against Solon Stewart. Defendant's plea of bar of the statute of limitations was sustained by the trial

court, and question certified from the court of civil appeals. Reversed.

Onion & Henry, for appellant. Denman, Franklin, Cobbs & McGown, for appellee.

WILLIAMS, J. The statement and question below are certified for decision by the court of civil appeals for the Fourth district: "On August 19, 1892, Solon Stewart and his wife, Georgia C. Stewart, desiring to build a home in the city of San Antonio, entered into a contract with the San Antonio Real-Estate, Building & Loan Association to obtain the sum of \$2,376, with which to erect a home, and at the same time executed and delivered to said association 72 promissory notes, payable in monthly installments, including interest from date up to September 1, 1898, and at the same time made, executed, and delivered to said association a builder's and mechanic's lien in writing, properly acknowledged, so as to bind the homestead, and in that lien, which is referred to in each of the notes, it was provided 'that, whenever any three of said notes or monthly payments remain unpaid, in whole or in part, after due, then and thereupon the balance of said notes remaining shall be due and payable, and said association may at any time thereafter proceed to foreclose said debt and lien.' The money was used to erect a home for Stewart and wife. Stewart defaulted in payment of the notes that became due in January, February, and March, 1894, and paid nothing on any of the notes due in 1894 until October of that year, when he paid the January note, and in December paid the February note, and afterwards the March note of 1894. On the 1st days of April, May, June, July, August, September, October, November, and December, 1894, and January, February, and March, 1895, and at various times for many months thereafter, the representative of the association saw Stewart, and urged him to pay the notes that were past due, and each time Stewart begged for further time, verbally promising to pay the notes. Further time was granted by the association, and Stewart paid off at different times twenty-nine of the seventy-two notes, among the number being the three notes due respectively in January, February, and March, 1894. Both parties acted in connection with the notes as though no default had taken place by reason of failure to pay the installments due for the first three months of 1894. Payment was never refused by Stewart until just before the suit was instituted. On March 1, 1900, more than four years after default had been made in the payment of the three notes due in January, February, and March, 1894, but at a time when none of the remaining unpaid notes were barred by limitation on their faces, this suit was instituted, and Stewart interposed a plea of four years' limitation, on the ground that all the notes became due in March, 1894, which plea was sustained by the court. Question. Did all the unpaid notes become due upon de-

fault in the payment of the three notes, in such manner that the statute of limitations has barred appellant, regardless of what took place, as hereinbefore stated, between Stewart and the association in reference to the contract?"

The notes and the instrument creating the lien, executed at the same time concerning the same subject-matter, are to be construed together as constituting one contract. According to the great weight of authority, including decisions of this court, the stipulation in the last-mentioned writing has the effect of fixing a contingency upon the happening of which the debt should mature at a time earlier than the dates given in the notes for their maturity. *Dodge v. Signor* (Tex. Civ. App.) 44 S. W. 926; *Bank v. Peck*, 8 Kan. 660; *Manufacturing Co. v. Howard* (C. C.) 28 Fed. 741; *Brownlee v. Arnold*, 60 Mo. 79; 1 *Daniel*, Neg. Inst. 156; *Gregory v. Marks*, 8 Biss. 44, Fed. Cas. No. 5,802; *Noell v. Gaines*, 68 Mo. 649. There is some authority for the construction that such a stipulation in the mortgage alone does not have the effect, upon default in the payment of an installment, of maturing the notes for general purposes, but operates only to allow foreclosure of the mortgage, and the application of the proceeds of the property to the whole debt, without otherwise affecting the terms of credit expressed in the notes. *Owings v. Mackenzie* (Mo. Sup.) 33 S. W. 802, 40 L. R. A. 154, dissenting opinion of Hough, J., in *Noell v. Gaines*, supra, and cases cited. This view cannot be adopted consistently with the previous decisions of this court or the current of decisions elsewhere, of which many others could be cited besides those before referred to, and the effect of the stipulation in question in the instrument giving the lien must be held to be the same as if it had been inserted in the notes. Among the courts so treating it, another difference of opinion has arisen as to its effect, some treating it as maturing the notes absolutely, upon default in payment of one of the installments, and others holding that it merely gives to the creditor a right of election to declare the whole debt to be due, or to waive the default, and insist upon the performance of the contract as it originally stood, unaffected by such default.

The view first stated has been adopted by this court, with the result that upon default in an installment the debt matures and limitation begins to run. *Harrison Machine Works v. Reigor*, 64 Tex. 91; *Dodge v. Signor*, supra. Other authorities to the same effect are *Hemp v. Garland*, 45 E. C. L. 519; *Moore v. Sargent*, 112 Ind. 484, 14 N. C. 466; *Bank v. Peck*, supra. It was insisted at the argument that these decisions were not well considered, and that the proposition that such provisions merely give to the creditor the option of declaring the debt due upon default in an installment is supported by the weight of authority and by the better reason. We have given the question a careful re-examination, and, as a result, are unable to say either that

it did not receive proper attention in the cases previously before this court, or that the decisions are so clearly wrong or against the preponderance of authority as to justify us, if we were inclined to a different conclusion, to overrule them. They have, to say the least, the merit of giving to the unqualified provision that default shall mature the debt its exact meaning, while the opposite view qualifies it by an intention arrived at by construction that something else, viz. the option of the creditor, shall be essential to such maturity. Provisions in such contracts sometimes expressly give the option to the creditor, and sometimes assume the form used in the present case. The authorities relied on by appellant give precisely the same effect to these differing provisions, which is, at least, a questionable liberty taken with the language in which the parties have expressed their intention.

Most of the authorities advancing this doctrine regard the provision as being in the nature of a penalty or forfeiture of which the party to whom it may accrue is not bound to take advantage. *Belloc v. Davis*, 38 Cal. 242; *Fletcher v. Daugherty*, 13 Neb. 224, 13 N. W. 207; *Lowenstein v. Phelan* (Neb.) 22 N. W. 561; *Watts v. Creighton* (Iowa) 52 N. W. 12; *Leavitt v. Reynolds*, 79 Iowa, 348, 44 N. W. 567, 7 L. R. A. 365; *Nebraska City Nat. Bank v. Nebraska City Hydraulic Gaslight & Coke Co.* (C. C.) 14 Fed. 764; *Smalley v. Renken* (Iowa) 52 N. W. 507; *Society v. Culver* (Cal.) 59 Pac. 292; *Bell v. Romaine*, 30 N. J. Eq. 23; *Sire v. Wightman*, 25 N. J. Eq. 102. If this proposition is essential to the conclusion stated, those decisions are not to be sustained upon principle, and are opposed to the overwhelming weight of authority, by which such provisions are held to be neither penalties nor forfeitures, but simply as providing contingencies upon the happening of which the debt is to mature earlier than it otherwise would. 1 Pom. Eq. Jur. 430, and cases cited; *Bonafous v. Rybot*, 3 Burrows, 1370.

But a reason more difficult to meet is found in the stipulations in the contract itself. The debtor promises to make his payments in installments at stipulated times, and thereby gives to the creditor the benefit of an interest-bearing investment for the period agreed upon; and it may be said that this shows the intention of the parties that he should not have the right to violate this promise by breaking another,—to pay each installment at maturity,—and thereby secure the right to pay all before the times agreed upon; in other words, that the intention is apparent that he should not have the right to mature the debt, because he has promised to do the things which would prevent it from maturing, and that hence it was contemplated that only the creditor should have such right.

The question now before us is one of limitation, and we need not determine whether or not, under the view taken in this state, the debtor, by his willful default, could secure a right to pay the whole debt before

he had agreed to pay it without the creditor's consent. The fact that the party invoking limitation may have put it in motion by his wrong is no obstacle to but is usually the occasion of its operation. Besides, it is not necessary to assume that the parties to such a contract intended to provide for none but wrongful refusals to pay installments. It might happen that the debtor, upon good grounds, would afterwards deny his liability upon the contract, and therefore refuse to pay installments, in which case the provision would serve him a useful purpose in bringing the question at issue to a prompt test, and not leave it entirely with the creditor to delay until perhaps evidence of the defense had been lost. The question, at last, is one of construction of the language used, and that which makes it mean just what it says is not without reason or good authority to support it. Where the purpose is only to give the option to the creditor, language expressive of it may be easily inserted. It follows that when, upon default in the payment of the first installment, the whole debt matured according to the terms of the contract, the cause of action upon it accrued and limitation began and continued to run, unless the transactions between the parties changed their rights as they existed after the default was made. Authorities holding that by acceptance of payment of overdue installments, or extension of time upon an installment, and other like acts, the creditor waives the default, are relied upon, but those are decisions in which the contract is regarded as only giving to the creditor the right of election. When the proposition is established that the failure to pay an installment *ipso facto* gives rise to the cause of action upon the whole debt, it necessarily follows that mere delay in suing, or acceptance of part of what is due, or other act of the creditor, alone will not take away his right to sue, and, if that right continues, limitation runs against it.

It is not in the power of the creditor by his acts alone to change the rights of the parties resulting from the maturity of the debt. But both parties, by their joint action, may so alter such rights that the creditor would no longer have the right to demand nor the debtor to pay the entire indebtedness. If it be true that, in a contract like this, where the installments are payable at given dates, and the debtor has not the right before default to pay at any other times, such debtor acquires the right, after default, to pay all of the debt at once (a question which we need not now decide), any agreement the parties might make, which would have the effect of obviating the default and restoring the contract to its original condition as if it had not been broken, would be supported by a sufficient consideration. The debtor would secure from the creditor further credit, and give up his

right to discharge the whole liability at once. *Benson v. Phipps*, 87 Tex. 578, 29 S. W. 1061; *Abstract Co. v. Bahn*, 87 Tex. 582, 29 S. W. 646; 30 S. W. 430. But, aside from this, while neither party by his separate action or nonaction could impair the rights of the other, each could waive his own rights as they accrued from the default in payment of an installment so as to estop him from relying upon such default. To accomplish this, it would only be necessary that each should so act as to justify the other in believing and acting upon the belief that the effect of the failure to pay an installment was to be disregarded, and that the contract should stand as if there had been no default. The principle of estoppel by waiver would, we think, have proper application in such a case. *Bish. Cont.* §§ 789-808; *Bigelow, Estop.* p. 633 et seq.; *Insurance Co. v. Lacroix*, 45 Tex. 158; *Insurance Co. v. McGregor*, 63 Tex. 404. An agreement or waiver having the effect supposed may be inferred from the conduct and declarations of the parties as well as evidenced by their express stipulations.

Counsel for appellee rely upon the doctrines and distinctions illustrated by the decisions in the cases of *Abstract Co. v. Bahn*, 87 Tex. 582, 29 S. W. 646, 30 S. W. 430, and *Benson v. Phipps*, 87 Tex. 578, 29 S. W. 1061, and contend that an agreement or waiver, such as that we have instanced, would not be good because it did not bind the creditor to forbear, and the debtor not to pay, for any given time. The distinction is in this: The contract was in writing, fixing times and terms of credit, which were affected only by the default causing maturity earlier than such dates. It was therefore only necessary to take away the effect of the default, and to restore the contract as it was before that occurred, when its terms would be perfectly definite and certain.

The statute, which provides, "No acknowledgment of the justness of the claim made subsequent to the time it became due shall be admitted in evidence to take the case out of the operation of the law [of limitation], unless such acknowledgment be in writing and signed by the party to be charged thereby," does not control the question before us. The acknowledgment referred to in the statute is one which is to take the case out of the statute of limitation, and is therefore one made of a cause of action against which the statute runs. Where there is no cause of action, no right to sue, no limitation can run, and no acknowledgment is needed to take it out of the operation of the law. The effect of such an agreement or waiver as we have supposed is to take away the right to sue, and, until the debt should mature under it, there would be no cause of action.

The language, "acknowledgment of the justness of the claim," had a well-defined meaning in the law of limitations before such

statutes as this were passed, and the provision was intended to require them to be in writing where before they could have been oral, and not to restrict the power of the parties to contract generally. The purpose was only to require those things which had become known as acknowledgments of claims to be in writing. That there was such an agreement or waiver as we have supposed is not definitely stated in the certificate, but evidence is recited which tends to show it. Whether or not it existed is to be drawn as an inference of fact from all of the evidence, and this inference cannot be drawn by this court as a matter of law. We therefore can only answer that, while all of the notes became due upon default in payment of the first, we cannot say as matter of law that the notes were barred when suit was brought. Whether they were or not depends upon facts to be found from the evidence.

HUDSON v. COMPERE et al.

(Supreme Court of Texas. March 25, 1901.)

CONTRACTS — CONSIDERATION — NOTE — INSURANCE — PREMIUM — INSOLVENT COMPANY — AGENT — PERSONAL LIABILITY.

1. Where an insurance agent, pursuant to an agreement with the insured, issued a policy, and paid the premium to the insurance company, and took the notes of the insured therefor, the transaction was, in effect, a loan by the agent to the insured, and there was therefore full consideration for the notes, though the company was then in fact insolvent, and was soon after placed in the hands of a receiver.

2. Where a foreign insurance company has complied with the laws, and received permission to do business in Texas, an agent who receives and forwards premiums on policies issued by such company is not liable on the contract or to refund the premium, since by Rev. St. art. 3095, he is so liable only when he is acting for a company which has not complied with the law.

Certified question from court of civil appeals of Second supreme judicial district.

Action by Compere Bros. against Isaac Hudson. From a judgment for plaintiffs, defendant appealed to the court of civil appeals, where the judgment was affirmed. On motion for reargument, removed to the supreme court on a certified question.

Cockrell & Hardwicke and Theodore Mack, for appellant. C. M. Christenberry, for appellees.

WILLIAMS, J. This case is thus stated by the court of civil appeals: "Compere Bros. were local insurance agents at Abilene, Tex., representing nonresident fire insurance companies, among which was the Ft. Wayne Insurance Company of Ft. Wayne, Ind., which was acting under due permit to do business in this state. Compere Bros., as such agents, solicited Isaac Hudson to take out insurance on certain gin property owned by him. The terms as to payment of premium having

been stated by Compere Bros. to be cash, and Hudson not having the cash with which to pay such premium, it was agreed that Hudson would insure said property as solicited; that Compere Bros. should, for him, advance to the company the cash necessary for the payment of the premium, and in consideration of such advance accept Hudson's notes. The selection of the company in which such insurance should be taken was left to said agents. Compere Bros. thereupon, as agents, issued to Hudson a policy of insurance upon his said property in the company above named, and forwarded to the company the cash (less commission) required as payment for the premium, in consideration of which Hudson executed and delivered to Compere Bros. two notes, for \$112.50 each, payable to appellees, maturing, respectively, October 23 and November 23, 1899, the same representing the amount of the required premium, both parties acting in good faith. But it appeared that, within a short time after the policy was issued and the premium remitted as stated, said insurance company was placed in the hands of a receiver, it in fact being insolvent at the date of the issuance of the policy, but such insolvency was unknown to either Compere Bros. or to Hudson. No loss in fact occurred under the policy, but, had there been one, Hudson could have recovered nothing on his policy by reason of the insolvency of the company as stated. The cause was tried April 12, 1900, the policy expiring September 23, 1900. The permit to do business in Texas was revoked by the insurance commissioner of Texas on October 23, 1899, the policy and notes being dated September 23, 1899. At the maturity of said notes, Hudson having refused payment thereof, Compere Bros. instituted this suit in the county court of Taylor county against Hudson to recover thereon. Hudson was duly made party defendant, and pleaded in defense of the suit a total want and failure of consideration arising out of the insolvency of the insurance company, as above stated. The trial below resulted in a judgment for Compere Bros., which, on appeal to this court, was affirmed upon a former date, and the cause is now pending before us on motion for rehearing. The sole question of law arising upon the facts stated, and which we hereby certify to your honors, is, did such facts support said plea of a total want of consideration and failure of consideration as against the premium notes mentioned in the hands of said original payees?"

There can be no doubt that there was a consideration for the note when it was given, and we think it equally clear that the consideration has not failed. The money advanced by appellees to pay the premium was a loan to appellant, and for this the note was given. The contract of insurance was between appellant and the company, and was completed by the payment of the premium and delivery of the policy. It has been held

that a note given to an insolvent company for the premium on a policy is without consideration, and cannot be enforced. *Insurance Co. v. Smith*, 63 Ill. 187. It may be conceded, for the sake of argument, that this is correct, and also that, under proper circumstances, the insured would have a cause of action against such a company to recover back a premium actually paid, and still it would not follow that such an action would lie against an agent, through whose hands the premium had passed, after it had been paid over to the principal. With some exceptions not applicable here, the rule is that an agent receiving money for his principal, and paying it over to him, cannot be made liable for its return, although the principal should be so liable. *Story, Ag. (9th Ed.) § 300*, and authorities cited in note.

It is also a general rule of the law that the agent is not personally bound upon the contracts made in the name of his principal. *Story, Ag. §§ 261, 263*. These principles control this question. Appellant borrowed the money from appellees with which to pay the premium, and is therefore liable on the note, unless appellees are bound, because of the insolvency of the principal, to make restoration. The company being authorized to do business in this state, it, and not its agents, became bound upon the contract of insurance. Article 3695, Rev. St. The case stands precisely as if appellant had paid the premium to the agents, and they had in good faith delivered it to the principal. The agents, in such case, would not be bound for the return of the money, and it follows that their right to recover upon the note is as good as would be that of any other person from whom appellant might have borrowed it. The contention that the agents should be held to have warranted the solvency of the principal is inconsistent with the principles stated.

ERWIN v. STATE.

(Court of Criminal Appeals of Texas. March 20, 1901.)

ARSON—EVIDENCE—ADMISSIBILITY—INSTRUCTIONS.

1. Where one of the alleged owners of property charged to have been burned is not a witness in a prosecution of another for such arson, it is error to permit the state to introduce in evidence indictments charging such owner with arson, and as being an accomplice to arson, and of the murder, and of being an accomplice to the murder, of a certain person.

2. The instructions in a prosecution for arson should define the meaning of the word "willful" as therein used.

Appeal from criminal court, Dallas county; Charles F. Clint, Judge.

H. F. Erwin was convicted of arson, and he appeals. Reversed.

Thomas, Spellman & Stine, M. T. Lively, Crawford & Crawford, and A. I. Hudson, for appellant. D. E. Simmons, Acting Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of arson, and his punishment assessed at five years' confinement in the penitentiary.

During the trial the state introduced two indictments against C. H. Alexander; the first charging him with arson and accomplice to arson, and the second with the murder of I. G. Randle and as accomplice to said murder. Several objections were urged to this testimony, which, we think, are well taken. We have been cited to no authority, and no rule of evidence has been called to our attention, which would admit these indictments as original evidence against Erwin. Alexander did not testify in the case, and is one of the alleged owners of the burned house.

Exception was reserved to the court's charge because it failed to define the meaning of the word "willful." Upon another trial this term should be defined.

It is not necessary to discuss the action of the court refusing to continue the case, as the matter may not occur upon another trial. The same may be said with reference to the motion for severance.

For the reasons indicated, the judgment is reversed, and the cause remanded.

Ex parte CHOYNSKI et al.

(Court of Criminal Appeals of Texas. March 20, 1901.)

BAIL—AMOUNT.

The grand jury, having refused to return an indictment against defendant for prize fighting, which is punishable by confinement in the penitentiary not less than two nor more than five years, were reinstructed with reference to the matter, and defendant was required to give bail in the sum of \$2,500, but was unable to do so. *Held*, that the amount fixed was excessive, and should be reduced to \$1,000.

Appeal from district court, Galveston county; A. C. Allen, Judge.

Habeas corpus proceedings by Joseph B. Choynski and another to reduce bail. From an order fixing the amount, they appeal. Modified.

Marsene Johnson and John C. Walker, for appellants. D. E. Simmons, Acting Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellants were arrested charged with "prize fighting," and the bond of each fixed at \$5,000. Being unable to give this bond, they resorted to the writ of habeas corpus, and the district judge, upon hearing the same, reduced the bail to the sum of \$2,500 each. Appellants claim this amount is excessive, and they are totally unable to give such bond. The record shows their inability to give bond in this amount. The punishment for this offense is not less than two nor more than five years' confinement in the penitentiary. It also shows that the grand jury refused to indict appellants for this offense, and so reported to the court; but that body was reinstructed by the court

with reference to the matter, and, the court being still in session, indictment may be returned. Under the statute it seems they are not entitled to their discharge in any event until the adjournment of the grand jury for the term. Under the circumstances we believe the amount of the bail fixed by the trial judge is excessive, and amounts to a deprivation of bail, and we therefore fix the amount of the bail at \$1,000 each; and upon giving bond in this sum, in accordance with the terms of the law, they will be released from custody.

BLOCKER v. STATE.

(Court of Criminal Appeals of Texas. March 6, 1901.)

HOMICIDE—MISCONDUCT OF JURY—STATEMENTS IN JURY ROOM.

Code Cr. Proc. art. 817, authorizes the granting of a new trial when the jury receives material evidence after they have retired to consider their verdict. After a jury had agreed on defendant's guilt, but before they had fixed the punishment, one of the jurors stated that deceased was not the first man defendant had killed; and it was also stated that, if certain evidence as to the dying declarations of deceased had not been excluded on defendant's objection, they would have known more about the reason defendant went to the penitentiary at a former time. *Held* sufficient misconduct to warrant a reversal of a judgment of conviction.

Appeal from district court, Bowie county; J. M. Talbot, Judge.

B. F. Blocker was convicted of murder in the second degree, and he appeals. Reversed.

Glass, Estes & King, Sheppard & Sheppard, and Crawford & Crawford, for appellant. R. D. Hart, Dist. Atty., and D. E. Simmons, Acting Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of murder in the second degree, and his punishment assessed at 15 years' confinement in the penitentiary.

Appellant criticises the charge of the court on murder in the second degree and manslaughter. The charge, taken as a whole, we think is a clear and admirable presentation of the law applicable to the facts of this case.

After the jury had retired to consider their verdict, and after they had agreed to the guilt of defendant, but had not fixed the punishment (some of the jurors were in favor of punishing appellant with imprisonment in the penitentiary from 2 to 5 years, some for 5, 10, and 15 years, respectively, some for 25 years, and one for life), at this particular juncture, while the jury were deliberating upon the punishment, one of the jurors stated, "This is not the first man Blocker has killed." It was also stated at the same time that defendant, Blocker, had objected to some of the dying declarations of Pittman as introduced in this case, and that, if all of it had been let in, they would know more about why Pittman

went to the penitentiary. On the motion for new trial the foregoing was made to appear by the testimony of the jurors, and it was further admitted that Blocker and deceased, Pittman, were jointly indicted for the murder of one Woods; that defendant was tried in Bowie county, and convicted, and on appeal his case was reversed, and on his second trial he was acquitted; that, pending the appeal, Pittman obtained a change of venue to Cass county, where he pleaded guilty to murder in the second degree, and his punishment was assessed at 20 years' confinement in the penitentiary, and, after serving 8 or 10 years, was pardoned. All of the jury say the above facts did not influence them in their verdict. It is not necessary for us to copy the statements of all of the jurors who swore about this matter on motion for new trial. But that the old case against defendant was discussed by the jury there can be no doubt, and there can be no doubt but that the statement was made, to wit, that Pittman was not the first man that Blocker had killed. We do not find that any juror denies this fact. Article 817, Code Cr. Proc., appears to be mandatory, and where the jury has received other material evidence—whether from one of their number or others—after they have retired to consider their verdict, the judgment will be reversed. *Hargrove v. State*, 33 Tex. Cr. R. 431, 26 S. W. 993; *Ellis v. State*, 33 Tex. Cr. R. 508, 27 S. W. 135; *Mitchell v. State*, 36 Tex. Cr. R. 278, 33 S. W. 367, 36 S. W. 456. To what extent the discussion of the fact of defendant having previously killed a man influenced the jury in assessing the punishment of 15 years' confinement in the penitentiary on defendant is a matter of conjecture. We cannot say that it did not injure him, but that it was reasonably calculated to do so we are compelled to admit. Such conduct on the part of the jury is very reprehensible, and should meet the unmeasured reprimand of the trial courts. Defendant is entitled to a trial by a fair and impartial jury under the laws and the constitution of this state. If he killed deceased, Pittman, the jury, in their deliberations, should be limited to the consideration of the evidence bearing upon that fact alone. And if he killed a man other than the deceased, Pittman, at another and different time, in no way connected with the killing of this deceased, then that fact certainly should not militate against his rights in the case at bar. We have no alternative, when juries discuss extraneous matters prejudicial to appellant, other than to reverse the judgment. It matters not how important it is; and, the more important the case, the more important it becomes for the jury to try the appellant according to the law and the testimony adduced upon the trial. As indicated above, we have repeatedly held that such conduct on the part of the jury is cause for reversal. And see, also, *Darter v. State*, 39 Tex. Cr. R. 47, 44 S. W. 850; *Tate v. State*, 38 Tex. Cr. R. 261, 42 S. W. 595; *Ysaquille*

v. State (Tex. Cr. App.) 53 S. W. 1005. As indicated in appellant's brief, the last-quoted cases are conclusive upon the question, if there were not other authorities on the subject. For this action of the jury the judgment is reversed, and the cause remanded.

Ex parte QUALLS.

(Court of Criminal Appeals of Texas. March 6, 1901.)

HABEAS CORPUS—RELEASE ON BAIL—IMPROPER EVIDENCE—EFFECT—APPEAL.

In habeas corpus proceedings for release on bail, admission in evidence of conclusions and expressions of opinion by a witness is not ground for reversal, since on appeal therein the court will look to the proper evidence as a predicate for its decision.

Appeal from district court, Atascosa county; M. F. Lowe, Judge.

Habeas corpus by Bee Qualls for release on bail. From an order denying the application, he appeals. Affirmed.

W. O. Read, for appellant. D. E. Simmons, Acting Asst. Atty. Gen., for the State.

DAVIDSON, J. Appellant, being held under different charges of murder, resorted to the writ of habeas corpus for the purpose of securing bail, which, upon trial, was refused. Bill of exception was reserved to the action of the court admitting certain testimony, some of which seems to have been conclusions and expressions of opinion by the witness, which, upon a trial before the jury, should be excluded. But in appeals in habeas corpus proceedings, bail being the issue, this court will look to the proper evidence as a predicate for its decision. Without entering into a discussion of the testimony, we are of opinion the action of the court was correct in refusing bail. The judgment is affirmed.

JASPER v. STATE.¹

(Court of Criminal Appeals of Texas. March 6, 1901.)

LARCENY—INDICTMENT—SUFFICIENCY—INSTRUCTION—COMMENT ON EVIDENCE—DEFENDANT'S NAME—FAILURE TO MENTION IN CHARGE.

1. An indictment which alleged that defendant did take from the person of one M. \$80 in money, of the value of \$80, the same being then and there the corporeal personal property of M., without the knowledge and consent of M., was not objectionable for insufficiency in the description of the stolen property.

2. An instruction that if the jury believed that defendant had in her possession money which belonged to defendant, and which came into her possession by picking the same up from the ground, or from some place other than the person of the prosecuting witness, then to acquit her, was not objectionable as requiring the jury to believe that defendant had in her possession money belonging to herself,

¹ Rehearing denied March 20, 1901.

which she had acquired by other means than from the prosecuting witness, before they could acquit.

3. An instruction that the evidence on cross-examination of defendant with reference to former charges against her could be considered only as affecting her credibility, and not as tending to show that she committed the theft for which she was on trial, was not objectionable as a comment on the weight of the evidence, or as calling undue attention to particular evidence.

4. An objection to the charge because it nowhere mentioned, except in the style of the case, the name of defendant, and did not inform the jury who was meant by defendant, was without merit.

Appeal from district court, Tarrant county; W. D. Harris, Judge.

Lucile Jasper, alias Lucile Williams, was convicted of theft, and she appeals. Affirmed.

D. E. Simmons, Acting Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of theft from the person, and her punishment assessed at two years' confinement in the penitentiary.

Appellant made a motion to quash the indictment. The charging part of the indictment is as follows: " * * * That Lucile Williams, * * * on the 4th day of April, 1900, did then and there unlawfully, fraudulently, and privately take from the person and possession of one Frank Moody eighty dollars in money, of the value of eighty dollars, the same being then and there the corporeal personal property of said Frank Moody, without the knowledge and without the consent of said Frank Moody, and so suddenly as not to allow time for resistance, with the intent then and there on the part of her, the said Lucile Jasper, alias Lucile Williams, to deprive said Frank Moody, the owner thereof, of the value thereof, and to appropriate it to the use and benefit of her, the said Lucile Jasper, alias Lucile Williams," etc. We think the indictment is sufficient. *Green v. State*, 28 Tex. App. 495, 13 S. W. 784.

Appellant insists, as the second ground of her motion for new trial, that the court erred in the following portion of the charge: "If you believe from the evidence that defendant had in her possession, at the time testified about, money which belonged to the defendant, but that she came into such possession by picking same up from the ground, or from some place other than the person of the said Frank Moody, then you will acquit her; and, unless you are satisfied beyond a reasonable doubt that such was not the case, then you will acquit." Appellant insists this charge is erroneous, in that the same requires the jury to believe, before they can acquit defendant, that they must believe she had money in her possession belonging to herself, which she had acquired by other means than from Frank Moody; and because the same is misleading, and is not the law applicable to this case. We think the charge of the court

is correct, and is in entire accord with the facts of this case.

Appellant also excepts to the following charge: "The evidence brought out on cross-examination of defendant with reference to former charges against defendant can be considered by the jury only as affecting—if you believe the same does affect—her credibility as a witness in the case, and not as showing, nor tending to show, that defendant committed the offense for which she is now on trial." Appellant objects on the ground that the same is on the weight of the evidence, and singles out and calls undue attention to particular evidence of defendant. It was the imperative duty of the court to give this charge, and not to have done so would have been error.

The fourth ground of his motion is that the charge nowhere, except in the style of the case, mentions the name of the defendant, and nowhere in the body of the charge tells the jury who is meant by the term or appellation of "deft." and "defendant," and nowhere requires them to believe that Lucile Jasper did anything, and is insufficient and confusing for this reason. An inspection of the charge shows this exception to be hypercritical. It is not required of the trial court to name the defendant, but he may designate her as the defendant.

Appellant's fifth ground is that the court erred in failing to charge on circumstantial evidence. In this there was no error.

We have carefully reviewed appellant's assignments of error, and none of them are well taken. There being no error in the record, the judgment is affirmed.

FUNDERBURK v. STATE.

(Court of Criminal Appeals of Texas. March 6, 1901.)

CRIMINAL LAW—STATEMENT OF CO-DEFENDANT—SILENCE OF ACCUSED—WARNING DEFENDANT—EVIDENCE—INDICTMENT—SUFFICIENCY—GRAMMATICAL ERROR.

1. Where one is in custody for a crime, his silence cannot be used against him as a confession of the truth of a statement made in his presence by a co-defendant, also in custody, whether either of them had been cautioned as required by statute or not.

2. That an indictment charging the theft of hogs in its latter clause charges "with the intent to appropriate it" does not invalidate the indictment, the meaning of the pleader being apparent.

Appeal from district court, Red River county; E. S. Chambers, Judge.

Fred Funderburk was convicted of hog theft, and he appeals. Reversed.

D. E. Simmons, Acting Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of hog theft, and his punishment assessed at two years' confinement in the penitentiary. Bill of exceptions No. 2 is as follows: "The

state introduced the following testimony, to wit: The witness J. P. Brannon testified that he, with an officer, P. M. Rumbley, who had a search warrant for the hogs alleged to have been stolen and belonging to him (J. P. Brannon), went to the home of Mrs. Hulet, the mother of Sam Hulet, who is indicted by a separate bill of indictment with the theft of the same property that the defendant is accused of taking, and with whom (Mrs. Hulet) the defendant was temporarily residing, in search of the said hogs. When they (Brannon and Rumbley) arrived at Mrs. Hulet's house, they found Sam Hulet, and he was left with Brannon, while Rumbley looked for defendant Funderburk. Rumbley made two trips in search of defendant, and on the second trip found defendant in the field a short distance from the house of Mrs. Hulet, coming to the house. Rumbley walked back with defendant to where Brannon and Sam Hulet were, near the house; and after they got back, and found some hogs which Brannon claimed in a pen in the front yard at Mrs. Hulet's, the said Sam Hulet, in explanation of how the three hogs of the seven came there, said, 'We traded a boat for three of them in the pen to a man who lives north of here, near the river;' which testimony was objected to by defendant, because defendant was under arrest at the time the statement was made by Sam Hulet, and neither party had been warned under the law; second, because the statement was made by a co-defendant, and it did not appear affirmatively that defendant Funderburk heard the statement, or that he understood that the statement had reference to and included him as being one of the parties who traded the boat for the hogs; and the court overruled said objections, and admitted said testimony, to which defendant excepted."

Where a person is in custody for crime, his silence cannot be used against him as a confession of the truth of statements made in his presence, whether he was cautioned as required by the statute or not. *Denton v. State* (decided at the present term) 60 S. W. 670; *Gardner v. State* (Tex. Cr. App.) 34 S. W. 945. Then, if the silence of a person in custody cannot be used against him, it makes no difference that the exculpatory or inculpatory statement is made by a co-defendant; the rule would still apply. Referring to this bill, it appears that Sam Hulet, appellant's co-defendant, made a statement about buying the hogs and paying a boat for the same. The state used this evidence as inculpatory of appellant. This was error. Appellant had a right to remain silent, and being under arrest, as indicated in the bill, such silence could not be used as a criminative fact against him.

Appellant filed a motion to quash the indictment, and, after a careful inspection of the same, we are of opinion that the indictment is good. It appears that the prosecu-

tion is based upon the theft of certain hogs, and the latter clause of the indictment charges, "with the intent to appropriate it to the use and benefit of him, the said Fred Funderburk." Bad grammar does not vitiate an indictment. The meaning of the pleader is reasonably apparent, and cannot be misleading as to the purport of the indictment. The singular includes the plural. *White, Ann. Pen. Code, art. 23*, and *White, Ann. Code Cr. Proc. p. 284*. Because the court erred in permitting the introduction of this testimony, the judgment is reversed, and the cause remanded.

TAUL v. STATE.

(Court of Criminal Appeals of Texas. March 6, 1901.)

JURY—COMPETENCY—CHALLENGES—REVIEW—CRIMINAL COMPLAINT—INFORMATION—CONTINUANCE—INTOXICATING LIQUORS—EVIDENCE.

1. Jurors who state on their voir dire that they know nothing about the facts, and have no prejudice against one indicted for violating the local option law, and can give him an impartial trial, are not disqualified by reason of having contributed to a fund for the employment of counsel to represent the prohibition side in a local option election contest.

2. A bill of exceptions in a criminal case, which fails to show whether defendant's challenges for cause were overruled or sustained, is defective.

3. A criminal complaint, properly signed by the complainant, and the information filed thereon, are sufficient, though his name is not mentioned in the body of either instrument.

4. Statements in an application for a continuance to enable the accused to procure certain letters were too general, where the only statement with reference to the effect of the letters showed "that he had acted in good faith, and had not violated the local option law in taking an order for whisky."

5. Evidence offered by defendant in a prosecution for violating the local option law, for the purpose of proving that he received no pecuniary profit out of handling certain packages marked "Glass," and had no money interest in them, was properly excluded.

Appeal from Midland county court; E. R. Bryan, Judge.

M. L. Taul was convicted for violating the local option law, and appeals. Affirmed.

D. E. Simmons, Acting Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted for violating the local option law, and his punishment assessed at a fine of \$25, and 20 days' confinement in the county jail. While impaneling the jury, several of the jurors were shown to have contributed to a fund for the employment of counsel to represent the prohibition side of the question in a contest in the civil courts over the election. However, they had not contributed to the prosecution of this case. They were questioned rather rigidly on their voir dire, and in addition stated they knew nothing about the facts of this case; that they had no bias or prejudice against defendant, and could

give him a fair and impartial trial on the evidence and under the charge of the court. Appellant only challenged two of the jurors. Whether his cause for challenge was overruled is not shown by the bill. Two of the jurors sat upon the trial. There were four mentioned in the bill of exceptions, and we are left in doubt as to whether his challenges were overruled or sustained. Of the four, two sat upon the jury; the other two did not. As this bill is presented to us, from no standpoint is there error.

Motion was made to quash the complaint and information because the name of the affiant or complainant is not mentioned in the body of either instrument. The complaint is signed and sworn to by J. N. Jackson, and upon this the information is based. The court properly overruled the motion. White's Ann. Code Cr. Proc. art. 257, § 195; Upton v. State, 33 Tex. Cr. R. 231, 26 S. W. 197.

Appellant requested a postponement of his case until the following day, in order that he might procure some orders and letters that were in the possession of the witness Mason, which Mason had at Odessa, some 20 miles from the place of the trial. Appellant's statement is that these letters and orders would show that he had acted in good faith, and had not violated the local option law in taking the order for whisky with which he is charged in this information; that he did not know of the materiality of this testimony until the trial of a similar case on the day preceding this trial; that said Mason was the only person who could procure these letters and orders. By these letters and orders, he expected to prove that he (defendant) was acting as the agent for R. L. Martin, whose order he had taken, which taking was charged as the sale. This bill is qualified by the court, with this statement: "Defendant was arrested on December 21, 1900. Ed. T. Mason came down from Odessa, twenty miles distant, to testify as a witness for defendant, and while here was subpoenaed for the state." If the orders were as indicted by appellant, it would seem that he and Mason were the only parties who knew of their existence. Mason came voluntarily to testify for defendant. He was the intimate friend and former employé of appellant, and came at his instigation. The statements set up in the application are too general. Appellant was charged with selling intoxicants to R. L. Martin, and the only statements with reference to the force and effect of these letters show "that defendant had acted in good faith, and had not violated the local option law in taking the order for whisky." There was no error in refusing to postpone the case.

Appellant offered to prove by Fuller that he was in the drayage business, and that defendant had told Fuller not to bring packages marked "Glass" from the depot to appellant's place of business. This was offered for the purpose of proving appellant's system of doing business, and that he was not get-

ting any pecuniary profit out of handling packages marked "Glass," and had no money interest in them. The object and purpose of introducing this evidence is not stated in the bill, and it is not apparent that it was beneficial to appellant. That appellant was disposing of whisky this record shows beyond any question. If he was not shipping it from a distance on orders, then he was selling it direct from his stock left over in his saloon when local option went into effect. This evidence, if it tended to prove anything, showed that appellant was not shipping whisky on orders, but was selling from his saloon. We are of opinion the charge sufficiently presents the issues of the case to the jury. The testimony amply supports the conviction. The judgment is affirmed.

MOORE v. STATE.

(Court of Criminal Appeals of Texas. March 6, 1901.)

CRIMINAL LAW—APPEAL—RECOGNIZANCE—STATEMENT OF AMOUNT OF FINE—NECESSITY.

Where a recognizance on appeal fails to state the amount of the fine assessed against defendant, as required by Code Cr. Proc. art. 887, the appeal will be dismissed.

Appeal from Fisher county court; Jesse Wright, Judge.

J. R. Moore was convicted of violating the local option law, and he appeals. Appeal dismissed.

D. E. Simmons, Acting Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of violating the local option law, and his punishment assessed at a fine of \$25 and 20 days' confinement in the county jail. An inspection of the record before us discloses that the recognizance is not in conformity with article 887, Code Cr. Proc., in that the same does not state the amount of the punishment assessed against appellant. We have repeatedly held that this is a prerequisite to a good recognizance. May v. State, 40 Tex. Cr. R. 197, 49 S. W. 402. Without a valid recognizance, we have no jurisdiction. The appeal is accordingly dismissed.

WILLIAMS v. STATE.

(Court of Criminal Appeals of Texas. March 6, 1901.)

CRIMINAL LAW—APPEAL—ASSIGNMENTS OF ERROR—BILL OF EXCEPTIONS—EVIDENCE—BURGLARY—INDICTMENT—VARIANCE—ASSAULT—RES GESTÆ—INSTRUCTIONS.

1. Assignments of error relative to the admission of testimony cannot be considered in the absence of a bill of exceptions.

2. On a prosecution for burglary, testimony as to an alleged assault at the same time as the burglary is admissible as part of the res gestæ.

3. On appeal in a criminal case, in the ab-

sence of a bill of exceptions, remarks of the county attorney cannot be reviewed.

On Rehearing.

When an indictment is in the ordinary form charging burglary of a house, but the proof shows that it was a private residence, a conviction cannot be sustained.

Appeal from district court, Tarrant county; W. D. Harris, Judge.

George Williams was convicted of burglary, and he appeals. Affirmed. On rehearing. Reversed.

Cummings & Baskin, for appellant. D. E. Simmons, Acting Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of burglary, and his punishment assessed at confinement in the penitentiary for a term of 12 years; hence this appeal. There is no bill of exceptions in the record; consequently we cannot notice the assignments with reference to the improper admission of testimony regarding an assault alleged to have been made at the same time the burglary was committed. However, if there had been an exception to this testimony, it was admissible as a part of the *res gestæ*. There was no error in the court's charge in failing to limit the effect and purpose of the testimony regarding the assault. The charge did limit the purpose for which this testimony was admitted, and, we think, properly. There is no bill with regard to the remarks of the county attorney; hence the same cannot be noticed. There being no error in the record, the judgment is affirmed.

On Motion for Rehearing.

(March 20, 1901.)

This case was affirmed at a previous day of this term, and now comes before us on motion for rehearing. The indictment is in the ordinary form, charging burglary of a house. The proof, however, shows that it was a private residence, and, under the authority of *Osborn v. State* (decided at the present term) 61 S. W. 491, the conviction cannot be sustained under this indictment. The motion for rehearing is accordingly granted, and the judgment is reversed, and the cause remanded.

Ex parte BROWN.

(Court of Criminal Appeals of Texas. March 6, 1901.)

INTOXICATING LIQUORS—SUNDAY LAW—CONSTITUTIONALITY.

Pen. Code, art. 199, making it an offense for a liquor dealer to keep open his place of business on Sundays for purposes of traffic, is not unconstitutional as an arbitrary exercise of the police power.

Appeal from district court, Tarrant county; M. E. Smith, Judge.

W. T. Brown was convicted of violating the Sunday liquor law, and appeals. Affirmed.

Jas. S. Davis, for appellant. D. E. Simmons, Acting Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Relator was convicted for violating article 199, Pen. Code, by keeping his place of business open on Sunday for the purpose of traffic, he being a retail liquor dealer. A discharge is sought under the writ of habeas corpus on the ground that the law is unconstitutional; that it was an arbitrary exercise of police power, and invades his inalienable right to sell liquor and other intoxicants on Sunday. The questions involved in appellant's contention have been discussed very frequently, not only in this state, but throughout the Federal Union, by courts of last resort. As an original question, it might be the subject of interesting study and review. The subject, however, seems to be practically exhausted by the decisions, and we see no reason to enter into its further discussion. Sunday laws of this character, and police regulations generally of this nature, have been held constitutional by courts of last resort in this state. See *Gabel v. City of Houston*, 29 Tex. 335; *Ex parte Sundstrom*, 25 Tex. App. 133, 8 S. W. 207; *Searcy v. State*, 40 Tex. Cr. R. 460, 50 S. W. 699, 51 S. W. 1119, 53 S. W. 344; *Ex parte Kennedy* (Tex. Cr. App.) 58 S. W. 129. The cases referred to sufficiently discuss the matters involved. The judgment is affirmed.

WITHERSPOON v. STATE.

(Court of Criminal Appeals of Texas. Feb. 27, 1901.)

RESISTING AN OFFICER IN EXECUTING PROCESS—WRIT OF SEQUESTRATION—WRIT VOIDABLE—NO DEFENSE—INSTRUCTION PROPERLY REFUSED—DESCRIPTIONS IN AFFIDAVIT AND WRIT—EVIDENCE—STATUTES.

1. In a criminal prosecution for resisting an officer who was attempting to seize property under a writ of sequestration, the defendant was not justified in making such resistance by the fact that the writ was voidable and defective in not stating the value and location of the property, as the writ, issuing from a court of competent jurisdiction, justified and authorized the officer to attempt to execute the same; a different rule being applied in criminal than in civil cases.

2. In a criminal prosecution for resisting an officer who was attempting to seize property under a writ of sequestration, it was not error to refuse to instruct that, if the jury believed that the officer was attempting to execute a writ which was not valid and legal, they should acquit, as such instruction relegated to the jury the question of the validity of the writ, which was for the court to determine.

3. Under *Sayles' Civ. St. art. 4869*, prescribing that a sequestration writ must describe the property as it is described in the affidavit on which it is issued, it was not necessary, in a criminal prosecution for resisting an officer who was attempting to seize property under a voidable writ of sequestration, that the descriptions in the writ and affidavit correspond to justify the officer in executing it, and hence an instruction to that effect was properly refused.

4. Where an information contained two counts, and the defendant was convicted on the first, errors alleged in the charge of the court

as to the second count will not be considered on appeal, as the same are immaterial.

5. In a criminal prosecution for resisting an officer who was attempting to seize property under a voidable writ of sequestration, the writ was properly received in evidence on behalf of the state, over defendant's objections that the same was invalid as not describing the property sufficiently, and because such description did not comply with that in the affidavit, since such objections, though valid in a civil suit, are without merit as a defense on a criminal prosecution.

6. On a criminal prosecution for preventing an officer from seizing property under a voidable writ of sequestration, it was prejudicial error to admit evidence of defendant's sayings and doings in resisting arrest, as such evidence related to a separate and distinct offense, in no way connected with the fact in issue.

7. On a criminal prosecution for preventing an officer from seizing property under a writ of sequestration, where it was alleged as a defense that the writ was void as not conforming to the affidavit on which it was issued, evidence of the bond and affidavit for sequestration was properly refused, as the writ was simply voidable on its face, having issued from a court of competent jurisdiction under the signature of the justice, and hence the officer was justified in attempting to execute the same.

Appeal from Ellis county court; J. E. Lancaster, Judge.

J. Y. Witherspoon was convicted of resisting an officer, and appeals. Reversed.

J. C. Smith, for appellant. D. E. Simmons, Acting Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted for resisting an officer, under the first count in the information, and his punishment assessed at a fine of one dollar. The information is as follows: "In the name and by the authority of the state of Texas, Lee Hawkins, county attorney in and for the county of Ellis, state of Texas, duly elected and qualified, now here in county court of said county information makes that J. Y. Witherspoon, on or about the 11th day of April, A. D. 1899, and before the making and filing of this information, with force and arms, in the county of Ellis, state of Texas, did unlawfully and willfully prevent and defeat the execution of a certain process in a civil cause, by means not amounting to actual resistance, but which were calculated to prevent and defeat the execution of said process; that is, W. P. Dunaway, who was then and there the duly-qualified constable of justice precinct number six, in and for Ellis county, said state, had in his hands, and directed to him as such officer, for execution, a legal valid writ of sequestration, which had been issued from the justice court of justice precinct number six of said Ellis county, in a civil cause in said court, wherein J. A. Brown and Susan Brown were plaintiff, and J. Y. Witherspoon was the defendant, numbered on the civil docket of said court 465, and which said process commanded the sheriff or any constable of said county to take into his possession one trunk, one clock, one white bonnet, two quilt tops, one silk handkerchief, one pair of gloves, one silk chair cushion, one

parasol, one red handkerchief, one teapot, one shovel, some delftware, one dress, two gowns, and keep the same subject to further orders in said suit, unless replied according to law. And while the said W. P. Dunaway, as constable aforesaid, was then and there in a lawful manner attempting to execute said process as therein commanded, the said J. Y. Witherspoon, knowing that the said W. P. Dunaway was constable aforesaid, and that said W. P. Dunaway as such was attempting to execute said valid legal process, did unlawfully and willfully prevent and defeat the execution of the same by then and there refusing to permit the said W. P. Dunaway to take the said property into his possession, and by then and there threatening to kill the said Dunaway if he attempted to take possession of said property, and by pushing the said Dunaway back from the stairway, thereby preventing him from going upstairs, where a part of the property was. And said county attorney does further information make that on or about the 11th day of April, 1899, and before the making and filing of this complaint, in the county of Ellis, state of Texas, the said J. Y. Witherspoon did unlawfully and willfully oppose and resist an officer in executing and attempting to execute a lawful process in a civil cause, in this: That W. P. Dunaway, who was then and there the duly-qualified constable of precinct number six, in said Ellis county, had in his hands, as such officer, a legal, valid process, as follows: 'The State of Texas. To the Sheriff or Any Constable of Ellis County—Greeting: Whereas, Susan Brown has made affidavit that J. Y. Witherspoon unlawfully detains from her the following described property: One trunk, one clock, one white bonnet, two quilt tops, one silk handkerchief, one pair of gloves, one silk chair cushion, one parasol, one red handkerchief, one teapot, one shovel, some delftware, one dress, two gowns, of the value of five dollars,—the property of her, the said Susan Brown, to the possession of which she has a good and lawful right, and for the recovery of which she has brought suit; and that she fears that the defendant, J. Y. Witherspoon, will ill treat, injure, waste, destroy, and remove from the county said property during the pending of this suit,—these are therefore to command you that you take into your possession the above-described property, if to be found in your county, and to keep the same subject to further orders in said suit, unless replied according to law. Herein fail not and due return make. Given under my hand this the 11th day of April, A. D. 1899. P. W. Lowe, Justice of the Peace, Precinct Number Six, Ellis County, Texas.' And while the said W. P. Dunaway, constable as aforesaid, was then and there, in a lawful manner, attempting to execute the said process as therein commanded to do, the said J. Y. Witherspoon did unlawfully and willfully resist and oppose him in

so doing, by then and there threatening to kill the said Dunaway before he would permit him to take said property, and by then and there pushing the said Dunaway down and away from a stairway with his hands, thereby preventing the said Dunaway from going upstairs, where some of said property was. And said county attorney does further information make that on or about the 11th day of April, 1899, and before the making and filing of this complaint, in the county of Ellis, state of Texas, the said J. Y. Wither-spoon, in and upon W. P. Dunaway, did commit an aggravated assault, and did then and there push the said Dunaway with his hand, the said Dunaway then and there being an officer, to wit, constable of justice precinct number six, Ellis county, said state, and then and there in the lawful discharge of the duties of said office, and the said J. Y. Wither-spoon then and there being informed and knowing that the said W. P. Dunaway was then and there an officer discharging an official duty, contrary to the form of statute in such cases made and provided, and against the peace and dignity of the state."

Motion was filed by appellant to quash the information, but an inspection thereof shows it relates solely to the second count thereof, and does not refer to the first count, on which the conviction was had. We deem it proper, however, to pass upon the first count in the information, regardless of whether or not appellant's motion refers thereto. Furthermore, we hold all of the counts in the information are valid.

Article 4865, Sayles' Civ. St., provides: "No sequestration shall issue in any case until the party applying therefor shall file an affidavit in writing stating (1) that he is the owner of the property sued for, or some interest therein, specifying such interest, and is entitled to the possession thereof; or (2) if the suit be to foreclose a mortgage or enforce a lien upon the property, the fact of the existence of such mortgage or lien, and that the same is just and unsatisfied, and the amount of the same still unsatisfied, and the date when due. (3) The property to be sequestered shall be described with such certainty that it may be identified and distinguished from property of a like kind, giving the value of each article of the property and the county in which the same is situated. (4) It shall set forth one or more of the causes named in the preceding article entitling him to the writ." Article 4860, Sayles' Civ. St., provides, in substance, that the writ must describe the property as it is described in the affidavit.

Were this a civil proceeding, upon motion filed, the court might quash the writ copied in the information here, on the ground that the value of each article of property, and the county in which the same is situated, is not stated in said writ. But we apprehend a different rule prevails where a defendant is proposing to justify resistance to an officer

in the execution of a writ with this character of defect from the rule on a motion to quash the writ, and the affidavit upon which it is predicated, in a civil suit. Judge Cooley, in his work on Torts, in treating this matter, used the following language: "The process that shall protect an officer must, to use the customary legal expression, 'be fair on its face.' By this is not meant that it shall appear to be perfectly regular, and in all respects in accord with proper practice, and after the most approved form, but what is intended is that it shall apparently be process lawfully issued, and such as the officer might lawfully serve. More precisely, that process may be said to be fair on its face which proceeds from a court, magistrate, or body having authority of law to issue process of that nature, and which is legal in form, and on its face contains nothing to notify or fairly apprise the officer that it is issued without authority. When such appears to be the process, the officer is protected in making service, and he is not concerned with any illegalities that may exist back of it. The word 'process' is made use of in this rule in a very comprehensive sense, and will include any writ, warrant, order, or other authority which purports to empower a ministerial officer to arrest the person, or to seize or enter upon the property of an individual, or to do any act in respect to such person or property which, if not justified, would constitute a trespass. Thus, a *captas ad respondendum*, or any warrant of arrest, is process; so is a writ of possession; so is any execution which authorizes a levy upon property; and so is any authority which is issued to a collector of taxes, and which purports to empower him to collect the tax by distress of goods. These are only illustrations of a class too numerous to be specified in detail." See Cooley, Torts (2d Ed.) pp. 538, 539, 560.

Mr. Mechem says: "The duty of the officer is ministerial, not judicial. His province is to execute the process regularly delivered to him for service, and not to sit in judgment upon the regularity of the proceedings upon which it was obtained. He is protected by the law, as will be seen hereafter, in executing according to its tenor all process, fair upon its face, which is delivered to him for service. He will therefore be protected in executing, and it is his legal duty to execute, process, though it be irregular, erroneous, or voidable, where it comes in due form from a court of competent jurisdiction, and neither his own intrinsic knowledge that there existed no cause of action, or that the judgment, not reversed or stayed, was fraudulently obtained, nor the fact that the judgment or proceedings were irregular, nor any other defect or irregularity not rendering the process void, can excuse him from its service. 'Mere formal defects in the process,' it is said, 'not rendering it void, even if considerable enough to cause it to be abated, quashed, or set aside as irregular, on proper motion

or plea by the party directly affected by it, but which, if not so moved, do not affect the legal validity of the process, can never be interposed by the officer in whose hands it is placed for service as a shield to protect him from the consequences of plain derelictions of duty in respect to it.' A distinction is, however, to be observed between process which is irregular, defective, or voidable only and that which is void for want of jurisdiction or other cause." *Mechem, Pub. Off. § 745.* And again: "Where process, fair upon its face, is put into the officer's hands for service, it is his duty, as has been seen, to proceed to execute it according to its command. Out of this duty arises the necessity of protection, and the rule is well settled that for the proper service of such process the officer incurs no liability, however disastrous may be the effects upon the defendant, or however unlawful may have been the proceedings which preceded it. The process which will afford the officer this protection, as being fair upon its face, has been defined by Judge Cooley as that 'which proceeds from a court, magistrate, or body having authority of law to issue process of that nature, and which is legal in form, and on its face contains nothing to notify or fairly apprise the officer that it is issued without authority.'" *Id. § 768.* It is laid down in *Whart. Cr. Law, § 425*, that where a warrant is merely informal, but not illegal or senseless, its informality will be no palliation for the killing of the officer intrusted with its execution.

From the foregoing it appears that defendant could not be prosecuted for resisting a void writ, but an informal or voidable writ, where it comes from a court of competent jurisdiction, as the writ alleged in the information in this case, would justify and authorize an officer to execute the writ, and if defendant resists that character of writ he would be guilty, regardless of any mere informalities in the writ.

Appellant asked the court to charge the jury that if they believed from the evidence that said W. P. Dunaway, constable, was attempting to execute a writ of sequestration, but it was not a valid and legal writ, as required by law, to acquit. In his main charge the court gave the following, in substance: "If you believe from the evidence beyond a reasonable doubt that defendant did * * * prevent or defeat the execution of any process in a civil cause, by any means not amounting to actual resistance, but which were calculated to prevent the execution of such process, you will find defendant guilty," etc. We do not think the court erred in refusing the special instruction, since it relegated to the jury the question of the validity and legal effect of the writ. This was a question for the court, and not the jury, to decide. In other words, it was the duty of the court to tell the jury that the writ introduced was in fact a valid and legal writ.

His special charge No. 2 is also with reference to the legality of the writ, submitting that the affidavit on which the writ of sequestration is issued must describe the property so that it may be identified and distinguished from property of a like kind, giving the value of each article and the county where situated. As stated before, it is immaterial, so far as this prosecution is concerned, whether the writ was exactly formal or not, and whether it corresponds exactly with the affidavit. If the writ, as said by Judge Cooley, is fair on its face, although informal, and although it might be quashed in a civil proceeding, yet these matters would not be any defense to appellant, nor any reason why the officer would not be protected in an effort to execute the same.

The fifth ground of appellant's motion complains of the third paragraph of the court's charge. The charge is numbered by paragraphs, but this complaint seems to relate to a portion of the charge with reference to the second count in the information. The jury having found appellant guilty under the first count, it is immaterial as to any error or supposed error in the charge as to the second count in the information.

It is made to appear by bill of exceptions No. 1 "that the state offered in evidence the writ of sequestration, to which counsel for the defendant objected: (1) The writ of sequestration, the execution of which defendant is charged with resisting, shows on its face that it is invalid, because it failed to describe the property sought to be sequestered with such certainty that it may be identified and distinguished from the property of a like kind, and failed to give the value of each article of the property, and to show in what county the same was situated; (2) because the writ showed Susan Brown was plaintiff in the civil cause, when defendant was charged with resisting a writ in cause in which J. A. and Susan Brown were plaintiffs; (3) because the affidavit on which said writ was issued was wholly insufficient and defective to support said writ, and admitted so to be by counsel for state, and the court overruled the objections, and permitted the writ to be introduced." A reference to the information shows objection No. 2 does not lie against the first count, upon which appellant was convicted, since that charges that J. A. and Susan Brown were plaintiffs, and J. Y. Witherspoon was defendant. As said above, the objections might or might not be good (on this matter we are not passing) in a motion to quash the writ in a civil case; but, even conceding they are, they are without merit when urged by appellant as defense in this case.

Bill No. 2 states that "the state offered to prove the following facts, viz.: While witness W. P. Dunaway was on the stand, and had testified that, at the time of the arrest of defendant, he (defendant) resisted said arrest, and told said Dunaway and Deput

Sheriff Forbes, with him, that they could not arrest him, and after said Dunaway had testified that defendant did not try to strike the officers, that they, said Dunaway and Forbes, arrested defendant, and handcuffed him, to which counsel for defendant objected, for the following reasons: Because defendant was not charged with resisting a warrant of arrest, and any testimony as to what said defendant said or did at said time was irrelevant, and had no connection with the case, and tended to prejudice, and did prejudice, the jury against the defendant; and the court overruled the objections, and permitted said witness to testify as aforesaid. Defendant excepted to said ruling," etc. The court qualifies this bill as follows: "That W. P. Dunaway had testified that he went to house of defendant about nine o'clock in the morning to levy the writ of sequestration, and defendant resisted and prevented the execution of the same. That witness left house of defendant. A complaint was filed against defendant for resisting the execution of said writ of sequestration, and warrant was issued and placed in the hands of said Dunaway, and about five o'clock in the evening of same day said Dunaway and Henry Forbes, deputy sheriff, went back to the house of defendant, for the purpose of executing the writ of sequestration and the warrant of arrest. Upon the arrival at house of defendant, he told said Dunaway and Forbes that they could not arrest him, and that there were not men enough in Ellis county to arrest him. And defendant's attorney took his bill of exceptions substantially as stated above. But on the trial of this case Henry Forbes testified that, before anything was said by either him or Dunaway about arresting defendant, he (Forbes) told defendant that they had come after those things; that defendant replied they could not get them; and that he (Forbes) then told defendant that they would 'take the goods, and him too,' and proceeded to arrest defendant and handcuff him, and, while he (Forbes) held defendant, Dunaway executed the writ of sequestration." We do not think this testimony is admissible. It was permissible to prove the gravamen of the offense charged in the information; but, on the question of resistance of the warrant of arrest, if appellant subsequently resisted the execution of the civil process,—the writ of sequestration,—this would be a separate and distinct offense, in no way connected with, illustrative of, or tending to prove any issuable fact in the case then on trial. The learned judge should not have permitted the introduction of this testimony.

Bill No. 3 complains that appellant offered in evidence bond and affidavit for sequestration, for the purpose of showing that same was insufficient, invalid, and void, and that the writ of sequestration, execution of which it was charged defendant resisted, was illegal, invalid, and void. On objection of the state, it was excluded. We do not think the

court erred in this ruling. As indicated above, the writ of sequestration, put in its strongest light in favor of appellant, was simply voidable on its face. The officer had a right to execute the same, being from a court of competent jurisdiction, under the proper signature of the justice of the peace. We note that the information charges appellant did unlawfully and willfully prevent the execution of certain process, etc. Upon another trial the charge of the court should follow this allegation. For the error discussed in admitting the testimony complained of, the judgment is reversed, and the cause remanded.

PERRY v. STATE.

(Court of Criminal Appeals of Texas. March 6, 1901.)

CRIMINAL LAW—THEFT—MONEY—DESCRIPTION—INFORMATION—VARIANCE—EVIDENCE—CONFESSION—WARNING.

1. Under an information for theft, describing the property stolen as "lawful money of the United States," proof of a theft of silver certificates or national bank notes was a variance.

2. A warning to a prisoner that anything he stated could be used against him "or for him" is not in accordance with law, and a confession thereafter should not be admitted.

3. Though a warning to a prisoner that anything he stated could be used against him, given the day before an alleged confession, was sufficiently near in point of time, it should have been repeated, where the prisoner was a mere boy.

Brooks, J., dissenting.

Appeal from Navarro county court; J. F. Stout, Judge.

Ben Perry was convicted of theft, and appeals. Reversed.

Ballew & Ballew, for appellant. D. E. Simmons, Acting Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of theft of money under the value of \$50, and his punishment assessed at imprisonment in the county jail for 60 days; and he prosecutes this appeal.

Appellant assigns as error a variance between the proof and the allegations as to the description of the money in the information. The information describes the property as "twenty-nine dollars, same being lawful money of the United States of America of the value of twenty-nine dollars." The proof showed four five-dollar bills, silver certificates or national bank notes, and seven one-dollar bills, silver certificates, and one two-dollar bill, also described by the witness as a silver certificate. It has been held in a number of decisions that the allegation "lawful money of the United States" means coin or treasury notes made a legal tender by act of congress. We are not advised of any case holding that under our statute with reference to theft of money national bank bills or silver certificates are

regarded as money. See *Otero v. State*, 30 Tex. App. 450, 17 S. W. 1081; *Menear v. State*, Id. 475, 17 S. W. 1082; *Dukes v. State*, 22 Tex. App. 102, 2 S. W. 590; *Thompson v. State*, 35 Tex. Cr. App. 511, 34 S. W. 629; *Warren v. State*, 29 Tex. 369; *Wofford v. State*, 29 Tex. App. 536, 16 S. W. 535. In our opinion, there was a variance between the allegations in the information and the proof offered. It occurs to us it would have been a very easy matter for the pleader, in drawing the information, to have described the money more fully. The character of bills could have been set forth, and the number and denominations of same. When this is practicable, it should always be done; and, when not, there should be an allegation in the information giving an excuse for the want of this particularity of allegation.

Appellant objected to his alleged confession introduced in evidence by the state through the witness Martin Clark, on the ground that he had not been warned by Clark. However, the bill shows that he had been warned by the city marshal, Cole, on the day previous. The warning, though, was not in accordance with the statute. He was told by the officer that anything he stated "could be used against him or for him." In *Barth v. State*, 39 Tex. Cr. R. 351, 46 S. W. 228, it was held that the confession need not be made to the party giving the warning, but it must be within such reasonable time thereafter as to indicate defendant remembered and was impressed with the warning given, and made the confession under it, comprehending its legal effect, to wit, that it could be used against him. The warning given here was sufficiently near in point of time, but, appellant being a mere boy, it occurs to us the warning should have been repeated, so as to have put him on guard with reference to his rights. More than this, the warning was not in accordance with the law. *Guinn v. State*, 39 Tex. Cr. R. 257, 45 S. W. 664; *Unsell v. State*, 39 Tex. Cr. R. 330, 45 S. W. 1022.

We also think the testimony given by Clark as to what Claud Maddox told him was clearly hearsay. It is not necessary to notice other assignments. The judgment is reversed, and the cause remanded.

BROOKS, J. I think the information is correct, and there is no variance.

CAMP v. STATE.¹

(Court of Criminal Appeals of Texas. Feb. 13, 1901.)

INTERSTATE COMMERCE—OCCUPATION TAX—
CONSIGNMENT OF GOODS—INDEPENDENT
CONTRACTS—RESIDENT PARTNERS.

Defendant took orders to erect lightning rods, and the rods and equipments were ship-

ped to him from another state, but he often completed work on contracts immediately after making them, and before he could have received the goods from the consignor. Under defendant's contract with the consignor he had a salary and shared in the profits, he paying all freights and expenses of the business. The liability of the consignor was limited to the acts of the defendant in furnishing the goods on orders taken by him. *Held*, that defendant was either an independent dealer or a partner residing and doing business in the state, and was not engaged in interstate commerce, but was liable to the occupation tax.

Appeal from Erath county court. L. N. Frank, Judge.

T. S. Camp was convicted of pursuing an occupation without a license, and appeals. Affirmed.

W. J. Oxford and Martin & George, for appellant. D. E. Simmons, Acting Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted for pursuing the occupation of a dealer in lightning rods without having paid the state and county tax due thereon and procuring a license to pursue such business in Erath county, and his punishment assessed at a fine of \$54, the amount of the state and county taxes for one year. There is no bill of exceptions in the record, and appellant's only contention is that under the facts proven he was pursuing an occupation protected as interstate commerce, and so not liable to a tax. In support of his contention he cites us to the cases of *Talbutt v. State* (Tex. Cr. App.) 44 S. W. 1091, and *French v. State* (Tex. Cr. App.) 58 S. W. 1015. In both of said cases we endeavored to apply the rule laid down by the supreme court of the United States as to what constitutes interstate commerce to the facts as presented. In the latter case we laid down the rule, as extracted from *Lelsy v. Hardin*, 135 U. S. 100, 10 Sup. Ct. 661, 34 L. Ed. 128: "That it is only after the importation is completed, and the property imported has mingled with and becomes a part of the general property of the citizens of the state, that its regulations can act upon it." In that case the party was dealing in organs, and we held that the organ was protected, not only until its arrival within the state into the custody of the agent of the foreign company, but that interstate commerce protected it while the agent of the foreign company carries it around with him, and until he finds a purchaser, and then sells and delivers it to such purchaser. This is going as far as we are willing to extend the rule in its application to interstate commerce, and we believe is going to the extreme limit as laid down by the supreme court of the United States. This case, however, it occurs to us, goes much further than that. Here, while appellant took orders from the citizens of this state to erect lightning rods upon their buildings, and so took them from a number of citizens of Erath

¹ Rehearing denied March 20, 1901.

county, yet all the goods—i. e. the lightning rods and their equipments—appear to have been shipped direct to him in consignments; and he did the work of erection himself on the houses, or had it done at his expense, furnishing the wagons, etc. Not only so; he is shown in a number of instances to have used material for erecting the lightning rods on houses within so short a time after taking the orders as that opportunity was not afforded to have the material sent from St. Louis before the work was begun and finished. In one instance he began the work in three days after making the contract, when the proof showed that it would take about ten days to get the consignment by freight (as he shipped by that mode) from St. Louis. In another instance he began the work in an hour and a half after making the contract with the party to erect a lightning rod for him. In another instance he appears to have made a trade with a party, taking his old lightning rod as a part of the consideration when the terms of his contract with Cole Bros., of St. Louis, gave him no such authority. Moreover, as a part of his contract with parties, he erected said lightning rods, which was done by an expert furnished and paid by him; and it is shown in the contract between him and Cole Bros. that he was authorized to make sale, they giving him a margin predicated on the catalogue of list prices; that he was not only to get a salary, but was interested in the business, and shared the profits with Cole Bros. As stated before, all the goods were shipped to him, and he paid all the freights and expenses of the business in this state. While the notes were taken in the name of Cole Bros. in cases where he did not make a cash sale, he had an interest in these notes, i. e. as we understand the arrangement between them, he was first to pay Cole Bros. net one-fourth the price of the goods as per their printed list, and all the balance of the proceeds, whether money or notes, was to go to the said agent (appellant) as his commission for taking orders, delivering and erecting the lightning rods, etc., and for all other expenses connected with the business of said agency; and, in addition thereto, he was authorized to receive a salary, the amount of which is not stated. The contract further limits the liability of Cole Bros. only to the acts of the agent in furnishing lightning rods, fixtures, and ornaments on orders taken by him. It is further provided that as to the notes they shall be sent by the agent to Cole Bros., but in case of loss or damage Cole Bros. shall not become liable to said agent for his interest in the same. It is provided further—evidently in order to secure Cole Bros. for goods furnished to appellant—that they should have at all times in their possession notes in double the amount which may be due from such agent. As we construe this agreement or contract, it was evidently in-

tended that appellant should carry on the business of dealing in lightning rods and erecting them on the houses of all persons with whom he could make contracts. He was to do the work of carry the lightning rods from place to place and set them up at his own expense, and was to share in the profits arising, only accounting to the foreign concern for one-fourth of their list price for such goods; and all the balance over this was to go to appellant. If this arrangement did not constitute appellant an independent dealer in the lightning-rod business, then it certainly constituted him a partner with the foreign house, he at the time residing and doing a lightning-rod business in this state. It looks to us very much as if the arrangement was concocted and entered into for the purpose of evading the occupation tax, which applies indiscriminately to all persons engaged in dealing in lightning rods within this state. We do not believe appellant was engaged in interstate commerce, or that the rules of law applicable thereto will protect him against the payment of the tax. The judgment is accordingly affirmed.

GRAMMER v. STATE.¹

(Court of Criminal Appeals of Texas. Feb. 21, 1901.)

ASSAULT—PRELIMINARY EXAMINATION—EVIDENCE OF DEFENDANT ADMISSIBILITY—CONVERSATIONS PRIOR TO ASSAULT—COMMUNICATION TO DEFENDANT—NECESSITY—CONVICTION AS PRINCIPAL—INSTRUCTIONS.

1. During an investigation of an assault by a magistrate, defendant was called as a witness, and, after a partial examination, the prosecuting attorney, suspecting that defendant was implicated in the crime, warned him of the incriminating character of his testimony; but defendant continued to testify, and, after the whole of his evidence was read over to him, he signed it. *Held*, that such testimony was admissible against defendant on a charge of having committed the assault.

2. Where defendant was charged with an aggravated assault on D., evidence of conversations between the witness and D., reflecting on the character of a sister of defendant's wife, and which occurred two years before the alleged assault, was not admissible in mitigation of the offense, in the absence of proof that the conversations were communicated to defendant prior to the assault.

3. Where the court charged fully as to the law of principals, and that, to be convicted, it must be shown that accused was a principal, it was not error to refuse to charge that a mere knowledge on defendant's part that an assault was going to be committed would not render him a principal.

Appeal from Parker county court; I. N. Roach, Judge.

A. C. Grammer was convicted of an aggravated assault, and he appeals. Affirmed.

A. B. Flanary and D. E. Simmons, Acting Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of an aggravated assault, and his punish-

¹ Rehearing denied March 20, 1901.

ment assessed at a fine of \$50; hence this appeal.

Appellant objected to the statement of A. C. Grammer taken in an examining trial at Mill-sap. It appears that prosecutor, Harve Dick, was assaulted at night, at the town of Mill-sap, just after he got off the train. His assailant was not known, and subsequently the magistrate proceeded, under article 941, Code Cr. Proc., to make an investigation, in order to ascertain who committed the assault. Among others, he had appellant, A. C. Grammer, before him, and examined him. His testimony was reduced to writing, signed, and sworn to by him. This, in connection with the testimony of Holt (the magistrate) and Flanary (the county attorney), was introduced against appellant on the trial of this case. The witness Flanary stated that when defendant was first introduced before the magistrate he was not warned; that, after he had testified awhile, and from the nature of his testimony he suspected that witness (appellant) was implicated in the assault, he then warned him; that the testimony of appellant then proceeded, and, after it was completed, he read over the statement to him, and corrections were made as suggested by the witness, and said witness then signed it. The testimony introduced was of a criminal character against appellant. The question is, was it admissible under the predicate laid? the rule being that testimony so taken is not admissible, although the party may not be arrested, if the party interrogated is suspected of the offense, and knows he is suspected, unless he has been warned in advance. *Wood v. State*, 22 Tex. App. 431, 3 S. W. 336; *Gilder v. State* (Tex. Cr. App.) 33 S. W. 867. This seems to be an interpolation on our statute, or, rather, an exception outside of the statute, as the statute itself relates only to confessions made while under arrest, and requires that, before such confession shall be received in evidence against a party, due caution must be given. In *Wood's Case*, supra, the condition of the party under such circumstances is treated as tantamount to an arrest, and that a confession under such circumstances is not voluntarily made in the absence of a statutory warning. However, in this case a warning was given, though this was pending the examination of appellant as a witness. At what stage of the proceeding is not made manifest, but appellant was warned before the conclusion of his testimony; and, after being warned, instead of refusing to further testify, he appears to have continued his testimony, and all that had gone before was read over to him, corrections were made, and the witness certified to it. Now, it occurs to us that the witness, after being warned, reiterated all the testimony that had gone before; thus ratifying his testimony after the warning given. It has been held that, where more than one confession has been made, though the first may be inadmissible, the subsequent one may be admitted. *White*

v. State, 32 Tex. Cr. App. 625, 25 S. W. 784; *Walker v. State*, 9 Tex. App. 38; *Id.*, 7 Tex. App. 245. And the same principle has been applied in case of dying declarations. *Bryant v. State*, 35 Tex. Cr. App. 394, 33 S. W. 978, 36 S. W. 79. We accordingly hold that the testimony was admissible.

The court properly excluded the testimony of the witness Pistole as to conversations between Pistole and the prosecutor, Harve Dick, some two years before the alleged assault, in regard to the sister of the wife of appellant. The witness could not be definite as to when he repeated these conversations to appellant. His recollection was that he told him after the difficulty, and he thought that he told him before the difficulty. Aside from this, there was no effort on the part of appellant to prove that the assault was committed at their first meeting after he heard of the reflections on his wife's sister. His defense was that he did not commit the assault at all; that he was not present. More than this, we do not understand that our law makes an assault, which would otherwise be an aggravated assault, a simple assault, because of insults towards a female relative, communicated prior to the assault. The statute only reduces a homicide on this account from murder to manslaughter. It is not necessary, however, to decide as to the admissibility of this character of evidence in mitigation of the offense, inasmuch as the bill of exceptions does not show the admissibility of the testimony as heretofore stated; that is, it does not show that the insult was communicated to appellant prior to the assault, much less does it show that it was on the first meeting between appellant and prosecutor after the communication to him. What we have said applies with more force to the testimony offered by appellant through the witness Will Little on the same subject.

What we have heretofore said with reference to the admissibility of the statement of appellant taken before the magistrate disposes of the charge asked on that subject by appellant. As stated, the testimony was admissible, and there was no testimony controverting the evidence of the county attorney, Flanary, given on this subject.

Nor do we believe that the court was required to give a charge, as requested by appellant, to the effect that mere knowledge on the part of appellant that an assault would be committed did not render him a principal in the offense. The court sufficiently instructed the jury on the doctrine of principals, and required the jury to believe beyond a reasonable doubt that appellant acted as a principal in committing the assault on the prosecutor, before they could find him guilty,—having previously defined to the jury the law of principals.

There is nothing in the contention of appellant that the county attorney improperly alluded to the failure of appellant to prove certain facts by his wife. This is permissible.

We have examined the record carefully, and, in our opinion, the evidence fully supports the verdict, and the judgment is affirmed.

DOUTHITT v. STATE.¹

(Court of Criminal Appeals of Texas. Feb. 21, 1901.)

INTOXICATING LIQUORS—INDICTMENT—LOCAL OPTION—INSTRUCTIONS—APPEAL.

1. An indictment for violating the local option law, which charges that the election for local option in a certain precinct was held in the precinct, and alleges that a certain subdivision was a portion of such precinct, is not duplicitous.

2. An instruction that whisky is intoxicating liquor is proper in a prosecution for violating the local option law.

3. Error in refusing a charge requested by the accused cannot be reviewed in the absence of a statement of facts.

4. Argument of counsel in a criminal case cannot be considered on appeal in the absence of a bill of exceptions.

Appeal from Somervell county court; J. G. Adams, Judge.

A. L. Douthitt was convicted for violating the local option law, and appeals. Affirmed.

D. E. Simmons, Acting Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted for violating the local option law, and his punishment assessed at a fine of \$100 and 20 days' imprisonment in the county jail.

There is no statement of facts in the record. We have carefully inspected the indictment, and do not think the court erred in overruling the motion to quash the same. While the indictment does state "that an election was held to determine whether or not the sale of intoxicating liquors should be prohibited in said county in justice precinct No. 1 thereof, and in the following subdivision of said precinct, to wit," this is not duplicitous because it charges that the election was held both for the precinct and the subdivision thereof. It does not do so. It merely alleges that the subdivision was a portion of the justice precinct. The indictment was good in other respects, the venue being properly laid in the subdivision or school district.

We cannot review the exceptions reserved in the motion for new trial to the refusal of the court to give certain requested instructions and the action of the court in giving certain instructions. We must assume that there was no question as to the legality of the election for local option, and that this was not controverted; and, consequently, the court properly instructed that local option had carried in said school district on the day mentioned.

The court properly instructed the jury that whisky was an intoxicating liquor.

The requested charge with reference to

Douthitt merely acting as the agent of Latham cannot be reviewed in the absence of the statement of facts, inasmuch as we cannot determine that same was authorized. Nor are we able to determine, in the absence of a bill of exceptions, as to whether or not counsel for state used improper and prejudicial remarks to the jury. However, we note, in the charge of the court, that the jury were instructed to disregard certain remarks attributed to the state's counsel, and, for aught that appears, this was entirely proper, and cured any possible error that may have occurred in that respect. No error appearing in the record, the judgment is affirmed.

JACKSON v. STATE.¹

(Court of Criminal Appeals of Texas. Feb. 21, 1901.)

HOMICIDE—APPLICATION FOR CONTINUANCE—REFUSAL—AGGRAVATED ASSAULT—INSTRUCTION—EVIDENCE TO SUPPORT.

1. Defendant, who was charged with an assault with intent to murder, applied for a continuance on account of the absence of D., who defendant alleged was an eyewitness of the assault. Two eyewitnesses, in naming the parties present, made no mention of D., and the occupants of the house where the assault occurred did not refer to D. in their testimony. Held, that it was not error to refuse a new trial on account of the failure to continue the case.

2. The trial court certified that defendant testified that he found S. in bed with his wife, and that she was submitting to S.'s embraces, and charged that, if defendant found S. in bed with his wife, and that she was submitting to his embraces, and thereby there was produced in defendant's mind such anger as would render the mind of one of ordinary temper incapable of cool reflection, and defendant thereupon unlawfully cut his wife, he should be found guilty of an aggravated assault. Held not objectionable as not authorizing such verdict under the exact evidence, which was that S. was in bed with defendant's wife, and they were close together.

Appeal from district court, Harris county; A. C. Allen, Judge.

Jim Jackson was convicted of an assault with intent to murder, and he appeals. Affirmed.

W. F. Tarver and E. J. Marks, for appellant. D. E. Simmons, Acting Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of an assault with intent to murder his wife, and his punishment assessed at two years' confinement in the penitentiary. He sought a continuance, which being refused exception was reserved. The absent witness was Carrie Davis, by whom he expected to show that she was present at the time of and saw the entire difficulty; that when he entered the room where his wife resided it was for the purpose of stopping improper relations between Charles Smith and his wife; that Smith undertook to eject appellant, us-

¹ Rehearing denied March 20, 1901.

¹ Rehearing denied March 20, 1901.

ing violence, attacking defendant with a knife, club, and chair, cutting defendant, and placing him in fear of his life and great bodily injury; that his wife attempted to aid Smith in this attack, and in doing so inflicted wounds upon him; that appellant, in striking at Smith, accidentally cut his wife. On the trial, appellant testified: That he went to his wife's room, and found her and the preacher, Smith, in bed together, Smith having off his pants and shoes. This aroused his anger, and he immediately made an attack upon Smith. That his wife cut him, and called Bessie Jefferson, who grabbed him from behind, and together sought to push him out of the room. That, while trying to get to the preacher, Bessie Jefferson hit him over the head with an ax handle, and knocked him down, and his wife cut him on the arm and hand with a butcher knife. That he started towards the preacher, who was then putting on his pants and shoes. That the preacher grabbed the chair, as if to strike. That he did not know his wife was cut. He did not try to cut her. That he was just trying to cut the preacher. As soon as dressed, the preacher ran away, and he followed him. Appellant's wife and Bessie Jefferson both testified on the trial. The record before us shows these were the three persons present; i. e. defendant, Bessie Jefferson, and appellant's wife. The name of Carrie Davis does not occur in the testimony, and in mentioning those present, or who were eyewitnesses to any portion of the transaction from beginning to end, none of them mention the name of Carrie Davis. Nor does a single witness except appellant—either those at the house or at the saloon, some 150 feet away, to which Dicey Jackson fled for protection—mention the presence of the preacher or Carrie Davis, nor does appellant mention Carrie Davis. We do not think, under this statement, the court erred in refusing to grant a new trial on account of the failure to continue the case. From this statement it is apparent that Carrie Davis was not present at the time and place of the difficulty. There was no error in this.

Appellant reserved an exception to that portion of the court's charge as follows: "If defendant found the man testified about as the preacher in bed with defendant's wife, and she was submitting to his embraces, if by reason thereof there was produced in the mind of defendant such a degree of anger, rage, resentment, or terror as would render the mind of one of ordinary temper incapable of cool reflection, and if in such state of mind he unlawfully cut said Dicey Jackson, then find defendant guilty of aggravated assault." This was excepted to on the ground that the issue was submitted on the theory that she was submitting to the embraces of the preacher, Smith. The court certifies, in connection with this bill, "that defendant testified 'he found the preacher in bed or on the bed with defendant's wife, and the latter

submitting to his embraces.'" The court submitted this charge upon the theory that this was sufficient adequate cause to reduce to manslaughter had a killing occurred. The objection by appellant is that the court predicate the charge upon the idea that his wife was found in the embraces of the preacher, when the facts show they were in bed together, and close together. The court certifies the facts in this connection against him. The charge, if followed by the jury, would have reduced the offense from assault to murder to aggravated assault. The testimony is sufficient to support the conviction. The judgment is affirmed.

MURPHY v. STATE.

(Court of Criminal Appeals of Texas. March 6, 1901.)

APPEAL—RECOGNIZANCE—SUFFICIENCY.

A recognizance which fails to state the amount of the fine as required by Code Cr. Proc. art. 887, is insufficient to support an appeal.

Appeal from Fisher county court; Jesse Wright, Judge.

Jesse Murphy was convicted of an assault, and appeals. Appeal dismissed.

L. B. Allen, for appellant. D. E. Simmons, Acting Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of an assault, and his punishment assessed at a fine of five dollars; hence this appeal. The assistant attorney general has filed a motion to dismiss the appeal because the amount of the fine is not stated in the recognizance, as required by article 887, Code Cr. Proc. An inspection of the record shows that this motion is well taken, and the appeal is dismissed.

Ex parte MESSER.

(Court of Criminal Appeals of Texas. March 6, 1901.)

HABEAS CORPUS—APPEAL—DISMISSAL.

Where one arrested resorted to habeas corpus to procure bail, and pending an appeal by him from a decision on the writ he was indicted, convicted, and sentenced, his appeal will be dismissed on motion.

Appeal from district court, Bell county; John M. Furman, Judge.

Habeas corpus proceedings by J. B. Messer. From a judgment remanding him to custody, he appeals. Dismissed.

Geo. W. Tyler, Jas. H. Ferguson, J. B. McMahon, and Banks & Cochran, for appellant. W. W. Hair, Dist. Atty., and D. E. Simmons, Acting Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was arrested for murder, and resorted to the writ of habeas corpus for the purpose of securing bail. Upon his trial under the writ he was re-

manded to custody, and prosecutes this appeal. Pending the appeal he has been indicted and convicted of murder in the second degree, and his punishment assessed by the jury at 20 years' confinement in the penitentiary. Under this state of case, motion is made to dismiss this appeal. The motion is well taken, and the appeal is dismissed.

GULF, C. & S. F. RY. CO. v. SOUTHWESTERN TELEGRAPH & TELEPHONE CO.

(Court of Civil Appeals of Texas. March 18, 1901.)

EMINENT DOMAIN—TELEPHONE COMPANY—FOREIGN CORPORATION—POWER TO CONDEMN RIGHT OF WAY—STATUTES—APPLICATION—OCCUPATION PENDING APPEAL.

1. Rev. St. art. 745, provides that on compliance with the law the secretary of state shall issue a permit to a foreign corporation to do business in the state, and that such corporation, on obtaining the permit, shall have all the rights conferred on corporations organized under the laws of the state. *Held*, that a foreign telephone company, after having obtained the required permit from the secretary of state, was on the same footing as a domestic corporation, and hence could condemn a railroad company's land for its use, under Rev. St. arts. 698, 699, and article 642, subd. 8, authorizing telegraph corporations to condemn private property for its use.

2. Act April 15, 1899, provides that, pending litigation in condemnation proceedings, the corporation may enter on the property sought to be condemned after award if defendant deposit double the amount of damages awarded, pay all the accrued costs, and deposit in court a bond for further costs that may accrue. *Held* that, as this act affected the remedy, and not the action, it applied to condemnation proceedings commenced before and pending at the time of the passage of the act, and hence a telephone company, whose condemnation proceedings were commenced before the passage of the act, could enter on the land of a railroad company pending an appeal from the judgment assessing damages, after having deposited double the amount of damages assessed, paying the accrued costs, and depositing a bond to secure the costs still to accrue.

Appeal from district court, Lamar county; E. S. Chambers, Judge.

Action by the Gulf, Colorado & Santa Fé Railway Company against the Southwestern Telegraph & Telephone Company. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

This is a suit by the appellant, the Gulf, Colorado & Santa Fé Railway Company, against the Southwestern Telegraph & Telephone Company, for injunction, filed November 28, 1899, to enjoin and restrain the defendant from entering upon plaintiff's right of way to construct a telephone line, pending appeal by plaintiff from the award of commissioners condemning the right of way on plaintiff's right of way for the purposes of the telephone line between Paris and Ladonia, Tex. The petition shows that prior to the suit defendant had instituted proceedings for condemnation, and commissioners had been appointed for condemnation, and re-

turned their award of damages. The petition also shows that the commissioners had made their report to the county judge of the amount of damages assessed by them on the 26th day of June, 1899, assessing and awarding damages for the 30 miles at \$150, and the railway company appealed July 3, 1899, to the county court. Defendant deposited \$300, double the amount of the award, in the county court of Lamar county, as required by the act of April 15, 1899, paying at the same time all costs of condemnation proceedings up to that date, and at the same time made bond, as required by law, to pay further costs that might be adjudged against it. The appeal to the county court is still pending. The petition shows that the railway company appeared before the commissioners of condemnation, and made objection to the application for condemnation; and the commissioners afterwards, on the 23d day of June, 1899, heard the application and the objections thereto, condemned for the purposes asked, and made the award of damages. The petition also avers that any statute of the state which authorizes the entry upon its right of way upon deposit of double the amount of the award of the commissioners is retroactive, and contrary to sections 16 and 17 of article 1 of the state constitution, and is, therefore, of no effect. The petition also sets up that it appears from the application to condemn that the telephone company is not incorporated under the laws of this state, and not authorized to condemn property for its use; but it is not alleged that defendant is not authorized by the state by permit to do business in the state. The facts set up are verified by affidavit. Defendant filed general and special exceptions to the petition and a sworn answer setting up that it had a permit from the state to do business therein. The court sustained special demurrers to the petition for injunction, and, plaintiff declining to amend, judgment was rendered dissolving the temporary injunction and dismissing plaintiff's bill, from which plaintiff has appealed.

H. D. McDonald and J. W. Terry, for appellant. McLaurin & Wozencraft, for appellee.

COLLARD, J. (after stating the facts). It is settled law in this state that a foreign corporation, created for the purpose of erecting and maintaining telegraph and telephone lines, having obtained from the state a permit to do business, has the right of eminent domain for its right of way; and the court below did not err in sustaining appellee's exception to the petition claiming that appellee had no such power. The sworn answer of defendant (appellee) that it had such permit was a complete defense to the averment that it had no authority to do business in this state. The statute (Rev. St. art. 745) provides that upon compliance with the

law the secretary of state shall issue a permit to a foreign corporation to do business in the state, and that "such corporation, on obtaining such permit, shall have and enjoy all the rights and privileges conferred by the laws of this state on corporations organized under the laws of this state." So that we conclude that a foreign corporation with a permit to do business in the state is upon the same footing as a corporation created by the legislature. We also believe that telephone lines, under our statutes, have the same right of eminent domain to condemn lands for their use as are granted to telegraph lines. The supreme court of this state in the case of *San Antonio & A. P. Ry. Co. v. Southwestern Telegraph & Telephone Co.* (Tex. Sup.) 55 S. W. 117, construing our statutes (Rev. St. arts. 698, 699; Id. art. 642, subd. 8), maintains the doctrine that the statute authorizing condemnation of land for telegraph lines includes telephone lines.

2. We believe there can be no doubt that, after commissioners of condemnation have made their report of award to the county court of damages assessed for property taken, as in this case, paying all accrued costs, and double the amount of damages is deposited in the court, and the bond required by statute by the defendant, the company may proceed to construct and operate its lines, notwithstanding an appeal has been taken. It is provided by act of the legislature approved April 15, 1899, the legislature having adjourned May 27, 1899, that, pending litigation in condemnation proceedings, the corporation may enter upon the property sought to be condemned after award, if defendant deposit the amount of damages awarded, subject to the order of defendant paying all costs awarded, and deposit in court a further sum equal to the amount of damages awarded, and execute bond to pay further costs that may accrue. Defendant complied with the act in all particulars on the 23d day of November, 1899, the foregoing act being in full force. This suit for injunction was not brought until November 28, 1899. These facts appearing in plaintiff's petition, the court, acting on defendant's demurrer, correctly decided that it was shown that defendant had the right to enter upon the right of way of plaintiff for use as a telephone line, and that the act of 1899 controlled the question at issue. *Texas Midland R. Co. v. Southwestern Telegraph & Telephone Co.* (Tex. Civ. App.) 58 S. W. 152; *Odum v. Garner*, 86 Tex. 376-378, 25 S. W. 18.

The contention that the act of 1899, applied to the facts of the case, would be retroactive, is not believed to be correct, as will be seen by the authorities last above cited. The statute affected the remedy and acted on the case then pending, nothing appearing in the act excepting proceedings then pending. The appellee, by complying with the act of 1899, could invoke its protection, though the original proceeding was com-

menced prior to its enactment. We find no error in the judgment of the lower court, and it is affirmed. Affirmed.

WATSON v. BOSWELL et al.¹

(Court of Civil Appeals of Texas. Feb. 13, 1901.)

LANDLORD AND TENANT—ILLEGAL DISTRAINT—DAMAGE THEREFOR—LIABILITY OF LANDLORD—FAILURE TO ESTABLISH GROUNDS—INSTRUCTIONS—EVIDENCE—ADMISSIBILITY—COSTS.

1. A provision in a lease that the landlord shall not be liable for damages arising from any future distraint is against public policy and void, since, if valid, it would render the court powerless to remedy wrongs done to the tenant.

2. The failure to establish all the grounds alleged by a landlord in his application for a distress warrant will not render him liable in damages to the tenant when he establishes one of the grounds.

3. A landlord's application for a warrant of distress alleged that a certain amount of rent was due and unpaid, and that the tenant had removed agricultural products grown on the premises, and that he was about to remove other products grown thereon. The court instructed on an issue of damages, resulting from the illegal issuance of the warrant, that, if some of the amount of debt alleged in the application was found not to exist, the warrant was wrongfully sued out as to such amount, and would render the landlord liable in damages. *Held*, that the instruction was erroneous, since it authorized a recovery of damages, even if the other grounds for the issuance of the warrant existed as alleged.

4. Where the attention of the court is called to an erroneous instruction by a requested instruction, it is error to fail to correct such error by a proper instruction.

5. Where an application for a writ of distress alleges rent due as a cause therefor, and the evidence shows that only a part thereof is due, the tenant is not entitled to damages for the distraint of the whole crop, but only to the damages sustained for the distraint of an excessive amount caused by the false allegation.

6. A letter written by the attorney of a tenant to the landlord, stating that the tenant is willing to consider any reasonable proposition of settlement, is not admissible in an action by the landlord against such tenant.

7. Parol evidence is admissible to show that a note sued on is without consideration.

8. Where the defendant testifies that he paid a certain sum to W. for the plaintiff as a payment on the note sued on, an answer filed by plaintiff, in an action by W. against him, stating that defendant paid such sum to W. for plaintiff, is admissible to corroborate defendant.

9. Parol evidence is admissible to show that a bill of sale, absolute on its face, was executed to secure the grantee by reason of the grantor having sold other mortgaged property securing such debt.

10. Evidence of loss of time by a tenant and his family as the result of an illegal distraint is admissible as bearing on the question of exemplary damages.

11. The value of time lost and money expended in prosecuting an action of replevin to obtain possession of property wrongfully distrained is an element of damages in an action therefor.

12. Parol evidence that certain books of

¹ Rehearing denied March 13, 1901.

count show a certain indebtedness is a violation of the best-evidence rule, and inadmissible.

18. Where an amendment to a petition, stating a cause of action within the jurisdiction of the court, only changes the original by omitting a part of the amount claimed therein, it was an abuse of discretion to tax all the costs up to the time of the filing of the original petition to plaintiff.

Appeal from Ellis county court; J. E. Lancaster, Judge.

Action by S. H. Watson against R. C. Boswell and others. From a judgment in favor of the defendants, the plaintiff appeals. Reversed. Motion for rehearing overruled.

The appellant, Watson, claiming certain indebtedness accruing to him from the appellee Boswell, growing out of the relation of landlord and tenant existing between the parties, caused the issuance and levy of distress warrants upon the property of the latter, upon which the former claimed a landlord's lien to secure such indebtedness. After the writs, which emanated from the justice's court, were levied, and the property distrained, as it was, replevied by Boswell, and the papers in the distress proceedings filed in the office of the county-clerk, Watson filed suit in the county court against Boswell to recover the alleged indebtedness, and to foreclose certain alleged mortgage liens on some of the property, as well as his alleged landlord's lien on all, setting up also the issuance of the distress warrants, the seizure of the property by virtue thereof, its replevy by the defendant, and asked judgment on the replevy bond against the principal and the sureties thereon. The defendant pleaded failure of consideration of one of the notes, evidencing a part of the indebtedness; that one of the mortgages alleged by plaintiff to have been made by him to secure a part of the latter's demand was a forgery; matters in offset; and, in reconvention, actual and exemplary damages for wrongfully and maliciously suing out the distress warrants. D. W. Oppenheimer and A. E. Klersky, sureties on Boswell's replevy bonds, answered, denying any liability. Klersky then, by answer in the nature of a plea in intervention, averred that he had a superior mortgage lien to the liens claimed by plaintiff on two certain gray horse mules, and on the crop of cotton and corn grown by Boswell, to secure him in an indebtedness in the sum of \$178; for which sum he asked judgment, together with a foreclosure of his alleged mortgage. The case was tried before a jury, who found a verdict in favor of Boswell on his counterclaims, and plea in reconvention against the plaintiff for \$585.78, and in favor of the latter against Boswell for \$526.71. They then found the difference between plaintiff and defendant to be \$59.24, in favor of the latter, less \$20.75, with 6 per cent. interest from May 29, 1899. The jury also rendered a verdict in favor of Klersky on his plea in intervention, and for a foreclosure of his mortgage lien as against both plaintiff and defendant. From the judgment

rendered on the verdict against him, Watson has appealed, and has assigned errors which relate both to the judgment in favor of Boswell and to the one in favor of Klersky.

C. M. Supple, for appellant. Templeton & Harding, for appellees.

NEILL, J. (after stating the facts). The contract between Watson and Boswell, which established their relation as landlord and tenant, provided that, in the event the former should institute suit for distraint against the latter, he should be free from all damages to appellees' crops, from whatever cause claimed, or from any personal liability arising therefrom in any wise whatsoever. In view of this provision of the contract, the appellant asked the court to instruct the jury that appellee could not recover either the actual or exemplary damages sued for. The court's refusal to give such instruction is assigned as error. In order for a party to obtain rightfully the issuance of a warrant in this state to distrain the property of another, certain facts must exist which the statute requires the party applying for such process to verify by his affidavit. If the facts exist, and are verified in this manner, however much the party against whom it issued may have been damaged by the distraint of his property, he cannot recover either actual or vindictive damages. But if the facts which authorize the issuance of this extraordinary and oft-times harsh process do not exist, the party, to obtain a distress warrant, must necessarily swear falsely, and, in procuring the writ by this means, violates the law, and renders himself liable for actual and vindictive damages, as well as to a criminal prosecution. So it is seen the clause in the contract upon which the refused charge is predicated, as far as the agreement between the parties can, authorizes the wrongful issuance and abuse of judicial process, and exempts the party guilty of such wrong from such damages to the injured party as flowing from such abuse; thus closing the courts of justice to the oppressed, and granting immunity to the oppressor. The superior condition of the landholder to the tenant class gives the former such an advantage in making rental contracts that it is against public policy to allow the former to use such advantage by inserting such a provision in a contract of lease as authorizes oppression through process of the law, and, if enforced, renders the courts powerless to redress the wrongs flowing from such oppression. We think, therefore, that clause of the contract is void, as against public policy. *Loftus v. Maxey*, 73 Tex. 242, 11 S. W. 272; *Gillett v. Moody* (Tex. Civ. App.) 34 S. W. 35.

2. There are several statutory grounds for the issuance of a distress warrant. When more than one is properly alleged in the application for the writ, its procurement does not subject the applicant to an action for

damages if one of the grounds is established upon the trial, though the proof may fail to show the existence of the others. The grounds averred in this case were (1) that a certain amount of the debt sued for was due and unpaid; (2) that the appellee had removed from the rented premises a portion of the agricultural products raised thereon during the year 1899; and (3) that he was about to remove from said premises other products raised thereon during said year. The first and third, if the amount sued for is for rent, are statutory grounds. The second is not. Rev. St. art. 3240. The court, in its charge upon the issue of damages, in effect instructed the jury that, if some of the amount of the debt averred in the application to be due was not a subsisting indebtedness, the writ was, as to so much of the alleged debt as did not subsist, wrongfully sued out, and its wrongful issuance, on that account, would render the appellant liable for damages. This part of the charge is complained of as error for the reason that it, in effect, excluded from the jury the consideration of the other grounds alleged in the application for the writ, and authorized a verdict against appellant on the issue of damages, although the evidence should show the existence of both or one of the other grounds. There was evidence tending to prove that the third ground stated in the application was true. If, as we have said, it existed when the warrant was issued, such issuance was not wrongful nor unlawful, and no liability would be incurred by appellant. We think, therefore, the assignment is well taken. The appellant by special charges, which were refused, having suggested this error, the trial court should have corrected it by giving a proper charge upon the issue.

3. Besides, if the first had been the only ground alleged, and the evidence had shown a part of the debt alleged to be due for advances was in fact due, though a part of it was not, Boswell would not be entitled to damages by reason of the whole crop being distrained (for, in the event a part of the debt was due, appellant was entitled to levy upon all the property upon which he had a landlord's lien), but only to such damages as he may have actually sustained by reason of the wrongful averment in the application of a greater amount due for advances than was actually due when the warrants were applied for. *McKee v. Sims* (Tex. Sup.) 45 S. W. 564.

4. If it should be conceded that the letter written by Boswell's attorney to appellant, to the effect that appellee was ready to consider any reasonable proposition of settlement appellant might submit, were admissible in evidence, then it might be that the facts appellant offered to prove by his attorney, Mr. Supple, were admissible for the purpose of showing that appellee, notwithstanding the statement in the letter, had no intention of entertaining a proposition of compromise, and had such letter written merely for the pur-

pose of placing appellant in an unfavorable attitude before the jury upon the trial of the case. But upon no conceivable ground was such letter admissible in evidence. Its exclusion upon another trial will have no pretext for appellant's offering the testimony, the rejection of which is complained of in his seventh assignment of error.

4a. The testimony of Boswell, complained of in the eighth assignment of error, was admissible to show that the \$80 note sued on was without consideration. To show the true consideration, or the failure of consideration, of a promissory note, is not prohibited by the rule that it is not permissible to change or vary a written contract by parol testimony.

5. If, as is stated in appellant's ninth assignment of error, it appeared from the answer of appellee, admitted to have been filed with his knowledge and concurrence, in the suit of Bailey against him, that he admitted the \$45 credit given him in the account sued on by Bailey was paid the latter by Watson, then the answer would be admissible in corroboration of appellant's testimony that he paid that sum to Bailey for the appellee as a part of the consideration for one of the notes sued on, and in rebuttal of appellee's testimony denying the truth of such testimony. But no such admission or statement appears in such answer. Therefore the court did not err in refusing, upon the ground of irrelevancy, to admit it in evidence.

6. It was not error for the court to admit the evidence complained of in appellant's tenth assignment, to show that a certain bill of sale executed by appellee to appellant for three hogs was intended merely to secure the latter by reason of the former's having sold a cow upon which appellant had a mortgage. It is generally admissible to show that an instrument purporting upon its face to be an absolute deed is in fact merely a mortgage. Such testimony does not vary the written contract, but merely shows what it is in fact.

7. Evidence of the loss of time of appellee and family occasioned by the seizure of his crop may not have been admissible to show actual damages, because not the natural and proximate result of the seizure, but upon the issue of exemplary damages, we think, was admissible.

8. If the writs were wrongfully sued out, then the value of the time spent, and expenses incurred, by appellee in regaining possession of his property by replevying the same was a proper element of damages, and its admission was not error. *Suth. Dam.* (2d Ed.) § 512.

9. The testimony of Oppenheimer that Kiersky's books of account showed that Boswell was indebted to him, on open account, \$173, according to the books, inclusive of the \$75 note, was secondary evidence, and should not have been admitted.

10. Special charge No. 9, by which appellant asked the court to instruct the jury that

mortgage No. 52,979, on file in the office of the county clerk, was sufficient to put Klersky on notice that it secured all indebtedness, by note or otherwise, owed appellant by Boswell, on, prior to, or subsequent to October 24, 1898, and to convey notice that the mortgage covered all stock owned prior to, or subsequent to, that date, and that if the jury believed from the evidence that the two gray mules on which Klersky claimed a mortgage were owned by Boswell on or prior to October 24, 1898, and were so owned when the mortgage to Klersky was made, to find that plaintiff's mortgage was superior to Klersky's, was the law applicable to the facts, and should have been given.

11. The action of the court in taxing all the costs of the case up to the time appellant filed his original petition was a matter largely within the sound discretion of the trial court, but, if it could be made to appear that the original petition showed a good cause of action within the court's jurisdiction, then it would seem to us that, as the amendment simply omitted a part of the amount claimed in the original petition, the court went beyond sound judicial discretion in taxing such costs against appellant. On account of the errors indicated, the judgment of the county court, for both Boswell and Klersky, against appellant, is reversed, and the cause remanded.

KEPPERT v. AULTMAN, MILLER & CO.
(Court of Civil Appeals of Texas. March 20, 1901.)

SALE—REPUDIATION—RECOVERY OF CONTRACT PRICE—TENDER OF SPECIFIC ARTICLE—INCUMBRANCES.

Where a company, having sold to a person a certain binder, shipped two to its agent at the place of the buyer's residence, and the buyer repudiated the sale, the seller could not recover the contract price for the binder sold while the railroad company held both of them for freight and storage, and would deliver neither till the entire amount thereof was paid since no such action could be maintained without a tender of the specific property to the buyer free from all incumbrances.

Appeal from Milam county court; W. M. McGregor, Judge.

Action by Aultman, Miller & Co. against Frank Keppert. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Henderson, Streetman & Freeman, for appellant. W. H. Tracy and Morrison & Wallace, for appellee.

KEY, J. Appellee sued appellant for the contract price of a certain binder. From a judgment against him, appellant has appealed, and we sustain his fourth proposition under his first, second, fifth, tenth, and eleventh assignments of error. The proposition referred to is this: "If the vendor in a contract of sale of personal property can ever maintain an action for the purchase price

when the vendee refuses to comply with the terms of the contract, he cannot do so unless he tenders to the vendee the article sold unincumbered by any lien." The uncontradicted testimony shows that appellee shipped two binders to its agent, Lee Clark, at Rockdale, Tex.; that the freight charges on the entire shipment were \$117.85; that, after the shipment arrived at Rockdale, appellant repudiated the contract, and stated that he would not pay the freight nor receive the binder; that at the time of trial the railroad company was still in possession of both binders, holding them for the freight charges referred to and for storage, and that neither binder would be delivered to appellant, Clark, or any one else until the entire charges for storage and freight upon both binders were paid. From this it will be seen that if appellant should tender to the railroad company half the freight charges due for the transportation of the two binders, the company would not deliver either binder to him. Therefore, if for no other reason, appellee is not in a position to maintain an action to recover the contract price. If such right exists at all in this state, there must either be a tender by the plaintiff of the specific property, or a waiver of such tender; and the property must be free from incumbrance, and in such condition as that the judgment of the court will have the effect of establishing the defendant's title and right of possession thereto. The undisputed testimony coming from both sides shows that appellee is not entitled to maintain this action, and for this reason the judgment will be reversed, and here rendered. Whether or not it has a right of action for damages, is a question we are not called upon to decide, as the suit was brought for the contract price of the property, and not for damages. The judgment of the county court will be set aside, and judgment here rendered for appellant. Reversed and rendered.

TEXAS & P. RY. CO. v. RICHMOND et al.
(Court of Civil Appeals of Texas. Feb. 13, 1901.)

CARRIERS—NEGLIGENCE—COMMON-LAW LIABILITY—SHIPPING RECEIPTS—CONDITIONS—STATUTES.

1. Plaintiffs delivered a car load of cotton to defendant for transportation. The cotton was in good condition, placed in a tight car, and the doors cleated and sealed. Seven days after, the cotton burned in the car. Defendant showed by each conductor and engineer who had hauled the car that all engines were in good condition, provided with the most improved spark arresters, carefully managed, and scattered no sparks; that there were no cracks or breaks visible in the car; and that the car was not exposed to fire while on his run. *Held*, that a charge that plaintiffs were entitled to recover was proper, since, there being no evidence as to how the fire started, the burden was on the defendant to show that it was not the result of its negligence, and proof that it was not negligent while the car was on moving trains was not sufficient when it appeared that for much of the time the car was not on moving

trains, and there was no evidence as to the conditions surrounding it at such times.

2. Plaintiffs delivered cotton to defendant in Texas for transportation to Rhode Island, and received a shipping receipt containing the condition that neither defendant "nor any connecting carrier handling said cotton shall be liable to damage to or for destruction of said cotton by fire, nor for any loss thereof or damage thereto by causes beyond its control." Seven days after, the cotton, while still in defendant's possession, was destroyed by fire; there being no explanation of how the fire started. *Held*, that defendant was liable as a carrier at common law, even though the contract was interstate in character, since, by the statute of Texas, where the contract was made, carriers were forbidden to limit their common-law liability, and especially as, in the absence of evidence as to the law of Rhode Island, where the contract was to be performed, the law there would be presumed to be the same.

Appeal from district court, Dallas county; Richard Morgan, Judge.

Action by Richmond & Tiffany against the Texas & Pacific Railway Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

Perkins, Gilbert & Hall and T. J. Freeman, for appellant. Coke & Coke, for appellees.

JAMES, C. J. This action was for damages for cotton consumed by fire near Davis, La., while in the carrier's hands under a contract for transportation from Detroit, Tex., to Darlington, R. I., said shipment to be via New Orleans, La., and the Cromwell Line. The evidence introduced by defendant was to the effect that the cotton was compressed at Clarksville, and was in good order when placed in the box car there; that the doors of this car were sealed up and cleated; that it left the compress under the compress seal, which was "A. 61. (Com.);" The conductor who had charge of the cotton from Clarksville to Texarkana testified that the doors of the car were closed, cleated, and sealed, and securely fastened, and that it was not in any way exposed to fire while in his possession. The same, in substance, was testified to by defendant's conductors, viz. J. R. Strock, who handled the cotton from Texarkana to Marshall on December 12, 1897; W. V. Brown, conductor from Marshall, Tex., to Boyce, La., December 14, 1897; and W. D. Barksdale, the conductor from Boyce to Davis, La., in whose possession the car was when discovered to be on fire on December 16th. The cotton left Clarksville on December 9th, making seven days out before the cotton was observed to be on fire. The testimony of Barksdale was that the fire was first noticed from smoke coming through the top of the car at a point about a mile and a half east of Davis, which was about 19 miles this side of New Orleans and 180 miles from Boyce; that there were no breaks or cracks visible in the car; that it was cleated and sealed by seals "A. 61. (Com.);" and that there were no alterations in the seals during the time he had the car. There were 40 cars on this train, and this car was the

thirty-second from the engine. Strock testified that on his train from Clarksville to Texarkana the car was the tenth from the engine, and that the cotton was not exposed to fire in any way while on his run, and that fire could not have reached the cotton in the car, as it was sealed and cleated. The other conductors testified substantially the same, and testified to the carefulness and competency of their respective engineers. Van Ness, the engineer on Barksdale's train, testified as to his engine and spark arrester, etc., being perfect appliances, and that the engine threw no sparks; and this was also, in effect, the testimony of the other engineers handling the cotton after it left Clarksville, and each testified that nothing happened to the cotton while on his train. That the several engines that had been used on the trip were in good condition as to appliances for arresting sparks was testified to, as were all engines of defendant in use between Clarksville and Texarkana and Texarkana and Marshall, Tex., and Marshall and Boyce, La. The court directed the jury to return a verdict for plaintiff for the amount which the parties had agreed should be found if defendant was liable. The charge gives us the benefit of the judge's view of the law of the case. He told the jury, in substance, that by the uncontroverted evidence all the facts were shown which were necessary to entitle plaintiffs to recover, unless the fire was not caused by defendant's negligence; that the burden of proof was on defendant to show this; that there was no proof as to what caused the fire; and that, while defendant may have exercised due care in the particulars in respect to which its testimony relates, it is impossible to say that defendant has shown that the fire was not occasioned by its negligence, when there is no proof as to what did cause the fire. "Therefore you are instructed to return a verdict for plaintiffs." In order to properly understand these views of the judge, we should have stated that the contract stipulated "that neither the Texas & Pacific Railway Company nor any connecting carrier handling said cotton shall be liable to damages to or for destruction of said cotton by fire, * * * nor for any loss thereof or damage thereto by causes beyond its control." The charge was evidently framed upon the theory that, this being an interstate shipment, the common-law liability might be restricted in such matter, except as to defendant's own negligence. Under the decisions in this state (*Ryan v. Railway Co.*, 65 Tex. 13, and *Missouri Pac. Ry. Co. v. China Mfg. Co.*, 79 Tex. 27, 14 S. W. 785) the court did not err in the views expressed in the charge, nor in directing the verdict. The presumption of negligence arose from the fact that the cotton was consumed while in the carrier's custody, and proof that nothing happened nor could have happened to communicate fire to this cotton while on moving trains was not sufficient to

rebut this presumption. The cotton was about seven days reaching Davis, La., from Clarksville, Tex., and the evidence indicates that for some of the time, and perhaps much of the time, the cotton was not on moving trains, and what conditions surrounded it at such time and place is not made known by the evidence. We are inclined to think that this contract, although interstate in its character, was subject to the statute of this state forbidding carriers to limit their common-law liability. The contract was made in Texas, and performable in Rhode Island. There is no proof of the law of Rhode Island on this subject, and the presumption would be that the law there is the same as here. Since the decision of the supreme court of the United States in *Railway Co. v. Solan*, 169 U. S. 133, 18 Sup. Ct. 289, 42 L. Ed. 688, we regard the cases of *Railway Co. v. Sherwood*, 84 Tex. 125, 19 S. W. 455, 17 L. R. A. 643, and *Houston Direct Nav. Co. v. Insurance Co. of North America*, 89 Tex. 1, 32 S. W. 889, 30 L. R. A. 713, as of very doubtful correctness in holding that the statute just referred to has no effect upon a contract of interstate shipment. *Armstrong v. Railway Co.* (Tex. Civ. App.) 29 S. W. 1117; *Id.*, 92 Tex. 117, 46 S. W. 33; *Railroad Co. v. Ware* (recently decided by this court) 60 S. W. 343. We think defendant was liable as at common law, without regard to the exception in this contract. There can be no question that the evidence in this case showed no defense according to the rules of the common law applicable to carriers. On either theory of the law concerning the effect of our statute upon such contract, defendant, under the evidence here, is liable. Affirmed.

COLEMAN v. FLOREY.

(Court of Civil Appeals of Texas. Feb. 2, 1901.)

ESTATES—CONVEYANCES—ADVERSE POSSESSION.

1. The owner of a tract of land conveyed the east half thereof to a grantee, described by name, and also as "executor" of one deceased. Part of the probate records was burned, but the records saved showed the appointment of such grantee as executor of the will of such deceased; that he was directed to sell the land described in such deed as the property of the estate; that he reported the sale thereof, and the sale was confirmed by the court. The name of the purchaser did not appear in the records. Shortly thereafter a person went into possession of the land and built thereon, and he and his grantees thereafter claimed to own it. After such probate sale, neither such executor nor his heirs paid any taxes on the land, or made any claim thereto for more than 40 years, when such heirs executed a deed to plaintiff. *Held*, that it should be presumed that the conveyance to such executor was for the benefit of the estate, and that pursuant to the probate sale he conveyed the premises to the one who thereafter went into possession, and hence that his heirs had no title or interest to convey by their deed to plaintiff.

2. More than 20 years before the commencement of an action of trespass to try title de-

fendant purchased and received a deed covering the lands in controversy, and other lands adjoining, from one who, 14 years before, received a deed thereof from one who occupied a portion, and claimed to own the tract included in the deed to plaintiff. Plaintiff occupied the portion of the tract occupied by his grantor and the preceding grantor, paid the taxes on, and claimed to own, the whole tract, and occasionally cut wood and posts from the land in question. *Held*, that though defendant's possession of the land in controversy, considered alone, was not sufficient to support a claim under the statute of limitations, having gone into actual possession of the adjoining land under a deed covering the whole, such possession should be deemed to extend to all the tract covered by the deed, and was sufficient to give defendant title.

Appeal from district court, Rusk county; W. J. Graham, Judge.

Action by J. W. Coleman against J. W. Florey. From a judgment for defendant, plaintiff appeals. Affirmed.

John R. Arnold, for appellant. Turner & Hendricks and W. O. Buford, for appellee.

GARRETT, C. J. This was an action of trespass to try title brought by the appellant against the appellee for the recovery of 56½ acres of land, a part of the Reddick Arrant survey of 228½ acres, situated in Rusk county. The defendant pleaded not guilty and title-by limitation. A trial was had before the court without a jury, and resulted in a verdict and judgment in favor of the defendant. The land was patented to Reddick Arrant as assignee of George A. Sims, on December 15, 1854. The survey was a parallelogram, whose sides ran north and south and east and west. Before the issuance of the patent, by a bond for title dated August 26, 1854, Arrant contracted all of said survey, except 100 acres off the east end, to Thomas Powell. On March 16, 1855, Arrant conveyed to J. H. Griffis, executor of Daniel Rowe, deceased, by metes and bounds, 113¼ acres off the east end of the survey. The deed, as far as pertinent, is as follows: "For a consideration of three hundred dollars to me paid by James H. Griffis, executor of Daniel Rowe, deceased, of the county of Smith and state of Texas, have bargained, sold, and released * * * unto said James H. Griffis, Exc., etc., a piece or parcel of land situated; * * * to have and to hold said piece or tract of land above mentioned, together with all and singular the rights hereditaments belonging to or incident to the same, unto the said James H. Griffis, Exc., etc., his heirs and assigns, forever." It concludes with a general warranty of title to "James H. Griffis, Exc., etc., his heirs and assigns." Powell afterwards released to Griffis 18¼ acres. Plaintiff claims under deeds executed by the heirs of Griffis in December, 1898, and February, 1899, conveying to him the north half of said 113¼ acres, which is the land in controversy. Josiah Carter and wife, by their deed dated October 8, 1858, conveyed to W. W. Hearst the southeast corner of the Sims (R. Arrant) survey, being the south half

of the land deeded by Arrant to Griffis. This deed was filed for record October 21, 1878. On September 6, 1860, Thomas Powell conveyed to William T. McAfee two tracts of land, one of 120 acres off the Hester survey, and the other of 113¼ acres of land off the west end of the Sims survey; and on November 18, 1863, William T. McAfee executed a deed to Charlotte Robinson, conveying the 120 acres above mentioned, and purporting to convey 170¼ acres, the western portion of said survey of 226½ acres, "and lying north of the tract above described," to wit, the 120 acres of the Hester survey which lay contiguous to, and immediately south of, the west half of the Sims survey. The N. E. ¼, the land in controversy, would make the exact complement of acreage called for, but it lies northeast of the 120 acres in the Hester survey. J. S. Robinson and others conveyed the land to the defendant, J. W. Florey, by deed dated December 18, 1877, describing it as above. Under the conveyance to him from the Robinsons, the defendant has always asserted title to the land in controversy. He claimed all the land in the Sims survey except the southeast quarter sold to Hearst by Carter, and has been in actual possession of the west half of the survey ever since the conveyance to him, cultivating the same, as were his predecessors in title, for many years. As to the N. E. ¼, the defendant has paid all taxes thereon, and claimed the same as his property. He has taken fence posts and firewood therefrom, and for about four years one Florence, as his tenant, had a calf pen thereon, inclosing four or five acres thereof. Defendant's claim to the land was notorious in the neighborhood, and before his purchase from the heirs of Griffis the plaintiff had tried to buy it from him. Griffis never resided on the land or had possession thereof. He came to Texas in 1852, and lived three or four miles from the land in controversy for about four years, or possibly till 1860, when he left the country, and moved to northwest Texas, and died in Wise county about twenty years later. The wife of J. H. Griffis was the daughter of Daniel Rowe. The deed from Arrant to Griffis remained in the possession of Griffis until his death, and afterwards in the possession of one of his sons until the conveyance to Coleman, when it was delivered to him. Neither Griffis nor any of his heirs were ever known to assert any title to the land in controversy, and they never had any possession thereof or paid any taxes thereon.

The estate of Daniel Rowe, deceased, was administered in the probate court of Rusk county. A portion of the records of Rusk county were destroyed by the burning of the court house in March, 1878. As shown by such records as were saved, there was an order discharging a former administrator entered December 27, 1852, and J. H. Griffis was appointed executor on the same day. The minutes of the court show that an order

was made in the Daniel Rowe estate on the 1st day of the November term, 1854, upon the petition of the administrator, directing him to sell 113¼ acres of land, the east half of the George A. Sims survey, and that it be sold on the first Tuesday in January, 1855, at the court-house door in the town of Henderson, on a credit of 12 months. And, further, that at the February term of the court the administrator of said estate came and filed his report of the sale of the land belonging to said estate, which being considered by the court, it was ordered that the same be received and recorded, and that the sale be in all things confirmed. The name of the purchaser does not appear. It appears from the records of estates that at the December term, 1859, publication was ordered to be made of a report for final settlement. The report was sworn to and subscribed by J. H. Griffis on December 27, 1859, before the clerk of the county court of Rusk county, and in the jurat Griffis is described as the executor of the will of Daniel Rowe, deceased. An order of final settlement and discharge of J. H. Griffis, executor of the estate of Daniel Rowe, deceased, was entered January 30, 1860. The original papers in the estate could not be found. Josiah Carter and William Carter appear from the evidence to have asserted some claim to the east half of the Sims survey. William Carter built a house—a blacksmith shop—on the land in controversy in 1857 or 1858, and Josiah Carter moved onto the south half of the 113¼-acre tract as found by the trial court, and shown by the testimony of Woodward. Josiah Carter sold to Hearst, as above stated. Both of the Carters left the country in 1860 or 1861.

We are of the opinion that the conclusion of the court below that the land belonged to the estate of Daniel Rowe, and was sold by order of the court during the administration of that estate to William or Josiah Carter, or both, is supported by the evidence, and it will not be disturbed. While the deed from Arrant to Griffis, unsupported by any other facts, was not sufficient to show that the equitable title to the land belonged to the estate of Daniel Rowe, there were other facts sufficient to show that the land belonged to that estate. Griffis, as executor or administrator, as the case may have been, dealt with the land as the property of the estate, and procured the sale thereof as such. He lived in the neighborhood of the land for several years after the sale, and never paid any taxes thereon, and was never known to make any claim thereto. It will be presumed that the land belonged to the estate of Rowe, and was sold. While the possession of the identical land in controversy was not sufficient to support limitation, it is by no means certain that the description in the deed to Florey did not include it so as to support limitation by the possession of the west half proper. We think, however, that such possession as the Carters had and exercised

sufficient to found the presumption of a deed upon to them, and the subsequent possession by the defendant under his deed from Robinson, and from McAfee to Robinson, coupled with his notorious claim for many years, and the absence of any claim or the payment of taxes by the Carters or Griffis, would also be sufficient to presume a conveyance to him by the Carters, if that were necessary.

There are several assignments of error questioning the findings of the trial court upon issues of fact, but we find all of such findings supported by the evidence, and will not disturb them. The testimony of Minor and Gray as to the statement made to them by Hearst in 1878, that Griffis owned the land in controversy, was properly rejected. There is no principle of law upon which it should have been received. It was not a declaration against interest, and was pure hearsay. The judgment of the court below will be affirmed. Affirmed.

On Motion for Rehearing.

(March 19, 1901.)

Appellant has requested this court in case his motion for a rehearing should be overruled to give him "such a revision of the findings of facts as will show the contents of the various deeds, and how the title passed from one owner to another, with a clear and separate statement of its conclusions of law on each item raised by us in our assignment of errors and motion for rehearing." This request does not point out any finding of fact that has not already been made. The conclusions heretofore filed by the court are deemed sufficiently full to present the questions that were raised, and, in the absence of a more specific request for findings, we cannot undertake to revise our conclusions at length. It is not deemed necessary to set out the contents of the several deeds that were introduced in evidence, but we state more fully the facts showing the situation of the land, and quote the exact descriptive language of the deeds under which the appellee claimed. The Sims survey is 800 by 1,600 varas. Its longest sides run east and west. It was known also as the pre-emption survey of Thomas Powell. Just south of the Sims survey lies the Daniel Hester 320-acre survey, but its most western corner is 300 varas east of the most western corner of the Sims survey. Powell resided on the west part of the Sims survey. He conveyed to McAfee, September 6, 1860, 120 acres off the west side of the Hester survey; "also one hundred and thirteen and one-fourth acres of land being and lying on the pre-emption survey of Thomas Powell, in the county of Rusk, it being taken from the west end of said survey." The deed from McAfee to Charlotte Robinson was dated November 18, 1863, and conveyed the 120 acres above mentioned; "also one hundred and seventy and one-fourth acres, being the western portion

of the pre-emption survey of Thomas Powell of two hundred and twenty-six and one-half acres, and lying north of the tract above described." J. S. Robinson and others conveyed to J. W. Florey, on December 18, 1877, the 120 acres above mentioned; "also one hundred and seventy and one-fourth acres, being the western portion of the pre-emption survey of Thomas Powell of two hundred twenty-six and one-half acres, and lying north of the tract above described." Briefly stated, the title was vested in Reddick Arrant as the assignee of George A. Sims by patent from the state; it was conveyed by Arrant to the estate of Daniel Rowe; the land was sold by order of the probate court as the property of the estate of Daniel Rowe, and William or Josiah Carter, or both, became the purchaser or purchasers thereof; McAfee claimed the land, and sold it as his own to Charlotte Robinson; J. S. Robinson and others claimed the land, and sold it to the defendant; the connection between J. S. Robinson and others and Charlotte Robinson, if any, is not shown by the record.

It is not necessary to pass upon the appellant's assignments of error in detail, if we are correct in our conclusions that the evidence shows that the land in controversy belonged to the estate of Daniel Rowe, deceased, and that it was sold as the property of his estate, and conveyed by Griffis, as his administrator, to either Josiah or William Carter. The existence of such conveyance is shown by circumstantial evidence. While the facts indicate that the appellee may derive his claim through one of the Carters as his predecessor in title, still we do not think it necessary that such should be the case in order to sustain his title, since it appears, as we think, that the heirs of Griffis had no title when they made their deed to the appellant.

Upon the question of limitation, we stated broadly that we found all of the findings of fact found by the court below sustained by the evidence. Several of the assignments of error attacked findings of the court supporting title by limitation. We now expressly conclude that the deed of J. S. Robinson and others to the appellant should be construed as including the land in controversy in the description of the land sought to be conveyed. While this construction would make a part of the land reach the eastern boundary of the Sims survey, yet the greater part of it would be the western portion of the survey; and all the facts taken into consideration such as the conveyance from Powell for the west half, furnishing descriptive language for the succeeding deeds; the greater part of the land being all of the western portion; that even the west half did not lie due north of the 120 acres, but extended 300 varas to the west of it; that Carter had previously conveyed to Hearst the S. E. $\frac{1}{4}$, and that the remainder of the tract was exactly 170 $\frac{1}{4}$ acres; and that appellant had

claimed the land under the deed for more than 20 years,—we think the quantity stated in the deed becomes controlling, as descriptive of the land conveyed. The evidence showed such possession of the west half as would confer title by limitation of 10 years, and, as we are of the opinion that the deed conveyed the land in controversy also, the possession extended to it by construction, and perfected title in the appellee by limitation. The motion for a rehearing will be overruled. Overruled.

CORDRAY et al. v. NEUHAUS et al.¹

(Court of Civil Appeals of Texas. Feb. 1, 1901.)

JUDGMENT—TAX LIEN—FORECLOSURE—COLLATERAL ATTACK—VALIDITY—EXECUTION SALE—PURCHASE BY JUDGMENT CREDITOR—SUBSEQUENT PURCHASER—REVERSAL—EFFECT—JUDGMENT BY CONFESSION—ATTORNEY'S AUTHORITY—ESTOPPEL.

1. Const. 1869, art. 12, §§ 20, 21, provide that taxes on land shall be a lien thereon, but that no land shall be sold for taxes, except under decree of court. Galveston City Charter 1871, tit. 6, art. 14, provides that no sales of land for taxes shall be made, except under decree of the Galveston district court, and that the city council may provide by ordinance for the institution and regulation of suits to enforce the lien of unpaid taxes, except that no sale shall be made till 30 days' notice has been given the owner, which notice may be actual or by advertisement for 60 days; and that the owner may redeem from the sale at any time within 2 years, after which time the purchaser may apply for confirmation of the sale. Rev. Ord. Galveston 1871, c. 39, art. 1, § 14, provides that the city may foreclose any tax lien on land when the gross amount of taxes shall be \$100 or more, and that in rendering judgment separate parcels shall be separately condemned, except in case of lots in the same block. *Held*, that the jurisdiction of the Galveston district court to foreclose a tax lien was a special and limited statutory jurisdiction, and hence a judgment foreclosing a tax lien was subject to collateral attack.

2. Where the record of a judgment of the Galveston district court foreclosing a tax lien showed that the action was brought to foreclose tax liens amounting to less than \$100, that lots in more than one block were condemned and sold together, that notice of sale was given by advertising for 22 days, and that no confirmation of the sale was ever had, the judgment was void, and no title passed by the sale made under the judgment.

3. Where a judgment creditor purchased land of the debtor at the execution sale, and the land was afterwards sold on execution against such judgment creditor, and the first judgment was thereafter reversed on writ of error, the title of the second purchaser was thereby extinguished.

4. Where the owner of land authorized her attorney to confess judgment for a given amount, and the attorney confessed judgment for a much larger amount, the authority of the attorney to confess being incorporated in the judgment, the landowner was not estopped from denying the validity of an execution sale under the judgment.

Error from district court, Galveston county; William H. Stewart, Judge.

Action by George Cordray and others against Charles L. Neuhaus and others. From

a judgment in favor of defendants, plaintiffs bring error. Reversed.

L. E. Trezevant, for plaintiffs in error.
Kleberg & Neethe, for defendants in error.

GARRETT, C. J. This action was brought by the plaintiffs in error against the defendants in error for the removal of cloud from the title of plaintiffs to lot No. 9, block 21, in the city of Galveston, and for partition between themselves. It was averred in the petition that the defendants were asserting a claim of ownership and title to the lot, which was a cloud upon the title of plaintiffs. The defendants pleaded their title specially, and plaintiffs raised the questions presented on the trial and in this court by demurrers to the answer and motion for a new trial. The demurrers were overruled by the court, and, upon a hearing of the facts, the court, sitting without a jury, rendered judgment in favor of the defendants.

Kate Cordray is common source of title, and the plaintiffs, except Jonas Grosmyer, are her heirs, and claim an undivided one half of the lot. Grosmyer claims the other half by mesne conveyances from her. As alleged in the answer and shown by the facts, Kate Cordray was the wife of J. T. (or Julius) Cordray. The lot in controversy was her separate property. She died October 21, 1896. On May 22, 1876, the city of Galveston brought a suit in the district court of Galveston county (No. 8,903) against Mrs. Kate Cordray for the recovery of \$16 and interest, alleged to have been levied and assessed as city taxes for the year 1875 on lots 8 and 9, block 21, and for the sum of \$17 and interest, alleged to have been levied and assessed as city taxes for the year 1875 on lot No. 9, block 612, the property of Mrs. Kate Cordray. Mrs. Cordray's husband was not made a party to the suit. On July 19, 1876, a judgment was rendered in said suit in favor of the city of Galveston against Mrs. Cordray for the gross sum of \$36.46, with 8 per cent. interest, which was adjudged to be a lien upon lots 8 and 9, block 21, and lot 9, block 612; and the same were ordered to be sold as under execution for said sum, with interest and costs of suit. On the 6th day of June, 1877, an order of sale was issued on said judgment by the clerk of the district court of Galveston county, directed to the sheriff of said county, commanding him to sell said property as under execution for the satisfaction of the said sum of \$36.46, with interest thereon at the rate of 8 per cent. per annum from July 19, 1876, and the sum of \$9.45, costs of suit, and the further costs of executing the writ. The sheriff received the writ on the 8th day of June, 1877, and on the 12th day of June, 1877, advertised said property for sale on the 1st Tuesday (the 8d day) of July, 1877, by causing an advertisement thereof to be posted up in three public places in the county of Galveston, one of which was at the door of the court house

¹ Writ of error denied by supreme court.

of said county; and on the 8d day of July, 1877 (being the 1st Tuesday in said month), the sheriff sold said property at public vendue in front of the court-house door, and the city of Galveston having bid therefor the sum of \$57.81, a sum sufficient to satisfy the judgment, and that being the highest and best bid for the same, it was struck off and sold to the city of Galveston for said amount. The writ was returned satisfied. It does not appear that any deed was ever executed. It was shown by the evidence that lot 9, block 612, was the homestead of the defendant Kate Cordray and her husband, J. T. Cordray. On May 27, 1880, the city of Galveston brought a suit in the district court of Galveston county (No. 10,201) against Kate Cordray and her husband, Julius Cordray, to recover the sum of \$1,687.92, as the amount expended by the city in filling lots 8 and 9, block 21, in the city of Galveston, alleged to be the property of Mrs. Kate Cordray, for which the city claimed a lien under its charter and ordinances. In this suit a judgment was rendered on August 15, 1880, in favor of the city for the sum of \$2,986.93, with foreclosure of lien upon lot 9 in block 21 by confession of their attorney, under a power to confess judgment for the amount expended by the city, with a decree that lot 9 only should be sold. In pursuance of said judgment lot 9, block 21,—the property in controversy,—was duly sold on October 15, 1880, and the city of Galveston became the purchaser thereof for the sum of \$600, and the sheriff executed to the city a deed therefor. On January 13, 1882, Henry Sayles recovered judgment against the city of Galveston in the district court of Galveston county for the sum of \$2,937.85; and by virtue of an execution regularly issued upon said judgment the property in controversy was levied upon and sold on March 7, 1882, and one Edward Garratt became the purchaser thereof for the sum of \$285, and a deed was executed to him therefor by the sheriff; and from Edward Garratt the said property passed by mesne conveyances to the defendants, whose deed from one J. C. Kirschner is dated October 18, 1890, and is a general warranty deed for a consideration of \$2,000. The respective purchasers paid full value for the property at the time of their purchases. On June 30, 1893, Kate Cordray, joined by her husband, sued out a writ of error from the judgment rendered against her in cause No. 10,201; and on April 15, 1894, said judgment was reversed by this court, and the cause remanded to the district court of Galveston county for another trial. 26 S. W. 245. On July 6, 1890, after said cause had been reinstated on the docket of the district court and continued for several terms, the city of Galveston, by its attorney, dismissed the same, and disclaimed all title to the said lot 9, block 21. The property in controversy is, and always has been, a vacant lot, and has not been in the possession of any person other than Kate Cordray and her husband until

February 10, 1897, when the defendants took and remained in possession thereof until dispossessed by the sheriff of Galveston county by virtue of a writ of possession issued in cause No. 10,201 upon its dismissal by the city. No taxes were ever paid on the lot No. 9, block 21, by Kate Cordray, or any one for her, or her heirs, after the rendition of the judgment in favor of the city in cause No. 10,201; but all taxes upon said lot have subsequently been paid thereon by the said Garratt and those holding under him, the defendants having paid all taxes accruing since their purchase. Neither the defendants nor any of the purchasers of said property under said execution sale against the said Kate Cordray had any knowledge that said Kate Cordray, or her heirs or assigns, were dissatisfied with the judgment in said cause No. 10,201, and were without any personal or actual knowledge at the time of their respective purchases or at any time that Kate Cordray was a married woman, or that she intended to appeal said cause by writ of error; but the petition and judgment disclosed the fact that she was a married woman, and the authority to confess judgment for only the amount expended was set out in the judgment.

Upon the trial below, plaintiffs put in evidence an ordinance of the city of Galveston which was in force at the time that tax suit No. 8,908 was instituted, and, so far as it is relevant or pertinent to the issues in this case, is as follows:

"Section 14, of article 1, of chapter 39, of the Revised Ordinances of the City of Galveston of the Year 1871.

"Section 1. That in all cases where any tax shall be or may hereafter become due upon any property the city may in addition to the remedies hereinbefore provided, institute suit in the district court of Galveston county, for the recovery of the same, and may in the same suit pray a foreclosure of the lien upon such property, accruing by reason of the assessment of such tax. The petitions in any such suit shall state the property proceeded against and the tax due on the same as near as may be and also the rate of interest due on said tax, as prescribed by city ordinance; and the gross amount of taxes claimed in any such petition must be one hundred dollars or over. In rendering judgment each piece or parcel of land shall be condemned separately as near as may be, save that several lots in the same block may be condemned together; and it shall be the duty of the sheriff of the county of Galveston, at any time after such condemnation by the court, to make sale of the same in the manner prescribed in the city charter and subject to the redemption therein specified."

If either one of the two execution sales relied on by the defendants was valid, the plaintiffs were not entitled to recover. When there is no actual prohibition either in the constitution or the statute, an action of debt

lies for the collection of taxes, and the lien therefor may be foreclosed in the district courts of this state. *Cave v. City of Houston*, 65 Tex. 619; *City of Henrietta v. Eustis*, 87 Tex. 16, 26 S. W. 619. If the district court, in the exercise of its general jurisdiction, can entertain a suit for the recovery of taxes, and the foreclosure of a lien therefor, its judgment is conclusive of the regularity of the legal requirements in the levy and assessment of the tax; and a foreclosure sale for the satisfaction of the judgment should be made in the usual manner of such sales generally, and would not be held invalid for irregularities in a collateral attack such as has been made in this case. Unless the district court of Galveston county could only exercise a special jurisdiction when it foreclosed the tax lien in cause No. 8,903, and had the property of Kate Cordray sold, it seems that the sale under the judgment in that case was valid, and that title was vested in the city by its purchase thereat. It does not appear that a deed was executed to the city by the sheriff, but this was not necessary. The title of the purchaser of land at a sheriff's sale does not depend upon the deed. It rests upon a valid judgment, levy, and execution sale, and the payment of the money. *Donnebaum v. Tinsley*, 54 Tex. 365; *Flaniken v. Neal*, 67 Tex. 631, 4 S. W. 212. But a special and limited jurisdiction may be prescribed for a court of general jurisdiction in the sale of land for taxes, and when this has been done nothing is taken by intentment in favor of the action of the court. It must appear by the recitals of the record itself that the facts existed which authorized the court to act, and that in acting the court has kept within the limits of its lawful authority. *Cooley, Tax'n*, 525, 526. By the constitution of 1869 (article 12, §§ 20, 21) the annual assessment of taxes on land were made a lien thereon, but no landed property could be sold for the taxes due thereon, except under a decree of some court of competent jurisdiction. In pursuance of these provisions of the constitution the Twelfth legislature, in granting a charter to the city of Galveston by a special law approved May 16, 1871, provided that all taxes should be a lien upon the property upon which they were assessed, and for a proceeding in the district court of Galveston county for the sale of real estate. *Charter of Galveston*, tit. 6, arts. 10, 14 (*Sp. Laws 12th Leg., 1st Sess.*, pp. 370, 371; 6 *Gammel's Laws*, p. 1509). Article 14, which provides for the sale of real estate, is as follows: "Section 1. That the foregoing provisions under head of title 6, relating to notices, assessments and collection of taxes on personal property, and all other provisions thereof not inconsistent with this section, shall also apply to real estate, but that no sales of real estate shall take place unless by decree of the district court of Gal-

61 S.W.—27

veston county at some regular term thereof; and the city council may, by ordinance, enact the mode and manner in which such suits for collection of taxes due and unpaid on land shall be instituted, and may have such other and further power regulating the proceedings necessary for the sale of lands as it thinks best and is not inconsistent with the laws and constitution of this state: provided, that no sale be made until the owner has thirty days' notice thereof, which notice may be given actually by any officer of this city, or by advertisement for sixty days, which advertisement may merely so describe the property, as to designate it, and it shall not be necessary to set out the owner's name, unless the same is known; and further provided, that such owner, his agent or attorney, may redeem said property within two years from the day of sale, by paying the purchaser or purchasers the full amount of his bid and costs of suit, with interest thereon at the rate of twelve per cent. per annum from day of sale; and further provided, the purchaser or purchasers may apply to the district court at any time after said expiration of two years for confirmation of sale, and which said decree of confirmation shall vest full and absolute title in the purchaser or purchasers of said property, their heirs or assigns, and said district court shall take and exercise all jurisdiction required to carry this into effect, and such ordinances as may be passed by the city council relative to the subject matter." Article 1 of title 6 provides that the city council "may and shall make all such rules and regulations, and ordain and pass all ordinances as they may deem necessary to the levying, laying, imposing, assessing and collecting of any of the taxes herein provided." Page 366. The suit was brought after the adoption of the constitution of 1876, but there is nothing in that instrument inconsistent with the charter and ordinances prescribing the mode of procedure for the sale of land for taxes. Other provisions of the charter contemplate a sale of land by the collector, but these are subordinate to the controlling requirement that it can only be sold by a decree of the district court. The charter and ordinances passed in pursuance thereof must be construed as prescribing the mode of procedure in the district court to have land sold for taxes. They prescribe a different rule for the sale from that followed under the general powers of the court, and confer only a special and limited jurisdiction on the court. Such being the case, it was necessary to a valid sale in the first place that the court should have had jurisdiction of the amount, which was by the ordinance fixed at \$100 or more, and, after judgment, that all the requisites prescribed for the sale should have been complied with; and the authorities relating to sales by the collector are applicable to the sale made by the sheriff under the decree

of the court, when it is exercising only limited and special jurisdiction. There are quite a number of objections to the validity of the sale: (1) The amount of the taxes was less than \$100; (2) the gross amount of taxes was adjudged to be a lien on the property in bulk, and the property was sold in bulk, the homestead being included with the other property, and the manner of sale was not as prescribed by charter; (3) the notice required by law was not given; (4) no deed for the property was executed; and (5) no confirmation of the sale was ever had. It would seem from the facts that no deed was executed, and that the city took no steps to have the sale confirmed, but sought to charge Kate Cordray and her husband personally and the property with a lien for filling it under the sanitary ordinances of the city; that it had abandoned any claim under the tax suit. We are of the opinion that no title ever became vested in the city by reason of this tax sale.

At the time of the sale of the lot under the execution issued on the judgment of Henry Sayles v. City of Galveston, the city had obtained a judgment against Kate Cordray and Julius Cordray for the sum of \$2,936.98, with foreclosure of a lien on the lot, without execution over; and the lot had been sold under the decree of foreclosure, and bought by the city for the sum of \$600. The city's judgment, when it had the lot sold in satisfaction of its lien, had not been appealed from, and was unreversed and in full force; and it was not reversed until long after Garratt bought it at execution sale against the city, and until long after the defendants acquired their title. It is well settled that where there has been a sale under execution of lands or goods, and a stranger is the purchaser bona fide, his title will not be affected by a subsequent reversal of the judgment. *Stroud v. Casey*, 25 Tex. 754. The city purchased at its own sale, and, if the title had remained in it at the time of the reversal of the judgment, there could be no question but that it would have become extinguished by the reversal. But was Garratt a stranger to the suit, so that he would be protected in his purchase? "It is a rule nowhere disputed that third persons purchasing at a sale made under the authority of a judgment or decree, not suspended by any stay of proceedings, thereby acquire rights which no subsequent reversal of such judgment or decree can in any respect impair." 2 Freem. Judgm. § 484. There are some courts which hold that, while the title of the plaintiff in execution would be annulled by a reversal of the judgment, a conveyance by him to a third person, purchased in good faith before reversal, would be protected. 2 Freem. Judgm. § 484, citing cases from Illinois and Missouri. Kentucky stands almost alone in holding that the title of the plaintiff

in execution himself would not be affected by the reversal. *Parker's Heirs v. Anderson's Heirs*, 5 T. B. Mon. 455. See *Freem. Judgm.*, supra. But it is believed that the rule is settled otherwise in this state, and that a purchaser from the plaintiff in execution, who had bought at his own sale, will not be protected. *Harle v. Langdon's Heirs*, 60 Tex. 564; *Adams v. Odom*, 74 Tex. 213, 12 S. W. 34. The assignee of the plaintiff is in no better attitude than the plaintiff himself. *Dembitz*, in his work on Land Titles, says: "The weight of opinion gives to a purchaser from the plaintiff no greater right to hold on to his purchase than he has himself; the estate gained by the plaintiff at a sale under an erroneous judgment being held in the light of a defeasible fee, which does not become absolute by being sold to a party ignorant of the defect." 2 *Dembitz*, Land Tit. p. 1229. See, also, other authorities cited by *Dembitz* and *Freeman*; 2 *Black*, Judgm. § 955. It is not deemed necessary to analyze or discuss the cases decided by our supreme court. It is believed that they are directly in line with the rule as stated. The purchase by Garratt at execution sale against the city was just as though he had bought directly from the city. *Ayres v. Duprey*, 27 Tex. 606, citing *Cooper v. Blakey*, 10 Ga. 253. The title of the defendants fell with the reversal of the judgment.

It is urged that Kate Cordray is estopped by her confession of judgment from denying the validity of the sale, and in support of this contention counsel have cited *Railway Co. v. Blakeney*, 73 Tex. 180, 11 S. W. 174; *Stafford v. Harris*, 82 Tex. 178, 17 S. W. 530; *Ryan v. Maxey*, 43 Tex. 192; *Cravens v. Booth*, 8 Tex. 243. The letter of attorney given by Mrs. Cordray to her attorney to confess judgment was copied into the judgment entry, and showed by its terms that he had no authority to confess judgment for more than the amount expended in filling the lots, but judgment was entered for nearly twice as much, and showed on its face that it was unauthorized and erroneous. Mrs. Cordray was certainly not estopped from asking to have it set aside. We are of the opinion that the judgment of the court below should be reversed, and that judgment should be here rendered in favor of the plaintiffs in error, and it is so ordered. Reversed and rendered.

Correction of Conclusions of Fact.

(Feb. 28, 1901.)

We were mistaken in saying that it did not appear that any deed was ever executed in the tax case, No. 8,903. On the contrary, the record does show that a deed was executed to the city of Galveston by the sheriff who made the sale, and the conclusions heretofore filed are corrected so as to show that fact.

HERNISCHTEL v. TEXAS DRUG CO.¹

(Court of Civil Appeals of Texas. Feb. 28, 1901.)

MASTER AND SERVANT—INJURIES TO SERVANT—ABSENCE OF FIRE ESCAPE—FACTORY—EVIDENCE—ISSUE—SUBMISSION TO JURY—DISCOVERED PERIL—NEGLIGENCE—DIRECTING VERDICT.

1. Ordinances of city of Dallas require the owners or lessees of factories over two stories high in a city to provide the same with suitable fire escapes. Defendant was a wholesale drug company, occupying a four-story building, with its city department and offices on the ground floor, its packing room and heating plant in the basement, and its stock on the remaining floors. On the third floor defendant's chemist, plaintiff's minor son, and two others, were employed in bottling goods and compounding prescriptions, the room containing vessels for fluids and a drug mill, but no other machinery; the entire output of the laboratory being less than 2 per cent. of the business, and three-fourths of that was rebottled goods. No one was employed on the top floor. A fire broke out on the first floor, and plaintiff's son jumped from a window on the third floor to a building below, and was injured. *Held*, in an action for loss of his services, that the evidence was not sufficient to present the issue as to whether defendant was operating a factory requiring fire escapes.

2. The fire occurred between 12 and 1 o'clock, when it was the custom of most of the employes, including plaintiff's son, to be absent; but he had been requested by the chemist to remain, and his presence in the building was known only to such chemist, who was not present when the fire broke out. The first and third floors were connected by a speaking tube, so that the boy could have been notified of the fire had his presence been known. The fire spread with such rapidity that the employes on the first floor had little time to escape. *Held*, that no issue of liability of defendant on the theory of discovered peril was presented by the evidence.

3. There being no contention that the fire was caused by defendant's negligence, or that it could have been extinguished, it was not error to direct a verdict for defendant.

Appeal from district court, Dallas county; Richard Morgan, Judge.

Action by Mrs. A. E. Henschel against the Texas Drug Company. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

Crawford & Crawford, for appellant. McCormick & Spence, for appellee.

GILL, J. This action was brought by the appellant, Mrs. A. E. Henschel, against the Texas Drug Company, the appellee, to recover damages for the loss of the services of her minor son, occasioned by personal injuries alleged to have been sustained by him as a result of the negligence of appellee. On the trial the court, after the evidence was adduced, instructed the jury to return a verdict in favor of the appellee, which was done, and judgment rendered accordingly. This is an appeal from that judgment.

Appellant's son was injured in the following manner: He was an employe on the third floor of the drug company's business

house, and while so employed a fire broke out on one of the lower floors, which prevented his escape by the elevator or stairways, and, to escape death by fire, he jumped from the third-story window to the office roof, about 15 feet below, whereby he was injured as alleged. Appellant seeks to fix liability upon the appellee: First. Because it was alleged to be operating a factory in a building over two stories high, and had, in violation of one of the city ordinances of Dallas, Tex., failed to provide suitable fire escapes to the building so occupied. Second. The building, by reason of the character of stock carried and business done, was peculiarly liable to sudden and dangerous fire, and they failed to provide a safe place for said employe to work, and failed to provide rules and proper means for the extinguishment of fires. Third. The appellee, knowing of the presence of the appellant's son upon the third floor, and of his danger, after the fire broke out failed to notify him of his danger, but left him to ascertain it, and escape as best he could. Appellee answered by general denial, plea of contributory negligence, and specially denied that it was operating a factory, within the purview of the city ordinances. It was established without dispute that appellee, a corporation, was the lessee of a four-story brick building in the city of Dallas, Tex., in which it conducted its business and kept most of its stock of goods. It was a wholesale drug concern, engaged in buying in large quantities from the manufacturers drugs, medicines, and druggists' sundries, and such goods as are usually handled by the retail druggist, and selling at wholesale to the retail druggists throughout the state. It had on hand at the time of the fire a stock of goods of the value of \$125,000. In the basement was kept the furnace for heating the building. In another part of the basement were kept cigars in boxes, and alcohol, liquors, etc., in barrels and cases. The packing room, in which goods were put up for shipment, was also in the basement, and this contained hay, straw, etc., for use in packing. The greater part of its inflammable stuff, such as whisky, paints, turpentine, oils, etc., was stored in another building. On the first floor was the city department, the offices, and a part of the stock, consisting of bottled goods, pill boxes, and cases of drugs. In the remaining stories of the building was kept the stock of goods usually carried by the company. A part of the third floor was used by one Eberle, a stockholder in the company, and the company's chemist, who was continually engaged in bottling goods bought in large quantities, and placing them in convenient shape and quantity for the retail houses for which they were intended. He also compounded prescriptions and formulas in quantities, and put them up in convenient form for the retail trade. In doing this he used the ingredients bought at wholesale, and mixed them

¹ Rehearing denied.

in their prescribed and proper proportion. His duties in these respects kept him and one boy (Ed Hernischel) busy daily. Another boy was occasionally called in to assist, and a negro boy on the same floor assisted them occasionally in lifting heavy packages. There was situated on this floor a stove for use in heating the various compounds, together with utensils and vessels for the fluids, among which was a 50-gallon pot or boiler, and several 50-pound lard cans. He had also a hand mill for grinding drugs, like the mill usually used in grocery stores for grinding coffee. They had no machinery in use in the discharge of their duties. The entire product or output of Eberle and his assistants in this laboratory was less than 2 per cent. of the business of the concern, and three-fourths of that output consisted not of compounded goods, but of rebottled goods, which had been bought in bulk in large quantities. No persons were stationed on that floor except Eberle and the three others above mentioned. The fourth story was visited by the employes only as occasion required, no one being in constant charge of it. The building was 50 feet wide and 100 feet deep. The means of egress from the second and third stories was a stairway 5 feet in width, and conveniently located, and a large elevator, operated by water power. They also had large windows and doors, and from the second story one could easily step from the window to the roof of the office, which was only about 14 feet from the ground. There were no fire escapes on the outside of the building, and the only means of egress are stated above. The city ordinances in question are as follows: "Article 487. That the owners or lessees of all hotels, theaters, boarding houses, tenement houses and factories over two stories high in the city of Dallas are hereby required to provide the same with good and suitable fire escapes amply sufficient to furnish means of egress to all inmates in case of fire." Article 337, Code 1898: "That the owners or lessees of all hotels, theaters, boarding houses, tenement houses and factories over two stories high in the city of Dallas are hereby required to provide the same with good and suitable fire escapes amply sufficient to furnish means of safe egress to all inmates in case of fire." They had open barrels of water on each floor, with buckets attached, and had a water faucet on the third floor and one in the basement. On the third floor were also several ladders, some of which would have enabled a person to descend from the third story to the roof of the office without injury. On the day of the fire, Eberle, the chemist, requested Ed Hernischel to remain during the dinner hour from 12 to 1 o'clock, and stir a mixture which he was preparing, and the latter was so engaged when the fire occurred. It was the custom of the employes, including Hernischel, to be out of the building, and at their meals, from 12 to 1 o'clock, as that hour had been given

them for the purpose. The employes and officers in the city and office departments on the lower floor remained on duty during that time. The fire occurred during the noon hour. No one except Eberle knew that Hernischel had remained on the third floor, and Eberle was at home when the fire occurred. There was a speaking tube from the office to the third floor, and Hernischel could have been notified in two or three minutes had his presence there been known. The fire started on the first floor, and was so sudden and furious that the office employes had barely time to put a few books and papers in the safe and escape. When Hernischel heard the alarm, he tried to make his way down the stairs, but was prevented by the smoke and flames. He then jumped from the third-story window to the office roof, and was severely injured.

We are of opinion that the proof is not sufficient to present the issue whether or not the company was operating a factory. If manufacturing was done in any proper sense, it amounted to only one-half per cent. of the business of the concern, and seems to have been a mere incident to its business. The evident purpose of the ordinance was to provide additional means of egress from high buildings, where the nature of the business required the employment or presence of many people. According to appellant's contention, a retail druggist conducting his prescription department on a third floor would come within the purview of the ordinance. A shoemaker, with his bench, last, and awl would come within the definition. In Black's Law Dictionary the word "factory" is thus defined: "In the English law the term includes all buildings or premises wherein or within the close or curtilage of which steam, water, or any mechanical power is used to move or work any machinery employed in preparing, manufacturing, or finishing cotton, wool, hair, silk, hemp, or tow. Later this definition was extended to other manufacturing places." The American legal definition of the word is practically the same. We do not understand, however, that its meaning is confined to such enterprises as use machinery and mechanical power, especially in construing the ordinance in question. The rule should not extend beyond the reason for its application, but should extend at least that far. There are, doubtless, enterprises in this country using no machinery of any sort, and yet in the strictest sense coming within the proper definition of "factory." Such, for instance, are cigar factories, or factories where garments are made, and in each of which a large number of employes may be engaged in a single building or a small space. The facts of this case bring it neither within the reason of the rule nor within the rule itself by any fair and reasonable construction. We are of opinion, therefore, that the court did not err in refusing to submit the issue. As bearing either directly or indirectly upon the ques-

tion decided, see *Hartman v. Wiegmann*, 121 U. S. 610, 7 Sup. Ct. 1240, 30 L. Ed. 1012; *People v. Wemple*, 138 N. Y. 582, 34 N. E. 386; *Same v. Knickerbocker Ice Co.*, 99 N. Y. 181, 1 N. E. 669; *Same v. Roberts* (N. Y. App.) 50 N. E. 53; *Chickassaw Cooperage Co. v. Police Jury of Parish of Jefferson (La.)* 19 South. 476. No issue of liability based on the theory of discovered peril is presented, for it is shown without contradiction that those who knew of the fire did not know of *Hernischel's* presence or danger, and *Eberle*, who had left him there, did not know of the fire until after his injury. *Railway Co. v. Breadow*, 90 Tex. 27, 36 S. W. 410. The appellant does not contend that the fire was caused by any negligence on the part of appellee or its employes. Neither its origin nor sudden fury is accounted for, nor is there any evidence that it could have been extinguished by any known means. The company had for some years been carrying on its business in the building in question in the usual way. It carried the character of stock usual with such concerns, and handled it in the usual way. No employe was stationed in the fourth story, only four in the third story, and these had as a means of egress an elevator and a stairway. The house was equipped with ample doors and windows, and had no unusual feature about it. We are of opinion that the facts present no issue of negligence on the part of the company, and that the court correctly instructed a verdict for defendant. The judgment of the trial court is affirmed. Affirmed.

WESTERN UNION TEL. CO. v. RAGLAND.

(Court of Civil Appeals of Texas. Feb. 27, 1901.)

TELEGRAMS—STIPULATION AGAINST LIABILITY—NEGLIGENCE—DAMAGES—LOSS OF TIME—SICKNESS.

1. A stipulation in a telegram that the company shall not be liable for mistake unless the message is telegraphed back for comparison does not relieve the company from a mistake occurring through want of reasonable care in repeating the message at a relay station.

2. A death message was received, and was transmitted over a route requiring its repetition at three relay stations, though the company could have sent it over a route only requiring one repetition. The message was directed to one "Rone," and a relay operator read and transmitted the name as "Bone," and the message was not delivered, as a result thereof. Held sufficient to raise the issue of the negligence of the company.

3. Loss of time is an element of damages for a failure to deliver a death message notifying the person to whom the message is addressed to meet the sender and to have a grave prepared, since such injury may be reasonably contemplated by the parties.

4. Sickness caused by exposure by being compelled to walk a certain distance, as a result of the negligence of a telegraph company in failing to deliver a death message, is not an element of damages for such failure, since such injury could not have been in the contemplation of the parties.

Appeal from Hunt county court; R. D. Thompson, Judge.

Action by John Ragland against the Western Union Telegraph Company. From a judgment in favor of the plaintiff, the defendant appeals. Reversed.

Geo. H. Fearons and N. L. Lindsley, for appellant. Thos. W. Thompson and Craddock & Looney, for appellee.

JAMES, C. J. Appellee sued for damages for mental anguish, loss of time, and physical suffering on account of the nondelivery of the following message: "Winnsboro, Texas, Jan. 12, 1898. To Will Rone, Commerce, Texas: Send Jim Jackson word pa is dead, and have grave dug by my children. Leave space between for one grave. Have two wagons meet train at Campbell at 11:50 this morning. John Ragland." There was testimony of the following facts: The message, when it reached Commerce, read, "Will Bone," and therefore failed to be delivered. There was testimony which tends to show that the mistake in the name of the addressee was due to negligence of defendant's agents in transmitting it. A stipulation on the face of the telegram read: "To guard against mistakes or delays, the sender of a message should order it repeated; that is, telegraphed back to the originating office for comparison. For this one-half the regular rate is charged in addition. It is agreed between the sender of the following message and this company that said company shall not be liable for mistakes and delays in the transmission and delivery and for nondelivery of any unrepeatable message, beyond the amount received for sending the same."

Under assignments 1, 2, 4, 5, and 6, appellant insists that it is not liable, except for the toll paid; this not having been a repeated message. There was testimony tending to show that the change in the name came about from want of reasonable care by an intermediate agent, and the stipulation invoked would not avail defendant if such was found to be the fact. The message was urgent, upon its face, and defendant had agencies by which it could have been transmitted to Commerce through but one relay station, and been handled but once while en route, whereas it was sent around by Jefferson, Dallas, and Ft. Worth, through three relay stations, and was taken from the wires and handled several times. It was testified that, the less number of relay stations a message passes through, the less likelihood there is of mistakes. There was evidence, also, that the message as taken and dispatched at Dallas read, correctly, "Will Rone," but as taken from the wire at Ft. Worth it read, "Will Bone," and this was due to the fact that the operator at Ft. Worth misread the relay copy. It was further shown "that the letter 'R,' in telegraphy, is made with a dot, a space, and two dots, and the letter 'B' with

a dash and three dots. A dash and a space are just the opposite of each other, and different as day from night." The issue of negligence was fairly raised.

It was shown that, when plaintiff arrived at Commerce with the corpse, as consequences of the failure to properly transmit and deliver the message he was not met by wagons, nor was the grave dug, and he was unable to inter the remains that day, and had to hold them until the next day. Plaintiff testified, in effect, that when he arrived at Campbell he waited awhile, thinking the wagons would come; that he sent a neighbor for wagons, and one came, and the corpse was hauled out, and, traveling at the usual gait, arrived at his home about sundown. He lived about a half mile from the graveyard. No grave had been prepared, and the body remained at the house until next morning, when it was buried. It was decomposed before burial, and offensive. He was not expecting to keep the body overnight. He had to walk part of the way, and became fatigued, and took cold, and was sick on account thereof for about three weeks. Could do no work during that time. His time was worth one dollar per day. The failure of the wagons to meet him to transport the remains, and having to haul it out under the circumstances; the walk, and taking cold and getting sick, and having to keep the remains at his house overnight, and the body becoming decomposed and offensive before it could be buried,—all these things distressed and grieved him, and had a serious effect on him, and he suffered from his sickness about three weeks. The rule is that plaintiff may recover for such injuries as may fairly and reasonably be considered as arising, according to the usual course of things, from the breach, or as may reasonably be supposed to have been contemplated as the probable result thereof. *Telegraph Co. v. Edmondson*, 91 Tex. 209, 42 S. W. 549. The third assignment complains of a charge authorizing the jury to find "for plaintiff such additional sum [in addition to the cost of the message] as will compensate him for his loss of time, physical and mental pain, and anguish suffered, if such as may have been the proximate and direct result of defendant's failure to deliver such message." The complaint made is that such matters as loss of time and physical pain were too remote, and could not have been contemplated by the parties when the message was sent. We think appellant is right in this assignment. It could reasonably have been expected that the nondelivery of the telegram would cause plaintiff some delay, and the loss of time consequent on his inability to have the burial take place that day, but not that it would cause him exposure and consequent sickness. The only testimony of physical pain was the sickness which resulted from plaintiff taking a cold. There is no state of facts here which would warrant the jury taking into consid-

eration such sickness, and the attendant suffering and loss of time, as damages that were, or might reasonably have been, anticipated.

We have considered the remaining assignments, and regard none of them as well taken. Reversed and remanded.

LANE v. JACK.

(Court of Civil Appeals of Texas. March 20, 1901.)

APPEAL—COUNTY COURT JUDGMENT—FORCIBLE ENTRY AND DETAINER.

Under Rev. St. art. 2540, providing that when an action of forcible entry and detainer is appealed to, and tried by, the county court, the judgment of that court shall be conclusive, and no further appeal shall be allowed, unless the damages recovered exceed \$100, an appeal in such action will not lie from a judgment of a county court dismissing an appeal from a justice's judgment allowing no damages.

Appeal from Kaufman county court; John Vesey, Judge.

Action by S. H. Jack against R. H. Lane. From a judgment for plaintiff, defendant appeals. Appeal dismissed.

Lee R. Stroud, for appellant. Jack & Jack, for appellee.

KEY, J. Appellee sued appellant in justice's court in an action of forcible entry and detainer. From a judgment in appellee's favor, appellant appealed to the county court, where, upon motion of appellee, the appeal was dismissed, and appellant now attempts to appeal to this court. Appellee recovered no damages in either court. Appellee has submitted a motion to dismiss the appeal, predicated upon article 2540 of the Revised Statutes, which, in substance, provides that when an action of forcible entry and detainer is appealed to, and tried by, the county court, the judgment of that court shall be conclusive, and no further appeal be allowed, except where there is a recovery of damages in an amount exceeding \$100. There can be no mistake about the meaning of the statute, and it is quite clear that it cuts off the right of further appeal in this case. *Yarbrough v. Jenkins*, 3 Willson, Civ. Cas. Ct. App. § 464; *Stein v. Stely* (Tex. Civ. App.) 32 S. W. 861. Motion sustained, and appeal dismissed.

RUTHERFORD v. TEXAS & P. RY. CO.¹

(Court of Civil Appeals of Texas. Feb. 20, 1901.)

RAILWAYS—SPARKS FROM ENGINE—DESTRUCTION OF BUILDING—NEGLIGENCE OF RAILWAY—DUTY OF OWNER TO ANTICIPATE.

A charge that if plaintiff stored hay in his barn, which was 50 feet from defendant's track, with knowledge that combustible material had been allowed to accumulate on the right of way, plaintiff could not recover for a destruction of the hay by a fire originating from a spark from an engine, was erroneous.

¹ Rehearing denied March 27, 1901.

Appeal from district court, Lamar county; E. S. Chambers, Judge.

Action by J. C. Rutherford against the Texas & Pacific Railway Company. From a judgment in favor of defendant, plaintiff appeals. Reversed.

Sturgeon & Stone and Hill & Moore, for appellant.

FLY, J. Appellant instituted this suit to recover damages for the destruction by fire of a barn and its contents, which were ignited by sparks from a passing locomotive belonging to appellee. The cause was tried with a jury, and resulted in a verdict and judgment for appellee. Appellant owned a piece of land lying contiguous to the right of way of the railroad company, and on it erected a barn, about 50 feet from the main track, and placed in the barn, some time before the fire, 125 tons of hay. There was testimony tending to show that the fire was communicated by sparks from an engine belonging to appellee, which ignited shucks which had been permitted by appellee to accumulate on the right of way near its track, and was communicated from the shucks either directly to the barn of appellant, or to the house of another, and from that set the barn on fire. Appellant knew the shucks were on the right of way, but persisted in using his barn on his own land for storing his hay.

The court gave the following charge: "If you believe from the evidence that the plaintiff's hay was in his barn, which was next to or adjoining the right of way owned or controlled by the defendant, where it was burned, and if plaintiff knew at the time that he placed said hay in said barn that combustible matter had accumulated and was accumulating on the right of way of the defendant, if there was such combustible matter on such right of way, or on the land of the parties adjoining the land of plaintiff, and that said combustible matter, if any, was liable to be ignited and burned, and fire communicated to his property, and it was thereby destroyed; and if you find that such placing of said hay where it was burned, and that so leaving said hay, was such an act and omission as a person of ordinary prudence would not have done, in view of the probable danger of fire from passing engines, if such danger was probable; and if you further find from the evidence that such placing of the hay in said barn, and leaving it exposed, was a proximate cause, which, concurring with the negligence of defendant, if you find that the defendant was negligent, produced the fire which destroyed the property of plaintiff,—then the plaintiff cannot recover, no difference how negligent in the matter you may find the defendant to have been." The charge was in effect an instruction that plaintiff must forego the use of his property, to prevent it from being destroyed through

the negligence of the railroad company. Such is not the law. The railway company, by obtaining a right of way through the country, does not obtain the right to restrict the use of land contiguous to it. In *Cooley, Torts*, p. 816, it is said: "Where the injury is inflicted upon the plaintiff upon his premises, it is not contributory negligence that he had not guarded his premises as perfectly against such injuries as prudence might dictate. Thus one's buildings near the line of a railway, by reason of very combustible material, may be peculiarly exposed to take fire from passing engines; but, while the owner must take upon himself all such risks as may result from a careful management of trains, he has a right to redress if his buildings are negligently burned." Several authorities are cited to sustain the text. In section 416, *Beach, Contrib. Neg.*, a case is cited in which it was held that it was not contributory negligence to put up a wooden building upon a person's own property, although it be situated near a dock upon a navigable river, where the house is exposed to fire from steamers touching at the dock, and, if the house is burned by sparks from the steamer, the owner may recover damages, although he put the house there in the face of the risk. "The occupant of land near or even next to a railroad is not chargeable with contributory negligence merely by reason of leaving his land in its natural state, or making any legitimate use of his property. It makes no difference if by so doing his property may be extremely liable to take fire in the event of the railroad trains being negligently managed. He is not required to anticipate such negligence, nor to give up the lawful use of his property in such manner as would be deemed prudent under ordinary circumstances, simply because a railroad has been constructed beside his land. * * * Neither will the knowledge of an adjacent landowner that engines on the road are habitually so mismanaged or defective as to cause frequent fires upon or near the track make any difference." *Shear. & R. Neg.* § 680. The above quotation is supported by the decisions of every state in the Union, with the exception, perhaps, of Iowa and Illinois, and is sound and just. No man in the lawful use of his property is chargeable with negligence because he does not anticipate the unlawful acts of others. It is not pretended in this case that appellant had been negligent in any manner, unless it was negligent to put his hay in a house that had been prepared for it upon his own land. The proposition contained in the charge was that, seeing the shucks which appellee had negligently allowed to accumulate on its right of way, he ought to have refrained from the use of his barn. The law does not require any such sacrifice at the hands of the landowner, and he is not required to anticipate negligence and unlawful acts on the part of another, and guard against the same by abandonment.

the use of his property. *Clark v. Dyer*, 81 Tex. 339, 16 S. W. 1061. The judgment is reversed, and the cause remanded.

VOELCKER v. McKAY.

(Court of Civil Appeals of Texas. March 20, 1901.)

LIMITATIONS—SALES—CONTRACT IN WRITING—
ASSIGNMENT OF ERROR—TOO GENERAL—NOT REVIEWABLE.

1. A written order for goods, containing a promise to pay therefor, is a contract of sale, and hence the four-years statute of limitations applies thereto.

2. Where a motion for a new trial stated that the verdict was contrary to the law and evidence, without specifying the particular defects, such statement was too general to call the attention of the court to the question raised, and hence the court of civil appeals will not review the question on appeal.

On rehearing. Motion granted, and former judgment set aside, and the judgment of the trial court affirmed.

For former opinion, see 60 S. W. 798.

FISHER, C. J. A re-examination of the record leads to the conclusion that we erred in the construction placed upon the instrument sued upon by the appellee. There are expressions in that instrument, which, in effect, constitute a contract between the Sawyer Medicine Company and the appellant, whereby the latter promised to pay the amount sued for. This being true, the four-years statute of limitation would apply, and not the two-years statute. We cannot consider those assignments of errors which complain of the verdict of the jury and judgment of the court as being contrary to the evidence. The question here raised by these assignments of error was not called to the attention of the trial court by a motion for a new trial. It is true that the motion for new trial, in general terms, states that the verdict of the jury is contrary to the law and the evidence, and this is all that it says upon that subject. This statement is too general to be considered, and, in view of the ruling made by the supreme court in *Degener v. O'Leary*, 85 Tex. 171, 19 S. W. 1004, and the case there cited, doubtless the trial court declined to pass upon this question. For the reasons stated, the motion for rehearing is granted, our former judgment set aside, and the judgment of the trial court affirmed.

CLIFFORD v. KOHR et al.

(Court of Civil Appeals of Texas. Feb. 27, 1901.)

JUSTICE'S COURT—APPEAL—JUDGMENT FOR LESS THAN CLAIM—NOTICE—BOND—DISMISSAL.

Where one sued in a justice's court for \$100 actual and \$100 exemplary damages, and recovered a judgment for \$8.25, from which he prosecuted a regular appeal, except that he gave no notice and filed no bond, a dismissal of

the appeal for such omissions was error, since the case was not within *Sayles' Civ. St. art. 1670*, providing that the party appealing from a justice court must file a bond "in double the amount of the judgment," which means judgment against the appellant, and requiring notice of appeal as a condition precedent to judgment by default against the appellee.

Appeal from Bexar county court; Peter Jonas, Judge.

Action by G. G. Clifford against Joe Kohr and others. From a judgment dismissing an appeal from a justice's judgment for a part only of the relief demanded, plaintiff appeals. Reversed.

L. B. Henyan, for appellant.

FLY, J. Appellant sued appellee in a justice's court for \$100 actual and \$100 exemplary damages, and on the trial recovered a judgment for \$8.25. He applied for and obtained a transcript of the proceedings of the justice's court, with a proper certificate from the justice of the peace, and filed it and the original papers in the county court within the time provided by law. Appellee moved to dismiss the appeal because appellant had not given notice of appeal, nor an appeal bond, and the motion was sustained and the appeal dismissed. This action was erroneous. Neither notice of appeal nor an appeal bond is required, in order that a plaintiff may appeal from a judgment allowing him nothing, or only a part of his claim. *Article 1670, Sayles' Civ. St.; Edwards v. Morton*, 92 Tex. 152, 46 S. W. 792; *Karnes Co. v. Ray* (Tex. Civ. App.) 57 S. W. 76; *Thomas v. Hogan* (Tex. Civ. App.) 57 S. W. 300. The judgment is reversed, and the cause remanded.

TEXAS & N. O. R. CO. v. ANDERSON et al.

(Court of Civil Appeals of Texas. Feb. 28, 1901.)

LANDS—OVERFLOW—OBSTRUCTION IN DITCH—REMOVAL—EVIDENCE—SUBSEQUENT REPAIRS—PRIOR NEGLIGENCE—INSTRUCTION—HARMLESS ERROR—DAMAGES—SPECIFICATION OF ITEMS—ORDINARY CARE—ACT OF GOD.

1. Where the petition, in a suit for damages for negligently causing the overflow of the petitioner's premises, alleged that such overflow was caused by the obstruction of a certain ditch, and that as soon as the obstruction was removed the water ran off, the admission of testimony to show that when such obstruction was removed the water receded from such premises was not error, since such testimony tended to show that the obstruction caused the overflow.

2. The admission of such testimony was not in contravention of the rule that proof of subsequent repairs is not admissible for the purpose of proving prior negligence.

3. Where an instruction, in a suit against a railroad company for negligently causing the overflow of certain premises, submitted an issue as to the company's negligent construction of its roadbed and ditches, which issue was not raised by the pleadings or evidence, such instruction, though manifest error, was not ground for reversal, where the jury found that the injury was caused by the obstruction of the

company's ditch; it affirmatively appearing that the charge had not misled the jury.

4. Where an instruction, in a suit for negligently causing the overflow of certain premises, submitted the plaintiffs' loss of service of their children as an element of damage, in the absence of proof that such services were of any value, and the verdict did not specify any of the items of damage, such instruction was reversible error, since it did not affirmatively appear from the verdict that such loss of services had not been considered in estimating the damages.

5. An instruction that if the defendant used ordinary care to prevent a certain injury, and such injury was caused by the act of God, and not by want of care, the jury should find for the defendant, was error, since the defendant was entitled to verdict if the injury was caused by the act of God, regardless of whether or not it used ordinary care.

Appeal from district court, Liberty county; L. B. Hightower, Judge.

Action by E. W. Anderson and others against the Texas & New Orleans Railroad Company. From a judgment in favor of plaintiffs, defendant appeals. Reversed.

Baker, Botts, Baker & Lovett and Greer & Chester, for appellant. Stevens & Marshall, for appellees.

PLEASANTS, J. Appellees brought this suit to recover of appellant for injuries alleged to have resulted from the accumulation of water upon the premises occupied by appellees, which overflow and accumulation of water is charged to have been caused by the negligence of appellant in allowing the ditch by which said premises were drained to become obstructed. The petition alleges that appellees, as tenants, were residing upon and cultivating, during the year 1900, lots 3 and 4, in block 28, in the town of Liberty; that appellant's roadbed is south of and adjoining said lots, and is so constructed that it obstructs the natural flow of the surface water, and causes same to accumulate upon said lots, surround the house in which appellees reside, and submerge the crops and garden of appellees upon said premises; that, in order to prevent said accumulation of water, the appellant has constructed along the north side of its embankment a ditch, which when kept open and unobstructed carries off the water, and prevents its accumulation upon said premises; that from the 1st of April to about the 14th of August, 1900, appellant allowed said ditch, and the culvert over same, to become obstructed, so as to prevent the passage of water through said ditch; that by reason of said obstruction of said ditch appellees' premises were from April 1 to August 14, 1900, continuously submerged with water, which wholly destroyed the crop planted thereon by appellees, and rendered the land on said premises useless and unproductive for the entire season; that said overflow rendered said premises uncomfortable, disagreeable, and unhealthy as a place of residence, and produced sickness in appellees' family. Damages are prayed for in specific amounts for injury to the land, the destruc-

tion of the crops, the loss of the services of appellees' children on account of sickness caused by said overflow, for doctor's and medical bills, and for the discomfort and annoyance caused appellees by the odors arising from said stagnant water, and by the mosquitoes produced by said overflow. Appellant's answer contained, besides general and special demurrers, a general denial, and special plea setting up that during the time said water was upon appellees' premises that section of the country was visited by the most unusual and unprecedented rainfalls, which were not and could not have been foreseen by appellant when it constructed its roadbed and ditches, and that said overflow of appellees' premises was caused by the act of God, and was not due to any negligence on the part of appellant. The trial of the cause in the court below by a jury resulted in a verdict and judgment in favor of appellees for the sum of \$100, from which judgment this appeal is prosecuted.

Appellant's first assignment of error predicates error upon the ruling of the trial court in permitting appellees to prove, over the objection of appellant, that the appellant removed the obstruction in said ditch about the 15th of August, and that after said obstruction was removed the water ran off appellees' premises. We are of opinion that the trial court did not err in admitting this testimony. Appellees alleged in their petition that the overflow of their premises was caused by the obstruction of the ditch, and that as soon as said obstruction was removed the water ran off. The issue in the case was not whether or not the obstruction existed, but whether or not it was the cause of the overflow of appellees' premises. It would certainly have been permissible for appellant to have shown on this issue that after the obstruction of the ditch had been removed water continued to accumulate upon appellees' premises, and thereby demonstrate that said obstruction was not the cause of the overflow, and we think it was equally permissible for the appellees to show that the removal of the obstruction caused the water to recede from their premises. We do not think the admission of the testimony contravenes the well-established rule that proof of subsequent repairs is not admissible for the purpose of proving prior negligence. As before stated, the evidence was not admitted for the purpose of showing negligence, but to show that the condition of the ditch was the cause of the overflow of appellees' premises.

Appellant's second assignment complains of the charge of the court, in that it submits to the jury the issue as to whether or not appellant was negligent in the construction of its roadbed and ditches, which issue was not raised by the pleadings or evidence in the case. The charge complained of is manifest error. It is equally as clear that the jury wholly disregarded this charge, as they

by their verdict that the injury to appellees was caused by "the obstruction to appellant's ditch"; thus ignoring the only issue of negligence submitted to them by the court, and determining the issue as presented by the pleadings and evidence in the case. Upon this state of the record we are of the opinion that, if affirmatively appearing that the charge did not mislead the jury, the error in such charge was harmless, and would not authorize a reversal of the judgment. *Hubby v. Stokes*, 22 Tex. 220; *Kaise v. Lawson*, 38 Tex. 164; *Railway Co. v. Baker* (Ark.) 55 S. W. 941.

The fifth assignment of error complains of the charge of the court, in that it submits to the jury, as an element of damage, appellees' loss of the services of their children, when the evidence fails to show that the services of said children were of any value. We think this assignment should be sustained. There is no evidence that the services of appellees' children were of any value, and the loss of such services should not have been submitted to the jury as an item of damage. Appellees do not contend that the charge complained of is not erroneous, but insist that the error, if any, was harmless, because the verdict of the jury shows affirmatively that no damage was found by the jury for the loss of the services of appellees' children. We do not so understand the verdict. The trial court, at the request of the appellant, instructed the jury that, if they found for the plaintiffs, they should specify in their verdict the amount of each item of damage claimed by plaintiffs which they should so find. The jury failed to comply with this instruction, and returned the following verdict: "We, the jury, find for the plaintiffs the sum of one hundred dollars (\$100) for the obstruction of the ditch by the defendant, and by causing water to stand on plaintiffs' property." This verdict finds the cause of the damage, but fails to specify any of the items of damage claimed by the appellees, and it cannot be determined from said verdict which of said items of damage were found by the jury. The claim for the loss of the services of appellees' children may have been considered by the jury in estimating the amount of damages found by them, as nothing to the contrary is shown by their verdict.

The eighth assignment complains of that portion of the court's charge which instructs the jury that, "if the defendant used ordinary care to prevent injury to plaintiffs, as they alleged was caused, and that said injury was caused directly and proximately by the act of God, and not by such want of care, to find for the defendant." Appellant contends that this instruction was erroneous, because, if the damage was caused by the act of God, appellant would not be liable therefor, notwithstanding it may have been negligent in not keeping its ditch free from obstruction. This proposition as to the non-

liability of appellant for damages caused by the act of God, regardless of whether or not appellant used ordinary care to prevent the injury, is clearly sound, and we are of opinion that the instruction complained of is open to the objection urged, and should not have been given. It is unnecessary to consider any of the remaining assignments, because, if any errors are thereby pointed out, they are not such as are likely to occur upon another trial of this case, and it would serve no useful purpose to discuss said assignments. For the errors in the charge of the court as above indicated, the judgment of the court below will be reversed, and this cause remanded for a new trial. Reversed and remanded.

NEEDHAM v. BYTHEWOOD.

(Court of Civil Appeals of Texas. Jan. 24, 1901.)

ARBITRATION AND AWARD—ACTION ON AWARD—FAILURE TO ITEMIZE CLAIM—EFFECT OF SETTLEMENT—LIMITATIONS—INSTRUCTION—REQUESTS.

1. A petition alleging performance of certain services, the existence of a partnership agreement, and a settlement and compromise of such claims by a third person, whereon the defendant promised to pay such compromised claim, states a cause of action on the compromise, and hence an objection that the claim was not itemized was properly overruled.

2. An award of an arbitrator appointed to adjust claims between partners is binding on the parties thereto, in the absence of fraud, accident, or mistake.

On Rehearing.

In an action on an award growing out of an alleged partnership, where the question whether the claim had been barred by limitation was in issue, but was not submitted in the court's charge, it was error to refuse a charge that plaintiff's claim was barred if the same accrued more than two years before the commencement of the action, unless a partnership existed between plaintiff and defendant by an express or tacit understanding to that effect, as such charge, whether accurate or not, called the court's attention to the question of limitation.

Appeal from Wharton county court; G. S. Gordon, Judge.

Action by D. W. Bythewood against J. B. Needham on an award for services and interest in an alleged partnership. From a judgment in favor of plaintiff, defendant appeals. Reversed.

G. G. Kelley, for appellant.

PLEASANTS, J. The cause of action upon which judgment was rendered in the court below in favor of appellee is set out in plaintiff's amended petition, upon which the case was tried, as follows: "And for cause of action plaintiff says: That during the years 1893 and 1894 and 1895 plaintiff was employed by defendant, J. B. Needham, as a clerk and manager for said Needham in carrying on and conducting a mercantile busi-

ness at the Brooks store and on the Brooks farm in Wharton county, Texas, at a salary of \$25 per month. That during the years 1893 and 1894 and 1895, while plaintiff was so employed by said defendant, this plaintiff drew wages sufficient, and no more, to meet his necessary expenses, and left the remainder of his wages on deposit with the said J. B. Needham, defendant, to be drawn by plaintiff at any time he might desire to do so. That in the spring of 1895 plaintiff and defendant, with one Tom Smith, entered into a contract with one W. C. Brooks, of Wharton county, Texas, for the rent of the Brooks farm, with the store thereon, for the year 1895. The terms of the said contract were that the said Needham, Tom Smith, and this plaintiff were to conduct said mercantile business situated in said Brooks store, cultivate the Brooks farm, and be equal partners in the profits arising from the year's business of 1895. That in pursuance of said verbal agreement this plaintiff labored and worked during the year 1895, furnished tools and implements, and assisted in conducting said business, and making, housing, and gathering a crop raised on said Brooks farm; but that the said J. B. Needham, at the end of the year 1895, refused to pay to plaintiff his part of the profits and rents arising from his year's labor, and failed and refused to pay the amount due to this plaintiff theretofore deposited with the said J. B. Needham. That on or about the 15th day of January, 1896, this plaintiff and J. B. Needham, Tom Smith, and W. C. Brooks had an accounting and settlement of all their accounts then due to each of the above-named parties. That each of said parties above mentioned agreed that R. L. Hardman should take all the books and accounts, and adjust the claims, and state how much was then due to the said W. C. Brooks for the rent of said farm, and how much was due to this plaintiff by the said J. B. Needham, defendant. That it was found in said settlement that defendant, J. B. Needham, was due to plaintiff the sum of \$621.35, and that this plaintiff was released from all indebtedness to the said Tom Smith and said W. C. Brooks. That defendant, J. B. Needham, then and there promised to pay to this plaintiff the said sum of \$621.35. That the books and accounts and all other written data by which said settlement was made were placed in the hands of defendant, J. B. Needham, and this plaintiff has since said day and date been unable to procure same in order to make an itemized statement and account thereof. Plaintiff says that said amount is justly due to him, and that the defendant, J. B. Needham, did, on or about the 15th day of January, 1896, promise and agree to pay to plaintiff said sum of \$621.35," etc. Appellant's answer contained general and special exceptions, general denial, special denial under oath of the alleged partnership, pleas of limitation of two and four years, and a plea in

reconvention, setting up various items of indebtedness against the appellee, the aggregate amount claimed in said plea being \$1,000. The cause was tried by a jury, and a verdict returned in favor of appellee for the sum of \$651.35, and a judgment rendered accordingly against the appellant, from which judgment this appeal is prosecuted.

While the evidence is conflicting, and not entirely satisfactory, it is sufficient to sustain the finding that the claims and accounts between appellant and appellee were adjusted and compromised in January, 1896, and as a result of said compromise the appellant agreed and promised to pay appellee the sum of \$651.35 in settlement of all claims and demands theretofore made against him by appellee arising out of said alleged partnership or otherwise, and further agreed to release appellee from all indebtedness claimed against him. As we understand appellee's petition, it is a suit upon the compromise agreement, and not one upon a stated account; and the rule announced in *Neyland v. Neyland*, 19 Tex. 423, does not apply. It was not necessary for said petition to contain an itemized account or bill of particulars of all the claims and accounts asserted by appellee, and considered and adjusted in said compromise, and appellant's exception to the petition on the ground that it did not contain an itemized statement of the accounts sued on was properly overruled.

Appellant requested the court below to give the following instruction to the jury: "You are instructed that if you believe from the evidence that more than two years elapsed from the time the indebtedness claimed to be due by defendant to plaintiff accrued, then said indebtedness would be barred by the statute of limitation of two years, unless you further believe that said parties were partners, and that this is a partnership debt; and in this connection you are charged that, in order for said parties to have been partners as between themselves, there must have been an agreement to that effect between them, or their dealing during the period of said alleged partnership must have shown a tacit understanding or acquiescence to that effect." We do not think the court erred in refusing to give this instruction, because it ignores the alleged adjustment and compromise, and would have authorized the jury to have applied the statute of limitation to the several claims of appellee upon which said adjustment and compromise was based, and to have found appellee's suit barred if two years had elapsed between the date of the accrual of said claims and the filing of this suit, unless such claim was shown to have arisen out of the alleged partnership. We think the statute of limitation would only run from the date of said alleged adjustment and the promise of appellant to comply with the terms of same, and the question of partnership was an immaterial issue in this case. Whether appellee was a partner in the busi-

ness, as alleged, or not, he claimed to be such, and claimed an interest in the profits of the business of said firm, and also claimed other indebtedness due him by appellant, and to effect a settlement and adjustment of these claims and of the counterclaims asserted against him by appellant it was agreed that Mr. Hardman should adjust the matters in dispute. When Hardman made this adjustment, and it was agreed to between the parties, and appellant promised to pay the amount found by Hardman to be due appellee, in the absence of pleading and proof of fraud, mistake, or accident the adjustment or compromise so made is binding between the parties, and appellant's promise to comply with the terms of said adjustment became a new obligation. We think none of the assignments point out any reversible error, and the judgment of the court below will be affirmed. Affirmed.

On Motion for Rehearing.

(March 13, 1901.)

Upon reconsideration we have become convinced that we erred in our judgment in this case rendered on the 24th day of January, 1901, affirming the judgment of the court below. The issue of limitation was fairly raised by the pleadings and evidence in the case, and the court below failed to submit the question in his charge to the jury. Such being the fact, the charge requested by appellant on said issue, whether entirely accurate or not in its application of the law to the facts of this case, was sufficient to call the trial court's attention to the omission in his charge, and to require of him a charge properly submitting said issue to the jury; and the failure to instruct the jury upon said issue is reversible error. *Railway Co. v. Long* (Tex. Civ. App.) 48 S. W. 599; *Sanger v. Thomasson* (Tex. Civ. App.) 44 S. W. 400. If the petition in the case could only be considered as setting up a cause of action based on a stated account, appellant's exception to said petition on the ground that the items of indebtedness claimed and the dates of the accrual of same are not set out with sufficient certainty should have been sustained. We are, however, unable to agree with learned counsel for appellant that the cause of action set out in the petition is based upon a stated account. We think the petition, tested by any of the exceptions urged against it by appellant, sufficiently states a cause of action based upon a settlement and compromise of plaintiff's claims against the defendant, and upon this question we adhere to the views expressed in our former opinion. Because of the error of the trial court in failing to submit the issue of limitation in his charge to the jury, the judgment of affirmance heretofore rendered by this court will be set aside, and the judgment of the court below will be reversed, and this cause remanded for a new trial.

PEIGHTAL et al. v. COTTON STATES BLDG. CO.

(Court of Civil Appeals of Texas. Feb. 27, 1901.)

BUILDING AND LOAN ASSOCIATIONS—USURY—EVIDENCE—QUESTION FOR JURY.

1. When there is doubt as to whether a transaction, apparently fair on its face, is free from usury, or is a mere device to obtain more than legal interest, the question whether it is usurious is for the jury.

2. Parol evidence showing the true character of a contract is admissible on an issue of usury, though the contract is in writing, and appears fair on its face.

3. The fact that a sum taken as interest by a building association exceeds the legal rate does not show usury, where the amount of the excess is insignificant, and it is apparent that the excess was paid simply for the convenience of the parties, with the intention of deducting it from the last payment.

4. It is competent to permit the parties to a transaction to testify to their intentions when the question of usury is in issue.

Appeal from district court, Lamar county; E. S. Chambers, Judge.

Action by Cotton States Building Company against J. B. and Nettie Peightal. From a judgment for plaintiff, defendants appeal. Reversed.

Lightfoot, Denton & Long and R. W. Wortham, for appellants. Moore, Park & Birmingham, for appellee.

NEILL, J. This suit was brought by the appellee, a Texas corporation, against appellants, J. B. and Nettie Peightal, to recover \$500 and interest according to the terms of a contract between the parties, the terms of which will be hereinafter stated, together with \$50 attorney's fee, and for foreclosure of an alleged mechanic's lien on a certain house and lot situated in Ennis, Tex. The appellants, defendants below, pleaded under oath that the contract declared upon was usurious; that the contract was devised by appellee and the National Building & Loan Association as a scheme to cover usury, and exact from them more interest than they were allowed to charge by law, and that under it usury was exacted by appellee from, and paid it by, appellants; that, as an inducement for them to enter into the contract, the appellee held out to them, through its agents and printed circulars, that appellants could borrow \$500 at 10 per cent. per annum with which to build their home; that, in order to procure said loan, it was necessary to take 10 shares of stock, and that every payment of stock would reduce the principal of the debt each month, and that each monthly payment on stock would reduce the principal that much; that no loan could or would be extended beyond 6 years, or 72 months, and that at the end of that time the debt would be fully paid; that, being induced by said promises and agreements, they entered into said contract, agreeing to pay the sum of \$500, and secure it by a lien on their homestead in

Ennis, and as a part of the contract of loan subscribe for 10 shares of the company's stock; that the issuance of the stock was a mere pretense and device to cover usury; that, at the time of its pretended issuance by the association, it immediately required it to be transferred back to the company; that it had never been in appellants' possession, but remained in the custody of the association from the date of issuance to the present time; that appellants did not make or want any investment in such stock, but said contract was made by both parties purely as a loan, in order that appellants might borrow \$500 to build their homestead, and for no other purpose; that the contract was dated August 25, 1892, but appellants had previously thereto been required to pay and had paid the association thereon, on August 5, 1892, \$11, on September 5, 1892, \$7.70, and that they had been required by the association to pay and had paid regularly, on the 5th day of each month thereafter, the sum of \$7.70 for the period of seven years,—that is to say, 84 months,—making in the aggregate \$640.10; that there was at no time of such payments the amount of interest due from appellants as was demanded and paid; that appellee wholly failed and refused to carry out its promises and agreements to apply the payments on stock to reduce the principal of the debt each month, as it had agreed, but continued to demand and require appellants to pay the same amounts of the usurious interest on the last month of said 84 months as had been required on the first, and that such interest was largely more than 10 per cent. per annum. Appellants denied that they ever made default for three months, or for any other time; that the principal of the debt was fully paid; and that all interest payments on said debt were usurious, and that they were entitled to recover double the amount so paid. They prayed for a cancellation of the contract sued on, and for judgment against appellee for \$800. By a supplemental petition, the appellee denied the allegations in appellants' cross bill, and alleged that the payments made each month were made and appropriated as follows: \$4.20 interest and premiums, and \$3.50 per month on stock. It also pleaded limitation of two years upon the penalty claimed by appellants for usury. By supplemental answer, appellants averred that the subscription of stock and loan of the money were one and the same transaction; that the agreement to mature the stock and pay the debt in six years was a material inducement, held out to them to take the loan; that the plea of limitation does not apply, because the contract was and is a continuous one, extending from August 5, 1892, to August 5, 1899, inclusive, and that the applications of said payment were made and received in writing each month during such time.

After hearing the evidence, the court instructed the jury as follows: "In this case I instruct you to render a verdict for plaintiff. You will calculate the interest on the payments made on the amounts paid and due on the ten shares of stock at the rate of 6% per annum, and for 42½ months, and add that amount to the amount of dues paid on stock; deduct the total thus arrived at from \$500, the amount of credits and interest amounting to \$360.40, which deducted from \$500 would leave \$139.60; and calculate the interest on the amount to this date,—that is, \$139.60, at the rate of 10% from September 5, 1899,—and return your verdict for that amount, with foreclosure of lien. You will also return a verdict for reasonable attorney's fees." In obedience to this charge, the jury found a verdict in favor of appellee for \$147.86, with foreclosure of lien on the land described in its petition, and also found for plaintiff \$25 as attorney's fees. Upon this verdict the judgment appealed from was rendered.

So much of the evidence as is necessary to a consideration of the questions involved in this appeal may be stated as follows: On August 5, 1892, the National Building & Loan Association, the name of which was afterwards changed to Cotton States Building Company, issued to Nettie Peightal, one of appellants, 10 shares of class A stock. In her written application to the association for the stock, Mrs. Peightal stated that she had read its literature, and understood the amount of dues required to maintain the shares to be 35 cents per month on each \$50 share, payable on or before the 5th day of each month, making a total monthly payment of \$7, and she agreed to abide by all the terms and conditions and by-laws of the association, and to comply with all its rules and regulations. On the margin of the application was written in red ink: "Agents are not allowed to make any promise not in conformity to our printed matter." The by-laws of the association provide that all holders of class A shares shall be entitled to a loan of \$50 on each share held by him, such loans to be secured by first lien on real estate; that each loan shall be based on shares in class A equal at maturity to the amount of the loan; that such shares must be six months old, or six monthly installments must have been paid in advance before an application would be considered; that if any shareholder shall fail or neglect to pay the interest on his loan, or his regular monthly installment, or other fees, for three months, or in any way fail to comply with his contract, the association may compel payment of principal, interest, fines, and dues by proceeding to foreclose the lien or other securities, which shall at once become due and payable, and the association may cancel and treat as forfeited the shareholder's stock, whether deposited as collateral security or not, and the pay-

ments thereon shall be forfeited to the shareholders; that the certificate, terms, and conditions of shares of the association and its by-laws form the contract with the shareholders, and the application for a loan shall form a part of the contract with the borrower; that no agent who solicits shares for the association shall have the right to promise a loan at any time, or to sell shares with the understanding that a loan will be made, until it has been first approved by the directors of the home office, nor shall he have authority to change or alter any of the terms or conditions contained in its literature.

The prospectus, under the title "Homes Make Happiness," issued by the association, and read and considered by appellants before applying for shares and a loan from the company, contains the following: "The object of the National Building and Loan Association is to assist its members either to obtain homes or invest savings in a safe and profitable way. The interest of the borrower is linked with that of the investor in such manner that both is materially advanced. When the payment of the shares, together with the net profit, amounts to the maturity value, they shall be fully matured and paid, and no more payments shall be required, and the holder shall be entitled to receive the full face value of each share. Class A or general shares: The maturity value of this class of shares is \$50.00 each, and are estimated to mature in about seventy-two months from their date, and the monthly installment, which is 35 cents on each share, must be paid on or before the 5th day of each month, without notice. An applicant for a loan must carry shares in class A equal at maturity to the face value of the loan. His shares must be six months old, or he must pay, or cause to be paid, six months' installments, in advance, before his application for a loan will be considered. Loans are not made for longer than six years." In said prospectus, under the title "Illustration," is the following, showing the estimated cost of a \$1,000 loan to the holder of 20 shares in class A:

Membership fee	\$ 10 00
Monthly installments	\$ 7 00
Monthly interest	8 33½
Contingent fund	1 00
Seventy-two monthly installments \$16.33½	1,176 00
Cancellation fee, 25 cents per share..	5 00

Total cost to borrow in 72 months \$1,191 00

And under the head of "Safety of the Investment" is the following: "The association takes the maximum risk at the time the loan is made, and every payment of monthly installment thereafter reduces the debt, while the security remains the same. All shares in class A are estimated to mature in about six years from their date, and at maturity any member may withdraw such shares, and receive \$50 therefor. While it cannot be stated with absolute certainty what time it will

require for these shares to mature, yet the experience of building and loan associations, and reliable, safe mathematical calculations, make six years a conservative estimate for the maturity of shares under this plan."

On the 25th day of August, 1892, the appellants and appellee entered into a written contract, properly signed and acknowledged, whereby the latter agreed to build a house, according to certain plans and specifications, for appellants on certain lots situated in Ennis, Ellis county; and, in consideration of this agreement, appellants agreed to pay the appellee \$500, and to pay said association the sum of \$3.50 on their 10 shares of stock until the maturity of said shares, as provided for in the plan and by-laws, which were made a part of the contract. They also agreed to pay, as interest on the \$500, the further sum of \$4.16% per month from the 25th day of August, 1892, till the maturity of their 10 shares of stock. The contract contained provisions in relation to insurance, taxes, etc., not necessary to state here. To secure the payment of the above sums of money, interest due thereon, all dues and fines, as prescribed in the by-laws of the association, and reasonable attorney's fees (if judicial proceedings should be used in collecting said sums of money or in foreclosing the lien given), it was agreed between the parties that the association should have a mechanic's and builder's lien on the house and lot. The house was built according to plans and specifications, with the \$500 loaned and furnished by the association, half of which was paid out by the association on October 15, 1892, and half on the last of that month.

The payments made by appellants, excluding membership fee of \$7.50, are as follows:

Advance payment on stock	\$ 21 00
Monthly payments on stock, \$3.50, August 5, 1892, to August 5, 1899, inclusive	394 00

Aggregate payments on stock	\$315 00
Interest payments, \$4.20, August 5, 1892, to August 5, 1899, inclusive...	852 80

In full payments..... \$667 80

No payments were made after August 5, 1899.

Appellee's secretary, W. B. Connor, testified that "the exact amount of interest on the \$500 loaned, at the rate of 10 per cent. per annum, would be \$4.16% per month, but we collected \$4.20 per month, because it was a small matter and even figures. These collections were made each month through local boards, on collection sheets sent out by the home office, and the collection sheets were sent out showing \$4.20 per month, to save trouble in going into fractions."

Opinion.

The principal questions raised by the assignments are: (1) Were antecedent and contemporaneous acts and declarations of the parties admissible in evidence for the purpose

of showing the contract was a device to cover up usury? (2) Was it error for the court, under the facts stated, to withdraw the question of usury from the jury, and peremptorily instruct a verdict for the defendant? If the first question should be answered in the affirmative, it might not be necessary to consider the second; but as both are germane to the issue of usury, and so intimately connected as to be hardly severable, they will be considered together.

Upon the first question, the trial court ruled, when such testimony was offered by the appellants, that neither antecedent nor contemporaneous acts and declarations were admissible upon the issue, because they would tend to change or vary a written contract. Upon its face the contract is not usurious. *Association v. Goforth* (Tex. Sup.) 59 S. W. 871. If such antecedent or contemporaneous acts and declarations of the parties to a contract as surround and are connected with the transaction cannot be used to illuminate and cast the light of truth upon it, then, however much it may have been intended as a device to hide usury, it must remain forever shrouded in darkness, and our law against exorbitant interest rendered a dead letter. In *Mitchell v. Napier*, 22 Tex. 128, it is said: "It is quite immaterial in what manner or form, or under what pretense, it is cloaked. If the intention was to receive a greater rate of interest than the law allows for the use of money, it will vitiate the contract and taint it with usury. Whether the transaction was so intended, where, upon its face, it does not appear to be usurious, is a question of intention, for the decision of the jury." In the construction of a contract alleged to be usurious, the chief aim should be to ascertain the intention of the parties, and the mere form of the contract is immaterial, except in as far as it is one of the most conspicuous circumstances evidencing the intention of the parties. *Webb, Usury*, § 203. In *Moroney v. Association*, 116 N. C. 882, 21 S. E. 924, it is said: "The courts have always said that in usury cases they 'look through all disguises, to the real nature and truth of the transaction.' The shifts and devices of avarice are countless in attempting to evade the protection which the lawmaking power sees fit to erect against its exactions. Calling 'interest' by the name of 'premiums,' 'fines,' and 'penalties' is a threadbare device." In *Rowland v. Association*, 116 N. C. 877, 22 S. E. 8, the same court said: "We reiterate what this court said in the case of *Mills v. Association*, 75 N. C. 292: 'We know of no device or cover by which these associations can take from those who borrow their money more than the legal rate of interest, without incurring the penalties of our usury laws.' Calling the borrower a 'partner,' or substituting 'redeeming' for 'lending,' or 'premium' or 'bonus' for an amount which they profess to have advanced, and yet withholding, or 'dues' for 'inter-

est,' or any like subterfuge, will not avail. We look to the substance." Whether or not a contract is a device to cover usury cannot ordinarily be determined as a matter of law, "It is a question of fact to be determined on trial, where the court can go behind the returns, and inquire and ascertain the intent and motives of the parties." *Stevens v. Staples* (Minn.) 65 N. W. 959. Where the transaction disclosed by the evidence is per se usurious, the court is authorized to charge the jury to that effect. If, however, there is doubt as to whether the transaction is a cover for usury, or a perfectly fair one authorized by law, then it is a question for the jury to determine, from all the facts and circumstances of the case, whether the transaction disclosed is bona fide, in the ordinary course of business, free from the taint of usury, or whether it was a mere cloak and device, under the form of an ordinary business transaction, to obtain more than legal interest. *Bank v. Spencer*, 107 Ga. 629, 33 S. E. 878; *Callaway v. Butler*, 79 Ga. 356, 7 S. E. 224.

A usurious agreement is not absolutely void. It is illegal, and this fact it would be probably impossible to prove except by oral testimony. *Webb, Usury*, § 425. Hence it was held by this court in *Roberts v. Coffin*, 22 Tex. Civ. App. 127, 53 S. W. 597, that a contemporaneous parol agreement to pay 18 per cent. interest, instead of 10, as stipulated in the contract, could be proven on the issue of usury. And we understand the law to be firmly settled that any evidence surrounding and so connected with a transaction as will throw light upon it, and disclose, or tend reasonably to show, its true character, is admissible upon the issue of usury, although the contract is in writing, and appears upon its face fair and legal.

In this case the appellants sought to show that their sole object in subscribing for the shares of the association was to obtain the loan of \$500, and that their purpose was known to its agent with whom the loan was negotiated; that the stock subscription was a part of the transaction, which culminated in the contract sued on; and that both parties, when the loan was being negotiated for, considered the so-called monthly stock installments as payments on the principal, and so treated them in estimating, from appellee's prospectus, when the debt would mature. If there was an understanding between the parties at the time appellants subscribed for the stock that Mrs. Peightal was not in fact to become a stockholder in the association, but subscribed for the shares simply for the purpose of borrowing money, with the understanding on the part of appellee, or the agent representing it in the transaction, that the monthly stock payments should be received as payments of and in reduction of the debt, the transaction would be usurious (*Association v. Thomson* [Tex. Civ. App.] 58 S. W. 202), and the stock sub-

scription and the monthly installments provided by the contract as payments thereon would be regarded as subterfuges, made simple for the purpose of hiding the true character of the transaction. If, however, although it may have been appellants' purpose in subscribing for the stock to borrow money, and though this purpose may have been known to appellee, yet if it was the intention of the parties that the stock installments were to be received by the association as bona fide payments on appellants' shares, and not as payments upon and in reduction of the principal on the money loaned, the transaction would not be usurious. In determining this question, it would be legitimate to inquire what was done by the association with the money it received from its borrowing members purporting to be monthly payments on their stock subscriptions. Did the association appropriate it as its own, ignoring any right or interest of such borrowing members in it? If so, a jury might consider such appropriation as a cogent circumstance, tending to show the required subscription for stock was simply a device to conceal usury. On the other hand, did the association, in the interest of its members, invest, or seek to invest, the money received from its borrowing members, with a view to crediting them upon the stock subscribed for with the profits of such investment? If it did, this would tend strongly to show the transaction was not tainted with usury. *Association v. Go-forth, supra.*

The contention of appellants that the taking by appellee as interest of \$4.20, instead of 4.16% per month, ipso facto shows usury cannot be maintained. "Where the amount of interest taken above the legal rate is trivial, the maxim, 'De minimis non curat lex,' is applicable. The taking of an insignificant amount would have a tendency rather to disprove than to prove usury; for any one intending to take more profit upon a loan of money than the law would hardly be content with an exceeding small amount." *Webb, Usury, § 210.* Besides, it is apparent that this insignificant amount in excess was paid simply for the convenience of both parties, with the intention of deducting such excess from the last payment.

Some question is made as to whether it is competent to permit the parties to the transaction to testify to their intentions. In cases where the motive or intention actuating a party is the subject of inquiry, it has been held in this state that the witness could testify what his motive or intention was. *Hamburg v. Wood, 66 Tex. 168, 18 S. W. 623; Brown v. Lessing, 70 Tex. 545, 7 S. W. 783; Sweeney v. Conley, 71 Tex. 545, 9 S. W. 548.* And it seems the same rule applies in cases where the question of usury is involved. *Webb, Usury, § 424.* We are of the opinion that the court erred in refusing to admit the parol testimony offered by appellants to show that the contract was usurious, and in per-

emptorily instructing the jury to find for the plaintiff. Therefore the judgment is reversed, and the cause remanded.

GATLING v. SAN AUGUSTINE COUNTY.

(Court of Civil Appeals of Texas. Feb. 28, 1901.)

CONVICTS—BONDS—CONDITIONAL SURETIES—CONDITION UNFULFILLED—LIABILITY.

Where a convict-hire bond executed to the county judge of San Augustine county was signed by G., as surety, on condition that he was not to be liable on such bond unless the same were signed by a certain party, and the judge knew of such condition, but accepted the bond without the signature of such party, G. was not liable on the bond, since the condition precedent to his liability was never fulfilled, and the instrument never executed as to him.

Appeal from district court, San Augustine county; Tom C. Davis, Judge.

Action by San Augustine county against George E. Gatling. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Davis & Davis, for appellant.

PLEASANTS, J. Appellee brought this suit to recover the amount due upon a convict-hire bond executed by W. M. Hunt, George Gatling, and W. A. Wall, and payable to the county judge of San Augustine county. The defendant, Gatling, answered that he signed the bond as surety for the said W. M. Hunt, the principal therein, upon condition that the said Hunt would procure the signature of L. H. Knight to said bond as co-surety with said defendant; that said bond was signed in the presence of the county judge of San Augustine county by the said Hunt and the defendant, and said county judge was fully informed and fully understood the conditions upon which the defendant signed said bond; that after said bond was so signed it was left with the said county judge, with the distinct understanding that defendant was not to become liable thereon, and the same was not to be considered as delivered, until it was signed by the said L. H. Knight; that said Hunt never procured the signature of said Knight to said bond, which fact was known to said county judge at the time he accepted and approved same. The uncontradicted evidence in the case sustains the averments of defendant's answer. At the time the bond was signed by appellant, he and W. M. Hunt, the principal in said bond, were in the county judge's office. The county judge, Leo Bierhalter, wrote the bond and handed it to Hunt, who signed it, and requested appellant to sign as one of his sureties. Appellant agreed to do this on condition that he was not to become liable on said bond unless Hunt also secured the signature of L. H. Knight as a surety thereon. The county judge heard this agreement, and understood the condition upon which appellant signed the bond. Appellant

left the office after signing the bond, and did not know until this suit was filed that said bond had been accepted and approved by said county judge without having the signature of the said Knight thereto. We think it clear that under these facts the appellant never became liable on said bond. It was not a complete and binding obligation upon appellant when he left it in the possession of the county judge, and could only become so under the condition upon which appellant signed it,—when it was signed by L. H. Knight. This condition never having been fulfilled, the instrument was never executed and delivered in such manner as to bind appellant, and cannot be enforced against him. *Smith v. Doak*, 3 Tex. 215; *Manufacturing Co. v. Powell* (Tex. Sup.) 14 S. W. 245. The judgment of the court below will be reversed, and judgment here rendered in favor of appellant, and it is so ordered. Reversed and rendered.

NEEDHAM v. HICKEY.¹

(Court of Civil Appeals of Texas. March 15, 1901.)

JUDGMENTS OF AFFIRMANCE—LAST RESORT—WRITING OPINIONS.

Where the court of civil appeals is the court of last resort in a case, and the appeal results in an affirmance of the trial court's judgment, such court of appeals will not write an opinion, in the absence of some reason for it assigned in the motion, since its decisions are not the highest authority, and hence writing opinions of affirmance would be an unnecessary consumption of time.

Appeal from Ft. Bend county court; J. S. McEachin, Judge.

Action by Charles Needham, executor, against M. J. Hickey. Judgment for defendant, and plaintiff appeals. Affirmed. Motion to file conclusions of fact and law. Denied.

J. C. & T. E. Mitchell, for appellant. S. C. Russell and Slyfield & Davidson, for appellee.

GILL, J. As to this case this is a court of last resort, the amount sued for being only \$160. In such cases it has been the custom of this court to write no opinion when the appeal resulted in an affirmance of the judgment of the trial court. Such was the result in this instance. When the result is a reversal, an opinion is necessary, in view of another trial. The court, in refusing to write an opinion where such causes are affirmed, have been moved to that course by what are deemed excellent reasons. A written opinion is not required by law, and, as the decisions of this court are not the highest authority in this state, no useful purpose can be subserved by consuming time in their preparation. In our judgment, such time and labor can be directed to better purpose,

in disposing of the business with which our dockets are crowded. If a reason exists in any particular instance which would render a written opinion necessary, such reason should be set out in the motion. The motion in this case is a bare request, no reason being offered why it should be granted. We therefore adhere to our custom, and overrule it. What is here said is not intended to apply to this motion any more than to others of like nature. Such requests are not infrequent, and the desire to know the reasons which control the court in disposing of an appeal is but natural. We have simply availed ourselves of this opportunity to make plain the motives which have prompted us to adopt the custom mentioned.

PALESTINE COTTON-SEED OIL CO. v. CORSICANA COTTON-OIL CO.¹

(Court of Civil Appeals of Texas. Feb. 19, 1901.)

SALES—CONTRACTS—SUBSTANTIAL PERFORMANCE—BREACH—DAMAGES—EVIDENCE.

1. Defendant contracted to sell and deliver to plaintiff five tanks of cotton-seed oil, in buyer's tanks, at defendant's mill, during the first half of October. The tanks were sent, and received at defendant's station, two on October 12th, and the others on the 14th; but the side track to defendant's mill was full of cars loaded with seed, to and including the 16th, so that the tanks could not be placed in position to be filled. The price of oil had advanced, and defendant on the 16th refused to deliver the oil, on the ground that the tanks had not been furnished in time to enable it to comply with the contract. *Held*, the refusal was not justified, since defendant, by its own act in filling its side track with other cars, prevented the tanks being placed at the mill.

2. Where under a contract by defendant to deliver cotton-seed oil at its mill to plaintiff, in buyer's tanks, within a specified time, there has been a substantial compliance with the terms of the contract by plaintiff, defendant is not justified in refusing to deliver the oil on the ground that the tanks were not delivered in time.

3. Defendant contracted to sell and deliver five tanks of cotton-seed oil, f. o. b. at its mill in buyer's tanks, during the first half of October. The tanks were sent, and received at defendant's station, two on the 12th and the others on the 14th of October, but the railroad company did not notify defendant of the receipt of the tanks till the morning of the 16th. Defendant then refused to fill the contract, on the ground that the tanks were not received in time. *Held*, that the court properly excluded evidence that it would take defendant six hours to load a tank car with oil; there being no evidence that plaintiff had any knowledge of defendant's facilities for loading.

4. Defendant contracted to sell and deliver to plaintiff five tanks of cotton-seed oil during the first half of October, at 18 cents per gallon. Plaintiff resold the oil at 22 cents, and so notified defendant. On October 16th the price had increased to 25 cents, and defendant refused to furnish the oil. Plaintiff then had oil on hand, which it was obliged to hold, to fill its contract with the one to whom it had resold; but afterwards the price fell, and it purchased oil at 20 cents and filled its contract. *Held*, the measure of damages for defendant's breach of contract was 7 cents per gallon, being the difference between the contract price and the

¹ Rehearing denied.
61 S.W.—23

¹ Writ of error denied by supreme court.

market price at the time defendant refused to perform the contract.

Error from district court, Anderson county; A. D. Lipscomb, Judge.

Action by the Corsicana Cotton-Seed Oil Company against the Palestine Cotton-Seed Oil Company. From a judgment for plaintiff, defendant brings error. Affirmed.

B. H. Gardner and Gregg & Brooks, for plaintiff in error. Thos. B. Greenwood, for defendant in error.

PLEASANTS, J. This action was brought by defendant in error against plaintiff in error to recover damages for the breach of a contract of sale of 30,000 gallons of cotton-seed oil. The trial of the case by a jury in the court below resulted in a verdict and judgment in favor of defendant in error for the sum of \$2,100, from which judgment this writ of error is prosecuted. The following are the facts as disclosed by the record: On the 14th of September, 1899, defendant in error agreed to purchase of the agent of plaintiff in error five tanks of cotton-seed oil at 18 cents per gallon, f. o. b. cars at Palestine; the terms of said contract of sale being set out in the following letter written on said date by defendant in error to plaintiff in error: "We confirm purchase of you through Jno. Hamilton of five buyer tanks prime crude cotton-seed oil, at 18 cents per gallon, f. o. b. our tanks, Palestine, for shipment first half of October; tanks to hold 130 barrels each, 10% more or less." On September 23d defendant in error wrote plaintiff in error as follows: "If you can let us send you one or two tanks very early in October, please advise us in time so that we can get tanks to you in time to move the five tanks bought of you for first half of October shipment." Plaintiff in error replied to this letter on September 25th, stating that one tank could be sent at once, two more the last of the week, and the last two in about a week from September 25th. On October 3d defendant in error wrote plaintiff in error as follows: "We beg leave to advise we have resold the oil bought of you recently to Swift & Company, at 22 cents per gallon, first half of October shipment." On same day defendant in error wrote to their broker: "We confirm sale through you to Swift & Company of 625 barrels prime crude oil at 22 cents per gallon, f. o. b. buyer's tanks, Palestine, Texas, first half October shipment. We bought this oil from the Palestine oil mill at a low price, and it is absolutely necessary that tanks reach Palestine in time to load first half of October, or else they will get out of trade." Swift & Co. wrote plaintiff in error on October 4th: "We confirm purchase from you of 625 barrels prime crude cotton-seed oil at 22 cents per gallon, load in our tank cars, f. o. b. your mill, shipment first half of October." Plaintiff in error wrote Swift & Co. on October 5th as follows: "We would like to have you send the tanks at once to move the oil

sold to Corsicana Oil Mill, and then sold to you by them. Send tanks promptly. Can ship as fast as you can get tanks here." When plaintiff in error wrote this letter, it knew that it would take two days for the letter to reach Chicago, and about eight days for the cars to come from Chicago to Palestine. This letter was received by Swift & Co. on October 7th, and on same day they started seven tank cars from Chicago to Palestine for shipment of this oil, and on next day notified plaintiff in error that the cars had been sent, and requested that they be notified by wire if there was any delay in their transportation. These cars were shipped over the usual route, and were carried to Palestine with the usual dispatch; two arriving October 12th, and the others October 14th. There is a conflict in the testimony as to whether or not the plaintiff in error was notified on October 13th of the arrival of the two cars at Palestine on the 12th. The agent of the railway company at Palestine testifies that he notified the manager of plaintiff in error on the 13th of October of the arrival of said cars, and was told by him that plaintiff in error was not ready to have the cars placed on the mill siding, and would let the railway company know when it wanted the cars so placed. The manager denies that he was notified of the arrival of the cars on the 13th, but says that if he had been so notified the cars could not have been placed on the mill siding, because said siding was filled with seed cars. The siding was in this condition from the 12th to the 16th, and, as the tank cars could only be filled when placed on the siding, they could not have been filled at any time between the 12th and 16th of October. On the morning of the 16th the railway company notified plaintiff in error that the cars had all arrived, and desired to know if they should be placed on the mill siding. This notice was given between 9 a. m. and 12 noon on the 16th. Upon receipt of this notice, plaintiff in error informed the railway company that it would notify them if it desired the cars placed on the siding, and then communicated with the defendant in error, the Corsicana Company, and informed said company that the cars had arrived too late to be filled for shipment the first half of October. On the 20th of October plaintiff in error wrote defendant in error, declining to fill the contract on the ground that defendant in error had made the performance of the contract impossible, by failing to deliver the cars in time, but offering to fill the two cars which reached Palestine on the 12th. Defendant in error continued to demand the oil until the 26th of October, when it filled the contract with Swift & Co. with other oil, which it had bought for 20 cents a gallon. The price of oil began to advance in October, and on the 16th of the month the market price of prime crude cotton-seed oil at Palestine was 25 cents per gallon. The price began to decline after the 16th, and on the

26th, when defendant in error filled its contract with Swift & Co., it was worth only 20 cents per gallon. Defendant in error, in order to be able to fill its contract with Swift & Co., kept on hand, and refused to sell, five tanks of oil, which it otherwise would have sold at 25 cents per gallon. There was no evidence as to how long it would ordinarily take a mill of the capacity of the Palestine mill to load five tanks of oil, nor any evidence that defendant in error had any knowledge of the facilities of the Palestine mill for loading tank cars. Plaintiff in error offered to prove by its manager, Johnson, and its president, Wright, that it would take their mill six hours to load a tank car with oil; but on objection of defendant in error this testimony was excluded, on the ground that it was not shown that defendant in error had any knowledge of the facilities possessed by plaintiff in error for loading tank cars; neither was it shown, or offered to be shown, how long it would ordinarily take a mill of the capacity of the Palestine mill to load said cars. The evidence shows that it was the custom of the Palestine mill to load only one car at a time, and load through a two-inch pipe, but there is no evidence that defendant in error had any knowledge of these facts. Wright, the president of the Palestine Company, testified, "If oil had been worth less than 18 cents on October 16th, it is very likely that the tanks would have been loaded." It is evident from the letters of defendant in error introduced in evidence that it construed the contract to require the tank cars to reach Palestine and be delivered to the plaintiff in error in time to be loaded during the first half of October. The only defenses pleaded by defendant in the lower court were the failure of the plaintiff to furnish the cars in time to make the delivery of the oil within the first half of October, and that plaintiff, having sold the oil at 22 cents per gallon, and filled the contract with oil bought at 20 cents per gallon, could in no event recover more than 2 cents per gallon in damages.

We deem it unnecessary to consider the various assignments of error presented in the brief of plaintiff in error complaining of errors in the charge of the court on the issue as to whether or not the defendant breached the contract, because, under our view of the law applicable to the facts in this case, no other verdict could have been rendered than one in favor of the plaintiff, and if the trial court committed any error in his charge, in submitting said issue, such error was harmless. Conceding that the contract required the defendant in error to furnish the cars in which said oil was to be shipped in time for them to have been loaded before 12 o'clock noon on October 16th, we think the evidence in the case shows conclusively that, if said cars were not so furnished, the failure to furnish them within said time was due to conditions for which the plaintiff in error was primarily responsible, and to permit plaintiff in

error to avoid its contract because said cars were not so furnished would be to allow it to take advantage of its own wrong. When the defendant in error notified the plaintiff in error that it had sold the oil to Swift & Co., and requested that it be delivered, in accordance with the contract, in cars to be furnished by Swift & Co., plaintiff in error acquiesced in the transfer of the contract to Swift & Co.; and, with full knowledge of the fact that it required about eight days for Swift & Co. to forward the cars from Chicago, it wrote said company, on October 5th, requesting that the cars be forwarded at once. This letter plaintiff in error knew could not reach Chicago until the 7th of October, and the evidence is uncontradicted that the cars were started from Chicago to Palestine on that day, and on the next day Swift & Co. wrote plaintiff in error that the cars had been forwarded, and requested that they be notified by wire of any delay in their transportation. All of these cars reached Palestine by the 14th of October, which was in ample time for them to have been loaded before noon of the 16th. Notwithstanding the knowledge on the part of plaintiff in error that said cars had been forwarded from Chicago, and could not reach Palestine before the 13th, according to the undisputed testimony plaintiff in error had its siding so filled with seed cars during all of the time between the 12th and 16th of October that the tank cars could not have been placed on said siding and loaded during any portion of said time. In view of these facts, the statement of the president of the defendant company that, "If oil had been worth less than 18 cents on October 16th, it is very likely the tanks would have been loaded," appears to us to be a frank statement of real reason for the failure of plaintiff in error to deliver the oil in accordance with its contract. The offer of plaintiff in error to fill the two cars which arrived on the 12th was an admission that the failure to fill said cars before noon of the 16th was due to conditions for which plaintiff in error was responsible, as it denied it had any knowledge of the arrival of said cars in Palestine before the morning of the 16th, and its manager testified that he did not expect to be notified by defendant in error of the arrival at Palestine of any of said cars. The same conditions which prevented the loading of the two cars before the end of the first half of October also prevented the loading before said time of the three cars which arrived on the 14th, and plaintiff in error was as much responsible for said failure in regard to the cars arriving on the 14th as in regard to those which arrived on the 12th. We think the trial court did not err in excluding, upon the grounds hereinbefore stated, the proffered testimony as to the length of time it would take the Palestine oil mill to load a tank car with oil. Said testimony was also inadmissible because immaterial under our conclusion as to the effect

of the undisputed evidence in the case, above expressed. If our conclusion as to the effect of the evidence as above expressed is erroneous, we are of opinion that the judgment of the court below should be affirmed because the delivery of the cars to the plaintiff in error before noon of the 16th of October was such substantial compliance by defendant in error with the terms of the contract as contended for by plaintiff in error as would, in equity, entitle defendant in error, under all of the facts in this case, to enforce a performance of said contract by plaintiff in error.

There is nothing in the facts of this case which would make the application of the general rule as to the measure of damages for a breach of a contract of sale inequitable. It is true, defendant in error filled its contract with Swift & Co. with oil worth only 20 cents per gallon, and made a profit of 2 cents per gallon on said sale, but in order to fill this contract it had to hold the oil which it would otherwise have sold for 25 cents per gallon. We think it clear that, under the evidence, defendant in error has been damaged in amount equal to the difference between 18 cents per gallon, the contract price of the oil, and 25 cents per gallon, the market price at Palestine, Tex., on the day plaintiff in error failed to perform its contract; and the trial court did not err in rendering judgment for defendant in error for that amount. We are of opinion that the judgment of the court below should be affirmed, and it is so ordered. Affirmed.

On Motion for Rehearing.

(March 15, 1901.)

At the request of plaintiff in error, we find the following additional conclusions of fact, and modify the conclusions stated in our former opinion as herein indicated.

1. It is not shown when the letter written by plaintiff in error on October 5th to Swift & Co., requesting that the cars be forwarded, was received by Swift & Co. In their letter of October 8th notifying plaintiff in error that the cars had been shipped on the 7th, Swift & Co. do not refer to the letter of plaintiff in error of October 5th, and the cars were not forwarded in response to the request made in said letter. When plaintiff in error wrote the letter of the 5th of October, it did not know where the cars would be shipped from, as they were liable to have been forwarded from St. Louis, or at any point from which they could have been obtained on the International & Great Northern Railroad.

2. Plaintiff in error did not offer to fill the two tanks which arrived on the 12th, in its letter to defendant in error on October 20th, but such offer was made on October 16th, and was conditioned that defendant in error would not insist on the filling of the remaining tanks. The offer to fill the two tanks

upon condition that the defendant in error would consider the contract as at an end should not be considered as an admission by plaintiff in error that it was bound, under the contract, to fill said two tanks; and our reasoning upon that point in our former opinion is not sound, as the facts are now found to exist.

With these modifications of our findings of fact, we adhere to our former opinion, and the motion for a rehearing will be overruled. Overruled.

HOUSTON, E. & W. T. RY. CO. v. WHITE.¹ (Court of Civil Appeals of Texas. Feb. 21, 1901.)

CARRIERS—WRONGFUL EJECTION OF PASSENGER—PERMITS—CONTRACT OF CARRIAGE—RULES OF COMPANY—SUFFICIENCY OF EVIDENCE—EXCESSIVE DAMAGES.

1. Where a passenger requests a permit to ride on a certain train when he purchases a ticket, and is told by the agent that the conductor will give him one, the company is liable for his ejection by the conductor for the failure to have such permit.

2. Where a railroad has a rule forbidding the issuance of permits by conductors, and a passenger is ejected for want of such a permit, the company is not liable because its conductors have violated such rule, unless it has been so frequently violated as to warrant the conclusion that it is not enforced.

3. Defendant was operating a freight train which carried passengers on permits issued by station agents and conductors, and plaintiff was ejected, though he had a ticket and asked the conductor for a permit. The plaintiff testified that he asked the station agent for a permit, and was told to get it from the conductor, which was denied by the agent. The company introduced a rule by which conductors were only allowed to give permits at stations where no tickets were sold. The agent had not been furnished with blank forms up to such time, and plaintiff's evidence showed that the conductors had been in the habit of giving permits. Held sufficient to authorize a submission of the issue whether it was the custom for conductors to furnish permits to passengers after they got on the train.

4. Where a passenger is wrongfully ejected from the train on a rainy night, and compelled to walk half a mile to defendant's station, and wait five hours for another train, and contracts a fever from such exposure, and is confined in his bed for two days, and loses a week's work as a blacksmith, a verdict for \$500 is not excessive.

5. Where a passenger is wrongfully ejected from defendant's train, and takes a cold as a result of exposure resulting therefrom, he may recover for his pain, though there is no direct evidence thereof.

Appeal from district court, Liberty county; L. B. Hightower, Judge.

Action by Willis White against the Houston, East & West Texas Railway Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Feagin & Carter and Oswald S. Parker, for appellant. Stevens & Marshall, for appellee.

GARRETT, C. J. This action was brought by Willis White, plaintiff in the court below,

¹ Rehearing denied.

against the Houston, East & West Texas Railway Company, defendant, to recover damages for an alleged wrongful ejection from a railway car in which he was riding as a passenger. The case was tried by jury, and resulted in a verdict and judgment in favor of the plaintiff for the sum of \$500.

On April 21, 1900, the defendant was running over its railroad local freight trains, which carried passengers upon permits issued by the station agents and conductors. On that date the plaintiff purchased a ticket from the defendant's agent at Diball for passage to Lufkin, and went aboard the train. When the conductor called for his ticket, the plaintiff tendered it and asked for a permit. The conductor refused to give him a permit, and ejected him from the car. It was a cold, rainy night, and plaintiff had to walk back to the station, about a half mile, and wait without shelter five hours, until the regular passenger train came. He was 61 years of age. He got wet, and contracted a cold and fever by reason of the exposure, and was confined to his bed for two days, and lost a week's work at his trade as blacksmith. Plaintiff testified that when he bought the ticket he asked the agent for a permit to go on the local, and that the agent told him the conductor would give him one, and that, when he offered his ticket to the conductor and asked him for a permit, he told the conductor that the agent had told him when he purchased his ticket that the conductor would give him a permit. The agent testified that nothing was said about a permit; and the conductor, Rodgers, testified that he told the plaintiff that it would be necessary for him to have a permit to entitle him to ride on the train; that he would have to get off; and that plaintiff got off without objection. Defendant's evidence as to its rule allowing passengers to ride on local freights was to the effect that they were required to procure permits from the agents of whom the tickets were purchased, and, at stations where the company had no agents, to procure them from the conductors, and that the conductors had orders to put any passenger off who did not have a permit, except such passengers as got on at points where tickets were not sold. The permit issued was upon a printed form furnished to the agents and conductors, and was required to be signed by the agent and the passenger, when furnished by an agent. It contained a notice to the passenger that the company did not undertake to furnish facilities usual in the carriage of passengers, and was a release on the part of the passenger to the company of its liability as a carrier of passengers. Up to this time the agent at Diball had not been supplied with these blanks. The plaintiff testified: "People were accustomed to travel on that train while I was at Diball, and I rode on it several times myself. Sometimes I would get permits, and sometimes I would not. I got them on the

train from the conductor. I always bought my ticket at the commissary." Defendant had no depot building at Diball. The "commissary" belonged to a lumber company, and Rutland, who was in charge of it, acted also as agent for the defendant. He further testified that the conductor would often ask him why he did not get a permit, and he would reply that there were none there. Another witness, who was with plaintiff at the time, also testified that he had gone from Diball to Lufkin several times before on the local train after getting a ticket, and got the permit from the conductor after he got on the train, and that he had never got it from the agent.

In submitting the case to the jury the court instructed them that if they believed from the evidence that when the plaintiff purchased his ticket he asked the agent for a permit, and was told by him that he could procure one from the conductor, and that the plaintiff applied to the conductor for the permit, he was rightfully upon the train, and the defendant would be liable. Or if it was the custom of the defendant to furnish the conductor with blank permits, to be issued to parties after they got aboard the train, and the plaintiff, when he tendered his ticket to the conductor, asked for such permit, he was rightfully on the train, and the expulsion would be wrongful. If, when the plaintiff purchased his ticket, he asked the agent for a permit, and was told by the agent that the conductor would furnish him one, the duty of the defendant to furnish the permit became a part of the contract for carriage, and the plaintiff was rightfully on the train. *Railway Co. v. Moorman* (Tex. Civ. App.) 46 S. W. 662; *Railway Co. v. Halbrook*, 12 Tex. Civ. App. 475, 33 S. W. 1028. The defendant would not be liable for the violation of its rule about the issuance of permits unless it was so frequently violated as to authorize the conclusion that it had been waived, and was not being enforced. *Railway Co. v. Lynch* (Tex. Civ. App.) 28 S. W. 253. But the issue was not as to the violation of the rule. It was as to the rule itself. Although the defendant's evidence was that the rule required permits to be obtained from the agent at stations where tickets were sold, and that the conductors had orders to put off passengers getting on at such stations without permits, yet, on the other hand, it appears that up to the time plaintiff purchased his ticket the agent at Diball had not been furnished with blanks, and that the conductor had been giving permits to passengers getting on with tickets. The evidence was sufficient to authorize the submission of the issue to the jury of whether or not it was the custom or rule of the defendant to furnish blank permits to the conductors, to be issued to parties after they got aboard the trains, and this was the issue submitted. There was no error in doing so. There was evidence sufficient to support the verdict of the ju

upon both of the issues in the case, and it is approved.

We cannot say that the verdict was excessive in amount. Plaintiff suffered physically with cold and fever as a result of his wrongful expulsion from the train, and it was not necessary to produce direct evidence as to mental pain and anguish, to entitle him to recover therefor. *Railway Co. v. Curry*, 64 Tex. 85; *Railway Co. v. Mitchell*, 1 Tex. Ct. Rep. 430, 60 S. W. 996. We find no error in the judgment, and it will be affirmed. Affirmed.

LEAZAR v. MENEFEE.

(Court of Civil Appeals of Texas. Feb. 21, 1901.)

PRINCIPAL AND SURETY—ACTION BY CREDITOR—REQUEST—VERBAL—WRITTEN.

Under Rev. St. arts. 3811, 3812, providing that a surety by notice in writing may require creditors to bring action against the principal debtor as soon as a right of action has accrued, a verbal notice by the surety, not acted on by the creditor, will not release the surety from his liability.

Appeal from Jackson county court; John O. Rowlett, Judge.

Action by W. G. Leazar against S. A. Menefee and another. From a judgment in favor of defendant Menefee, plaintiff appeals. Reversed.

McCrory & Austin, for appellant. O. S. York and Henry T. Chivers, for appellee.

GARRETT, C. J. The appellant brought this suit against the appellee and James Dever to recover upon their joint and several promissory note for the sum of \$278.17, dated November 11, 1898, and payable 11 months after date. Dever suffered judgment by default. The appellee answered that he was the surety of Dever, which fact the appellant knew, and that shortly after maturity of the note he went in person to the appellant, and urged him to bring suit against Dever and attach some land that Dever then owned, and to garnish a party then indebted to Dever; that appellant then authorized appellee to engage an attorney for him, and arrange for them to meet in Edna, the county seat; that appellee saw an attorney, who agreed to bring the suit, but in the meantime appellant had engaged another attorney, and delayed bringing suit until more than one term of the court had passed, and the said Dever had sold his land, and the party whom he sought to have garnished had paid his debt, and all opportunity for making the debt out of him was lost, wherefore appellee was discharged and released from liability to the appellant on said note. Appellant demurred to the answer, but the court overruled the demurrer, and, on proof of the facts alleged as to the request of appellee to bring the suit, rendered judgment in favor of the appellee. It was shown by the evidence that Dever had

sold the land, but that it was sold to pay liens thereon which absorbed all the proceeds, and that he received no part of the purchase money; and that the debt sought to be garnished was for the purchase money of land, and was paid by a reconveyance thereof. The demurrer should have been sustained, and, having been overruled when the evidence was heard, the appellant should have had judgment. There was no merit whatever in the defense. The giving of time to the principal by the creditor, without a binding contract to do so, or by forbearance or indulgence, or a failure by the creditor to prosecute his demand, does not release the surety. *Hunter v. Clark*, 28 Tex. 162. Appellee could have required the appellant to institute suit against Dever forthwith, by giving him notice in writing. Rev. St. art. 3811. And if he had failed to do so at the first term of court thereafter, or to the second term, showing good cause why he did not bring it to the first term and prosecute the same to judgment and execution, the appellee would have been discharged. Id. art. 3812. The allegations of the answer, as well as the evidence, show that the appellee went to the appellant in person, and urged him to bring the suit. There was no notice in writing as required by statute. The judgment of the court below will be reversed, and as the appellee prayed judgment over against Dever in case judgment should be rendered against him, and Dever was not made a party to the appeal, the cause will be remanded for trial in accordance with this opinion. Reversed and remanded.

LINDSEY v. WHITE.

(Court of Civil Appeals of Texas. Feb. 25, 1901.)

WILLS—PROBATE—ESTABLISHMENT BY PAROL—STATEMENTS OF DECEASED PERSON—DECLARATIONS AGAINST INTEREST—EXPERT TESTIMONY—HARMLESS ERROR—INSTRUCTIONS—RECORD.

1. On probate of a will, wherein the husband of the testatrix was named as executor, though not a beneficiary, and which was contested on the ground of mental incapacity of the testatrix, statements made by testatrix's husband, before his decease, that he regarded testatrix as insane, were properly excluded, as the same were not declarations against interest, the husband not being a beneficiary.

2. On the probate of a will, wherein the testatrix's husband was named as the executor, and the probate of which was contested on the ground of the mental incapacity of the testatrix, statements made by testatrix's husband, before his decease, that he regarded testatrix as insane, were properly excluded, the statements not having been made while he was actually clothed with his trust, and acting within the scope of his duties.

3. On the probate of a will, which was contested on the ground of the mental incapacity of the testatrix, where it was shown that testatrix had an insane antipathy to her husband, evidence of a physician that, in his opinion, testatrix was capable of acting intelligently with reference to her husband, did not violate the rule that experts cannot express an opinion as to the capacity of the person to do the very

thing in issue, as such witness was entitled to testify, in regard to testatrix's delusion as to her husband, that she was sane and intelligent on that subject.

4. The improper admission of evidence was harmless, where other evidence to the same effect, and directly infringing the rule alleged to have been violated, was admitted without objection.

5. Where there was no error in an instruction as given, and no other instruction was requested, an objection cannot be urged on appeal that the court should have instructed further in regard to the proposition stated.

6. An assignment of error that the court refused to give a requested instruction was not considered, where the record did not disclose whether it was given or refused.

7. On the probate of a will which had been lost and was being established by parol evidence, evidence of one witness that she had heard of two wills being executed after the execution of the first, but that she had never seen them, was insufficient to present the issue of a later will, and hence an instruction as to the weight of such testimony was properly refused, such question being for the jury.

Error from district court, Smith county; J. G. Russell, Judge.

Petition by Newell W. White, as administrator of the estate of Emily F. Brown, deceased, for the probate of the will of said Emily F. Brown, deceased. From a judgment admitting the will to probate, S. A. Lindsey, as administrator of the estate of J. H. Brown, deceased, brings error. Affirmed.

T. O. Woldert, for plaintiff in error. Marsh, McIlwaine & Fitzgerald, for defendant in error.

GILL, J. This action was brought by Newell W. White, defendant in error, to probate the will of Emily F. Brown, deceased. S. A. Lindsey, administrator of the estate of J. H. Brown, deceased, contested the probate of the alleged will on the ground that the testatrix, by reason of insanity, was incapable of disposing of her property by will. A trial on appeal from the county court to the district court resulted in a judgment admitting the will to probate, and the contestant has brought the cause here by writ of error.

Mrs. Emily F. Brown, deceased, and J. H. Brown, deceased, were husband and wife, and from the date of the will in question until their respective deaths resided in Smith county. The evidence establishes the fact that, in 1888 or 1889, Mrs. Emily F. Brown, being then a woman of mature years and the wife of J. H. Brown, executed the will in question, according to the forms of law, naming her husband, J. H. Brown, as independent executor, but making no bequest to him. At the date of the making of the will the husband was insolvent, and remained so until his death. Mrs. Brown, after the execution of the instrument, placed it in a bank in Tyler, in Smith county, afterwards removed it to another bank in the same city, and finally it was placed, either by her or her husband, in a safe in her husband's office, where it remained until about eight months prior to her death, which was the

last time it was seen by any witness who testified on the trial of this cause. Mrs. Brown died on the 12th day of August, 1897. J. H. Brown died July 12, 1898, without issue and intestate. He made search for the will a few months after his wife's death, but failed to find it. Its existence, contents, and terms were fully shown, and no question is here made on that phase of the controversy. It was also made to appear that proper search had been made, and that it could not be found.

Contestant adduced much evidence to the effect that testatrix was generally insane from a date anterior to the date of the will until her death. Many others testified that she was insane during the entire period last mentioned, but that her insanity assumed the form of an insane delusion with reference to her husband, which manifested itself in a groundless and violent antipathy to him. As to her mental condition just prior to, at the date of, and immediately following the execution of the will, the evidence is in sharp conflict; but we are of opinion, after a careful review of the entire evidence, that the proof is sufficient to support the finding of the jury that she was mentally sound when she executed the will.

The evidence is undisputed that she was afflicted with softening of the brain, to which she was predisposed by heredity, and that its immediate cause was a minute hemorrhage of the brain, which occurred prior to the date of the will. This softening of the brain was a progressive disease, its manifestations and effect upon the brain being slight in the beginning, but inevitably resulting finally in insanity and death. The conflict in the evidence was chiefly as to when the disease in its progress dethroned her reason, either generally or with reference to her husband, and whether, if such effect had resulted prior to the date of the will, she was experiencing a lucid interval when she executed it. As to her mental condition during the last year of her life, the proof is overwhelming that she was either insane or an imbecile, and during the last part of her life practically paralyzed, bedridden, and helpless. J. H. Brown died prior to any effort to probate the alleged will, and therefore never assumed the duties of independent executor.

Under the first error assigned, plaintiff in error complains of the exclusion of the testimony of the witnesses Oden and Johnson as to statements made by J. H. Brown, deceased, to the effect that he regarded his wife as insane. It is urged that this should have been admitted, for the reason that Brown was named executor in the proposed will. In *Prather v. McClelland*, 76 Tex. 575, 13 S. W. 548, it was held that the remark of the wife of the testator, questioning his mental capacity, and made just before the will was signed, was incompetent on the inquiry as to mental capacity, though she was

devisee under the proposed will. We are of opinion that the rule there announced justifies the exclusion of the proffered testimony.

The testimony in question was not admissible on the ground that it was an admission of a party, for the reason that it is not a declaration against interest, but is self-serving, as the husband's estate will receive something if the will is not admitted to probate, and nothing if it is. His admission was not admissible, in any event, unless made at a time when he was actually clothed with his trust, and acting within the scope of his duties. See 1 Am. & Eng. Enc. Law (2d Ed.) p. 679, note. If it be contended that it should have been admitted as tending to show how she was regarded by the immediate members of her family, the answer is that the testimony was admitted for that purpose in another and proper form, and from other witnesses. We think the court committed no error in excluding it.

The witness Dr. C. A. Smith was permitted, over objection, to testify (after stating facts and opinion as to her mental condition generally) that in his opinion she was capable of acting intelligently with reference to J. H. Brown, her husband. This is assigned as error, because violative of the rule that, while an expert will be permitted to express his opinion as to the mental condition of the testatrix as to sanity or insanity, he may not express his opinion as to her legal capacity to do the thing in question. The rule as stated is sound and well supported by authority. *Brown v. Mitchell*, 88 Tex. 350, 31 S. W. 621, 36 L. R. A. 64; *Lawson, Exp. Ev.* p. 130. But we are of opinion that the answer complained of is not obnoxious to the rule. The witness might properly be permitted to say, in speaking to the question of insane delusion with reference to the husband of testatrix, that in his opinion she was sane and intelligent upon that subject. His answer was but another way of saying the same thing, and the jury were still left to ascertain from this and other evidence whether she was legally capacitated to bind herself in matters affecting her husband. We think the answer was properly admitted, but, if error, it was harmless, as a mass of other testimony to the same effect, and directly infringing the rule above quoted, was admitted without objection. *Railway Co. v. Kindred*, 57 Tex. 491; *Clarkson v. Whitaker* (Tex. Civ. App.) 33 S. W. 1032; *Railway Co. v. John* (Tex. Civ. App.) 29 S. W. 558.

The fifth assignment complains of the following language occurring in the court's general charge: "And if you further find that said instrument has never been revoked by Mrs. Brown, you will find for proponent." The objection urged is that the court failed to instruct the jury that upon that issue the burden of proof was also on the proponent. If contestant desired a fuller instruction on

the point, he should have requested it in the form of a special charge. Not having done so, he cannot complain. There was no affirmative error in the portion of the charge complained of. It is also true that the point was substantially covered in special charge No. 8, given at the request of contestant.

The seventh assignment is predicated upon the alleged refusal of the trial court to give special charge No. 8, requested by contestant. The jury were charged, in a general way, in the court's main charge, on the question of lucid intervals. The special charge in question is addressed to that point, but does not appear to have been called to the attention of the trial court. The record does not disclose whether it was given or refused. We cannot, therefor, consider the assignment. *Michael v. Yoakum* (Tex. Civ. App.) 30 S. W. 1076; *Hodde v. Susan*, 63 Tex. 307.

The eighth assignment, complaining of the refusal to give special charge No. 4, will not be noticed for a like reason as last above given.

The twelfth special charge asked was on the weight of the evidence, and the court rightly refused to give it.

The verdict ought not to be set aside on the ground set out in the twelfth assignment. The only evidence tending to show a later outstanding will was an answer of one witness, who vaguely stated that she had heard of two wills being executed by Mrs. Brown since 1888. She does not claim to have seen it, and no other witness mentions such a thing. This evidence was insufficient to present the issue of a later will. In this case the evidence covers the broad field of inquiry usual in such contests, and there is present the usual conflict in the testimony. The case was fairly presented to the jury in a charge of unusual lucidity. Considered in connection with the special charges given, it covered every issue presented by the facts. The case, involving, as it does, the credibility of witnesses, their opportunity to know of the matters about which they testified, and the weight to be given to the facts stated and opinions given, comes peculiarly within the province of the jury. The trial court has approved the verdict, and we have found no reason to disturb the conclusion reached. The judgment is affirmed. Affirmed.

HOUSTON, E. & W. T. RY. CO. v.
JACKSON.¹

(Court of Civil Appeals of Texas. Feb. 21, 1901.)

CARRIERS—WRONGFUL EJECTION OF PASSENGER—PERMITS—CONTRACT OF CARRIAGE—RULES OF COMPANY—SUFFICIENCY OF EVIDENCE—EXCESSIVE DAMAGES.

1. Where a passenger requests a permit to ride on a certain train when he purchases a

¹ Rehearing denied.

ticket, and is told by the agent that the conductor will give him one, the company is liable for his ejection by the conductor for the failure to have such permit, since the duty to furnish the permit is a part of the contract of carriage.

2. Where a railroad has a rule forbidding the issuance of permits by conductors, and a passenger is ejected for want of a permit, the company is not liable because its conductor has violated such rule, unless it has been so frequently violated as to warrant the conclusion that it is not enforced.

3. Defendant was operating a freight train, which carried passengers on permits issued by station agents and conductors, and plaintiff was ejected, though he had a ticket, and asked the conductor for a permit. The plaintiff testified that he asked the station agent for a permit, and was told to get it from the conductor, which was denied by the agent. The company introduced a rule by which conductors were only allowed to give permits at stations where no tickets were sold. The agent had not been furnished with blank permits up to such time, and plaintiff's evidence showed that the conductors had been in the habit of giving permits. Held sufficient, in an action for wrongful ejection, to authorize a submission of an issue whether it was the custom for conductors to furnish permits to passengers after they got on the train.

4. Where a passenger is wrongfully ejected from the train on a cold and rainy night, and compelled to walk half a mile to defendant's station, and wait five hours for another train, and he contracts a cold and neuralgia therefrom, and is confined to his bed for 15 days, a verdict for \$500 is not excessive.

5. Where a passenger is wrongfully ejected from defendant's train, and takes cold and neuralgia as a result of exposure resulting therefrom, he may recover for his pain and anguish, though there is no direct evidence thereof.

6. The action of the court in stating that a verdict against a carrier for the ejection of a passenger is excessive, and in allowing a remitter to be filed to prevent the granting of a new trial, is not erroneous.

Appeal from district court, Liberty county; L. B. Hightower, Judge.

Action by T. S. Jackson against the Houston, East & West Texas Railway Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Feagin & Carter and Oswald S. Parker, for appellant. Stevens & Marshall, for appellee.

GARRETT, C. J. This action was brought by T. S. Jackson, plaintiff in the court below, against the Houston, East & West Texas Railway Company, defendant, to recover damages for an alleged wrongful ejection from a railway car in which he was riding as a passenger. The case was tried by jury, and resulted in a verdict and judgment in favor of the plaintiff. The verdict of the jury was for the sum of \$800, but, upon suggestion of the court on the hearing of the motion for a new trial that it was excessive, a remitter of \$300 was made, and judgment was entered for \$500. On April 21, 1900, the defendant was running on its railroad local freight trains, which carried passengers upon permits issued by the station agents and conductors. On that date the plaintiff pur-

chased a ticket from the defendant's agent at Diball for passage to Lufkin, and went aboard the train. There was no depot building at Diball. A lumber company has a "commissary" there, and Rutland, who had charge of the commissary, acted as agent for the defendant. When the conductor called for his ticket, the plaintiff tendered it, and asked for a permit. The conductor refused to give him the permit, and ejected him from the car. It was about 9 o'clock at night when plaintiff was put off the train, and it was cold, and raining, and plaintiff had to walk back to the station about a half mile, and wait, without shelter, five hours, until the regular passenger train came. Plaintiff got wet, and contracted a cold and had neuralgia by reason of the exposure, and was confined to his bed 15 days. Plaintiff testified that when he bought the ticket he told the agent he wanted to go on the local, and that the agent told him he would get the permit on the train; and that when he offered his ticket to the conductor he offered to sign a permit. The agent testified that nothing was said about a permit, or riding on the freight train; and the conductor, Rodgers, testified that he told the plaintiff that it would be necessary for him to have a permit to entitle him to ride on the train, that he would have to get off, and that plaintiff got off without objection. Defendant's evidence as to its rule allowing passengers to ride on local freights was to the effect that they were required to have permits, signed by the superintendent and the agent of whom the tickets were purchased. The permit issued was upon a printed form furnished by the defendant. Up to this time the agent at Diball had not been supplied with these blanks. The plaintiff testified: "Before that I had gotten permits all the time on the local from the conductor. They did not keep them at Diball. That is, the agent said they did not; that they kept tickets, but no permits. When I would get a permit from the conductor, I signed it on the train." "The permits were blanks, with certain printed form on it, which we had to sign." "The conductor carries them." "I had been getting permits on the local trains before that, but only at telegraph stations. At telegraph stations, the agent, when selling the ticket, would have to sign a permit; but, a little station like Diball, they did not keep permits." "The permits I speak of were in the possession of the conductors on the locals and agents at telegraph stations. Diball was not a telegraph station." "I understood the rule to be, about riding on these freight trains, that we got permits from agents at telegraph stations and from conductors on getting on at other places." In submitting the case to the jury the court instructed them that, if the plaintiff was told by the agent of the defendant he could obtain the permit from the conductor on the train, and that the plaintiff did tender his ticket to the con-

ductor, and demand the permit, then he was rightfully upon the train, and the defendant would be liable; but if it was required by the defendant that a person proposing to ride on such train should obtain a permit, and the plaintiff did not obtain such permit, and made no effort to obtain one, then he was a trespasser on the train. Or if it was the defendant's custom to furnish the conductor of such train with blank permits, to be signed by the parties after they got aboard of such trains, and the plaintiff, after he got on the train, demanded a permit of the conductor, then the plaintiff would be rightfully on the train, and not a trespasser. If, when the plaintiff purchased his ticket, he asked the agent for a permit, and was told by the agent that the conductor would furnish him one, the duty of the defendant to furnish the permit became a part of the contract of carriage, and the plaintiff was rightfully on the train. *Railway Co. v. Moorman* (Tex. Civ. App.) 46 S. W. 682; *Railway Co. v. Halbrook*, 12 Tex. Civ. App. 475, 33 S. W. 1028. The defendant would not be liable for the violation of its rule about the issuance of permits unless it was so frequently violated as to authorize the conclusion that it had been waived, and was not being enforced. *Railway Co. v. Lynch* (Tex. Civ. App.) 28 S. W. 253. But the issue was not as to the violation of the rule. It was as to the rule itself. Although the defendant's evidence was that the rule required permits to be obtained from the agent at stations where tickets were sold, yet, on the other hand, it appears that up to the time plaintiff purchased his ticket the agent at Diboll had not been furnished with blanks, and that the conductor had been giving permits to passengers getting on with tickets. The evidence was sufficient to authorize the submission of the issue to the jury whether or not it was the custom or rule of the defendant to furnish blank permits to the conductors to be issued to parties after they got aboard the trains; and this was the issue submitted. There was no error in doing so. There was evidence sufficient to support the verdict of the jury upon both of the issues in the case, and it is approved. We cannot say that the judgment is excessive in amount. Plaintiff suffered physically with cold and neuralgia as a result of wrongful expulsion from the train, and it was not necessary to produce direct evidence as to mental pain and anguish to entitle him to recover therefor. *Railway Co. v. Curry*, 64 Tex. 85; *Railway Co. v. Mitchell*, 1 Tex. Ct. Rep. 430, 60 S. W. 996.

Error has been assigned upon the action of the court below in allowing a remitter of \$300, and in rendering judgment in favor of the plaintiff for the sum of \$500, a ter expressing the opinion, in passing on the motion for a new trial, that the verdict for \$300 was excessive. When the motion for a new trial was presented to the court, and it was urged as one of the grounds thereof that the

verdict was excessive, the trial judge stated that it was excessive, and that he would grant the motion, unless plaintiff entered a remitter of \$300. Plaintiff thereupon entered the remitter, and the motion was overruled, and judgment rendered against the defendant for \$500. Such action was not error. 1 *Sayles' Civ. St. art. 1029a*; *Railroad Co. v. Syfan*, 91 Tex. 562, 44 S. W. 1064; *Railway Co. v. Johnson* (Tex. Civ. App.) 58 S. W. 622. In the case last cited the precise question was passed upon by court of civil appeals for the Fourth district, and the supreme court has refused an application for writ of error in the case, which assigned as a ground of error that the court of civil appeals erred in allowing plaintiff, at the suggestion of the court, pending action upon the motion for a new trial, to make the remitter, and afterwards in entering judgment in plaintiff's favor for the reduced amount. The court of civil appeals, however, before affirming the judgment, required the plaintiff to remit the further sum of the same amount, as it was of the opinion that the judgment was still excessive. As we are of the opinion that the judgment as rendered in this case is not excessive, and no other error appearing, it will be affirmed. Affirmed.

TEXAS MIDLAND R. CO. v. FREY.

(Court of Civil Appeals of Texas. Feb. 20, 1901.)

CARRIERS—INJURIES TO PASSENGER—NEGLIGENCE—RES IPSA LOQUITUR—SAFE PLACE TO ALIGHT.

1. Where the distance from the step of a railroad passenger car to the platform provided for passengers to alight was not more than 18 inches, the fact that the company did not provide a stool or box for passengers to use in alighting to such platform, as an additional step, was not such negligence as would authorize a recovery for injuries sustained by a fall of a passenger while alighting.

2. The doctrine of *res ipsa loquitur* does not apply, so as to authorize a recovery by a passenger for injuries sustained while alighting from a car, the step of which was not more than 18 inches from the platform, where none of the attending circumstances tended to show negligence on the part of the carrier.

Appeal from district court, Lamar county; E. S. Chambers, Judge.

Action by Samuel Frey against the Texas Midland Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed.

Edgar Wright and H. D. McDonald, for appellant. Wilkins, Vinson & Batsell and Moore, Park & Birmingham, for appellee.

FLY, J. This is a suit to recover damages arising from personal injuries alleged to have been inflicted upon the wife of appellee through the negligence of appellant. Upon the verdict of a jury, judgment was rendered in favor of appellee for \$2,000. It was alleged in the petition that Sarah

Frey, the wife of appellee, got on a passenger train, belonging to appellant, at Terrell, Tex., to go to Ennis, Tex.; that when the train reached Ennis no platform had been provided upon which Mrs. Frey could alight, and she was compelled to alight upon the ground; that there was no box or stool to aid her in reaching the ground, and, although she exercised proper care in alighting, she was severely and permanently injured. These were the only grounds of negligence alleged. The uncontroverted evidence established that there was a gravel and cement platform for the accommodation of passengers at Ennis, built on a level with the tracks, and that the platform was not more than 18 inches from the lower step of the passenger coach. A man was employed at the depot to assist passengers on and off all trains, and he was assisted by the conductor. Mrs. Frey, the only witness who swore to the circumstances connected with her injury, testified as follows: " * * * I arrived at Ennis about noontime. It was raining and thundering and lightning when I reached Ennis. It was an awful pour,—lots of rain. Began raining in Terrell before I bought my ticket. When train reached Ennis I got off. A man assisted me to get off the car. He was the conductor, and was standing near the steps. I did not see any one else. He assisted me by taking hold of my left hand. I stepped from the car to the ground. It was an awfully long step to me. I did not notice the long distance from the step to the ground before I made the step. It was raining, and the conductor took hold of my left arm and assisted me off the train steps. I stepped right onto the ground, and did not see any box or stool there to step on. I then went into the depot." It is evident from all the circumstances that what Mrs. Frey called the "ground" was the gravel and cement platform. No effort was made to show that the step was more than 18 inches from the "ground" or platform where Mrs. Frey alighted, but all the evidence of negligence introduced by appellee is quoted above.

It was the duty of the railway company to provide and maintain a safe way of reaching and departing from its cars at passenger stations, and it has been held in this state that such appliances must be "the safest that had been known and tested." *Railway v. Wortham*, 73 Tex. 25, 10 S. W. 741, 8 L. R. A. 368. If there was any testimony in this case that tended to establish a failure upon the part of appellant to furnish such appliances, and Mrs. Frey was damaged thereby, the jury was justified in the verdict upon which the judgment was based. Under the facts in this case, there could have been but one possible ground upon which the jury could have based the verdict, and that was the failure to have a box or stool upon which Mrs. Frey could step in getting off the cars. That there was

a platform was uncontroverted, and there was no attempt to prove that it was defective, or that it was not at the usual and ordinary distance from the steps of the cars. A man was employed to assist passengers on and off the cars, and he or the conductor, or both, assisted Mrs. Frey, in a careful manner, to alight from the cars. There is not one single fact that tends to establish negligence upon the part of the railway company, unless it should be presumed from the fact that Mrs. Frey was injured in stepping off the car. Can negligence be thus presumed from the mere happening of the event, none of the attending circumstances tending to establish negligence? We think not. *Railway v. Robinson*, 73 Tex. 277, 11 S. W. 327; *Broadway v. Gas Co.* (Tex. Civ. App.) 60 S. W. 270. There is no testimony that would show that it was safer to step on a box or stool without assistance than to alight on a solid platform with assistance; and neither can it be said, in the absence of proof, that it is negligent to have the platform 18 inches from the lowest step of the car. In the case of *Railway v. Wortham*, above cited, a box had been provided, upon which passengers could alight, and it turned, throwing a lady to the ground and injuring her. The platform was shown to have been defective, and the box too narrow for the purposes for which it was used. It was said by the court: "It may be conceded that, if appellants had a proper platform at the station upon which the passengers could have alighted, their duty as to this matter would have been discharged, and that they were not called upon to render personal assistance." In this case not only does the testimony fail to show an improper platform, but it tends to show a proper one, and, in addition, that proper personal assistance was given to persons alighting from the cars. *Laffin v. Railroad Co.*, 106 N. Y. 136, 12 N. E. 599; *Kelly v. Railway Co.*, 112 N. Y. 443, 20 N. E. 383, 3 L. R. A. 74. Because there is no evidence to sustain the verdict, the judgment is reversed and the cause remanded.

COMAN v. LINCOLN.

(Court of Civil Appeals of Texas. Feb. 21, 1901.)

APPEAL FROM JUSTICES' COURTS—BOND—CONDITION—SUFFICIENCY—UNNECESSARY OBLIGATION.

1. The condition of a bond on appeal from a justice that, if the judgment of the county court should be against the appellant, she would "perform its judgment, sentence, or decree," was the same, in legal effect, as the condition prescribed in Rev. St. art. 1670, requiring an appellant to file a bond conditioned to "pay off and satisfy the judgment which may be rendered against him on such appeal."

2. Where the bond on appeal from a justice was conditioned on the appellant's paying all damages that the court might award against

her, the bond will not be vitiated because containing an obligation more onerous than required by law.

Appeal from Harris county court; E. H. Vasmer, Judge.

Action by A. F. Lincoln against Sadie Coman. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Brockman & Kahn, for appellant.

PLEASANTS, J. The appellee recovered a judgment in the justice court for precinct No. 1 of Harris county against the appellant for the sum of \$117.68. Appellant's motion for a new trial having been overruled, she gave notice of appeal to the county court of said county, and in due time filed her appeal bond as required by the statute. The condition of said bond is "that the said Sadie Coman shall prosecute her appeal with effect, and in case the judgment of the county court of Harris county, Texas, shall be against her, that she shall perform its judgment, sentence, or decree, and pay all such damages as said court may award against her." Appellee filed in said county court a motion to dismiss said appeal because of the insufficiency of the appeal bond. The court below sustained said motion, and rendered a judgment dismissing the appeal, from which judgment this appeal is prosecuted.

The appeal bond which was held insufficient by the court below conformed to all of the requirements of article 1670 of the Revised Statutes, except that the condition of the bond was as before set out. We think that the condition of this bond, while not expressed in the exact language prescribed by said article 1670, is the same, in legal effect, as the condition prescribed in said article. When appellant and her sureties bound themselves to perform the judgment of the county court in case said judgment should be against appellant, they thereby bound themselves to pay and satisfy such judgment; and, in case the judgment of the county court should be against appellant, said judgment could also be rendered against the sureties on said bond. The condition of this bond is in the exact language prescribed by the statute for a supersedeas bond from the district or county court to the court of appeals, the very object and purpose of which is to authorize the appellate court, in case the judgment of the court below is affirmed, to render judgment against the sureties upon said bond. The appeal bond from the justice to the county court being in substantial compliance with the statute, the court below erred in dismissing said appeal. If the obligation to pay damages rendered the condition of said bond more onerous than required by law, such additional obligation may be treated as surplusage, and will not vitiate the bond. *Lee v. Stone*, 1 White & W. Civ. Cas. Ct. App. § 1277; *Trial v. Lepori*, Id. § 1275; *Janes v. Langham*, 29 Tex. 413; *Landa v. Heermann*, 85 Tex. 1, 19 S. W. 885. The

judgment of the court below will be reversed, and this cause remanded for a new trial, and it is so ordered. Reversed and remanded.

BOLIN v. ST. LOUIS S. W. RY. CO. OF TEXAS et al.

(Court of Civil Appeals of Texas. March 20, 1901.)

INTERPLEADER—CONTRACTOR—SUBCONTRACTOR—ATTORNEY'S FEES—COSTS—PARTIES.

1. A bill of interpleader which states that plaintiff is in possession of a fund, which he tenders into court, to which he has no claim, and which is claimed by two other parties, and that he is ready and willing to pay the fund to whomsoever the court may adjudge is entitled to it, is not demurrable.

2. Where plaintiff, in good faith and without collusion, files a bill of interpleader, asking that the court determine the ownership of a fund which he does not own, and which is adversely claimed, he is entitled to his necessary costs and attorney's fees out of the fund, when distributed.

3. Where a bill of interpleader is filed, naming the various claimants of the fund in the plaintiff's hands, a claimant not made a party by the bill may become so by entering a plea asserting an interest in the fund.

Appeal from district court, Bowie county; J. M. Talbot, Judge.

Bill of interpleader by the Ayer & Lord Tie Company against J. W. Bolin, as administrator of the estate of W. M. Legg, deceased, the St. Louis Southwestern Railway Company of Texas, and others. From a decree awarding the fund to certain of the defendants, J. W. Bolin appeals. Affirmed.

J. F. Jones, for appellant. Paul Jones, Wm. T. Hudgins, R. R. Lockett, and Ohas. S. Todd, for appellee.

FISHER, C. J. On January 12, 1900, the appellee Ayer & Lord Tie Company, plaintiff below, filed a petition in the district court of Bowie county, and styled same "Bill of Interpleader," in which plaintiff made all the other parties to this suit defendants. Plaintiff's petition alleges: That during the months of July, August, September, and October, 1899, it had a contract with the defendant the St. Louis Southwestern Railway Company of Texas to furnish it cross-ties on its right of way in the territory extending from mile post No. 433, in Bowie county, Tex., on through the counties of Bowie, Cass, Morris, Titus, Franklin, Hopkins, and other counties, to Ft. Worth, in Tarrant county. That by the terms of said contract plaintiff was authorized to sublet to other parties different portions of said territory, but that plaintiff bound and obligated itself to protect said railroad company from any and all liability for the claims and liens of laborers, material men, and parties furnishing labor, timber, and other material necessary in making and delivering ties. That plaintiff sublet to W. M. Legg the territory from mile post No. 433, in Bowie county, to mile post No. —, —,

in Hopkins county, for a stipulated sum for good ties, and a stipulated sum for culls. That on October 1, 1899, the said W. M. Legg died intestate, and that the said Legg's estate is insolvent, and that the defendant J. W. Bolin has been appointed administrator of said Legg's estate, and has duly qualified as such. That at the time of the death of said Legg there had been delivered by him, on said territory, as subcontractor, cross-ties, which had been inspected and accepted, amounting to the sum of \$3,731.45, which sum became due and payable on October 20, 1899. That said sum is due and unpaid, and that plaintiff stands willing and ready to pay same to whomsoever it is due. That at the time of the death of the said Legg the said Legg was due laborers, material men, and parties for timber and supplies for the making and delivering said ties. That plaintiff had been advised that the said Legg was, and his estate is, indebted to the hereinafter named parties the amounts claimed by them, to wit: J. W. Haralson & Co., \$1,195; Snipes Bros., \$293.47; O. E. Garrett, \$13.65; W. M. Walker, \$11.45; A. H. Howdeshell, \$103.35; J. C. Stone, \$54.08; John R. Heard, \$421.45; W. R. Heard, \$16.04; J. W. Risher, \$65.46; D. Whitecotton, \$93.75; Robert Martin, \$6.50; F. M. Pirdle, \$117.50; W. L. Hill, \$417.95; T. F. Davis, \$100.03; W. M. Thompson, \$57.33; B. F. White, \$26.10; C. C. Baird, \$55.39; W. L. Helms, \$242.75; J. H. Perkins, \$75; C. R. Pope, \$567.87. That plaintiff is informed and believes that all of said claims are for material, labor, and supplies furnished for making and delivering said cross-ties, and, under the laws of Texas, constitute a lien upon the said railroad, and that said claims may be first paid out of said money. That the above-named parties have demanded of plaintiff payment of their said claims, and have threatened to sue plaintiff, and will do so. That the defendant J. W. Bolin, as administrator of W. M. Legg's estate, has demanded payment of plaintiff for the entire amount, claiming the same is due to Legg's estate. That plaintiff does not know to whom said money is due. That it is a matter of doubt to whom said money is due. That plaintiff has no interest in said fund, save and except that it be paid to the person or persons legally entitled thereto, and to save the plaintiff from being compelled to pay same twice, and from being harassed and having vexatious litigation in many different courts. That plaintiff be allowed to bring same into court, and that he be discharged, with his costs, from further liability to any of the parties. That he be allowed his attorney's fee of \$250. That all the defendants herein be required by the court to interplead between themselves. That there is no collusion between plaintiff and any party or parties to this suit. That this suit was brought by plaintiff of its own accord for relief, and was sworn to by plaintiff's agent on January 10, 1900. The defendant the St.

Louis Southwestern Railway Company of Texas answered by general demurrer and general denial. The defendant J. W. Bolin, administrator of W. M. Legg's estate, answered by general demurrer and special exception to that portion of plaintiff's petition where it asks for attorney's fees, and by general denial, except that portion of plaintiff's petition that is afterwards confessed in said answer, which is that this defendant is a duly appointed and qualified administrator of W. M. Legg's estate, and that W. M. Legg was a subcontractor of the railroad under plaintiff, and that he delivered ties to plaintiff, and same were inspected and accepted by plaintiff, to the amount of \$3,731.45; that same is due from plaintiff to this defendant as said administrator, and is unpaid, and that this defendant is entitled to said money when paid into court. And this defendant then files his cross bill against plaintiff for payment of said ties, as shown by his petition, to wit, \$3,731.45. The defendants W. L. Helms, T. F. Davis, C. C. Baird, Robert Martin, W. M. Thompson, W. M. Walker, J. B. White, and J. W. Haralson & Co. each and all filed an amended answer on March 30, 1900, and each alleged that they were owners of a portion of the cross-ties alluded to in plaintiff's petition, setting out the number of ties and their value; that said ties were delivered on the defendant the St. Louis Southwestern Railway Company of Texas' right of way to the plaintiff and said railway company, who agreed and became jointly and severally bound to pay defendant for the value of said ties, and, though often requested, they had hitherto wholly failed and refused to do so; that said ties were inspected and appropriated by said railroad company to its own use in its roadbed, and said defendants have a lien on its road and equipments for said value of said ties; that the defendants are unaware of any arrangements existing between plaintiff and said railway company and said Legg, deceased,—and prays judgment against the plaintiff and said railway company for the value of said ties of theirs, respectively, as shown by their answers. The defendants F. M. Pirdle, Snipes Bros., J. H. Perkins, A. H. Howdeshell, and Pat Green each one filed his amended answer on March 29, 1900, and all answered the same way, except their amounts were different. Each claimed to have a verbal agreement to get out and furnish cross-ties to W. M. Legg, and did furnish ties to said Legg, which ties were to be placed upon and used in the construction of said defendant railroad company; that said ties were furnished and inspected; that said Legg promised to pay for said ties, and was liable to pay for same, but had failed and refused to do so. Defendants then set out Legg's relationship to plaintiff and the railroad company, and ask for a foreclosure of their liens on the railroad, and the money paid into court, and that said money be paid to the

as their claims may show they are entitled to, out of the money paid into court. They then plead in the alternative, in case they are denied the right to be paid out of the fund, that they have their judgment against plaintiff and the said railway company for the ties used by the said railway company and plaintiff of said defendants. The defendant W. L. Hill's answer is the same in substance as J. W. Haralson & Co.'s, above set out. The defendants Heard Bros. filed their answer March 6, 1900, which answer consists of a general demurrer, general denial, and specially that they had a right in the fund deposited in court to the amount of \$503.80. The defendants Ramage & Hays filed their answer on March 6, 1900, in substance the same as defendants Heard Bros., only the amount is different. The defendants D. Whitecotton, J. W. Richer, and T. A. Petty each filed their respective answers, which are in substance the same thing, and charge the fund paid into court as being the proceeds of their ties, and a trust fund in plaintiff's possession to pay for said ties. The defendant the railway company filed a supplemental answer to the defendants' answers, which was a general demurrer; one special exception to that part of the defendants' answer seeking a judgment against said railway company; also a general denial. The defendant J. W. Bolin filed a supplemental answer to the other defendants' answers, of a general demurrer and special exceptions: (1) To the jurisdiction of this court to adjust a settlement between this defendant and his co-defendants, because there was an administration pending in the probate court of Morris county, Tex., of the estate of the said W. M. Legg, deceased; (2) because the answers of the defendants show that they do not claim the fund in the plaintiff's hands in common with this defendant; and a general denial. The case was submitted to the court on both the facts and the law, and the court sustained the defendant the railway company's general demurrer to plaintiff's petition as to said defendant railway company, and the court overruled the defendant J. W. Bolin's general demurrer and special exception to plaintiff's petition; also overruled the defendant J. W. Bolin's general demurrer, and special exceptions to his co-defendants' answers. The defendant J. W. Bolin then filed a written motion requesting the court to render judgment for him for the fund in court, which motion the court overruled; and, when all the testimony of the plaintiffs and the other defendants was in, this appellant filed a written motion requesting the court to render a judgment in his favor for the funds in court, and the court overruled said motion, to all of which appellant excepted, and filed his bills of exceptions Nos. 1 and 2; and the court, after hearing said cause, rendered its judgment as follows, to wit: After sustaining the railway company's general

demurrer, and overruling the defendant J. W. Bolin's general demurrer and special exception to plaintiff's petition and his co-defendants' answers, the court ordered and decreed that the said sum of money paid into court by plaintiff, to wit, \$3,731.45, be disbursed by the clerk of said court as follows, to wit: "(1) Pay the court cost of this litigation, to wit, \$80.20. (2) Pay to the plaintiff \$254.50 to reimburse plaintiff for his attorney's fee, and \$4.50 costs paid out by plaintiff. (3) Pay the following named defendants the amounts herein set out, to wit: W. L. Helms, \$242.76; T. F. Davis, \$83.20; O. O. Baird, \$40.18; Robert Martin, \$23.50; W. M. Thompson, \$57.32; W. M. Walker, \$12.87; B. J. White, \$51.81; J. W. Haralson & Co., \$332.08; F. M. Pirdie, \$117.49; Snipes Bros., \$256.41; J. H. Perkins, \$47.74; A. H. Howdeshell, \$30.10; Pat Green, \$21.20; W. L. Hill, \$417.68; Heard Bros., \$111.05; Ramage & Hays, \$24.03; D. Whitecotton, \$113.71; J. W. Richer, \$66.20; T. A. Petty, \$23.90. (4) Pay to the defendant J. W. Bolin, as administrator of the estate of W. M. Legg, any balance that may be in said clerk's hands after paying the sums hereinabove set out. (5) That the claims of the defendants against the railway company and plaintiff, except those herein above adjudicated, be, and the same are hereby, dismissed." From which judgment Bolin appeals.

The appellant complains of the judgment of the court awarding appellees any part of the sum deposited in court by the Ayer & Lord Tie Company, and contends that under the evidence he is entitled to all of that amount. He also complains of so much of the judgment as awards plaintiff the sum of \$254.50 attorney's fees, and \$4.50 costs paid out by the plaintiff. There is evidence in the record which warrants the conclusion that the judgment of the court can be supported in the respect complained of. There is testimony coming from the appellees which shows that the ties in question, which are represented by the amount deposited in court by the Ayer & Lord Tie Company, were the property of the appellees when the ties were received by the Ayer & Lord Tie Company and the railway company. In substance, these parties testified that they furnished the ties to the Ayer & Lord Tie Company, supposing at the time that Legg was the agent and representative of the company, and they were not furnished by virtue of any separate and independent contract with Legg. Consequently, from these facts the conclusion is reached that the appellant, Bolin, the administrator of Legg, had no interest in the ties or the funds in question. This being true, the controversy narrows down to a contest between the Ayer & Lord Tie Company and the appellees, about which the appellant has no concern. This being the case, we could well pass over the appellant's remaining assignments of errors without any further disposition of them, except

in so far as complaint is made as to the judgment of the court awarding to the interpleaders their attorney's fees and costs. But, however, we have concluded that, in a general way, we will pass upon some of the other questions raised.

The appellant addressed demurrers to the bill of interpleader, which we think were correctly overruled. The bill, in substance, states that the appellant and the appellees are respectively claiming the funds which plaintiffs in the bill offer and tender into court. The bill alleges that both parties are setting up a claim to this fund, and that the plaintiffs are ready and willing to pay the amount to whomsoever the court may decree is entitled to it. Without discussing the question further, we think that the petition is not subject to any of the demurrers urged against it.

We are of the opinion that no error was committed in awarding plaintiffs the amount stated in the judgment as attorney's fees and costs paid out by them. There is nothing in the record indicating that the bill of interpleader was not filed in good faith under the belief that there was substantial ground of contest between the parties as to who should be entitled to the fund; and, in cases of this character, we find that it is in the discretion of the court to allow costs and attorney's fees to a reasonable amount. In our opinion, the pleadings of the appellees were sufficient basis for the decree in their favor. The appellee Pat Green was not made a party by the bill of interpleader, but he came into court by a plea asserting an interest in the funds. We think this was permissible.

We find no error in the record, and the judgment is affirmed. Affirmed.

WERNER v. TRAUTWEIN et al.¹

(Court of Civil Appeals of Texas. Feb. 7, 1901.)

MASTER AND SERVANT—INJURIES TO SERVANT—VOLUNTEER—EVIDENCE.

Plaintiff made a contract with the defendants, whereby plaintiff's 16 year old son was to be employed in defendants' cotton gin to mark, assort, and weigh the bales of cotton ginned at the round bale press. The boy was inexperienced in the work, and had been employed about two months, when he was injured while assisting one of the workmen, G., in cleaning out a gin stand in one of the square bale gins. Just before the accident the boy was not at his regular place, but was standing near the square bale gin, and G. called to him to help clean out the gin stand, as the same had become "choked," and required to be cleaned at once. The work in the gin was done under the personal supervision of one of the defendants, who, at the time of the accident, was standing near where the boy was cleaning the gin, but he did not see the boy until just before the accident, and because of the noise of the machinery he had not heard G. call. G. was not a foreman, but of equal rank with all the workmen, and he had never been authorized to call others to his assistance, and had never done so before.

Held insufficient to show a cause of action against defendants for injuries, since the boy was a mere volunteer in cleaning the gin, G. not having authority to call him to his assistance.

Appeal from district court, Dewitt county; James O. Wilson, Judge.

Action by Charles Werner against Trautwein & Wolters. From a judgment in favor of the defendants, plaintiff appeals. Affirmed.

Kleberg, Grimes & Baker, L. C. Grothaus, and Geo. C. Altgelt, for appellant. Patton & Ellis and A. B. Davidson, for appellees.

GILL, J. This action was brought by the appellant, Charles Werner, against the partnership of Trautwein & Wolters, appellees, to recover damages for personal injuries inflicted upon his minor son, Hans Werner, in a cotton gin owned and operated by appellees. A trial by jury resulted in a verdict and judgment for appellees. Plaintiff alleges that on or about August 22, 1898, defendants, by parol contract with plaintiff, engaged his (plaintiff's) minor son, Hans Werner, to count, mark, weigh, assort, and separate the bales of cotton ginned at defendants' round bale press; that it was understood between plaintiff and defendants that Hans Werner was at no time and under no circumstances to be employed to work at or about gin stands or other dangerous machinery, said Hans being inexperienced, and without training, and being a minor; that on or about October 14, 1898, defendants, in violation of said contract, and fully cognizant of the minority and inexperience of said Hans Werner, without the consent of plaintiff, and without the knowledge of plaintiff, by and through E. Gabitsch, a duly authorized agent of defendants, who was acting within the scope of his apparent authority, ordered and directed the said Hans Werner to clean a gin stand and feed box in defendants' gin; that said order was given by said Gabitsch while he was acting within the apparent scope of his authority, and was given to said Hans in the presence and hearing of E. Wolters, one of the defendants, and was given while the machinery was in full operation; that Hans complied with said direction and order, and in the presence of said Wolters proceeded to do the labor directed; that said labor was performed in the presence and under the direction of said Wolters, and of his said agent, Gabitsch, and was exceedingly dangerous, and that said Hans did not know its dangers, and that he was not warned as to such dangers by said Wolters, or any one else; that said Wolters knew said Hans was inexperienced, but gave him no caution, nor did he or his agent direct him (said Werner) how to perform said work without injury; that while so acting under such direction and control of defendants, and performing the labor requested of him, the left hand and arm of said Hans was

¹ Writ of error denied by supreme court.

caught in the gin saws, and so crushed, cut, and wounded that it had to be amputated; that plaintiff had the services of skillful physicians, but amputation was necessary; that such injuries were occasioned by the act of defendants and their agents in putting said Hans to perform such dangerous work, contrary to said contract, and without giving him any warning or caution as to the dangers attending same, and directing him how to avoid such dangers. Defendants answered by general denial, plea of contributory negligence, and averred that Hans Werner was at the time of the accident a mere volunteer, and was not directed to do the work by any one authorized so to do. The firm of Trautwein & Wolters was composed of William Trautwein, Louis Trautwein, and Edmond Wolters, and they were engaged in operating a cotton gin and cotton presses or baling apparatus in connection therewith. All the cotton gins were in the same building and on the same floor, but those connected with the round bale presses were on the opposite side of the room from those connected with the square bale presses. On the occasion in question one Gabitsch was in charge of four square bale gins, and it was his duty to attend to them, keep them in running order and proper repair, and to prevent injury to them, and in doing these things to use his own judgment and discretion; but it was not shown that he was authorized to hire assistance, or to call any one to his assistance, and he had never done so prior to the time in question. On the 22d day of August, 1898, Hans Werner was hired by the firm to mark, weigh, count, assort, and separate the bales of cotton ginned and pressed at the round bale press of defendants. The contract of hire was made with appellant, the father of the minor, the latter being at that time about 16 years old. There was evidence tending to show that by the contract of hire defendants agreed not to put Hans to work about dangerous machinery, and that appellant told Wolters, the partner who made the contract of employment, that Hans knew nothing about gins, but would soon learn; but upon this point the evidence was conflicting. In pursuance of the contract of hire, Wolters, who was in charge and had actual control and management of the ginning plant, and gave it his daily personal superintendence, placed Hans at work at the round bale press to mark, weigh, count, assort, and separate the bales coming from the last-named press. He worked in this way about two months prior to the accident, and during that period was never at any time directed by Wolters or any other person to do any other kind of work. At times when there was no work of that kind to do, he and other employes about the plant were in the habit of strolling over the building. On the occasion in question he was not on duty, and was standing or walking along the space between the round bale gin stands and the square bale

gin stands. His master, Wolters, who was giving the business his personal attention, came upstairs on the floor where Hans was, and near to him, when one of the square bale gins became "choked," and Gabitsch, who was in charge of it, called to him to assist him in cleaning it. This was a very dangerous task for one who did not understand the proper way to do it. He promptly responded to the call, and he and Gabitsch undertook to clean it. In doing so, Hans got his hand caught in the gin saws, and it was so injured as to necessitate amputation. It was shown beyond dispute that Wolters was within a few feet of Gabitsch and of Hans when Gabitsch called, but Wolters was not looking at Hans or Gabitsch, and he says he did not hear the call nor see Hans go to the assistance of Gabitsch. He admits, however, that when he was about nine feet distant he heard the gin "jumping," and, looking around, saw Gabitsch and Hans sitting down, cleaning the gin, and that in a moment Hans screamed, and he assisted Gabitsch in carrying Hans to the platform. He accounts for his failure to hear the call by the noise of the machinery, which was at that time in full motion, and he is not disputed upon this point. The evidence is conflicting as to whether Hans had been theretofore warned of the danger attendant upon the operation of gin stands, but it was not disputed that at the time of the accident no warning was given him, nor explanation made as to how the work might be safely done. Gabitsch had never been told whether he could or not call other employes to his assistance, but was not authorized to do so, and had never undertaken to do so before. It was shown without dispute that the gin stand could have been easily stopped before undertaking to clean it, and that that was the safe and proper way to do it. It was also shown without contradiction that it was necessary to clean the gin stand at once to prevent serious injury to the machinery. Both Gabitsch and Hans knew of the proximity of Wolters, but neither called to him, or said anything to him, until the accident had occurred. Hans had not been directly told that he should engage in no other work but that about the round bale press, but he had been assigned no other task, and had no reason to believe that he would be required to do any other work. He testified that when Gabitsch called him he thought Gabitsch was authorized to do so, and believed it was his duty to respond. It was also shown that all the hands about the plant received the same wages, viz. \$1.50 per day; that they were all in the same grade of employment; and that Wolters was personally present, and was exercising personal supervision and control.

Appellant urges many assignments of error, some of which should be sustained; and, if there is any evidence which, in the absence of opposing proof, would authorize a recovery, the judgment must be reversed.

Appellant bases his right of recovery upon two grounds: (1) That the minor was inexperienced. That appellees knew it, and placed him at work at a dangerous task without first warning him of the danger, and advising him how the task might safely be done. (2) That, if Wolters did not direct him to do such work without previously warning him, then that Gabitsch put him to work at the task with actual and apparent authority to do so. We are of opinion that the evidence shows without contradiction that Wolters did not order Hans to assist Gabitsch, nor did he know of, assent to, or acquiesce in the act of Gabitsch in calling him. The right to recover must, then, depend upon the authority of Gabitsch to call other employes to his assistance. The evidence is uncontradicted that he was clothed with no such general power, and it is conceded that he had never before undertaken to exercise such right, even in an emergency. But appellant contends that, inasmuch as Gabitsch was intrusted with the operation, care, and safety of the gin stand in question, he had the implied authority to call assistance in an emergency involving the safety of the machinery in his charge, and that, as the proof shows the machinery was in jeopardy, he acted within his authority in enlisting the assistance of Hans, and the master is, therefore, bound by his acts. In support of this contention the case of *Fox v. Railway Co. (Iowa)* 53 N. W. 259, 17 L. R. A. 289, is cited. In that case the conductor of a train employed Fox to take the place of a brakeman, who was temporarily and unexpectedly called away. The court held that in such an emergency, while making a trip, the right to supply the place of an absent member of his crew was within his general powers as a conductor in charge of a train and charged with its safe operation. But the court did not go to the length of holding that even an agent with such general powers as a conductor would have such authority if the master was present and in control, nor have we been cited to any authority so holding. Section 481, *Mechem, Ag.*, cited by appellant, treats of the duty of the agent as between himself and his principal, and lays down the rule that an agent charged with the performance of a duty in a particular way may, in an emergency which precludes consultation with his principal, depart from his instructions; and if he does so in good faith, and in the exercise of sound discretion, he incurs no liability to his principal for violating instructions. The rule announced does not cover the question here presented. In *Railway Co. v. Skinner*, 4 Tex. Civ. App. 661, 23 S. W. 1001, a minor employed by the company as a telegraph messenger boy was sent for the mail. In going to the post office he rode upon cars which were being switched in that direction. The foreman of the switch crew directed him to uncouple two

cars, and in doing so he was injured. He was held, in thus engaging in work other than that which he was employed to do, to be a mere volunteer, and not entitled to recover. The case was distinguished from *Eason v. Railway Co.*, 65 Tex. 577, where it was held that one assisting at the request of the agent of the railway, but who was at the same time furthering his own private business, could recover for injuries resulting from the negligence of the servants of the railway company. In *Mayton v. Railroad Co.*, 63 Tex. 77, the rule is recognized that, in order to recover in a case of this nature, the facts must show that the act of the servant in calling assistance was the act of the master. Appellant seeks to recover in this case on that theory alone. There is no allegation that the master was negligent in permitting an inexperienced minor to wander about in proximity to dangerous machinery, nor is a recovery sought upon that ground. The case of *White v. Waterworks Co.*, 9 Tex. Civ. App. 473, 29 S. W. 252, and kindred cases, cited by appellant, have no application here.

Conceding that appellees contracted with appellant that they would not put the minor to work about dangerous machinery, but would assign him to work at the round bale press, the undisputed facts show that appellees assigned him to the work agreed upon, and he had performed the duties assigned him for two months, without being once called to work elsewhere. It has been seen that Gabitsch was a servant charged with particular duties, just as Hans was, and was without control over other servants. With no power to employ assistance, no single fact is shown which would have authorized Hans to believe that Gabitsch was clothed with such power. On the other hand, he had never seen such authority exercised by any employe, and he knew that all the work was being conducted under the personal supervision of the master. The fact that he had responded to the call of Gabitsch was not brought to the attention of Wolters until the instant before his injury, and it is not contended that there was then time to prevent the injury by a warning from the master. Some evidence was adduced as to the failure of the master to publish rules for the safe operation of the plant, but such failure is not made one of the grounds of recovery. The minor was off duty at the time of the accident. He voluntarily assisted Gabitsch, who had no power, either real or apparent, to bind the master; and the minor was in no better position than a stranger in responding to the request. To hold that the master should foresee such an event would impose upon him the duty to instruct every servant in his employ, not only as to the dangers incident to their own tasks, but as to every other piece of machinery about the plant,—a duty clearly not imposed by law. We are of

opinion that the facts proven do not show a cause of action as the pleadings stand, and that, notwithstanding the erroneous charges complained of, the judgment should be affirmed. Affirmed.

On Motion to Correct Findings of Fact.
(March 25, 1901.)

In the main opinion we found that both Gabitsch and Hans Werner knew that Wolters was near by when Hans was called to assist in cleaning the gin. We were led to so find because of the statement of Hans that Wolters was within a few feet of him at the time, and by the statement of Gabitsch that he had seen Wolters come upon that floor only a short while before. A closer examination of the entire testimony of Gabitsch leads us to conclude that there is a conflict in the evidence as to whether Gabitsch knew of the proximity of Wolters at the time he called for Hans, and we now find that the evidence is conflicting upon the point. The change does not alter the conclusion heretofore reached by us, and we are unable to see in what respect the appellant's rights on writ of error would have been prejudiced by the inaccuracy; but for the sake of accuracy, and in response to the prayer of appellant, we make the correction. Our findings are assailed in other respects, but we think they are correct, and the motion, except to the extent indicated, is overruled.

GASS v. WATERHOUSE et al.

(Court of Chancery Appeals of Tennessee. Oct. 11, 1900.)

PUBLIC LANDS—TITLE—PARTITIONMENT—TENANTS IN COMMON—COMMISSIONERS—REPORT—DECREE—MODIFICATION—APPEAL—DIMINUTION OF RECORD.

1. Where an entry was made on 5,000 acres of land, but no description of the tract was given, and thereafter, but before the grant was issued, another entry and grant was made, which conflicted with the former entry as subsequently located, and a hiatus existed as to the former entry, the second entry and grant gave a superior title.

2. Tenants in common held land by a common tenant, and in harmony with each other, with no notice of any adverse interest, though they became tenants in common by purchases from different grantors at different times. One tenant in common had acted as agent for the others in regard to the land, and such tenant purchased a tax title to the land for himself and another tenant in common. *Held*, that the purchase was made for the benefit of all the tenants in common, and hence, on payment of their proportion of the price, they would be entitled to their share of the land on partition.

3. In an action against tenants in common to establish title to a tract of land part of which conflicted with the grant held by the tenants in common, one tenant in common, on consent of all, and with advice of common counsel, had purchased the whole tract, and offered to deed to the other tenants the part in conflict with their grant, on their payment of their proportion of the cost, which they refused to do unless the deed covered the whole tract. *Held*, that such purchase was made for all the ten-

ants in common only to the extent of the conflicting portion, and on payment of their proportion of the cost they would be entitled to their share of such portion only on partition of the grant.

4. Where, in partition proceedings, the parties agree as to the title to the land to be partitioned and claims to be excluded, the act of commissioners appointed to make the partition, in excluding therefrom certain other tracts of lands as being held by superior titles, was error.

5. Where, in partition proceedings, certain lands, part of which conflicted with the grant to be partitioned, were held to be included in the partition on payment of their share by other tenants in common of the cost of the purchase of a tax title by two tenants in common, but, on report of the master as to the amounts to be paid, the decree was modified to include the cost of only that portion which conflicted. Such modification was not reversible error, since the whole matter is before the court on appeal, and the modification was in accord with justice.

6. Where, on an appeal in partition proceedings, no question was raised as to the diminution of the record, whereby the fact that title to land, part of which conflicted with the grant sought to be partitioned, was superior to that of the grant, was not shown, and it appeared that complainant would be estopped to claim under the superior title, and that the decree was just, the cause will not be remanded on petition for rehearing for amendment of the transcript.

Appeal from chancery court, Rhea county; T. M. McConnell, Chancellor.

Action by W. T. Gass against E. F. Waterhouse and others to sell for division of proceeds or to partition lands. From a judgment including in the partition one tract, and excluding another, both parties appeal. Affirmed in part, and reversed in part.

Burkett, Miller & Mansfield, for complainant. Frazier & Swafford and V. C. Allen, for defendants.

BARTON, J. The original bill in this case was filed on November 9, 1891, seeking to sell for division of proceeds, or partition, two tracts of land located in Rhea and Bledsoe counties, one of the tracts being the tract known as the "J. F. Thompson Tract" or "Purchase," as to which there is no dispute, and the other tract being described in the pleadings as the "Haley and Kimbrough Grant," being a large tract of land, the calls of the grant covering several thousand acres. The bill alleged that this tract of land at that time was owned as follows: One-fourth by the complainant, W. T. Gass, one-fourth by Franklin Waterhouse (since deceased), one-fourth by E. F. Waterhouse, and one-fourth by the widow and heirs at law of J. R. Neal, deceased. The other owners, the Waterhouses and Neals, were made parties defendant. The complainant averred that, within the bounds of the tract covered by the Haley and Kimbrough grant, there were certain tracts covered by older and superior titles, to wit, one tract known as the "Anderson Whiteside Grant," one as the "Skilern Grant," and one as the "J. M. Pope Grant," or a portion thereof, which it was alleged lapped on the Haley and Kimbrough grant.

The bill alleged that the complainant and Neal each owned an undivided interest in the Pope grant, which was numbered 4,760, and that as to this interlap the defendants Waterhouse were not joint owners, and had no interest, and that the interlap should be excluded in a sale or partition of the Haley and Kimbrough grant. The original bill sought, as stated above, a sale for partition of the Haley and Kimbrough grant, with the exclusions above mentioned. The bill, however, was subsequently amended so as to pray for a partition in kind, if the chancellor should find that the land was susceptible of partition in kind. The defendants Waterhouse filed an answer, admitted the ownership of the tract of land covered by the Haley and Kimbrough grant to be in the proportion stated, and admitted practically all the allegations of the original bill, except those allegations relating to the land covered by the interlap of the Pope grant. These allegations of the original bill were denied by the answer, and it was asserted that this interlap should not be excluded, and it was averred that this, as the balance of the land covered by the Haley and Kimbrough grant, was owned by the complainant and defendants as tenants in common; the complainant being the owner of an undivided one-fourth, each of the Waterhouses of an undivided one-fourth, and the heirs of John R. Neal an undivided one-fourth. The two Waterhouses also filed their answer as a cross bill against Gass and the Neals, and in this cross bill they sought a partition of the entire Haley and Kimbrough grant, without excluding the Pope interlap, but admitting that the Anderson Whiteside and the Skillern grants should be excepted. They averred in the cross bill, as in their answer, that the title to the interlap under the Haley and Kimbrough grant was superior, but that, in any event, it was bought by Gass and Neal under such circumstances as to render it a purchase for the joint benefit of the Waterhouses as well. It was averred that Gass was estopped by judicial proceedings and otherwise to dispute that the Pope interlap was partly owned by the Waterhouses, and it was also averred that Gass and John R. Neal, deceased, bought substantially all of this Pope interlap at a tax sale in Bledsoe county in the case of the state of Tennessee et al. against Franklin Waterhouse, for the joint benefit of themselves and the Waterhouses, and that the failure to include the Pope interlap in the original bill by Gass for partition was improper, and that this interlap should be partitioned as a part of the Haley and Kimbrough grant. It was further shown and averred that the Haley and Kimbrough grant was based on entry No. 249, dated August 14, 1835, the grant being issued in August, 1845; that the Pope grant was based on entry No. 1,227, dated May 11, 1836, and the grant was issued September 26, 1836,—thus making the Haley and Kimbrough ti-

tle the older entry, but the younger grant. The Neal heirs answered the original and cross bill, substantially admitting the charges with reference to the Pope grant contained in the original bill, but denying the allegations with reference to the same contained in the cross bill. The complainant, Gass, answered the cross bill under oath, denying the estoppel charged; admitting the charges of the cross bill as to the dates of the entries and grants; insisting that the Haley and Kimbrough grant was not a special entry; that the Pope title was superior, because the Haley and Kimbrough entry was not special, and because an interlap or hiatus had intervened between the date of the Haley and Kimbrough grant and entry. Complainant disavowed his title from the Pope grant, and denied that he and Neal bought the interlap for the joint benefit of the Waterhouses at the tax sale, as charged in the cross bill. In 1863 the complainant was allowed to amend his original bill so as to ask that there be excluded from the Haley and Kimbrough grant, which it was sought to partition, an additional tract of 115 acres, comprised in what was known as the "Maria H. Riker Purchase," and alleging that while this 115-acre purchase lay within the Haley and Kimbrough grant, and while it was made by him for the joint benefit of himself and the Neals and the Waterhouses, the Waterhouses had declined to contribute their proportion of the purchase price, and that, therefore, they were not entitled to share in any part of this 115 acres. This amendment was allowed by the chancellor.

It is shown that Franklin Waterhouse sold his interest in the land to his son R. G. Waterhouse, and subsequently R. G. Waterhouse, as the owner of the Franklin Waterhouse one-fourth, and the defendant W. E. Waterhouse, answered the amendment of complainant, Gass, with reference to the Maria H. Riker 115-acre purchase, and as to this they denied that this tract should be excluded, but it was insisted that it should be included in the partition, and that the complainant while a tenant in common with these defendants had purchased, not only this 115-acre tract, but also a 500-acre tract, including the 115 acres, and that they had offered to bear their proportion of the cost price of the entire 500 acres, but that the complainant had refused to make them a deed therefor. They further averred that the title under the Haley and Kimbrough grant was superior to that under the Riker purchase.

Two issues were thus practically presented: First, as to whether the Pope entry should be excluded; and, second, whether the tract known as the "Riker Purchase" should be excluded.

Under the first issue, two questions are presented: First, as to whether the Pope title is superior to the Haley and Kimbrough title; and, second, whether the Pope interlap is r-

property of Gass and Neal only, or whether the Waterhouses own an interest therein, and are entitled to share in the benefits of the purchase of the Pope entry. The chancellor, after hearing proof, decreed a partition of the land, holding that the Pope entry and grant should not be excluded, but that the Riker purchase should, and holding, further, that the defendants Waterhouse should be operated with their proportionate part of the purchase price expended by Gass and Neal for the Pope grant, and he ordered a reference to ascertain the expenditures made in this respect. The commissioners made a survey, map, and partition, and reported their action to the court. The complainant and the Neals excepted to the report, and filed affidavits in support of their exception; counter affidavits were also filed in behalf of the defendants. A report was filed by the clerk and master showing total expenditures by Gass of \$626.70; by Gass and by Neal, \$497.63,—of which sums the Waterhouses would owe, according to the report, their proportionate part of one-fourth each. This report was modified by the chancellor so as to charge the Waterhouses with only one-fourth of the cost of that part of the Pope entry lying within the bounds of the Haley and Kimbrough grant. The complainant appealed, and has assigned errors. The defendants appealed from that part of the decree of the chancellor which excluded from the partition the 115 acres known as the "Maria H. Riker Purchase."

The first assignment of error on behalf of the complainant is that the chancellor was in error in refusing to exclude the Pope interlap from the Haley and Kimbrough grant before partitioning the same. In passing upon this point, it becomes necessary to inquire—First, as to which was the superior title to the land embraced in the interlap, the Pope or the Haley and Kimbrough grant; and, second, as to what the effect of the purchase of the Pope entry by Gass and John R. Neal, deceased, was at the time of the purchase, they then being tenants in common with the Waterhouses.

As to the first proposition: As shown in the cross bill, the Haley and Kimbrough claim was based on the older entry and younger grant. The Haley and Kimbrough entry was No. 249, dated August 14, 1835, but the grant thereon was not issued until August, 1840, and the Pope grant was based on entry No. 1,227, dated May 11, 1836, and the grant was issued September 26, 1836. The Haley and Kimbrough entry was as follows: "No. 249. State of Tennessee, Rhea County. 5,000 acres. John Haley and Joseph Kimbrough enter 5,000 acres of land in said county, beginning on the southwest corner of or where the southwest corner would be of a 5,000-acre entry, this day made in the entry taker's office of said county by said Haley and Kimbrough; thence southwardly; thence westwardly; thence northwestwardly; thence to the beginning,—including 5,000 acres of land. August 14, 1835. [Signed] John Haley. Jo-

seph Kimbrough." Indorsed: "Filed 14th of August, 1835, and recorded in my office. Robert Rock, Entry Taker." This entry, as will be observed, is not a special entry upon its face, and there is no proof from which we can find that it was a special entry. There is nothing to identify the beginning or any other corner well known or notorious. It is therefore clear that the entry was not a special entry, and that the grant cannot be connected with the entry so as to date the title back to the date of the entry. See *Bleldorn v. Mining Co.*, 89 Tenn. 201, 15 S. W. 737; *Barnes v. Sellars*, 2 Sneed, 33; *Wood v. Elledge*, 11 Heisk. 607. It further appears that there was what is known as a "hiatus" on November 29, 1841. See *Williamson v. Throop*, 11 Humph. 265; *Sampson v. Taylor*, 1 Sneed, 600; *Blevins v. Crew*, 3 Sneed, 152. So that it would appear that the Pope entry and grant became the better title so far as this record shows.

It therefore becomes necessary to inquire into the effect of the purchase of this entry. The complainant, Gass, in the name of himself and John R. Neal, made the purchase of the Pope grant or title from one R. B. Schoolfield in April, 1888. At that time he was the owner of an undivided interest in this tract of land, holding interest as tenant in common with John R. Neal and the Waterhouses. He subsequently bought other undivided interests within a month after his purchase of the Pope entry, but had owned an interest as tenant in common with the Waterhouses some two years before the purchase of the Pope entry, but none of the interests purchased by him were purchased at the same time from the same parties from whom the Waterhouses had purchased, though all of these interests were purchased and held under the Haley and Kimbrough entry and grant, from the grantees in which it is admitted all parties deraigned title down to themselves for their respective interests. It further appears that complainant, Gass, also bought in the tax title or claim of that part of the Haley and Kimbrough grant covered by the Pope interlap, which lay in Bledsoe county, and which covered substantially all the Pope interlap. This purchase was made by him from one James Roberson, who had purchased the bid of one Hart, who had purchased at a clerk and master's sale. This land was sold, as stated in the case of the state of Tennessee against Franklin Waterhouse et al. for the taxes, and purchased by the complainant on the — day of —, 1888. E. H. Hart, who had bid it in, testifies that he understood from Gass that he was buying it in for the benefit of the Waterhouses, Neal, and himself as tenants in common and joint owners. This, however, the complainant, Gass, denies. We find the facts to be, however, that at the time of the purchase of these outstanding claims he was a tenant in common with the Waterhouses, and that while he did not purchase under the same deed from the same parties, nor at the

same time, yet that their holding at the time of the purchase was in common, and there was no known antagonism between any of the parties. At the time of the purchase they had a possession on the land claimed by them by a tenant holding for the benefit of all, and after the purchase they had a common possession held for the benefit of all parties for some years. Complainant, Gass, does not claim to have given his co-tenants any notice of any adverse interest, and they deny that they knew of any such until about the time of the filing of the bill in this case. We find that leases or contracts were made for the cutting of tan bark off of this land, including some of the land covered by the Pope entry; that these contracts were made by the complainant, Gass, in the name of, and for the benefit of, all the parties, including the defendants Waterhouse.

For the complainant it is insisted that, as a matter of fact, there was no joint holding, and it is insisted that, as a matter of fact, the proof does not show that he (the complainant) executed the leases or contracts for the cutting of tan bark. It is true that one of the witnesses simply produces copies, or what are said to be copies, of these contracts. But another witness, although the same are not copied into the transcript, swears that he has the originals, and produces them, and that they were signed in the handwriting of the complainant, Gass, and to rebut this Gass only states that he has no recollection of signing such contracts.

We are satisfied from the weight of the evidence, and find as facts, that he did sign these contracts; that prior to this purchase the land was held by all these parties as tenants in common; that there was no notification of any adverse interest or holding; that their claim was common and harmonious; that after the purchase contracts were made, as stated, for the cutting of tan bark, and by the complainant as agent for the defendants; and we therefore find as a fact that the holding and possession was common, in the interest of all parties, and that there was no notification of any adverse interest at any time until the bringing of this suit. The general rule unquestionably is that the purchase of an outstanding title or claim by one tenant in common must and does inure to the benefit of all, and that all are entitled to the benefits and protection of the outstanding title so purchased. It is also true that there are exceptions to this rule. Counsel for the complainant insist that such is not the result if the parties hold by different purchases, and counsel cite and rely upon the cases of *King v. Rowan*, 10 Heisk. 683; *Tisdale v. Tisdale*, 2 Sneed, 598; *Burns v. Headerick*, 85 Tenn. 103, 2 S. W. 259. The cases cited and relied upon do recognize an exception to the general rule, but they do not hold that the simple fact of purchases at different times so changes the relations and duties of tenants in common as to absolve

them from their trust relations to each other, and as to always constitute an exception to the rule above mentioned. But these cases are simply based upon the principle that the tenants in common may at times occupy such distinct and adverse relations, well known to each other, as to abrogate all trust obligations, and that, where such adverse attitudes are known and recognized, one tenant in common may purchase for his own benefit an outstanding title in such a way as that the same will not inure to the benefit of the other tenants in common, and as that the implication will not at least arise that the purchase was so made. It appears clearly that these parties were tenants in common at the time of these purchases made by Gass. As we say, they had before that a joint and common possession through a tenant. There was nothing to indicate or give notice of any adverse interest. It appears from this proof that the complainant, Gass, at least to a part of the land, was acting as agent for the other tenants in common, that he did lease out or grant rights to cut tan bark upon this land, and we are satisfied that the agreement was that he was to look after taxes in Bledsoe county. Such being the case, he occupied a trust position and attitude towards the other tenants in common, and it presents an ideal case for the enforcement of the rule that the purchase by one tenant in common inures to the benefit of all, and we are therefore of the opinion that there is no error in the decree of the chancellor upon this point, and that the same should be affirmed, and we so hold also as to the title purchased.

The next question arises upon the appeal of the defendant from that portion of the decree of the chancellor which excluded from the lands to be divided a tract of 115 acres included in what was known as the "Riker Purchase." As shown above, the complainant's bill was filed on November 9, 1891, and in this bill he alleged that he himself and defendants were the owners of the tract of land covered by the Haley and Kimbrough grant, with the exception of the three tracts above named. On January 11, 1893, the complainant was allowed to amend his bill so as to allege the purchase of the Riker tract, above mentioned, of 115 acres, which was included within the bounds of the Haley and Kimbrough grant. The defendants answered this amendment, and claimed—First, that the Haley and Kimbrough title was superior to the Riker title; and, second, that, in any event, the defendants were entitled, on paying their proportion, to be vested with a one-fourth part of the Riker purchase, and claimed that he had purchased a 500-acre tract, only 115 acres of which was within the bounds of the Haley and Kimbrough grant. On the hearing the chancellor decreed that the defendants Waterhouse were not entitled to any interest in this 115 acres, because the complainant had offered to make them a deed on paying their fair share of the

costs, which they had declined to do. The facts in regard to this transaction appear to be that a suit had been brought in the chancery court of Rhea county against complainant and the defendants by one Mrs. Maria Henreeka Riker, who claimed to own a tract of land containing 500 acres, 115 acres of which overlapped on the Haley and Kimbrough grant, for which portion of the tract covered by her title she was suing. It further appears that the complainant was interested in other lands outside of the Haley and Kimbrough grant, with which this claim of Mrs. Riker conflicted. It also appears that after consultation with Mr. J. B. Frazier, counsel for complainant, and defendants in this suit, all of whom were defendants in the Riker suit, it was thought best to compromise with Mrs. Riker. The attorney, Mr. Frazier, advised the complainant that, if he could make a reasonable compromise of the Riker suit, it would be advisable. It appears that after some negotiation the complainant was able to buy Mrs. Riker's entire claim of 500 acres for the sum of \$500, and did so, obtaining a deed from her on the payment of that sum for the entire tract. He thereupon offered and agreed to make a deed for their respective one-fourths of the 115 acres which interlapped on the Haley and Kimbrough grant on their paying for the same at the rate of one dollar per acre, the price paid by him, but they demanded that he give them a deed for an undivided one-fourth each in the entire tract of 500 acres purchased by him. This he was unwilling and refused to do, and the chancellor based his decree apparently upon this refusal.

We think it true, as held by the chancellor, that the defendants had no right to claim anything beyond the bounds of their own grant. It appears that the complainant was interested in other lands outside of the Haley and Kimbrough grant, in which the defendants had no interest which the Riker purchase covered. As to these lands the defendants the Waterhouses had no claim, either moral, legal, or equitable, for a conveyance from the complainant, and having refused the deed that he tendered for that portion of the land included in their common claim, if there were nothing else in the case, it might be true that they had forfeited their rights to the benefit of this purchase. But the facts which confront us are that the complainant and the defendants both were then claiming that the Haley and Kimbrough grant was the better title. They have produced this grant, and it is admitted that the defendants, as well as the complainant, have deraigned a clear and perfect title from that grant down to themselves in this case. There is nothing to show the date or the validity of the grant covering the Henreeka Riker purchase, except that it was thought advisable to purchase it as a matter of compromise, and this was done by consent of all parties, or under the advice of their common counsel.

We are therefore not able to say that the chancellor was correct in excluding this 115 acres from the tract to be partitioned. So far as shown directly by this record, the Haley and Kimbrough title as to this portion of the land was the only true and valid title. But inasmuch as the Henreeka Riker purchase was made by common consent, and under the advice of the common counsel of the parties, we take it that the 115 acres included in the Haley and Kimbrough grant should be partitioned among the parties, and that the defendants Waterhouse should pay their proportion of the cost of this 115 acres. We cannot say that the complainant has a better title to it, and we cannot punish the defendants simply because they at one time refused to pay what was right and just. So we are of the opinion that the decree of the chancellor upon this point was erroneous, and should be reversed, and that this tract of 115 acres should be included in the partition, but defendants must pay their part of cost of clearing title.

It further appears that after the chancellor had decreed a partition of the land, and appointed commissioners to go upon the land and divide the same and make report, the commissioners named proceeded to act, had a survey made, inspected the land, and made and reported a partition, filing a map setting out the shares of the several parties in severalty. This report was excepted to, among other things, because the commissioners took upon themselves to except out of the tract of land a number of other tracts and interferences. The language of the report is as follows: "Having gone upon the premises on the 22d day of November, 1897, and begun a survey of said land, which we deem necessary in order to make an equitable division between the parties and continue the same until completed, and after considering and understanding the whole matter, taking into consideration such interferences, interlaps, to which our attention was called and our observations discovered, and certain deeds and title papers of divers parties filed in the suits bearing upon these lands, we assign to each of the parties in this cause a one-fourth interest in value, both quality and quantity considered, as per decree in same. Each assignment was made by lot, which was drawn for by two small girls," etc. Now, it is shown by the map and report that certain tracts, not mentioned in the pleadings, nor in the decree of the court, to be excepted, were excluded by these commissioners, on the ground that they were covered by older and better titles. The chancellor confirmed this report over the exception of the parties, and this is assigned as error.

Affidavits were filed to sustain the report, some of which were to the effect that this action on the part of the commissioners would be to the advantage of the complainant, who excepted. How this may be we have not thought it proper to consider, as it

is not a legitimate issue in the case. The complainant filed his bill alleging that he and the defendants were owners of all the tract of land covered by the Haley and Kimbrough grant except three several tracts named. The defendants answered admitting this except as to one tract, the Pope entry and grant. The complainant thereafter amended his bill seeking to also except the Riker purchase, and this the defendants opposed. The chancellor refused to exclude the Pope entry and grant, as we have held rightfully, but did exclude the Riker purchase, as we have held wrongfully. But, having thus settled the controversy then existing between the parties, he directed a partition of the remainder. It appears that the commissioners took it upon themselves, after an observation, and considering the title papers produced by various parties, to except other tracts. Now, to this the complainant objected. It may be true that the parties have not title to the tracts excepted by the commissioners, and it may be that it would be wise for the parties to so admit, and not to insist upon a division of these tracts, or that it may be wise for them to let the partition stand as it is, and leave the excepted tracts undivided, and to be settled by future adjustment or litigation. But it is not for the courts to decide as to what is the wisest and best for parties, but to decide upon their rights on issues properly presented.

In this case we have in their pleadings both parties agreeing as to the ownership of certain lands which have been excepted by the commissioners, and which the commissioners reported, in effect, should not be included in the partition, because covered by older titles. Upon what such conclusions were based we are not informed. It was the simple and plain duty of the commissioners to partition the lands which the decree of the chancellor had directed them to divide and partition. It was no part of their duty to pass upon the title of the whole or any part of the same, and we think the chancellor was clearly erroneous in confirming the report of these commissioners who had made these exceptions. In this respect the decree of the chancellor will have to be reversed, and the cause remanded, to the end that other commissioners be appointed, and the land partitioned, unless the parties themselves can agree upon what land shall be excepted from the decree for partition.

The complainant has further assigned as error the decree of the chancellor which modified the report of the clerk and master as to the amounts with which the defendants Waterhouse were chargeable on account of taxes paid and on account of the Pope purchase. The clerk and master charged the parties, in accordance with the decree of the chancellor previously entered, with the entire cost of the purchase of the Pope entry. Subsequently, on the coming in of the report of the clerk and master, he so modified this re-

port as to charge the defendants with only their proportion of the cost of the interlap of the Pope entry. It is insisted that the chancellor was in error, because his last decree was a reversal or modification of his first decree. While this may be true, the entire matter now being before us and open, we are of the opinion that the last decree of the chancellor was right. The defendants should only be charged with their proportion of the cost of that part of the land covered by the Pope interlap which lies between the Haley and Kimbrough grant, and which is to be partitioned among them and the other parties.

The result is that the decree of the chancellor as to the Pope entry is affirmed. As to the Riker purchase, and the confirmation of the report of the commissioners, it is reversed. The defendants the Waterhouses are entitled to have both the interlap within the Pope grant and entry and the Haley and Kimbrough grant and the Riker interlap included in the partition, but must be charged with the proportion of one-fourth each of the entire cost of the same; and the chancellor's decree will be so modified, and this cause remanded to the chancery court to be further proceeded in in accordance with this decree. The cost of the appeal will be divided between the parties. The cost of the cause in the court below will await the further decision of the case. All concur.

On Petition to Rehear.

(Oct. 17, 1900.)

The following is the complainant's petition to rehear in the above cause:

"Comes the complainant, W. T. Gass, and shows and represents to the court as follows: (1) On the 11th day of October, 1900, the decision of this honorable court was had herein, and an opinion rendered which does the petitioner a grave injustice, as he conceives, in this: That, under an assignment of error in behalf of defendants Waterhouse, this honorable court adjudged that said defendants Waterhouse were to share one-fourth each in what is known as the 'Maria H. Riker Purchase,' of one hundred and fifteen acres, by petitioner some years ago, on the conditions and in the manner set forth in the opinion filed herein, to which reference is here made, as well as to the entire record herein. It will be seen that the prime cause of the decision of this honorable court in the premises aforesaid was that the petitioner did not disclose in the record the chain of title for said purchase, while petitioner had agreed of record below that defendants Waterhouse could and did connect their chain of title under the Haley and Kimbrough grant with the state of Tennessee. The record failing to disclose the chain of title from the state of Tennessee to the petitioner through his said Riker purchase, this court held that the Haley and Kimbrough title was the only valid paper

title shown in the record, and hence this court should not say that the complainant (petitioner) 'has a better title to it [the Riker 115 acres].' See opinion, p. 454. On the trial below, the entire chain of title from the state of Tennessee to petitioner was filed in this cause, and consisted of the following conveyances, to wit: State of Tennessee to Robert Foster; Robert Foster to J. G. Smith; J. G. Smith to J. Wilson Howell; J. Wilson Howell to Maria H. Riker; Maria H. Riker to W. T. Gass. These several conveyances are found in the record in the case of *Gass v. Garrison*, No. 3 from Rhea county, before this honorable court, on pages 524, 526, 529, and 131 of the original transcript, and page 42 of the supplemental transcript, respectively, to each and all of which reference is here made. Complainant and the respondents Waterhouse are parties to said suit of *Gass v. Garrison*. As before stated, on the trial of this cause below, these title papers were all read, filed, and used in this suit, and constituted a part of the record herein, and they were afterwards also used in and made part of the record in the said suit of *Gass v. Garrison*, and, either through oversight, mistake, or neglect, they were not copied in the transcript in this case, and appear only to have been copied in the case of *Gass v. Garrison*, aforesaid. On the trial below there was no question made but what the Riker title was superior to the Haley and Kimbrough title. It was conceded by all parties, and correctly so adjudged, as is readily seen by an inspection of the title papers aforesaid. (2) This cause was remanded several months ago for the supplying of title papers of both parties herein, it being agreed of record in this court, as the records verify, that 'various of the title papers of both parties' had been wrongfully left out in making up the transcript, though as a matter of fact several of such title papers had not been omitted from the transcript, while many of them had. In supplying the title papers below, at the August term of court last of the chancery court at Dayton, counsel for defendants Waterhouse was not present during the term, but was otherwise engaged. Counsel for petitioner, desiring to speed the trial of this cause before this court, voluntarily agreed of record, in order to do so, that defendants Waterhouse connected their title with the original Haley and Kimbrough grant, verily believing and understanding at the time that the chain of title to the Riker purchase had originally been copied into and made a part of the transcript herein, and that it was only the J. M. Pope title of petitioner that was missing from the transcript, as originally sent up herein. Said original transcript was not before petitioner's counsel at the time, and they were cognizant of the fact that there had been no question made as to the superiority of the Riker title over the Haley and Kimbrough title on the trial below, and believed at the time, under a misapprehension,

however, that it was only the Pope chain of title, and not the Riker chain of complainant, that had been omitted in making out the original transcript. Petitioner's counsel were confirmed in this view and belief from the fact that the Riker chain of title, complete, appeared in the original file of papers at the said August term of chancery court at Dayton, 1900, as originally placed therein and as a part thereof, while the Pope chain of title had been either lost or mislaid, and the various deeds and conveyances constituting the same had to be supplied, as did also the conveyances constituting the Haley and Kimbrough title. In this attitude of the case, and after supplying the papers constituting the Pope title, petitioner's counsel believing the Riker title papers to have already been copied into the original transcript,—which, as stated, was not before them,—they agreed of record on the last day of the chancery court at Dayton, and in order to facilitate a hearing of this cause at the present term of this court, voluntarily, and in the absence of the counsel of defendants Waterhouse, that the Waterhouse title under the Haley and Kimbrough grant connected with the original grantor, the state. This agreement admitted nothing more than the facts, but would not have been made had petitioner or his counsel known the Riker title was not copied in the original transcript, except the chain of title to the Riker purchase had also been made a part of the supplemental transcript, which embodied the proceedings and title papers had and supplied herein after the order remanding, and was supposed and believed to include all the title papers omitted from the original transcript. (3) Petitioner verily believes from the opinion of this honorable court that, had the Riker chain of title been before the court, this court would have affirmed the chancellor's decree, holding, in effect, the Riker title superior to the Haley and Kimbrough title, and that defendants Waterhouse were not entitled to share in the Riker purchase. By the assignment of error filed herein by defendants Waterhouse, who appealed only from that portion of the chancellor's decree affecting the Riker purchase, petitioner's counsel did not understand the question of the superiority of the Riker over the Haley and Kimbrough title to have been raised, and the point was not made anywhere in the brief of counsel for Waterhouse in support of said assignment. Consequently the attention of petitioner's counsel was not directed to this failure to copy the Riker title in the transcript until receiving the opinion of this honorable court, filed October 11, 1900, and which was received by Mr. Mansfield, of Athens, the day of or the day following its rendition; but he was immediately taken seriously ill on its receipt, and was confined to his bed for three days thereafter, and the record and opinion were immediately sent to the counsel who prepares this petition and affidavit, and were

received by him October 13, 1900; and who on the same day prepared a notice, copy of which is hereto attached as Exhibit 1, to be served on counsel for defendants Waterhouse, and, being unable to reach them on account of their absence from home in distant portions of the state, as he was informed, he presented same to Col. W. L. Givens, a reputable attorney of Dayton, Tenn., who entered thereon the indorsement shown on Exhibit 1. One of defendants Waterhouse is a non-resident of Tennessee, and the other lived a considerable distance in the country, and petitioner was unable, owing to the limited length of time he had in which to do so, to serve said Waterhouses with personal notice. Petitioner presented Exhibit 1 to Mr. L. M. Coleman, partner of J. B. Frazier, counsel for Waterhouses, on yesterday, and gave him a fuller verbal notice of the contemplated action of petitioner in the presenting of this petition to-day, and its contents, than is shown in said Exhibit 1. (4) Petitioner therefore prays that that portion of the decree and opinion of this court aforesaid, respecting the rights of petitioner and the Waterhouses in and to said 115-acre Riker purchase, be set aside, and that the cause be remanded, not only to remedy the error committed by the partition commissioners, but as well for the perfection of the transcript with reference to said Riker title; that appropriate orders and decrees be passed in this respect; that right and justice may prevail, unhampered by mistake of the clerk and master and the misapprehension of petitioner's counsel. This application is not made for delay, but for justice. Burkett, Miller & Mansfield, Solicitors for Petitioner."

"Authorities: Bank v. Jefferson, 92 Tenn. 537, 22 S. W. 211; Shannon's Code, § 4905; Home Ins. Co. v. Stone Nat. Bank, 88 Tenn. 370, 12 S. W. 915; Nolon v. Black, 3 Tenn. Cas. 578.

"State of Tennessee, Knox County. Personally appeared before the undersigned, W. B. Miller, and made oath that he is one of the solicitors for petitioner, W. T. Gass; that he has prepared the foregoing petition, knows the contents thereof, and the truth of same better than his client; and that the facts and statements contained in said petition are true. W. B. Miller.

"Sworn to and subscribed before me this the 16th day of October, 1900. J. G. Stuart, D. C."

"Exhibit No. 1.

"W. T. Gass v. E. F. Waterhouse et al. Before the Court of Chancery Appeals at Knoxville, Tennessee, from Rhea County. The defendants E. F. and R. G. Waterhouse will take notice in above cause, that on Tuesday, October 16, 1900, in open court at Knoxville, Tennessee, the complainant will move the court to remand this cause, in order that the chain of title from the state of Tennessee to W. T. Gass, for what is known in the pleadings as the 'Maria H. Riker 500-Acre

Purchase,' may be supplied and copied into the transcript, such chain of title having originally been in and constituted a part of the file in the chancery court at Dayton. Complainant will further ask that no adjudication be made by this court as to such Riker purchase until such chain of title is copied into, and becomes a part of, the record. Complainant will support his application by petition and affidavit, and will ask that the opinion and decree herein conform hereto. This October 13, 1900. W. T. Gass, by W. B. Miller, Sol."

"I acknowledge receipt of a copy hereof on this October 13th, but have no connection with the case other than at the request of solicitor for Waterhouses. I agreed to assign errors on their behalf, and try the case for them in supreme court, if, in my opinion, such assignment was proper, and the solicitors of Waterhouses being absent in distant counties, otherwise engaged. W. L. Givens, Atty."

BARTON, J. This cause is before us on a petition to rehear. For the sake of brevity, to save repetition and time, we here refer to the petition for a statement of the petitioner's grievances, and annex it as a part of this additional opinion. Without repetition of the statements of the petition, we are of the opinion that this is not a proper case to remand for the purposes requested. No diminution of the record was suggested. The case was tried and decided by this court after argument by counsel, without any suggestion of diminution on the point now suggested. If it were a point upon which we thought an actual injustice had resulted to either party, we would lend a more willing ear to the request of the petition to remand the case, to the end that the Riker title be adjudicated, or that the transcript might be perfected upon this point. But to do this would delay the case, and we think substantial justice was reached in our former opinion. It may be that the Riker title was, as now insisted by the petitioner, the better title; but it was purchased by the complainant under circumstances and conditions existing which he admits placed a moral, if not a legal, obligation upon him to make a deed to his co-tenants for that part of the land covered by the common grant under which they claim. It is true that the Waterhouses at the time declined to do what was right, and pay their fair proportion of the charges on the land covered by the Riker purchase and their common grant, and demanded more than they were entitled to by demanding a deed for an undivided one-fourth interest each in the Riker purchase, when they had no claim to any part of the land outside of that covered by the Haley and Kimbrough grant. Having declined to pay their part when a deed was offered, it is true that they are not in a position to demand a deed under the Riker purchase now. But we are only decreeing to them that which the complainant himself at one time offered to give

and on the conditions offered by him, while it may be that if the cause were remanded it might be shown that the Riker title was the better title. But, if that question were again taken up, the complainant would be confronted by the fact that in another suit he has asserted and sworn that the Haley and Kimbrough grant was the better title. The just result has all the time been that the Waterhouses should be entitled to share in that part of the Riker purchase covered by the Haley and Kimbrough grant, but should be charged with their proportion of the cost. This we have decreed should be done. This result is just, and we do not think it a proper case to open up for further litigation on the question of the priority between the Riker and the Haley and Kimbrough grants. And for this reason, and because we are satisfied that upon this point the case has been equitably and justly decided, we decline to remand, and overrule the petition. But this response thereto will be filed as a part of the record. All concur.

Affirmed orally by supreme court, October 27, 1900.

BOARD OF COUNCILMEN OF FRANKFORT v. FARMERS' BANK OF KENTUCKY.¹

(Court of Appeals of Kentucky. March 14, 1901.)

PARTIES TO APPEAL — TAXATION — DESCRIPTION OF PROPERTY ASSESSED — DIRECTORY PROVISIONS OF STATUTE — LIEN FOR TAXES.

1. No person is a party to an appeal unless he is named in the statement.

2. Ky. St. § 3378, part of charter of cities of the third class, providing that "in assessing real estate each lot or parcel of ground shall be given in a separate item, together with the number of each lot on the map of the city, and the street and square where situated, and the number of feet front, and the depth," is directory merely, and a failure to comply therewith does not render the assessment void; it being provided by Id. § 3403, part of the same act, that "no error or irregularity in the assessment of property shall invalidate the assessment or any proceeding under same."

3. City lots belonging to an insolvent debtor were sold to satisfy the liens of various creditors. After the sale the city asserted a lien on the proceeds for taxes, but its claim was denied, and it appealed, making only one of the creditors a party to the appeal. Held that, while the city had a lien on each lot for the taxes on all the lots, the appellee can be required to pay out of the amount adjudged to him by reason of his mortgage debt only the taxes on the property which he bought in satisfaction of that debt, since the city, by failing to make the other creditors parties, has deprived appellee of the right to look to them for contribution, which he would otherwise have if required to pay all the taxes.

Appeal from circuit court, Franklin county.

"Not to be officially reported."

Action by the Farmers' Bank of Kentucky and others against H. R. Williams and others.

Judgment denying claim of board of councilmen of Frankfort for taxes, and it appeals. Reversed.

W. H. Julian, T. H. Crockett, and W. H. Sneed, for appellant. John W. Rodman, for appellee.

WHITE, J. In the consolidated actions of the various creditors of H. R. Williams against Williams, seeking foreclosure of mortgages, and by attachment on his property to secure and satisfy their claims, the appellant, the board of councilmen of Frankfort, filed an intervening petition, setting forth that certain taxes were due the city by H. R. Williams on property owned by him, and that had, at the time of filing this intervening petition, been sold in the actions under mortgage and attachment liens. These taxes were for the years 1892, 1894, 1895, and 1896. Under direction of the court the petition of the city was made specific, so as to show the valuation of each piece of property for each of the years, and the tax due therefrom. The county of Franklin and the commonwealth came in also by petition, and claimed taxes due them for the years 1895 and 1896. It was sought by these petitioners (appellants) to have adjudged to them out of the proceeds of the sale of the property the taxes due, all of which was in the hands of the commissioner, except the amount bid by appellee bank, which it was not compelled to pay, to the extent of its mortgage debt. To these petitions answers were filed by the creditors claiming the fund, in which it is averred that the taxes due the city were void because the description in the assessment roll or list was insufficient, and did not comply with the city charter. There was also a plea of laches in waiting till after the property had been sold. It was also pleaded that the tax lien was only on the specific piece or kind of property assessed. They further pleaded that the debtor Williams had a large amount of personal property out of which the taxes might have been coerced, and that, as no steps in that regard had been taken or effort made, the lien on the real property had been lost. Pending these issues, the court directed the commissioner to retain out of the fund in his hands an amount sufficient to cover any unpaid taxes that had accrued on the property before the purchase under sales by him. Upon final hearing, the court dismissed the petitions of appellant, and refused to direct the payment of the taxes, and from that judgment this appeal is prosecuted.

As the only party designated in the statement on the record as appellee is the Farmers' Bank of Kentucky, there is no appeal as to the other parties in the consolidated cases. We are of opinion that the assessment of the property for city taxes is not void. Section 3378, Ky. St., being part of the charter of cities of the third class, to which Frankfort belongs, provides: "In as-

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

assessing real estate, each lot or parcel of ground shall be given in a separate item, together with the number of each lot on the map of the city, and the street and square where situated, and the number of feet front, and the depth, and how much frontage on each street where it bounds on more than one street. The value of the ground and the improvements shall, as to each lot, be stated separately." It is also provided in section 3403: "No error or irregularity in the assessment of property shall invalidate the assessment or any proceeding under same."

Taking the two sections together, as we must, being a part of the same act, we think it clear that section 3378, supra, is directory only. It should be done for the benefit of the board of equalizers and the collector, but by section 3403 it is provided that no irregularity shall invalidate the assessment. The taxes were due and collectible, and there is no plea of limitation; in fact, the period of limitation (five years) had not elapsed. In the case of *City of Middlesboro v. Coal & Iron Bank*, a case to be officially reported (57 S. W. 497), we said: "By these provisions of the special charter of appellant, the general charter of cities of the fourth class, and the general law under the title 'Revenue and Taxation,' we are of opinion that there exists a lien on any and all property for any and all taxes due by its owner, and that the assets of the bank are liable to be subjected to the payment of the franchise tax due appellant, unless, by reason of laches, delay, or estoppel, that right has been lost or waived." The charter of appellant city provides (section 3375): "The city shall have a lien for five years from the date of the assessment on the property assessed, and on all other property, of each person or corporation, for all taxes due by them respectively to the city, which shall not be defeated by gift, devise, sale, alienation, or any means whatever, and nothing shall be exempt from levy and sale under a tax warrant." This provision of appellant's charter is almost identical with that of fourth-class cities, and the general law considered in the *City of Middlesboro Case*, supra. The difficulty here is that the lien against the property is not attempted to be asserted. The proceeding is not against the property sold and against the purchaser. It is here sought to subject the fund in court, the proceeds of the property sold, to the payment of the taxes. The proceeds of the sale of all the property was in court, except that due the appellee bank, as stated, it was not required to pay to the commissioner. We are of opinion that appellee bank is bound for the taxes on the property it bought, or, rather, this portion of the taxes due by Williams, to be paid out of the funds the bank was permitted to retain by reason of its mortgage debt. This is clear under the charter provision and the general law of revenue and taxation.

We are also of opinion that appellants should not be permitted to compel appellee bank to pay the whole tax due on all the property, for the reason that on this appeal they have failed to make the other creditors of Williams, to whom the fund was paid according to their equities, parties, and the judgment releasing them from taxes is final, and as against them the appellee could now have no contribution. Appellants might easily have made all the creditors parties to the appeal, or, failing in that, they might, if so desired, have superseded the judgment of distribution, and thus retained the whole fund in court that was ordered to be kept pending the decision of this tax question. For some reason appellants failed to take either of these courses, that would have kept the fund or the parties receiving it in court on this question, and then, on reversal, would have compelled a payment or contribution from each creditor on an equitable basis. By reason of this failure on the part of appellants to save the fund or keep the parties in court, the appellee bank, if compelled to pay the whole taxes due, would be wronged in being deprived of its right to contribution, which it could not prevent, but which could have been prevented by appellants. We therefore conclude that appellants are estopped by reason of this laches from recovering from appellee bank the tax due by Williams, except as to the property bought by the bank in satisfaction of its mortgage debt, but as to this amount appellee will be held liable to appellants, city, county, and state. For the error indicated, the judgment is reversed, and cause remanded for judgment in accordance herewith.

DAMRON v. COMMONWEALTH.¹

(Court of Appeals of Kentucky. March 12, 1901.)

INFANTS—DISAFFIRMANCE OF DEED—ESTOPPEL.

Where an infant conveyed land to his father to enable the father to become surety in a bail bond, and that fact was recited in the deed as the consideration therefor, the court having accepted the grantee as surety upon the faith of the grantor's testimony in open court that he was 21 years of age, the grantor was estopped, upon arriving at age, to disaffirm the deed; and one to whom he conveyed the land in his effort to do so is affected by that estoppel, so that he cannot claim the land as against the commonwealth, which purchased at a sale made to satisfy a judgment on the forfeited bond.

Appeal from circuit court, Boyd county.

"To be officially reported."

Proceeding by the commonwealth against Wayne Damron, Sr., to recover land purchased by plaintiff at execution sale. Judgment for plaintiff, and defendant appeals. Affirmed.

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

R. S. Dimple and J. A. Scott, for appellant. Morrison Breckinridge and Robt. J. Breckinridge, for the Commonwealth.

PAYNTER, C. J. One Harrison Combs was indicted in the Boyd circuit court, and permitted to give bond in the sum of \$550. The title to the property here in question was in John Combs, Jr. He desired to become surety for his brother Harrison, but the court would not accept him for reasons not necessary here to state. To make John Combs, Sr., a good bondsman, he conveyed to him the property, reciting in the deed the purposes for which it was conveyed to him. The circuit judge would not accept John Combs, Sr., as surety unless there was stated in the deed the purpose for which John Combs, Jr., conveyed him the property. This deed was duly recorded. The bond was forfeited, and the commonwealth had an execution levied upon the property, had it sold, and instituted this proceeding to recover the possession of it. It appears from the testimony in the case that John Combs, Jr., was about 20 years of age when he made the deed, and upon arrival at age, for the recited consideration of \$75 (although the property was worth over \$500), he conveyed it to the appellant, Wayne Damron, Sr. It is insisted here that John Combs, Jr., being a minor at the time he made the deed, could disaffirm the contract, and that the deed to Damron amounted to a disaffirmance of it. That a minor can usually disaffirm contracts which he makes on arriving at 21 years of age is not a debatable question, because his right to do so is generally recognized. It is equally certain that the deed to Damron, if he had the right to disaffirm under the facts of this case, would amount to it. The right of a minor to generally disaffirm a contract is not involved here, but the question is, under the facts of this case, was he estopped to do so? Before the circuit court would consider the question of allowing John Combs, Jr., to convey the property to John Combs, Sr., with a view of making him a good bondsman, he was required to testify as to his age, and in open court testified that he was over 21 years of age. If this court held that he should be permitted to disaffirm his contract, then it would allow him to perpetrate a fraud upon John Combs, Sr., and the commonwealth. That an infant must restore the property which he obtains in a contract before he can avoid it is the universal rule where he has been guilty of deceit or fraud. *Petty v. Roberts*, 7 Bush, 411. Here the infant received no property, and, of course, has none to restore. The only thing that he could have done in compliance with his contract would have been to pay the forfeited bond. In *Schmitzheimer v. Eiseman*, 7 Bush, 298, it appeared the deed was made by an infant feme covert. She sought to avoid it on the ground of her infancy. The facts appeared to be that, in order to induce the purchaser of her

property to accept a deed, and pay for it, she made an oath before a notary public that to the best of her knowledge and information she was more than 21 years of age. The court held that she was not entitled to recover the property, and said: "Neither infancy nor coverture can excuse parties guilty of fraudulent concealment or misrepresentation, for neither infants nor femes covert are privileged to practice frauds upon innocent persons." We are aware that in some jurisdictions the contrary view is taken, but we believe in most jurisdictions the rule is announced as in the case above cited. However, it is unnecessary to review the opinions of the courts of other states on this question, as we will follow the rule of this court. We would not hold in all cases that, if an infant testified that he was 21 years of age, the party who dealt with him by reason of that fact would be protected. It might be so manifest that an infant was not 21 years of age that the party could not claim to have been deceived by his statement; hence no fraud would have been practiced upon him. Damron is in no better condition to question the validity of the deed than his vendor. As we have said, the deed recited the consideration for the conveyance; hence he had notice of the terms of the contract between the parties. When Combs attempted to disaffirm the contract, Damron took the risk of his right to do so. The judgment is affirmed.

STOKELEY et al. v. BUCKLER.¹

(Court of Appeals of Kentucky. March-14, 1901.)

USURY—VENDOR AND PURCHASER—INTEREST ON MONEY ADVANCED FOR PURCHASE—ASSIGNMENT.

1. R. sold land to S., and S. sold a part of the land to B. For some reason R. being unwilling to convey the land to S., notes for the purchase price were executed by B. to R., and the entire land was conveyed to B., who conveyed to S. all the land except that S. had sold to him; and S. executed his notes to B. for the price, bearing 8 per cent. interest. Thereafter the notes sued on were executed by S. to B. for the interest, calculated at 8 per cent. *Held*, that the interest in excess of 6 per cent. was usurious, and should be extracted, though B. may have acted merely for the accommodation of S.

2. The assignee of a note takes it subject to the defense of usury.

Appeal from circuit court, Nicholas county. "Not to be officially reported."

Action by W. T. Buckler against W. T. Stokeley and others on a promissory note. Judgment for plaintiff, and defendants appeal. Reversed.

G. Egbert Coons and J. I. Williamson, for appellants. Hanson Kennedy, for appellee.

GUFFY, J. The appellee, W. T. Buckler, instituted this action in the Nicholas circuit court against appellants, W. T. Stokeley and

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

others, on a note for \$1,035, dated April 18, 1893. The appellants filed separate answers, in which they claimed that the note sued on contained \$278.75 of usurious interest, and asked that said sum be credited on said note. The reply traversed the averments of the answer. The pleadings and proof in this case conduce to show that one Richart sold to appellants Stokeley a certain tract of land at \$60 per acre, and placed them in possession thereof. It further appears that Stokeley sold to one G. W. Bramblett 40 acres of said land. For some reason which does not appear in this record, Richart refused to convey the land to the Stokeleys, and Bramblett executed to Richart his notes for the purchase money, and took the notes of Stokeley, etc., to him for the amount of the purchase money; said notes bearing 8 per cent. interest. And at the date of the note in suit the interest on these notes, together with the interest on a note held by appellee, Buckler, on the Stokeleys, with Bramblett as security, was counted at 8 per cent. interest, and the notes in suit executed in settlement of the interest aforesaid. It is claimed by appellants in their pleadings, as well as in their brief, that the note, to the extent of \$278.75, was for usurious interest, and therefore without consideration. The court referred the cause to the master commissioner to take proof and report what amount of usury, if any, was embraced in the note sued on. The report of the commissioner showed \$77.54 of usurious interest. This report was excepted to by appellants. The court overruled the exceptions to the report, and rendered judgment against the appellants for the sum of \$201.25, with interest from 18th April, 1894 (judgment having been before rendered for the portion of the note not contested); and from this judgment this appeal is prosecuted.

It is the contention of appellee that Bramblett was acting as the agent of appellants, and that he received and paid over to Richart whatever usurious interest was collected, and that appellants have no claim against him therefor. But it will be seen that the notes were executed to Bramblett, and that he in fact was the holder of the notes, and made calculations and settlements with the Stokeleys. The fact that the Stokeleys executed the note in suit clearly shows that they had not in fact paid the money to Bramblett, and if it be true that Bramblett paid said sum to Richart, as it is claimed he did do, it follows that he was furnishing that sum for appellants; and the amount agreed to be paid to him by appellants was clearly for the use or forbearance of the said sum so paid, and, to the extent of the 2 per cent. over 6 per cent., was clearly usurious. The appellee, Buckler, who was the assignee of Bramblett, took the note subject to any defense that appellants could have made against Bramblett. It seems clear to us that, whether so intended or not, the defense relied on in this case can amount to nothing more than an attempt

to evade the law against usury. The appellee is inclined, from quotations embodied in his brief, to condemn all those who rely upon the statute against usury as a defense. We do not concur in the views thus expressed. It is well known that the Mosaic law prohibited usury, which in that day and time meant any charge for the use of money; and we may remark that our civilization and religion have, in the main, come to us through the Mosaic or Jewish dispensation. It is also a fact that Rome at one time forbade any charge for the use or forbearance of money, and, as we all know, Rome at one time became the greatest power on earth. It is also a question of doubt whether, under the common law in England, prior to the reign of Henry VIII., any interest could be collected for the use or forbearance of money. It is certain that the practice was severely condemned by the church, by whose laws the taking of interest was branded as a heinous offense, and punished accordingly. It is also certain that the church was aided in its efforts by the temporal authorities, so that the usurer not only fell under the ban of the church's displeasure, but suffered the forfeiture of his property as well. It will thus be seen that the taking of any interest at all was regarded by some great men of ancient days to be not only wrong morally, but highly prejudicial to the prosperity of the people and detrimental to the public good. In later years the law has allowed certain rates of interest, and all higher rates are deemed usurious; and it is the policy of the law, and the public good demands, that no device or subterfuge to evade the law in regard to usury should be tolerated. It is the opinion of many that no interest should be allowed for the use or forbearance of money; it being contended that if no interest was allowed the surplus money would be invested in productive industry, thereby furnishing employment to labor and developing and improving the country. But, so far as this question is concerned, it cannot enter into a determination of this case. But, for the reasons indicated, the judgment appealed from is reversed, and the cause remanded, with directions to dismiss the petition in so far as the claim for \$201.25 is concerned, and for proceedings consistent herewith.

PITTMAN v. PITTMAN.¹

(Court of Appeals of Kentucky. March 15, 1901.)

CONTRACTS—PROMISE TO ADOPT ONE AS CHILD—TIME OF ACCRUAL OF CAUSE OF ACTION.

Where plaintiff performed services for defendant in consideration of defendant's promise to adopt him and make him defendant's heir, plaintiff cannot, during the life of defendant, if ever, recover the value of the services ren-

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

dered, though defendant acted fraudulently in making the promise, and now declares that he does not intend to carry out the contract, as he may yet conclude to do so.

Appeal from circuit court, Clinton county.

"To be officially reported."

Action by G. W. Pittman against Reason Pittman to recover damages for breach of contract. Judgment for defendant, and plaintiff appeals. Affirmed.

El. Bertram, for appellant. Brents & Winfrey, for appellee.

PAYNTER, C. J. On June 28, 1899, the appellant filed a petition against the appellee, in which it was substantially averred that about 23 years previous, and when he was 12 years old, the appellee took him into his family to live, with an agreement that if he would become a member of his family, and labor for him, until he was 21 years old, without any compensation except food, clothing, and schooling, he (defendant) would adopt him, thus making him share in his estate with his other children, and give him a horse, bridle, and saddle on the arrival at age of 21 years; that he entered into defendant's family, and performed services under that agreement, and faithfully kept it, until he was about 21 years of age, when, by an agreement, defendant gave him the remainder of his time, on condition that he would relieve him from the promise to give him a horse, bridle, and saddle. It is further averred that the defendant represented to him that he had been adopted and made one of his heirs at law; that he would receive a share of his estate with his other children; that defendant recognized him as his son, begotten out of wedlock; that he was ignorant of legal proceedings, and had great confidence in defendant; that he learned but a short time before that the defendant had not adopted him as one of his heirs at law; that his previous statements with reference thereto were false, and were made by him for the purpose of deceiving plaintiff; that as a matter of fact the defendant never adopted him as his son, but had procured the Clinton county court, without his knowledge or consent, to apprentice him. It is further averred that at the time he became a member of defendant's family, as averred, defendant was worth \$7,000 or \$8,000; that he is now worth \$11,000 or \$12,000; that defendant has eight children; that his share of the estate, if the contract is carried out, would amount to \$1,300 or \$1,400; that the defendant now says that he shall never have anything from his estate; that the labor which he performed for him, as stated, was worth \$1,650; and he prays judgment therefor. To this petition a demurrer was sustained, and, the plaintiff refusing to plead further, it was dismissed.

If specific performance of the alleged contract could be enforced, the time has not arrived to do so. The time to demand its enforcement is upon the death of the appellee, because he never promised anything except

food, raiment, education, and horse, saddle, and bridle, until his death. Our attention has not been called to any case of this court, nor have we any knowledge of one having been here, involving the question here for determination. In *Speers v. Sewell*, 4 Bush, 239, the father made an oral contract with his son, whereby he agreed to convey to him his homestead tract of land in consideration of his living with him, attending to his business, and taking care of him and his wife during their lives. Specific performance of the contract was denied because there was no written memorial of the contract, but the court decreed that the son was entitled to compensation for the services which he rendered, and a lien on the land therefor. It was held in *Myles' Ex'r v. Myles*, 6 Bush, 237, that by a contract to leave a legacy as compensation for services, without any definite agreement or understanding as to the nature and amount of the legacy, no absolute obligation is created. But it was also adjudged that where one performed services in faith of a legacy, and it was clearly proven that there was an absolute promise upon such consideration to leave the party a certain and definite legacy, compensation may be recovered by the one thus performing the services. In *Usher's Ex'r v. Flood*, 88 Ky. 552, the same rule was announced as in *Speers v. Sewell*. It is urged that the statute of limitation prevents a recovery growing out of the alleged contract. Had this action been brought upon the death of the appellee, the statute would not have barred it. *Myles' Ex'r v. Myles*, supra; *Thomas v. Feese* (Ky.) 51 S. W. 150. In our opinion, this is not a case for the application of the statute of limitation, because the cause of action has not accrued.

Does the fact that the appellee fraudulently represented that he would make the appellant his heir at law, and thus allow him to inherit with his other children his estate, and his declaration now that he does not intend to carry out that contract, precipitate a cause of action? We think not. The appellee might conclude to carry out the contract by making, if possible, by will or otherwise, that the appellant should take a share of his estate. If he should do that, then appellant certainly would have no cause of action against his estate for the alleged services or for specific performance. His estate might be large or small at his death, no one at this time being able to tell when he might die or what he might possess at his death. He did not agree that his estate would be of a certain value. The appellee has during his life the right to carry out his contract with the appellant. If he elects not to do so, then, of course, the appellant would have to proceed to recover from his estate the value of the services which he had performed. If he is not entitled to a specific performance of the contract; but we do not decide what will be his rights, if any he may have, at the death of the appellee. This right existing in appellee, to elect what course he

will pursue with reference to the promise which he made to appellant, prevents a cause of action from arising in favor of appellant before the death of the appellee. Therefore, if the appellant can at any time maintain an action on the alleged contract, the time has not arrived for doing so. We think the court properly sustained a demurrer to the petition. The judgment is affirmed.

CITY OF STANFORD v. LINCOLN COUNTY.¹

(Court of Appeals of Kentucky. March 14, 1901.)

MONEY PAID—DISCHARGE OF DEBT CONTRACTED FOR ANOTHER.

Where a county, through its fiscal court, contracted with a pump company to place two hydrants near the court house and jail square in a city, the county seat, for which the county agreed to pay a certain sum per annum, the order of the fiscal court providing that the sum which the county was to pay "should be entered on the contract of the company with the city, the said two fire plugs being a part of those contracted for by the city," the city, having been compelled to pay the agreed rent for the two hydrants ordered for the county, may maintain an action against the county to recover the sums so paid.

Appeal from circuit court, Lincoln county.
"Not to be officially reported."

Action by the city of Stanford against the county of Lincoln to recover money alleged to have been paid for defendant. Judgment for defendant, and plaintiff appeals. Reversed.

W. G. Welch and W. E. Varnon, for appellant. H. Helm and Hill & McRoberts, for appellee.

PAYNTER, C. J. It is substantially averred in the petition, and the averments are taken as true on demurrer, that on April 27, 1892, Lincoln county, through its fiscal court, contracted with the Howe Pump & Engine Company to place two hydrants near the court house and jail square in the city of Stanford, for which the county agreed to pay \$100 per annum, to it or its assignee, for a period of about 20 years; that the company or its assignee was to maintain those hydrants so they could be used for throwing water upon the court house and jail in case of fire, and for that purpose a sufficient supply of water was to be kept; that the two hydrants were to be embraced in the contract of the city of Stanford with the Howe Pump & Engine Company; that the order of the fiscal court provided that the sum which the county was to pay "should be entered on the contract of the company with the city of Stanford, the said two fire plugs being a part of those contracted for by the city"; that the Howe Pump & Engine Company assigned to the Stanford Water, Light & Ice Company all of its property franchise

contracts, among others the one which the county made with it, and the one made with the city of Stanford on April 29, 1892, by which it agreed to furnish the city a certain number of hydrants for a certain number of years, which included the two for which the county had agreed to pay as stated; that the hydrants were constructed and maintained as required by the contract; that the county has only paid the rent for one year; that, the city of Stanford having embraced in its contract the two hydrants for which the county had agreed to pay, it was compelled to pay therefor; hence seeks to recover the sum so paid on account of the contracts mentioned. It is insisted that there was no privity or mutual relation existing between the county and the city, and in the absence of which the city is not entitled to maintain this action.

It is admitted for the appellant that no one can make another his debtor against his will, and that the voluntary payment of the debt of another, without his knowledge or consent, the party paying being under no legal obligation to pay, will be regarded as a gratuity, and cannot be recovered back. So the principle of law which is invoked by appellee is conceded by counsel for appellant, and the correctness of which is here recognized. It is manifest from the order of the fiscal court it was in the contemplation of the fiscal court and the city that the city would make a contract with the Howe Pump & Engine Company to supply hydrants for the city, including the two additional ones which the county desired. The county authorities evidently thought the city should not bear the burden of these two, but the county should do so. The language of the fiscal court order shows that it was intended that the city should embrace the two hydrants in its contract with the Howe Pump & Engine Company, and, as foreshadowed in the order of the fiscal court, the city embraced two hydrants for which the fiscal court obligated the county of Lincoln to pay.

It is urged by counsel for appellant that the city could not bind itself for these hydrants, because the county had already done so; therefore the city was under no obligation to pay the Howe Pump & Engine Company for the use of them; hence no liability could arise against the county by reason of the payments which it made, it being a mere volunteer in the payment of the debt of the county. This position would be correct, except for the fact that the county bound itself to pay it, and also, in effect, agreed in its order that the city was also to bind itself therefor; but when the county made the payment the city was to be credited with the amount thereof on its contract with the Howe Pump & Engine Company or its assignee. The city and county both became liable to the Howe Pump & Engine Company or its assignee for the use of the two hydrants in question. While the city was liable for the

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

amount, still it was really the debt of Lincoln county, and the city, having discharged that obligation imposed by its contract and by that of the county, it is entitled to maintain this action against the county for the sums which it has paid under the terms of the contract. We think the petition states a cause of action. The judgment is reversed for proceedings consistent with this opinion.

LITTLE et al. v. BISHOP.¹

(Court of Appeals of Kentucky. March 15, 1901.)

VENDOR AND PURCHASER—BREACH OF WARRANTY—ABATEMENT OF PURCHASE PRICE—INTERLOCUTORY ORDER.

1. In an action by a nonresident or insolvent vendor to enforce a lien for purchase money, the purchaser may rely upon a breach of the covenant of warranty in his deed, though there has been no eviction.

2. It appearing in such an action that defendant obtained possession of vacant land embraced in the boundary purchased, and has not been disturbed in the possession thereof, he should be allowed, by way of set-off, for such land only the cost to which he may be subjected in obtaining a patent from the state.

3. It was error to direct the commissioner to determine the value of the vacant land, but, as the order was merely interlocutory, the error is not a reversible one, as it cannot be presumed that the court will, on final hearing, give plaintiff judgment for the value thus ascertained.

Appeal from circuit court, Morgan county. "Not to be officially reported."

Action by J. Miles Little and another against Miles Bishop to enforce a vendor's lien. Judgment that defendant is entitled to an abatement of the purchase price, and plaintiffs appeal. Affirmed.

W. H. Holt and W. W. McGuire, for appellants. C. P. Chenault and Lacy & Fogg, for appellee.

BURNAM, J. Appellants sold and conveyed to appellee, by general warranty deed, a tract of 204 acres of land, described by metes and bounds, courses and distances, at the price of \$1,500, all of which was paid in cash except \$450, which was evidenced by a note of appellee, which was the basis of this suit, and for the payment of which a personal judgment and an enforcement of the vendor's lien retained in the deed is asked. Appellee answered, and alleged that they were nonresident of this state and insolvent, and charged—First, that there was included in the deed about 18 acres of vacant and unappropriated land, the title to which was in the commonwealth, and which appellants had no right to sell or convey; second, that there was included in the deed 25 acres of land claimed by one J. M. Ingram, and to which he held a better title than plaintiffs; third, that 2 acres of the land were owned and held adversely by James Brewer. Appellee also alleges that the vacant land in-

cluded in the conveyance to him was worth \$200; that the land claimed by Ingram was worth \$300, and the Brewer land \$25; and made his answer a counterclaim, and asked judgment for the excess of his counterclaim over and above the note sued on. Appellants, by reply, traversed the affirmative averments of the answer, and charged that appellee had been put in possession of all of the lands conveyed to him, and had never been evicted from or disturbed in the possession thereof. J. M. Ingram was made a party to the suit, and claimed a part of the land conveyed by the deed. A considerable amount of proof was taken before the submission of the case to the trial judge, who held that appellants were nonresidents of this state and insolvent, and that at the time of the conveyance there was included in the boundary conveyed 10.61 acres of vacant and unappropriated land, the title to which was in the commonwealth, and to which appellants had no title; that J. M. Ingram was the owner and in possession of 12 acres of land covered by the conveyance to appellee; that one Brewer was in possession of 2 acres of these lands at the time of the conveyance; and it was adjudged that appellee was entitled to an abatement of the purchase price for the value of the 14 acres of land so held by Ingram and Brewer, as well as for the vacant land belonging to the commonwealth, included in the boundary; and the case was referred to the master commissioner to hear proof and determine the value of these three tracts of land, and to report his finding, under the order, to the court at the next term. From this judgment, plaintiffs in the court below prosecute this appeal.

It seems to us that the testimony in this case supports the finding of the circuit judge. The land recovered by Ingram and Brewer, we think, is clearly covered by a patent for 180 acres granted by the commonwealth to Raine Maxey, dated in May, 1839, upon a survey made in 1837, and to which Ingram and Brewer both trace title. It is a matter of doubt from the testimony whether the patent of James Gilmore, under which appellants claim title, covers this land at all, but, even if it does, the Gilmore patent was not issued until 1840, upon a survey made in April, 1839, and is therefore junior in point of time to the title of Maxey, under which Ingram claims. The land claimed by Ingram is shown by the evidence to be uninclosed or wild land, lying between the inclosed land sold to appellants by appellee and the farm of Ingram. The two acres claimed by Brewer are inclosed, and clearly within his possession.

The law is well settled that, in a suit by a nonresident or insolvent vendor to enforce a lien upon a tract of land, the vendee may rely upon a breach of the covenant of general warranty in his title, even though there had been no eviction. See *Pryse v. McGuire*, 81 Ky. 608; *English v. Thomasson*, 82 Ky.

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

280; *Laevison v. Baird*, 91 Ky. 204, 15 S. W. 252.

Appellee obtained possession of the vacant land from appellants, and has not been disturbed in the possession thereof, and should only be allowed, by way of set-off for this land, the cost to which he may be subjected in obtaining a patent from the state. The order of reference to the commissioner to determine the value of the land was an interlocutory one, and it cannot be presumed, in advance, that the trial judge in the final judgment will award appellee damages to which he was not entitled, by reason of the breach of warranty. Upon the whole case, we think the judgment is in accordance with the substantial rights of the parties, and it is therefore affirmed.

AKERS v. MARTIN et al.¹

(Court of Appeals of Kentucky. March 21, 1901.)

VENDOR AND PURCHASER—DECEIT OF PURCHASER—LIABILITY FOR PARTNER'S MISREPRESENTATIONS—CHAMPERTY.

1. Where the purchaser of land represented to the vendor, his sister, who lived in another state and was ignorant of the condition of the land, that the land had upon it no timber of any value, when in fact there were upon the land more than 200 trees, which he had already contracted to sell at five dollars per tree, and which constituted the chief value of the land, the vendor is entitled to recover damages for the deceit.

2. One who furnished to the purchaser one-half the money to pay for the land, and shared the fruits of the purchase, though he was not present when the purchase was made, and did not participate in the false representations, is liable to the purchaser for one-half the amount recovered against him by the vendor.

3. The vendor, by making a contract with another to give him one-half of all the money which might be recovered by suit or compromise on account of the deceit practiced upon her, he to pay all costs,—which contract was afterwards rescinded,—did not forfeit her right to recover damages for the deceit, as Ky. St. § 215, providing that none of the forfeitures declared by the chapter on "ChamPERTY" shall apply to cases of controversy between vendor and vendee, prevents such a forfeiture, even if it would otherwise occur.

Appeal from circuit court, Floyd county.

"Not to be officially reported."

Action by Josephine Martin against Jacob P. Akers and others to recover damages for deceit. Judgment for plaintiff, and defendant Jacob P. Akers appeals, plaintiff prosecuting a cross appeal. Reversed on original and cross appeal.

F. A. Hopkins and W. H. Holt, for appellant. James Golle and J. W. Norwood, for appellees.

BURNAM, J. The appellee Josephine Martin inherited from her father, Daniel Akers, a tract of land in Floyd county, Ky. In 1895 she sold and conveyed this land to her brother Jacob Akers for \$800 cash. On the 8th

of May, 1896, she instituted this suit against him, in which she alleges that she was married and left Kentucky in the year 1875, and had since lived in the state of Missouri, never having returned to Kentucky; that several years before the institution of this suit her father died, and a portion of the real estate belonging to him was allotted to her; that she had never seen the piece so allotted to her, and was unacquainted with its value, and did not know anything about the quality, character, or extent of the timber growing thereon; that, after the land had been laid off to her, appellant, who is her brother, and resided in the neighborhood, without her knowledge or consent contracted to sell all of the poplar timber standing on the land at an agreed price of \$5 per tree; that after making this contract sale he came to her home in Missouri for the purpose of buying the land; that before agreeing to sell she asked him about the timber growing thereon, and its value, and that, to deceive and defraud her, he falsely stated, in answer to her inquiry, that there were only about 50 small trees on the land, and they were worth nothing, and he represented to her that \$800 was about the salable value of the land; that he fraudulently concealed from her that there were about 210 poplar trees, which he had already contracted to sell at \$5 per tree; that she was induced to make the sale by these false and fraudulent representations of her brother; that the land in reality was worth more than twice as much as the sum realized therefor. And she asked judgment for \$1,050, the value of the timber contracted to be sold from the land by defendant, and for all proper relief. Appellant, in his answer, in substance admitted that he had contracted to sell the 210 poplar trees on the land of appellee at \$5 per tree before he went to Missouri for the purpose of buying it, and that he did not disclose this fact to his sister. In the second paragraph of his answer he says that he purchased the land for himself and for his brother George Akers, who was jointly interested with him in the sale of the standing trees thereon, and to whom he had since conveyed one-half of the land by deed; and he makes his answer a cross petition against George Akers, and asks that he be compelled to come in and make defense, and that, if plaintiff recovers anything from him, George Akers be adjudged to pay one-half of the amount recovered. The defendant George Akers admitted in his answer that he had agreed with his brother Jacob to purchase the land in partnership, and that his brother went to the state of Missouri to carry out the agreement, and that he furnished \$400 of the purchase money, and that Jacob had subsequently made him a deed for one-half of the property. Subsequently appellant, Jacob Akers, filed his amended answer, in which he alleged that appellee had forfeited any right which she had to maintain this suit, for the reason that she had

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made a champertous contract with her brother Floyd Akers, whereby she had agreed to give to him one-half of all the money which might be recovered by suit or compromise on account of the alleged deceit practiced upon her in the sale of the land, and that Floyd Akers had agreed to pay all of the costs growing out of the institution of any suit that might be necessary. Floyd Akers filed an answer in which he admitted that he had made the contract, but said that it had been subsequently rescinded, and the suit was prosecuted alone for the benefit of his sister.

Mrs. Martin and her two sons, Henry and William, all testify to the facts stated in their original petition; and she also testifies that, but for these fraudulent representations made by her brother, she would not have sold the land to him at all. Appellant, when interrogated upon this point, admitted that before he bought the land he had contracted to sell the timber growing thereon to one Adkins, and that he afterwards realized from that sale \$950, and that he did not communicate the fact of the sale to his sister, but denied that he represented to her that there were only 50 small trees growing on the land, and claimed that previous to that time his sister had offered to sell the land for \$800. It cannot be doubted that appellant deceived and overreached his sister in this transaction. By his own admissions, he fraudulently concealed from her the value of her property; and, by the testimony of herself and her two sons, he did not stop at this, but made false statements to her of the value and amount of the timber growing thereon. And these statements were relied on by her, and induced her to make the sale of her property. "The law is well settled, that the purchaser of property does not commit fraud by failing to communicate to the seller the knowledge of existing facts of which the seller is ignorant, and the purchaser informed, although such facts, if known, would operate directly to enhance the value of the property. Whatever moralists may think of this doctrine, the jurist is bound thereby." "Whilst decisions generally admit these propositions, they are agreed, on the other hand, that it is only silence which is permitted. If, in addition to the party's silence, there is any statement, word, or act on his part which tends affirmatively to a suppression of the truth, to covering up or disguising the truth, or to a withdrawal or distraction of the party's attention from the real facts, then the line is overstepped, and the concealment becomes fraud. The maxim is, 'Aliud est celare, aliud tacere.'" See *Pom. Eq. Jur.* 901; *Williams v. Beazley*, 28 Ky. 580; *Bowman v. Bates*, 5 Ky. 50. In other words, while a party may keep absolute silence, and violate no rule of law or equity, yet if he volunteers to speak, or to convey information which may influence the conduct of the other party, he is bound to

tell the whole truth; and a false or fraudulent misrepresentation of a material fact which would be important for the vendor to know affords ample ground for the interposition of a court of equity to relieve against the consequences of such fraud. In this case the poplar timber growing upon the lands of appellee constituted its chief value, and, while appellant might have maintained absolute silence with regard to the timber without committing a legal fraud, when he went further, and falsely misrepresented that there was no timber of this character on that land of any value, he committed a fraud against which a court of equity will relieve. From his own testimony, after deducting every possible source of expense to which he was subjected, he realized at least \$750 from his unconscious and fraudulent misrepresentations. While appellee George Akers was not present when the purchase was made, and did not participate in the false representations made to induce appellee to part with her property, yet he got the fruits of the purchase. He furnished one-half of the money to pay for it, and was bound by and responsible for the fraudulent misrepresentations of his partner and agent, and must share his part of the liability. We think, therefore, that the judgment should be reversed upon the cross appeal of appellee, and that she is entitled to a judgment for \$750 against Jacob Akers, and that he is entitled on his cross petition to a judgment against George Akers for one-half of this sum.

This is a proceeding by a vendor of land to recover damages for deceit practiced upon her by the vendee, and, under section 215 of the Statutes, is exempted from the forfeitures declared by section 212, even if the testimony authorized the application of that principle. For the reasons indicated, the judgment is reversed, and the cause remanded for proceedings consistent with this opinion.

MANIRE v. HUBBARD et al.¹

(Court of Appeals of Kentucky. March 15, 1901.)

APPEAL AND ERROR—REJECTED PLEADING NOT PART OF RECORD—LIBEL—WORDS CHARGING WANT OF SKILL IN PROFESSION.

1. The action of the trial court in refusing to permit a pleading to be filed cannot be reviewed unless the pleading is made a part of the record by order of the court or bill of exceptions.

2. Words charging one in a business or profession with ignorance or want of skill in a particular transaction are not ordinarily actionable per se.

3. A publication that there are and have been no cases of smallpox in a certain town, as published by plaintiff, a physician, is not actionable per se.

4. Words charging that "the negroes who were said to have the smallpox had no breaking out or eruption" until plaintiff, the attend-

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

ing physician, "applied a salve to their faces, and caused it to break out," do not charge improper treatment, unprofessional conduct, or want of integrity, and are, therefore, not actionable per se, though the petition alleges that defendant meant thereby to charge that plaintiff "had committed an unprofessional and disgraceful act as a physician."

5. Where the words complained of are not actionable per se, there can be no recovery in the absence of an averment of special damage.

Appeal from circuit court, Hickman county.

"To be officially reported."

Action by J. W. Manire against W. McKean Hubbard and another for libel. Judgment for defendants, and plaintiff appeals. Affirmed.

E. T. Bullock and R. L. Smith, for appellant. John M. Brummall, Sr., N. P. Moss, and Robertson & Thomas, for appellees.

BURNAM, J. This was an action for libel. The substance of the petition is that appellant is a physician, with a large and lucrative practice; and that the appellees, knowing this fact, on the 14th of March, 1890, falsely and maliciously caused to be published in a newspaper known as the "Bardwell Star" a writing, signed by them, in the following words: "That there were no cases of smallpox in Columbus, nor had been, as set out in the letters of Drs. Manire and Graves, published in the Bardwell Star; that the negroes who were said to have the smallpox had no breaking out or eruption, until the attending physician, Dr. J. W. Manire, applied a salve to their faces, and caused it to break out." "Meaning thereby that the plaintiff had committed an unprofessional and disgraceful act as a physician." The lower court sustained a demurrer to the petition. Thereupon plaintiff offered to file two separate amended petitions, which were objected to by appellees, and their objections were sustained by the court, and the amended petitions were not permitted to be filed. Neither were made a part of the record by order of the court or by a bill of exceptions, and they cannot be considered upon this appeal, although they were copied into the record. See sections 128, 335, Civ. Code, and especially note 20 to section 335, Carroll's Code (Ed. 1900). The sole question, therefore, to be determined upon this appeal is, are the words in the original petition libelous? "To sustain an action for libel, the plaintiff must allege special damage, or the nature of the charge must be such that the court can legally presume that he has been degraded in the estimation of the public, or has suffered other loss, either in his property, character, or business, in his domestic and social relations, in consequence of the publication." See Townsh. Stand. & Lib. § 178. "Words which are published in connection with one's profession or calling, which imputes to him ignorance generally in his business or profes-

sion, or such ignorance or incapacity as unfits him for its proper exercise, are actionable per se; but it is not ordinarily actionable to charge one in a business or profession with want of skill or ignorance in a particular transaction." Newell, Defam. p. 170; Townsh. Stand. & Lib. § 194; 13 Enc. Pl. & Prac. p. 38; Geary v. Bennett, 65 Wis. 554, 27 N. W. 335; Southee v. Denny, 1 Exch. 196; Camp v. Martin, 23 Conn. 86. It was not libelous for appellees to publish that there were no cases of smallpox in Columbus, as this is a question upon which laymen, as well as professional experts, are entitled to entertain and might express an opinion. The additional words, "That the negroes who were said to have the smallpox had no breaking out until the attending physician applied a salve to their faces, which caused it to break out," do not of themselves convey the meaning which appellant would attribute to them. There is no charge that this was improper treatment, or that it was resorted to from any corrupt or wrongful motive on the part of appellant. Nor do the words necessarily of themselves import that appellant was guilty of unprofessional conduct, or reflect upon his integrity. We are of the opinion that the words complained of were not actionable per se, and, in the absence of an averment of special damage, the petition was not good on demurrer, and the demurrer was properly sustained. Judgment affirmed.

HARP v. COMMONWEALTH.¹

(Court of Appeals of Kentucky. March 21, 1901.)

CRIMINAL LAW—RECOVERY OF FINE BY PENAL ACTION—PARTIAL REPEAL OF LOCAL LIQUOR LAW—CAPIAS PRO FINE.

1. Under Cr. Code Prac. § 11, providing that "a public offense of which the only punishment is a fine may be prosecuted by a penal action in the name of the commonwealth of Kentucky," a fine for the offense of selling liquor in violation of a local law may be recovered in a penal action, there being no requirement in the general local option law, which now controls as to the penalty to be inflicted and the proceedings for its recovery, that the proceeding shall be by indictment.

2. As to the penalty to be inflicted and the proceeding for its recovery, all local prohibitory liquor laws have been superseded by Ky. St. §§ 2557, 2558, part of the general local option law.

3. Under Cr. Code Prac. § 301, a capias pro fine may be issued upon a judgment for a fine rendered in a penal action.

Appeal from circuit court, Whitley county. "Not to be officially reported."

Action by the commonwealth of Kentucky against W. H. Harp to recover a fine. Judgment for plaintiff, and defendant appeals. Affirmed.

C. W. Lester, for appellant. J. N. Sharp, for appellee.

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

HOBSON, J. Appellant was fined in the court below \$100 under a petition filed against him by the commonwealth of Kentucky charging him with selling spirituous liquors in Whitley county, in violation of the local prohibitory law, and a *capias pro fine* was awarded on the judgment. It is insisted for him that the case cannot be prosecuted by a penal action, and that a *capias pro fine* cannot be awarded upon the judgment in such an action. Section 11 of the Criminal Code of Practice is as follows: "A public offense of which the only punishment is a fine, may be prosecuted by a penal action in the name of the commonwealth of Kentucky. * * * The proceedings in penal actions are regulated by the Code of Practice in civil actions." Under this statute it has been held that a fine may be recovered in a civil action, unless the statute provides that the proceeding must be by indictment. *Com. v. Railroad Co.*, 80 Ky. 291; *Com. v. Sherman*, 85 Ky. 686, 4 S. W. 790; *Com. v. Railroad Co.*, 37 S. W. 589.

The local prohibitory act, as to the penalty to be inflicted, the proceedings by which it may be recovered, and the like, has been superseded by the general law as contained in sections 2557, 2558, Ky. St. *Stamper v. Com.*, 42 S. W. 915; *Thompson v. Com.*, 45 S. W. 1039, 46 S. W. 492, 698; *White v. Com.*, 50 S. W. 678. The general law provides simply for a fine of not less than \$100 nor more than \$200, and this fine may be recovered, under section 11 of the Criminal Code of Practice, by a penal action, under the principles settled in the cases above cited.

As to the *capias pro fine* on the judgment, section 301 of the Criminal Code seems conclusive: "Upon judgments for fines, whether rendered on indictments, penal actions or otherwise, writs of execution as provided in the General Statutes may be issued against the person or property of the defendant." See *Long v. Wood*, 78 Ky. 392. Judgment affirmed.

TURNER v. MITCHELL et al.¹

(Court of Appeals of Kentucky. March 20, 1901.)

STATUTE OF LIMITATIONS—AMENDMENT OF PETITION—DELAY IN PROSECUTING ACTION AFTER INSTITUTION—TESTIMONY AS TO TRANSACTION WITH PERSON SINCE DECEASED—ENTRIES IN BANK BOOKS AS EVIDENCE—ANSWER AS EVIDENCE.

1. An action was not barred, though an amended petition for the purpose of perfecting the cause of action stated in the original petition was not filed until after the period of limitation had expired.

2. Though 17 years elapsed between the institution of the action and the rendition of final judgment, the delay did not bar the cause of action, under all the circumstances.

3. Where plaintiff sought to recover upon the ground that H., one of several sureties in the note sued on, had first taken an assignment of the note to himself, and then as-

signed one-half the note to plaintiff, H. being dead at the time of the trial, plaintiff was not a competent witness for himself as to the transaction, though he was not seeking to charge the estate of H.

4. Entries made in a bank book tending to establish the alleged transaction between plaintiff and H. were not admissible against the other sureties, especially as it was in the power of plaintiff to introduce the person who made the entries.

5. The answer of H. was not admissible as evidence against the other sureties.

6. The mere possession of the note sued on is not sufficient evidence of its assignment to authorize a recovery, the assignment and delivery being denied.

Appeal from circuit court, Montgomery county.

"Not to be officially reported."

Action by A. T. Mitchell against Thomas Turner and others on a promissory note. Judgment for plaintiff, and defendant Thomas Turner appeals. Reversed.

Joseph H. Lewis, Turner & Hazelrigg, and Hazelrigg & Chenault, for appellant. A. T. Wood, for appellees.

GUFFY, J. This action was instituted in the Montgomery circuit court, December 1, 1881, by A. T. Mitchell against R. H. Fitzhugh, Thomas Turner, Charles Harris, and others. The substance of the petition as to Turner was that he and Charles Harris were sureties for Fitzhugh to the North Middletown Bank in a note amounting to \$1,363, with interest at 8 per cent., dated 28th of March, 1877, and due in six months, which note Fitzhugh failed to pay, and which sum Harris paid off January 20, 1881, and that plaintiff paid to said Harris, or for him, at his request, on said day, one-half of said debt, to wit, \$862, and in consideration thereof Harris transferred and assigned, by delivery, said note to plaintiff as to the one-half thereof, and his right to hold defendants Fitzhugh and Turner liable for said half of said debt, for which sum plaintiff prayed judgment. An attachment was also obtained against Turner, but the same was dismissed, and is not before this court for revision. January 3, 1882, Turner, Harris, and others filed separate answers. Turner did not deny signing the note, nor did he claim that he had paid any part of it. He especially denied that plaintiff had paid to said Harris, or for him, any part of said note, and denied the assignment and delivery of the note by Harris to plaintiff. He further alleged that Harris had paid off the note, and it has now no existence, and is dead, and no recovery can be had thereon, although Harris may have a claim against him as co-security. He also denied that Harris could or did transfer to plaintiff his right to hold defendant for his half of said note or said debt, and denied that he owed, or ever did owe, plaintiff any sum for money paid as aforesaid. Harris' answer states that on the 20th of January, 1881, he paid the one half of said note, and the plaintiff paid the

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

other half thereof. He does not say whether he ever assigned the note and delivered it to Mitchell, or whether Mitchell was entitled to any part thereof, or whether he paid any part thereof. The reply of Mitchell alleges that he did pay one-half of the note named in his petition, but it was by the instance and request of Harris, and that plaintiff was not liable therefor or a surety in said note, but Harris and Turner were the only sureties thereto. November 28, 1893, the following order was entered: "The defendant R. H. Fitzhugh having been duly summoned herein on September 28, 1883, and failing to answer, the allegations of plaintiff's petition are now taken for and adjudged to be confessed by him. All other questions are reserved, and the cause is continued." March 31, 1891, the case was ordered to be filed away, with leave to redocket on motion by plaintiff, but on the next day said order was set aside. At the January term, 1898, the action, by agreement between plaintiff and Edward Rice, administrator of Harris, was revived in the name of said administrator, but under the distinct agreement that Harris' estate and said Rice are not to be put to any cost, and no relief is to be asked by plaintiff, Mitchell, against Harris' estate, or against said administrator, and no judgment is to be rendered in favor of said plaintiff against the estate or administrator for costs, or anything whatever, and Mitchell is to hold said Harris' estate and said administrator harmless for the payment of any costs in said action. At the April term, 1898, the demurrer of Thomas Turner to the petition of plaintiff was sustained, and plaintiff given leave to amend. In the amended petition the execution of the note was again set out, and it is alleged that Harris paid said note to the bank in full, and the bank, by its cashier, W. W. Hedges, assigned said note to the said Harris on the back thereof; that, about the time Harris paid the note and took an assignment, plaintiff paid Harris the one-half of the note and interest as of the 18th of January, 1881, and Harris verbally assigned to this plaintiff the one-half of said note that Harris had paid to said bank, and delivered to plaintiff the said note, which is filed in said petition. He prayed to be substituted to the rights of Harris in the one-half interest in the said note and judgment against said Turner for said sum. The demurrer of Turner to the petition as amended was overruled. Turner, in his answer to the amended petition, denied the right of said bank and its cashier to assign the note to Harris after its payment by him. The payment by plaintiff to Harris, and a verbal assignment and delivery of the note by Harris to plaintiff, are also denied. In the second paragraph it is pleaded that the principal, Fitzhugh, since the institution of this suit, paid to said Harris the debt and note sued on, and that Harris was authorized in his own right to receive and accept payment. It is further

pleaded that plaintiff, knowing that defendant had learned of the settlement and discharge of Fitzhugh, and after process had been served on Fitzhugh upon the original petition, took the allegations therefor for confessed against Fitzhugh, and that for about 14 years took no steps to collect said debt, or reduce the same to judgment, and pleaded, further, that plaintiff's lack of good faith and negligence operated as a release. He also relied upon the statute of limitations. The reply may be taken as a traverse of the answer. After the issues were fully made up, the court rendered a judgment in favor of plaintiff against Turner for \$407, with interest at 6 per cent. from 20th of January, 1881, and from that judgment Turner prosecutes this appeal.

The evidence in this case tends to show that this debt was first created in 1872 or 1873, and that the note filed herein was a renewal of the debt. The note filed herein has this indorsement: "Pay to Charles Harris or order; as security he has paid within note; no recourse being had upon bank. W. W. Hedges, Cas." It is evident that Harris, before his death, made a settlement with Fitzhugh for Fitzhugh's liability to him growing out of the execution and payment of said note, and the papers and correspondence between them pretty clearly sustain the contention that it was a full settlement of the whole matter; but Mitchell contends that the settlement was not so intended, and, if so intended, that it was after Fitzhugh had notice of his claim to be the owner of one-half of the debt. We do not deem it necessary to determine which party is right in regard to this question. We are also inclined to the opinion that the amended petition may fairly be considered as an attempt to perfect a cause of action imperfectly stated in the original petition; hence we are not inclined to hold that the action was barred by the statute of limitations. Nor do we think that the delay in the prosecution of this action, under all the facts and circumstances, is sufficient to create a bar to plaintiff's cause of action, if any he had.

It is contended with much plausibility that the arrangement as proven by Mitchell himself between him and Harris, without the knowledge of Turner, bars their right to recover by reason of any payment they might have to make upon the note in question. But we need not determine this question. If Mitchell was entitled to recover at all, his right rested upon the verbal assignment and delivery of the note in question. We have already seen that the assignment of the note, as well as the payment alleged by him, was denied by Turner, and no verbal testimony offered by Mitchell, except his own evidence, to sustain the transaction. His deposition was excepted to, and it is earnestly insisted that he was incompetent to testify in regard to the transaction and trade with Harris, Harris being then dead at the time the test'

mony was given, or, at any rate, at the time it was offered. It is provided in section 600 of the Civil Code of Practice that no person shall testify for himself concerning any verbal statement of, or any transaction with, or or any act done or omitted to be done by, an infant under 14 years of age, or by one who is of unsound mind, or dead when the testimony is offered to be given. Some exceptions to this provision are included in said section, but they do not exist in this case. It is true that Mitchell is not now seeking a judgment against Harris. Indeed, it may be taken that, for the express purpose of obtaining a judgment in this case against Turner, he released any claim, if any he had, against Harris; but that cannot render him competent. Practically the same question was presented in *Cofer v. Gardner*, 9 Ky. Law Rep. 196, and decided by the superior court in accordance with the view contended for by appellant in this action. We quote as follows: "W. being dead, C. could not testify as to a transaction with him so as to affect G., who was not present at the transaction, and who did not testify in regard thereto." It seems to us that Mitchell was endeavoring to do exactly what it is here decided could not be done. W. was not seeking by his testimony to make C. liable, but to hold G. In the case at bar, Mitchell seeks to testify in regard to a transaction between him and Harris, in order to enable him to recover against Turner. This he cannot, under the Code, be allowed to do. The exceptions to his deposition in that regard ought to have been sustained.

The entries made in the bank books do not show that the trade between Harris and Mitchell ever occurred, and, if they did, they would not be competent as against Turner, hence should not have been admitted, and especially so as it was in the power of plaintiff to introduce the person who in fact made the entries in the books.

The answer of Harris was not competent evidence against Turner, under the pleadings in this case, and, besides, his answer does not show that he ever sold or delivered the note in question to Mitchell. The mere possession of the note is not sufficient evidence of its assignment to authorize a recovery, the assignment and delivery being denied; and, in addition to this, there is some evidence tending to show that Mitchell was the real cashier of the bank at the time the note is said to have been paid off by Harris, and, if so, it might very properly have been left in his possession without any transfer or sale, especially so as Harris was a heavy stockholder and director in the bank. It will also be seen that the assignment to Harris by Hedges is without date.

After a thorough consideration of this case, and considering all the facts and circumstances, we are of opinion that plaintiff, Mitchell, failed to sustain his claim, and that the court erred in rendering any judgment against ap-

pellant, Turner. The judgment is therefore reversed, and cause remanded, with directions to set aside the judgment appealed from, and dismiss the petition, so far as appellant, Turner, is concerned, and for proceedings consistent herewith.

HINDMAN et al. v. LEWMAN et al.¹

(Court of Appeals of Kentucky. Feb. 27, 1901.)

ASSIGNMENTS FOR CREDITORS—LIABILITY OF ASSIGNEE'S SURETIES—RES JUDICATA.

In an action for the settlement of an estate assigned to S. for the benefit of creditors, the court gave the estate of S., who had defaulted and then died, credit for \$4,000 due attorneys employed by S. for services rendered by them in the administration of the trust, and rejected the petition of the attorneys asking that the \$4,000 be adjudged to them instead of to the estate of S. On appeal by the attorneys, that judgment was reversed, the court directing that on the return of the case to the lower court the petition of the attorneys be amended so as to make the sureties of the assignee parties. On the return of the case, the \$4,000 was adjudged to the attorneys. On appeal from that judgment, which was affirmed, it was contended for the sureties that it was error to adjudge the \$4,000 to the attorneys, and that the sureties should have been adjudged a credit therefor. *Held*, that there has been no judgment which precludes the trust estate from recovering of the assignee's sureties the \$4,000 adjudged to attorneys.

Appeal from circuit court, Jefferson county, common pleas division.

"Not to be officially reported."

Action by S. H. Sullivan, assignee of the Columbia Fire Insurance Company of Kentucky, for a settlement of the assigned estate. Judgment allowing certain credits to the sureties of the assignee, and Thomas C. Hindman and others, creditors, appeal. Reversed.

W. S. Pryor, W. W. Thum, Phelps & Thum, and O'Neal, Phelps & Pryor, for appellants. Dodd & Dodd and Humphrey, Burnett & Humphrey, for appellees.

PAYNTER, C. J. The Columbia Fire Insurance Company of Kentucky made an assignment to S. H. Sullivan for the benefit of its creditors. He executed bond as assignee, and the appellees Lewman & Schmidt were sureties thereon. He defaulted in the payment of money received by him as assignee. Grubbs & Morancy, attorneys at law, were employed by the assignee to advise him in the administration of the trust, and rendered important and valuable services in behalf of the estate. A suit was pending, to which the sureties were not parties, to settle the trust estate. The commissioner of the court made a report on the status of the accounts, etc. In rendering judgment upon the report and exceptions thereto, the court gave Sullivan's estate (he having died in the meantime) credit for \$4,000, balance of attorney's fees due

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

Grubbs & Morancy for services rendered to the estate. This was done because the court was of the opinion that the employment of the attorneys was personal, and, Sullivan having defaulted, his estate was entitled to the credit in the settlement with the trust estate; hence the attorneys were not entitled to receive the \$4,000. Grubbs & Morancy denied the right of the court to so adjudge, and tendered their petition (which the court refused to permit to be filed), claiming that the \$4,000 should be adjudged to them instead of Sullivan's estate. They appealed to this court to review the action of the court, and in delivering the opinion in that case the court said: "The petition should have been allowed to be filed, and on the return of the case it should be amended, making the sureties parties, that the question desired to be raised may be heard." In response to the petition for rehearing, the court said: "If the petition on its face did not present a cause of action as to both claims, the court would have said so. Other parties are required to be made." *Grubbs v. Insurance Co. (Ky.)* 37 S. W. 1180. On a return of the case, the court adjudged that Grubbs & Morancy were entitled to this fund, and not Sullivan's estate. Afterwards there were various appeals prosecuted in this court by the Courier-Journal Job Printing Company, representative creditor, and T. C. Hindman, also representing creditors, by which appeals it was sought to reverse the judgments because the court below refused to charge Sullivan's estate with large sums of money in addition to those adjudged to be due by it to the trust estate, and there was also an appeal from the judgment rendered in the case adjudging the \$4,000 to Grubbs & Morancy. Grubbs & Morancy prosecuted a cross appeal, asking to be adjudged a greater sum than \$4,000. The court affirmed the judgments on the original appeals, and also on the cross appeal of Grubbs & Morancy. On the return of the case, Hindman and the Courier-Journal Job Printing Company sought to have the judgment originally rendered in favor of Sullivan's estate for the \$4,000 claimed by Grubbs & Morancy corrected, and to take judgment against the sureties, Lewman & Schmidt, for the \$4,000 which the court had adjudged belonged to Grubbs & Morancy. This the court refused to do, and from that action of the court this appeal is prosecuted. On the hearing of the former appeal of the appellees, the Courier-Journal Job Printing Company and T. C. Hindman (54 S. W. 986), it was urged, especially by counsel for the sureties of Sullivan as trustee, both in oral argument and printed brief, that the court below had erred in adjudging to Grubbs & Morancy the \$4,000, claiming that the sureties of Sullivan as trustee should have been adjudged a

credit therefor. An examination of the opinion delivered by the court will show that most of it is devoted to a discussion of that question. The court affirmed the judgment below, which gave the money to Grubbs & Morancy.

The question here is, did the court below err in refusing to make the trustees of Sullivan pay the \$4,000 originally credited to Sullivan, but subsequently given to Grubbs & Morancy? It is urged here in behalf of the trustees that the question is *res judicata*. Therefore the sureties cannot be adjudged to account for the amount in question. If the question is *res judicata*, the effect is not to exonerate the sureties from its payment, but to make them pay it. The judgments have exactly the contrary effect to that claimed by appellees. That part of the original judgment giving Sullivan's estate credit for the \$4,000 was set aside by the lower court after the reversal on the appeal of Grubbs & Morancy. Judge Field delivered an opinion on the question of setting aside the judgment allowing the \$4,000 to Sullivan, assignee, in which he said he had been of the opinion that it should have been allowed to Sullivan, assignee, but, following the opinion of this court, delivered on the appeal of Grubbs & Morancy, he set aside the first judgment, and allowed it to Grubbs & Morancy. On the appeal from the latter judgment, notwithstanding the creditors of the assigned estate and the sureties urged it should be reversed, it was affirmed. The effect of the affirmance was to approve the action of the lower court in setting aside the former judgment in favor of Sullivan's estate, and in making the allowance of \$4,000 to Grubbs & Morancy. That part of the judgment which gave Sullivan credit in the settlement of the trust estate with the \$4,000 was reversed on the Grubbs & Morancy appeal, and therefore the affirmance of the first judgment on the subsequent appeal was only that part of it which remained in force. The court below had obeyed the mandate of this court as it understood it; hence the vigorous oral argument and brief by counsel for the sureties on the former appeal, urging this court to reverse that judgment because, as they believed, it erred in not adhering to its former opinion, to wit, that Sullivan, as trustee, was entitled to the \$4,000 as a credit in the settlement of his accounts, and not Grubbs & Morancy. From the foregoing facts, we conclude there is no question of *res judicata* involved on this appeal which bars the right of the trust estate to recover the \$4,000 and interest from the sureties. The judgment is reversed, with directions that the judgment be entered against the sureties for \$4,000, with interest from proper date, and for proceedings consistent with this opinion.

RATLIFFE v. BUCKLER et al.¹

(Court of Appeals of Kentucky. March 21, 1901.)

USURY—NOTE FOR MONEY BORROWED TO PAY.

The fact that the note sued on was executed for money borrowed by defendant to pay a debt owing by her to a building and loan association, which embraced usury, does not entitle defendant to plead the usury in the original transaction, though plaintiff was the president of the association, and may have made the loan to enable the association to collect its debt.

Appeal from circuit court, Bath county.

"Not to be officially reported."

Action by W. T. Buckler against Anna Ratliffe and Lee Ratliffe on a promissory note. Judgment for plaintiff, and defendant Anna Ratliffe appeals. Affirmed.

B. Gudgeon & Son, for appellant. Kennedy & Williamson, for appellee Buckler.

HOBSON, J. Appellant, Anna Ratliffe, and her husband, Lee Ratliffe, executed to appellee W. T. Buckler, on March 31, 1897, their promissory note for \$5,000, due 12 months thereafter; also a mortgage to secure the note on a tract of land containing 232 acres, owned by her; and this action was filed on April 11, 1898, by appellee against them, to recover judgment on the note, and foreclose the mortgage. They answered, pleading usury. The record discloses the following state of facts: Defendants, on September 8, 1894, negotiated a loan with the Carlisle Loan & Building Association, and executed to it their note for \$3,000, secured by lien on the land in question. The association at the time paid her in money \$2,775.50. It retained for membership fee \$30; examiner's fee, \$2.50; dues, interest, and premium for four months, \$192,—making in all \$3,000, for which the note was executed. This note was taken up by defendants on April 20, 1896, and a new note given for \$3,930, payable to M. Dills, and a new mortgage was given to secure it. Dills was a director of the association, and had no interest in the transaction. The note appears to have been made payable to him for the association only to hide usury. The amount of this note was arrived at in this way: Interest and premiums from April, 1895, to April, 1896, \$390; fines from April, 1895, to March, 1896, \$36; additional cash loaned by the association at the time of the renewal, \$400; amount of old note, \$3,000,—total, \$3,836. In addition to this, \$230 was added for interest included in the new note up to its maturity, and \$126 was deducted for payments made by defendants, leaving a balance of \$3,930, the amount for which the note was given. Defendants failed to meet this note at maturity, and suit was filed in the name of Dills against them to recover the money and enforce the lien on the land. To

this suit defendants filed answer pleading usury in the transaction, and that Dills had no interest in the note and only held it for the association. After this answer was filed, appellee, Buckler, who was president of the association, and a man of wealth, having some idle money, proposed to lend defendants out of his own means as much as \$5,000 if they would pay him interest at 8 per cent. annually in advance. They wanted some more money, and agreed to this proposition. He gave them a check for \$4,600, and took the note for \$5,000 sued on. The interest on \$5,000 at 8 per cent. for one year—\$400—was included in the note, and made up the sum for which it was given. Out of the \$4,600 appellant, Anna Ratliffe, paid the building association \$4,008.60 and retained \$591.40 which she used. The amount paid the association was the principal and interest of the \$3,830 note referred to. After this the suit on that note was dismissed.

It is insisted for appellant that the giving of the note and mortgage to appellee, Buckler, and the payment of the money by him, was only a device to cover usury; that it was a mere form, and the debt always belonged to the building association, of which Buckler was the president. The proof, however, fails to sustain this conclusion. The testimony is clear that Buckler furnished his own money, and took the mortgage on the real estate, because he wanted to lend his money on good real-estate security, and defendants wanted to get out of the building and loan association. The proof is clear and uncontradicted that it was his debt after this change was made, and that the association had nothing to do with it.

It is also insisted that Buckler knew the money was borrowed to pay the usurious debt to the association, and that the proof is sufficient to show that he lent the money for the purpose of enabling the association, of which he was the president, to collect its debt. Though all this be true, we are unable to see how it affects the legal rights of the parties. After defendants negotiated the loan from Buckler, they were under no legal obligation to pay the usury to the association, and when they voluntarily paid it they had instantly a cause of action under the statute to recover the usury included in the amount so paid. This was a matter between them and the association. They lost nothing in the deal with Buckler. They were only responsible to him for the money he furnished them, with legal interest, and they had a complete remedy against the association for the amount overpaid it. If they failed to assert their rights against the association, and have so sustained a loss, they cannot now throw this loss on Buckler, who would thus be made to suffer, and be without remedy, although he acted in good faith throughout the whole transaction. Judgment affirmed.

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

RICE v. COMMONWEALTH.¹

(Court of Appeals of Kentucky. March 21, 1901.)

**INTOXICATING LIQUORS—IMPLIED REPEAL OF
STATUTE REGULATING SALE—REVIVAL
OF REPEALED STATUTE.**

1. Act Feb. 9, 1871, prohibiting the sale of liquor in Magoffin county in any quantity, and providing for the same penalties prescribed by existing laws against keeping tippling houses or retailing ardent spirits, but reserving the rights of distillers under existing laws, was repealed by implication by Act April 22, 1884, prohibiting the sale in Magoffin county of certain liquors in quantities less than 10 gallons, and of all other liquors in quantities less than 24 gallons, and prescribing specific penalties for its violation, with a proviso in favor of physicians; it being manifest that the later act was intended to contain the entire law governing the subject.

2. Under Ky. St. § 404, providing that, when a law which may have repealed another is repealed, the previous law shall not be revived, the repeal of Act April 22, 1884, by Act March 8, 1888, did not operate to revive Act Feb. 9, 1871.

Appeal from circuit court, Magoffin county.

"Not to be officially reported."

Sherman Rice was convicted of the offense of selling whisky in Magoffin county in violation of the local prohibitory act, approved February 9, 1871, and he appeals. Reversed.

F. E. Fogg, A. P. Howard, and J. H. Sublett, for appellant. A. F. Byrd, D. D. Sublett, and J. W. Howard, for the Commonwealth.

HOBSON, J. Appellant was convicted of selling whisky in Magoffin county, in violation of the local prohibitory act, approved February 9, 1871. The initial question raised in the case is whether the law is still in force or has been repealed. The act in full is as follows:

"An act prohibiting the vending of ardent, malt or vinous spirits in Magoffin county.

"Whereas, at the last November election, in the county of Magoffin, the legal voters of said county voted by a large majority against the vending of ardent spirits in said county of Magoffin; therefore,

"Be it enacted by the general assembly of the commonwealth of Kentucky:

"1. That from and after the first day of April next (1871) it shall be unlawful for any person in the county of Magoffin, to sell or vend, in any manner, either whisky, brandy, rum, gin, wine, ale, lager beer, or the mixture thereof of either, or any kind of ardent, vinous or malt liquors in the county of Magoffin.

"2. That any person or persons violating the provisions of the first section of this act shall be liable to all the pains and penalties prescribed by existing laws against keeping tippling houses or retailing ardent spirits; and it shall be the duty of the circuit judge of Magoffin county to give this act in charge to the grand jury of said county.

"3. That nothing in this act shall affect the rights possessed by distillers under existing laws.

"4. This act shall take effect from and after the first day of April next."

1 Acts 1871, p. 137.

After this act had been in force about 12 years, the legislature passed the following act (Acts 1883-84, c. 968):

"An act to regulate the sale of intoxicating, vinous and malt liquors in Magoffin county.

"Be it enacted by the general assembly of the commonwealth of Kentucky:

"Section 1. That from and after the passage of this act, it shall be unlawful for any person to sell, vend, give or loan, either directly or indirectly, any whisky, rum, gin, wine, ale, lager beer, or any vinous, spirituous, malt or intoxicating liquors in the county of Magoffin, in any less quantities than twenty-four gallons, except apple or peach brandy, which is provided for in the next section.

"Sec. 2. It shall be unlawful for any person to sell, vend, give or loan apple or peach brandy, in the county of Magoffin, in any quantities less than ten gallons, and such sales shall only be made by the manufacturer thereof.

"Sec. 3. That any person violating the first or second section of this act shall, for each offense, be fined not less than fifty dollars nor more than one hundred dollars, to be recovered by indictment in the circuit court or any court having jurisdiction thereof: provided, that nothing in this act shall be so construed as to prohibit regular practicing physicians from using or administering intoxicating liquors as medicines in their practice. But any physician giving or administering intoxicating liquors when he does not deem the same absolutely necessary for such person to take or use the same, and that there is no other medicine that would answer and accomplish the purpose equally as well as spirituous liquors, he shall be fined in the sum of one hundred dollars for each offense, to be recovered by indictment in the circuit court, or before any court having jurisdiction of the amount.

"Sec. 4. That the judge of the Magoffin circuit court shall give this act in charge to the grand jury of Magoffin county at each term of said court.

"Sec. 5. This act shall take effect from and after the first day of June, one thousand eight hundred and eighty-four."

Approved April 22, 1884.

Two years later the following act was passed (1 Acts 1885-86, p. 574):

"An act to repeal chapter 968, Session Acts, 1883-4.

"Be it enacted by the general assembly of the commonwealth of Kentucky:

"Section 1. That chapter 968 of Session Acts, 1883-4, entitled 'An act to regulate the sale of intoxicating, vinous and malt liquors in Magoffin county,' be, and the same is hereby, repealed.

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

"Sec. 2. This act to take effect from its passage."

Approved March 8, 1886.

Section 404, Ky. St., which has long been in force in this state as a rule of statutory construction, provides: "When a law which may have repealed another shall be repealed, the previous law shall not be revived unless the law repealing it be passed during the same session of the general assembly." Under this provision, the repeal of the act of April 22, 1884, by the act of March 8, 1886, did not revive the previous act of February 9, 1871, if that act had been repealed by the subsequent act. The question to be determined is, therefore, was the act of February 9, 1871, repealed by the act of April 22, 1884? It will be observed that there is no repealing clause in the act of April 22, 1884, but it is entitled "An act to regulate the sale of intoxicating, vinous and malt liquors in Magoffin county." It does not purport to be an amendment to the existing law. It purports to regulate the sale of intoxicants in the county, and on its face to contain the entire law governing the subject. After its passage no part of the act of February 9, 1871, was in force. The law on the subject was not, in part, contained in both acts, but was all to be found in the last act. The first act prohibited any sales. It provided for the same penalties prescribed by existing laws against keeping tippling houses or retailing ardent spirits; and it did not affect the rights of distillers under existing laws, but left these as before. The act of April 22, 1884, allowed brandy to be sold in quantities not less than 10 gallons by the manufacturer, and other intoxicants in quantities not less than 24 gallons. It provided a penalty of not less than \$50 nor more than \$100, to be recovered by indictment, and contained a provision in regard to physicians. Taken as a whole, it was clearly intended to embrace the entire law on the subject, and to supersede altogether the old law. The old law was, therefore, repealed by it, and, as its repeal did not revive the former law, there was, after its repeal, no law in force except the general laws of the state. *End. Interp. St. § 241; Suth. St. Const. § 143.* Judgment reversed, and cause remanded for further proceedings not inconsistent with this opinion.

**FIDELITY TRUST & SAFETY-VAULT CO.
v. VORIS' EX'RS.¹**

(Court of Appeals of Kentucky. March 15, 1901.)

STREET ASSESSMENTS—LIABILITY OF PROPERTY NOT BORDERING ON IMPROVED STREET.

Under Ky. St. §§ 2833, 2834, part of charter of cities of the first class, providing that, in assessing property for the cost of the origi-

nal construction of a street each subdivision of the territory bounded on all sides by principal streets is to be deemed a square, and that the cost is to be apportioned in each fourth of a square equally, but that, when the territory is not defined into squares by principal streets, the depth "on both sides fronting said improvement," to be assessed for the cost of making it, shall be defined by the ordinance, the council, in determining the depth to be assessed, has no power to cross another principal street, and lay the burden on property fronting on that street, deriving no benefit from the improvement.

Appeal from circuit court, Jefferson county, common pleas division.

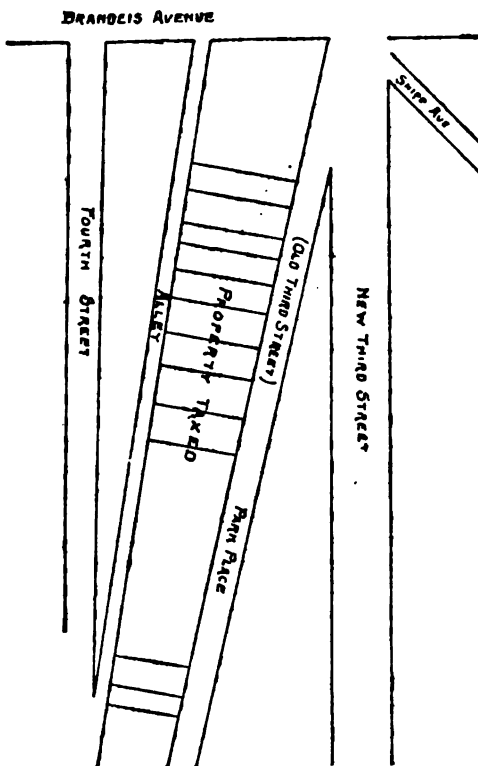
"To be officially reported."

Action by the executors of S. B. Voris against the Fidelity Trust & Safety-Vault Company to enforce a lien for the cost of a street improvement. Judgment for plaintiffs, and defendant appeals. Reversed.

Hardin H. Herr, Gibson & Marshall, and Pirtle & Trabue, for appellant. H. M. Lane, for appellees.

HOBSON, J. On February 14, 1894, the general council of the city of Louisville passed an ordinance fixing the grade of Third street from the south line of Brandeis street to the north line of K street extended, and ordering the improvement of the carriage way 42 feet in width from a line 108 feet south of Brandeis avenue to the north line of K street. The territory contiguous to the improvement was not defined into squares by principal streets, and the council, by ordinance, provided that the cost of the improvement should be laid upon the property lying on either side of the street to be improved, and within 200 feet of it. The improvement was made under the ordinance, and this suit was filed by the contractor to enforce his lien upon the property for his work. Third street runs substantially north and south. About 108 feet south of Brandeis avenue it forks. The west fork is known as "Old Third Street," or "Park Place," and has been a traveled way maintained by the city for many years. The east fork, known in the record as "New Third Street," is the street ordered to be constructed. Appellant's property, on which the burden of this improvement was placed by the ordinance, lies west of Old Third street, or Park Place; and between it and the improvement is the street in front of it, and also a lot of ground belonging to the Louisville Industrial School of Reform. It is insisted for appellants that the cost of the improvement cannot be assessed against their property, as they do not front upon it, and that as the cost of maintaining the street in front of them, as well as part of the cost of maintaining Fourth street and Brandeis avenue, falls upon them, if they can also be assessed for the improvement of New Third street they may be assessed for three streets running substantially north and south. The situation is shown in the following map:

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.



Sections 2833, 2894, Ky. St., are as follows:

"When the improvement is the original construction of any street, road, lane, alley or avenue, such improvement shall be made at the exclusive cost of the owners of lots in each fourth of a square to be equally apportioned by the board of public works according to the number of feet owned by them respectively, and in such improvements the cost of the curbing shall constitute a part of the cost of the construction of the street or avenue, and not of the sidewalk. Each sub-division of the territory bounded on all sides by principal streets shall be deemed a square. When the territory contiguous to any public way is not defined into squares by principal streets, the ordinance providing for the improvement of such public ways shall state the depth on both sides fronting said improvement to be assessed for the cost of making the same according to the number of square feet owned by the parties respectively within the depth as set out in the ordinance. * * *

"A lien shall exist for the cost of original improvement of public ways * * * for the apportionment and interest thereon at the rate of six per cent. per annum against the respective lots. Payments may be enforced upon the property bound therefor by proceedings in court; and no error in the proceedings of the general council shall exempt from payment after the work has been done as required by either the ordinance or

contract; but the general council, or the courts in which suits may be pending, shall make all corrections, rules or orders to do justice to all parties concerned; and in no event if such improvement be made as provided for, either by ordinance or contract, shall the city be liable for such improvement, without the right to enforce it against the property receiving the benefit thereof."

It will be observed that each subdivision of the territory bounded on all sides by principal streets is to be deemed a square, and that the cost of the improvement of a street by original construction is to be apportioned in each fourth of a square equally. When the territory is divided into squares, each fourth of a square is the basis of the apportionment. When the territory is not defined into squares by principal streets, the depth on both sides fronting the improvement to be assessed for the cost of making it is to be defined by the ordinance. The statute does not authorize any property to be assessed under this power, except that "on both sides fronting said improvement." The reason of this is that the apportionment for the improvement is to be made, as expressed in the last clause of section 2834, "against the property receiving the benefit thereof." That part of the statute which makes each fourth of a square the unit, where the land is divided into squares, is clearly inconsistent with the idea that, in determining the depth on both sides which may be assessed for an improvement, the council may cross another principal street, and lay the burden on property fronting on that street, and deriving no benefit from the improvement. If the council may cross one street, it may cross two or more, and the property of the individual might thus be taken for public purposes without just compensation as provided in the constitution. We cannot presume the legislature intended any such result, and, the words of the statute not requiring such a construction, it cannot be adopted upon doubtful intendment. This court has often held that the basis of all assessments of this character is presumptive benefit received, and that an assessment which amounts to spoliation will not be enforced. *Sutton's Heirs v. City of Louisville*, 5 Dana, 28; *Courtney v. Same*, 12 Bush, 419.

Preston v. Roberts, 75 Ky. 570, *Stengel v. Preston*, 89 Ky. 623, 13 S. W. 830, and *Boone v. Nevin* (Ky.) 23 S. W. 512, are relied on to sustain the judgment. The reasoning of the first case supports the conclusion we have reached in this case. We fail to see in either of the other cases anything in conflict with it. The facts of those cases, under the statute there before the court, distinguish them from this case.

The city of Louisville is not a party to this appeal; neither is the Industrial School of Reform; and what their liability may be

to the contractor, under the facts presented, we cannot therefore now determine. Judgment reversed, and cause remanded for a judgment pursuant to this opinion.

CITY OF LOUISVILLE v. GOSNELL et al.¹
(Court of Appeals of Kentucky. March 20, 1901.)

MUNICIPAL CORPORATIONS — APPROPRIATION FOR STREET REPAIRS—PART OF CONTRACT PRICE OF IMPROVEMENT TO COVER FUTURE REPAIRS — CONTRACT CREATING DEBT IN EXCESS OF INCOME.

1. Under Ky. St. § 2820, providing that the executive boards of cities of the first class and their officers shall not have power to bind the city to any extent beyond the amount of money at the time "already appropriated" by ordinance for the purpose of the department under the control of said board, where a part of the contract price of the original construction of a street was intended to cover future repairs the contractor was entitled to recover of the city that part of the price to be paid out of the appropriation for street repairs, no more specific appropriation being necessary.

2. To invalidate a contract by a city on the ground that it creates an indebtedness in excess of the income and revenue provided for the year, in violation of Const. § 157, the facts showing that such is the effect of the contract must be alleged.

"Not to be officially reported."

Petition for modification of opinion. Granted.

For former report, see 60 S. W. 411.

DU RELLE, J. On a former appeal of this case, under the style of *Fehler v. Gosnell*, 99 Ky. 394, 35 S. W. 1125, the city of Louisville was not a party. After the return of the case the city was made a party, and judgment sought against it for 10 per cent. of the amount of the apportionment warrants sued on, as not being for original construction of streets, but for repairs. Upon a second appeal of the case, under the style of *Gosnell v. City of Louisville*, 46 S. W. 722, it was held that a cause of action was stated against the city upon that claim. After the second appeal, the city filed its answer, to which a demurrer was sustained, and the correctness of that decision is now before us.

In the opinion upon the second appeal we held "that the city has authority to contract with regard to street repairs, and, having so contracted, we cannot assume that it has done so to such an extent as to increase the tax rate beyond the limit provided in section 157 of the constitution, or beyond the appropriation and levy provided for and mentioned in the sections of the act for the government of cities of the first class above referred to. On the contrary, we must assume that, in acting upon a subject with respect to

which it had jurisdiction to act, it acted within the constitutional limitation, and within its revenue as fixed and limited by the statute quoted. We see no reason why the city, if not exceeding the amount of its revenue which it is authorized to expend, may not expend its money for objects the benefit of which it will receive in subsequent years."

Upon the return of the case after the second appeal, counsel for the city, in a series of very skillfully drawn paragraphs, has attempted to plead around the opinion of the court. The first paragraph relies upon section 2820, Ky. St., providing that the executive boards and their officers shall not have power to bind the city "to any extent beyond the amount of money at the time already appropriated by ordinance for the purpose of the department under the control of said board," and it is claimed that, as no specific amount had been appropriated by ordinance for the specific purpose of paying 10 per cent. of the contract price of the street improvements under consideration for five years' repairs of the improvement after its completion, this claim could not be paid at all, although the same answer shows that over \$95,000 had been appropriated for the payment of street repairs for that year. As we have held these repairs are to be treated as ordinary street repairs, the averments of the paragraph do not constitute a defense, under section 2820.

So, in the third paragraph, appellant seems to be proceeding upon the theory that the subdivision of the levy was an appropriation for street repairs, and, therefore, having been appropriated for that purpose by the levy ordinance, there was no unexpended or unappropriated balance thereof which could, without violation of section 2982, be expended in payment for the street repairs here in question. The fourth paragraph is practically a plea that the court was in error in what it said upon the subject of these repairs in the former opinion. To be available, this matter should have been presented by petition for rehearing.

The second paragraph, which undertakes to rely upon section 157 of the constitution, is, if we understand it correctly, a statement that the amount of the contract price under consideration, which has been held to be for repairs, viz. \$577.07, makes the amount of indebtedness of the city for repairs of streets for that year exceed the total revenue and income of the city for that year by the amount of \$577.07. We hardly think counsel intended to make such a statement. But we are not of opinion that facts to show that this contract was in violation of section 157 of the constitution have been sufficiently pleaded in this paragraph. The judgment is therefore affirmed.

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

TEXAS LOAN AGENCY et al. v. MILLER
et al.

(Supreme Court of Texas. April 1, 1901.)

DEEDS—POWER OF ATTORNEY—INTERPRETA-
TION—AMBIGUITY—INTENTION.

Plaintiff's ancestor executed a power of attorney to her son "to buy and sell land, and to transact all business necessary in transaction of my affairs." The ancestor was an illiterate widow, owning land and chattels scattered over a large territory. There was no evidence that the ancestor and son ever entered into a general business of buying and selling lands and chattels. *Held*, that the son had authority to sell lands already owned by the ancestor.

Error to court of civil appeals of Fifth supreme judicial district.

Action by Mary Miller and others against the Texas Loan Agency and others. There was judgment in the court of civil appeals reversing a judgment in defendants' favor, and they bring error. Reversed.

McKie & Antry and Frost, Neblett & Blanding, for plaintiffs in error. Ballew & Ballew, for defendants in error.

WILLIAMS, J. The defendants in error, who were plaintiffs in the district court, claimed the land in controversy as heirs of Jane Beauchamp; and plaintiffs in error, defendants below, claimed it through mesne conveyances under a deed executed by William T. Charles as attorney in fact for Jane Beauchamp. The decisive question in the case is whether or not the power under which Charles acted authorized the conveyance made by him. The power of attorney was executed January 3, 1847, and the conveyance under it was made by the attorney in fact December 1, 1850. The only facts shown by the evidence as existing when the power was executed were that Jane Beauchamp was a widow, who could neither read nor write, living in Fayette county near her oldest son, William T. Charles, the donee of the power, and that she owned horses, cattle, and lands,—the latter situated in different counties, among which was that in controversy, inherited by her from a deceased son. The power of attorney thus stated the authority given: "For me and in my name to buy and sell lands, goods, and chattels, to receipt for me and in my name, and to transact all business necessary in the transaction of my affairs. And I, Jane Beauchamp, do hereby empower the said Charles, as my attorney in fact, to sign my name as my attorney, and I do further bind and confirm all the acts of said Charles as may be necessary and legal as my attorney in fact, hereby acknowledging every act or acts of said Charles as my attorney in fact as binding on me as if the same were done by me personally, hereby binding my heirs, executors, administrators, or assigns to regard the act or acts of said Charles, as my attorney in fact, as binding as if executed by me, Jane Beauchamp, in my proper person." The

land in controversy was sold and conveyed by the attorney in fact to James W. Scott for a money consideration, and his deed was recorded in 1851; and the mesne conveyances down to defendants were made at various times from 1854 until 1874, and recorded in due time. There have been actual possession of and improvements and payment of taxes upon the land under this title since 1868. Jane Beauchamp lived until 1866 or 1867, and William T. Charles until 1868, and the latter acted as the general agent of his mother; and, besides the sale of the land in question, the record states that "he appropriated all of the Jane Beauchamp estates in his lifetime." There is no evidence that Jane Beauchamp ever asserted claim to the land after the sale of it, and none that she received the purchase money, unless the fact may be inferred from the circumstances stated. The district court held that the power of attorney was sufficient to authorize the sale and conveyance of the land, and gave judgment for defendants; but the court of civil appeals reversed this judgment, and adjudged to one of the plaintiffs, who was not barred, the interest inherited by her from her ancestors. We think this was error. The power of attorney expressly empowered the agent to sell some land,—meaning, of course, land belonging to the constituent; and, when we ascertain the land the sale of which was authorized, the question at issue is solved. As the power is expressed, "to buy and sell lands," it is urged that a strict construction would make it mean simply to buy lands and sell them. The power with reference to goods and chattels is precisely the same as that with reference to lands, and, under the construction suggested, the agent would have no power of sale of either, except such as he had first bought. This would necessarily give to the power the effect of creating an agency simply for the purpose of buying and selling property, and of clothing the agent with unlimited power of that kind. If there were anything in the instrument or in the circumstances existing at the time of its execution to show that the parties contemplated entering upon such a business, the construction contended for might be admissible, not because it would make the authority narrower, but because it would effectuate the intent of the maker of the instrument. This theory of interpretation would give a character to the power which would defeat the sale in question, but we cannot see that the authority thus established would be of a kind inferior to the other. But the facts appearing lead to the other construction. No money is shown to have been furnished to the agent or to have been on hand, and the affirmative statement of the property owned by Mrs. Beauchamp carries with it the implication that there was none. The things with which the agent was to deal were lands, goods, and chattels. No power being given to buy on credit, and no

money being furnished with which to pay for them, the conclusion seems inevitable that the power was given with reference to those on hand, and was to be executed upon them. While it is often laid down that such powers are to be strictly construed, and not extended beyond their plain meaning or necessary implication, it is also true that the real intention of the parties is to be ascertained; and when that is discovered from the terms of the writing, and the circumstances properly admissible in evidence, there is no rule of construction that will defeat it. The most that can be said in favor of the position of the defendant in error is that the language used is consistent with it; but it is consistent, also, with the construction that it meant to authorize the agent to sell any property owned by the constituent, and to buy other property, and the true meaning is to be found by ascertaining from the circumstances surrounding the parties what property they had in mind. The facts stated, with what is generally known of the condition of the country at that time, enable us to do this. The constituent was an illiterate widow, and owned an estate consisting of lands and chattels scattered over a large territory, with scant means of travel and communication. If her situation was like that generally existing among the people of Texas at that period, she was without any considerable amount of money or means of subsistence, except such as might be derived from the prudent management and disposition of her property, and for this her limited capacity and the natural difficulties surrounding unfitted her. It was but natural that she should employ the services of her son, and empower him, in the language of the instrument, "to transact all business necessary in the transaction of my affairs," and in so doing to sell either the lands or chattels, of the management of which he was to relieve her. This view of the purpose of the power is thoroughly consistent with the situation and apparent needs of the maker of it, and her subsequent conduct, while the construction that it was intended only to authorize a business of buying and selling is out of harmony with both. There is nothing to show that either party ever contemplated or engaged in such a business, while, on the other hand, their true purpose, as we have indicated it, is revealed by their surroundings at the time of the making of the instrument, and their conduct afterwards. If it be assumed that Mrs. Beauchamp never learned of the sale of the land in controversy, she must necessarily have known of the fact that her agent was disposing of the personal property, as to which his power was exactly the same. In the absence of anything to the contrary, it is fair to assume that the appropriation of it by him, spoken of, was done under the power of attorney.

We have made a careful examination of all of the authorities relied on to support the

judgment, and find that all of them are distinguishable from this by the circumstances referred to. In all of them the intention of the parties expressed in the instrument, either so plainly as to admit of no explanation, or as inferred from the language where no extraneous facts appeared to aid it, or gathered from the language with the aid of surrounding circumstances, was made to prevail. In those in which the writing under consideration was susceptible of two constructions, and in which that which narrowed the power was adopted, the surrounding circumstances did not show that the purpose of the constituent was to give the broader power. Here the facts show the purpose of the parties to have been to give a power different from, but not broader than, that for which defendants in error contend. In cases where ambiguity exists, courts must necessarily look to the extrinsic circumstances to remove it, and to find the real intention consistently with the language used; and to this all rules of construction are subordinate. The judgment of the court of civil appeals is reversed, and that of the district court is affirmed.

BLACK v. STATE.

(Court of Criminal Appeals of Texas. March 20, 1901.)

FORGERY—INDICTMENT—EXPLANATORY AVERMENTS.

An indictment for forging a receipt is defective which contains no explanatory averments showing how the receipt affected or discharged some obligation outside of the receipt itself.

Appeal from district court, McLennan county; Samuel R. Scott, Judge.

Lon Black was convicted of forgery, and he appeals. Reversed.

W. H. Lessing, for appellant. D. E. Simmons, Acting Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of forgery, and his punishment assessed at two years' confinement in the penitentiary.

The only question necessary to be considered is the validity of the indictment. The indictment was for forgery, by altering the following receipt: "Received from Lon Black twenty-five dollars, payment on S. P. Tiner note, Oct. 21st, '98. [Signed] Winston & Higginson." The alleged alteration consisted in changing "twenty-five" to "fifty," so as to make the receipt for "fifty dollars." There are no explanatory averments showing how said receipt would affect or discharge any obligation. We are not informed how Lon Black was connected with the S. P. Tiner note. Of course, if Lon Black owed one S. P. Tiner, on a note, more than twenty-five dollars, and Winston & Higginson owned the Tiner note, or were Tiner's agents for the collection of the said note,

and Black paid them \$25 on said note, and received their receipt for the same, and afterwards raised the \$25 to \$50, in order to use the same as an offset against said note, said instrument would be the subject of forgery; and the proof in this record shows that such were the conditions in regard to said receipt and note, and Lon Black's connection therewith. But it occurs to us that, before all of this evidence could have been gone into, the indictment should have contained allegations or explanatory averments showing how said receipt or written instrument affected or discharged some obligation outside of the receipt itself; and such we understand to be the condition of the authorities on the subject. *Cagle v. State*, 39 Tex. Cr. R. 109, 44 S. W. 1097; *Womble v. State*, 39 Tex. Cr. R. 24, 44 S. W. 827; *Crawford v. State* (Tex. Cr. App.) 50 S. W. 378; *Colter v. State* (Tex. Cr. App.) 49 S. W. 379. We are not advised that this particular question, involving the validity of an indictment charging the forgery of a receipt, has ever been before this court. We are referred to one case for forging a receipt in which the conviction was sustained. *Fonville v. State*, 17 Tex. App. 868. But the indictment was not questioned in that case. The rule, as we understand it, is that where the instrument does not clearly import a pecuniary obligation, but requires extrinsic proof in order to show this, the extrinsic averments must be made. In this particular case the receipt is not an obligation. Under our statute, it may affect or discharge a pecuniary obligation, but the pecuniary obligation which it affects or discharges must be in existence; and, if it is not, the receipt would affect nothing, and the extrinsic fact (that is, the pecuniary obligation which the receipt is intended to affect) must be proven to exist, and, if it must be proven, we hold that it ought to be alleged.

It is not necessary to consider other questions, but for the refusal of the court to quash the indictment the judgment is reversed, and the prosecution ordered dismissed.

RUNNELLS v. STATE.

(Court of Criminal Appeals of Texas. March 18, 1901.)

HOMICIDE—EVIDENCE—CONFESSION—INSTRUCTIONS.

1. The day following a homicide a witness met the accused and asked him if he saw that comment in the paper about a white man being struck by two unknown negroes the night before (referring to the homicide in question), and accused said that he did. Thereupon the witness told him that it was "some of his and C's mischief." Accused, in a minute, remarked, "I struck one unknown lick;" and, on witness remarking that he was afraid he would get into trouble, he said he would "lay it on C., and get out of it." Accused was identified as one of the parties who threw the rock which killed deceased, and C. was identified as the

person with him at the time, which was the night before this conversation. *Held*, that his statements pointed to the homicide in question, and were properly admitted as in the nature of a confession.

2. In a prosecution for murder it clearly appeared that prior to the homicide there was no former grudge, and that it grew out of a sudden quarrel. There was no proof that the rock which was thrown and killed deceased was deadly, except from its effect; and the blow was not followed up, though it was not immediately fatal, deceased dying about a month afterwards. *Held*, that failure to charge on manslaughter was reversible error.

Appeal from district court, Tarrant county; W. D. Harris, Judge.

Andrew Runnells was convicted of murder, and he appeals. Reversed.

B. F. Bouldin and Carlock & Gillespie, for appellant. D. E. Simmons, Acting Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of murder in the first degree, and his punishment assessed at death.

Appellant excepted to the action of the court in admitting a conversation between Henry Green, witness for state, and defendant, the morning after the homicide. The statement, which is in the nature of a confession, is as follows: "I saw defendant early the next morning, but did not speak to him. I saw defendant about 11 a. m. down on Main street. I asked him if he saw that business in the paper about a white man being struck by two unknown negroes the night before, and he said he did. I told defendant that that was some of his and Cal's mischief. He laughed and did not say anything at first, but in a minute remarked, 'I struck one unknown lick.' I said to him, 'Are you not afraid you will get into trouble?' He said he would lay it on Cal, and get out of it." The objection made by appellant was that the confession did not point to and identify the transaction of the night before. We cannot agree to this. Appellant was identified as one of the parties who threw the rock which killed deceased. This occurred on the night before, and Cal Leach was identified as the person with him at the time. There is other testimony in connection with this matter, and it occurs to us that the testimony was admissible.

Appellant complains of the action of the court in failing and refusing to charge the jury on the law of manslaughter. Under the circumstances of this case, the court should have given a charge on this subject. Defendant and deceased were strangers to each other. No former grudge existed between them. On the night in question deceased and a companion were sitting near a lumber pile; and appellant (a negro), accompanied by a negro woman, and one or two other parties with negro women, passed along near where the parties were sitting. Deceased and his companion (white men) were singing a song, "All I want is my black baby back." Appellant appears to have considered that

this song was intended for him and his companions, and to have taken offense thereat, and told deceased and his companion "to go to hell." In reply, deceased used towards appellant a vile epithet, whereupon he and Leach turned back towards the parties. Defendant picked up a rock, saying, "Let's kill them," and threw at deceased and his companion. It struck deceased in the temple, breaking his skull, from which he died in about a month. We are not informed as to the size of the rock or its weight, nor do we know with any degree of definiteness how far appellant was from deceased when he threw the rock. It was in the nighttime, and, of course, it could not have been thrown with any great accuracy, though it appears to have struck deceased in a vital spot. Here we have no former grudge; a difficulty on a sudden quarrel; no proof that the weapon was deadly, except from the effect of the lick; no following up the blow on the part of appellant; no charge of the court with reference to the weapon; and, in the absence of proof that it was deadly, the jury must find, from the character of the assault, that appellant evidently had the intent to kill; and no charge on manslaughter was given. In *Johnson v. State*, 60 S. W. 48, we held that in every case where it becomes a question (in the absence of evidence that the weapon with which the homicide was committed was deadly) whether or not appellant intended to take life, the court should give a charge on manslaughter; and we think the same principle is applicable to this case. In this case the jury found appellant guilty of murder in the first degree, and inflicted the death penalty. If they had been charged on manslaughter, and not confined alone to murder of the first and second degrees, they might have found differently. Under the circumstances of this case, because of the failure to charge on manslaughter, we cannot permit the verdict to stand. The judgment is accordingly reversed, and the cause remanded.

McBROOM v. STATE.

(Court of Criminal Appeals of Texas. March 13, 1901.)

CRIMINAL LAW—THEFT—VALUE OF PROPERTY—EVIDENCE.

Where several witnesses testified that a pearl alleged to be stolen had a market value in the county, but they were not aware what it was, and the only testimony as to the market value was that of an expert, who stated that it was \$22 to \$24, it was error in the instructions to authorize a conviction on a value outside and above the market value, if the jury believed such value existed, and a conviction for felony, based on a valuation of \$50 or more, was error.

Appeal from district court, El Paso county; A. M. Walthall, Judge.

E. P. McBroom was convicted of theft, and appeals. Reversed.

Patterson & Wallace, for appellant. D. B. Simmons, Acting Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of the theft of a pearl, and his punishment assessed at two years' confinement in the penitentiary. The material question is the value of the alleged stolen property, to wit, a pearl or pearl pin. The evidence of the alleged owner shows it was a family heirloom, having been held by his family for generations. He stated it had a market value at El Paso, though he did not know what that value was, but it was worth \$100, and he himself would not take \$400 for the pin. The expert witness testified that the setting of the pin was not pearl, but was part of an oyster shell, and that its market value was \$22 to \$24. This witness seems to have been an expert in regard to pearls, and entered into a learned discussion on the subject, giving a history of pearls of all kinds and descriptions, where found, the manner of their formation, etc. The state introduced Richards in rebuttal as an expert, who testified that the setting of the pin was a pearl, and that it had a value in El Paso, but he was unacquainted with that value, and further stated that this was a peculiar pearl, the like of which he had never seen. Now, it will be observed that the testimony is conclusive of the fact that the pearl had a market value at El Paso. It is also shown that none of the witnesses, except the expert for the defendant, knew or could state that value. Then we have the testimony of the witness for defendant that the market value was \$22 to \$24 for the pin and pearl. The test of value, under the peculiar facts of this case, would be the market value of the stolen property at El Paso, because, where a market value is shown, it furnishes the criterion of value for the jury. This is especially applicable to this case, because the property must be shown to be of the value of \$50, or in excess, in order to constitute a felony. A value under \$50 would necessarily, under the statute, constitute it a misdemeanor. *Martinez v. State*, 16 Tex. App. 122; *Saddler v. State*, 20 Tex. App. 195; *Clark v. State*, 23 Tex. App. 612, 5 S. W. 178; 12 Am. & Eng. Enc. Law, p. 793. The court informed the jury correctly in regard to the market value, but further authorized a conviction on a value outside and beyond the market value, if they believed such existed. This latter phase of the charge is not correct here, because there was no evidence of that, and it would seem, under these authorities, where there is a market value, that will govern, to the exclusion of other rules of valuation. For a discussion of this question, see the authorities above cited. These matters were called to the attention of the trial court during the trial and on motion for new trial. Because the court's charge is incorrect, and because the evi-

dence did not justify the conviction for a felony, the judgment is reversed, and the cause remanded.

McBROOM v. STATE.

(Court of Criminal Appeals of Texas. March 13, 1901.)

CRIMINAL LAW—THEFT—VALUE OF PROPERTY—APPEAL—HARMLESS ERROR—EVIDENCE—HEARSAY—LAYING PREDICATE—BILL OF EXCEPTIONS.

1. Where proof on trial for theft, overwhelmingly showed that the market value of the stolen property was more than \$50, error in allowing the prosecuting witness to state that he paid \$125 for it in 1890 was harmless.

2. On trial for theft of a diamond, testimony that during the searching of defendant's room, in the presence of defendant and others, defendant's roommate said that he did not know defendant possessed a diamond, to which defendant replied that it was one he had owned for more than six months, was not objectionable as hearsay.

3. No predicate was necessary for the introduction of such evidence.

4. Where a bill of exceptions shows that the objection to evidence of a statement by defendant was that it was made while he was under arrest, but the bill did not disclose as a fact that he was then under arrest, the objection will not prevail, since the judge's certificate to a bill does not certify that the objections are facts, but merely that such objections were made.

Appeal from district court, El Paso county; A. M. Walthall, Judge.

E. P. McBroom was convicted of theft, and appeals. Affirmed.

Patterson & Wallace, for appellant. D. E. Simmons, Acting Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of theft of personal property over the value of \$50, and his punishment assessed at two years' confinement in the penitentiary. Appellant objected to the testimony on the part of state's witness Leigh Clark, who was asked, "What did you pay for the diamond in question,—the one alleged to have been stolen?" Witness answered, "I paid Mr. P. E. Kern, in 1889 or 1890, \$125 for it." Appellant objected because the witness had already testified that the diamond now and at the time it was lost had a market value in El Paso, but did not know the market value, and because it was not the proper manner of proving the market value of the diamond in question, and because irrelevant, incompetent, and tending to prejudice the minds of the jury against defendant. The court overruled said objections. It may be conceded that appellant is correct in these objections; yet, in the light of this record, the error becomes harmless, since the proof overwhelmingly shows the market value of the diamond in El Paso to be more than \$50, and the testimony objected to could not have injured the rights of appellant.

Complaint is made in the second bill of exceptions that "the witness Smith, on direct

examination, was asked by the district attorney, 'Did you hear defendant's roommate, Taylor, make any remark in the presence of Harrold and Bendy and defendant, McBroom, at the time the officers were searching defendant's room?' to which witness answered, 'He [Taylor] said, in answer to the question asked by one of the officers, that he [Taylor] never knew defendant had a diamond;' to which defendant answered, 'This is the one I have had for more than six months.'" Appellant objected to the question and answer, because same was hearsay, irrelevant, and immaterial, and calculated to prejudice the mind of the jury against him; because it was a declaration made by defendant while under arrest, and before he had been properly warned as required by law; because there had not been a proper predicate laid to use such testimony to impeach defendant. This testimony is not hearsay, as insisted by appellant; nor was it necessary that any predicate should be laid for its introduction. If appellant was under arrest, this would be a valid objection. The bill does not disclose this to be a fact, simply stating this as appellant's objection to the introduction of the testimony. Appellant might state as a ground of objection that defendant was under arrest, when as a matter of fact he was not under arrest. We have repeatedly held that the certificate of the judge to a bill of exceptions, certifying to the various objections urged by defendant, is not a certificate of the fact that the objections are facts, but simply that defendant urged them as objections to the testimony complained of. *Carter v. State*, 40 Tex. Cr. R. 225, 47 S. W. 979, 49 S. W. 74, 619; and, for a collation of authorities, see "White's Ann. Code Cr. Proc. § 857.

The only other error necessary to be considered is the sufficiency of the evidence. Appellant strenuously insists that it is not sufficient, because it does not identify the diamond alleged to have been stolen as the diamond of the prosecuting witness. The jury have passed upon the testimony, and we think there is sufficient evidence to support their finding. The charge of the court is correct. The judgment is affirmed.

GREEN v. STATE.

(Court of Criminal Appeals of Texas. March 13, 1901.)

CRIMINAL LAW—CARD PLAYING—PUBLIC PLACE.

The defendant played cards between the hours of 10 and 3 o'clock at night, in an unused mill, which was not open to the public. Held not sufficient to support a conviction for card playing in a public place.

Appeal from Jones county court; J. C. Phillips, Judge.

Walter Green was convicted of card playing in a public place, and he appeals. Reversed.

D. E. Simmons, Acting Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of card playing in a public place. There are several questions suggested for revision. The indictment is attacked as being insufficient, and error is suggested on the refusal of the court to give certain requested instructions. From the view we take of the case, it is not necessary to discuss any of these matters. The evidence shows the game was played in the engine room of a flouring mill, from 10 to 8 o'clock at night. The mill was closed, and was not being used at the time, nor open to the public. A flouring mill is not one of the houses specially denominated by the statute as a public house or place. It may be private at times and public at other times. Under this testimony, it was clearly not a public house or a public place at the time of the alleged card playing. The evidence being insufficient to support the conviction, the judgment is reversed, and the cause remanded.

GREEN v. STATE.

(Court of Criminal Appeals of Texas. March 13, 1901.)

JUSTICES OF THE PEACE—OFFICIAL MISCONDUCT—CRIMINAL RESPONSIBILITY.

There being no statute requiring a justice of the peace to make "return" to any court or tribunal of violations of the Sunday law within his view or knowledge, his failure to make such return is not an offense under Pen. Code, art. 269, declaring that any justice of the peace who neglects to return, arrest, or prosecute any person committing a breach of the peace or other crime within his view shall be deemed guilty of a misdemeanor.

Appeal from district court, Palo Pinto county; J. S. Straughan, Judge.

G. O. Green, a justice of the peace, was convicted of official misconduct, and appeals. Reversed.

W. P. Gibbs and Stevenson & Ritchie, for appellant. D. E. Simmons, Acting Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of violating article 269, Pen. Code, and his punishment assessed at a fine of \$75. Said article reads as follows: "If any justice of the peace, sheriff or other peace officer, shall wilfully neglect to return, arrest or prosecute any person committing a breach of the peace or other crime or misdemeanor which has been committed within his view, * * * he shall be guilty of a misdemeanor, and on conviction shall be fined not less than seventy five dollars nor more than five hundred dollars." The indictment charged, substantially, that appellant, Green, was justice of the peace of precinct No. 5, Palo Pinto county, and as such officer did then and there unlawfully wilfully, and knowingly neglect to return, arrest and prosecute one Lewis Galla-

her, who was then and there guilty of the offense (setting it out) of keeping his house open for traffic on Sunday, same being within the view and knowledge of the said Green. Under this indictment the prosecution and conviction was had, on the allegation that appellant failed to "return" said Gallaher on account of said offense.

Appellant assigned a number of errors, but, in the view we take of the case, it must go off on a proposition not presented or relied on by appellant. That is, does the statute in question comprehend or constitute the matters set out an offense under said statute? Before an officer can be punished for official misconduct, there must be some duty imposed by law; and it must then be shown that he has wilfully neglected or failed to discharge said duty. We find, under our statute regulating duties of justices of the peace, they are authorized to arrest or order the arrest of a person without warrant when the offense is committed within their view, and is a felony or a breach of the peace. Articles 247-250, Code Cr. Proc. Articles 392-394, Pen. Code, require the justices of the peace to cause all persons within their knowledge who have violated the gaming laws of this state to be arrested and prosecuted. This is made a distinct offense from the one under consideration, with a different penalty. Or a peace officer (and a justice of the peace is such) may, when he has good cause to believe that an offense has been or is about to be committed against the laws of the state, summon and examine witnesses in relation thereto, and if satisfied that an offense has been committed, after reducing the testimony to writing, etc., is authorized to issue a warrant for the arrest of the defendant. Article 941, Code Cr. Proc. This might be considered in the nature of a prosecution, but this appellant was not prosecuted for failing to arrest or prosecute, but, as stated, the prosecution was for failure to "return." As to his duty to return, outside of his duty to report moneys collected under articles 1010-1014, Code Cr. Proc., and his duty to return examining papers to the grand jury, we are not advised of any statute placing such a duty upon him to make return of any of his official acts. If there is a statute authorizing him to make some return to some court or tribunal of matters of the character set out in this indictment, we have been unable to find it; and, unless there is some requirement of this sort,—some duty imposed by the statute with reference to a return by a justice of the peace of persons who violate the Sunday law within his view or knowledge,—then it cannot be official misconduct on his part to neglect or fail to do said act. It might be highly proper for a justice of the peace to take cognizance himself, in his own court, of such violations, as a matter of public policy, and see that such delinquents are prosecuted. Or it might be sound public policy to have him make report of such violations

of law to the grand jury. But, until this duty is imposed by law, it cannot be an offense to fail in the discharge of what might be considered a merely moral obligation. Because the indictment does not charge a criminal offense against the laws of this state, the judgment is reversed and the prosecution ordered dismissed.

LITTLE v. STATE.

(Court of Criminal Appeals of Texas. March 13, 1901.)

CRIMINAL LAW—ASSAULT WITH INTENT TO MURDER—JURY—PANEL—DEFENDANT'S STATEMENTS—RES GESTÆ—INSTRUCTIONS—TEMPORARY INSANITY—INTOXICATION—NEWLY-DISCOVERED EVIDENCE.

1. Where the regular panels for the week were out considering other cases, it was not error for the court to order talesmen to be summoned to fill out the panel, in connection with those of the regular jury who were present.

2. Statements to an officer by one accused of assault, made several hours after the alleged offense, are not admissible for defendant, being no part of the *res gestæ*, and not brought out by the state.

3. Pen. Code, art. 41, provides that evidence of temporary insanity produced by the recent use of ardent spirits may be introduced by the defendant in any criminal prosecution in mitigation of the penalty, and that the judge shall so instruct the jury where temporary insanity is relied on as a defense. In a prosecution for assault with intent to murder, instructions were asked that if defendant's mind was in such condition, from any cause, that he was incapable of forming the deliberate intent to kill the assaulted party, the jury should acquit. *Held* properly refused, since the law imputed specific intent from the act committed, irrespective of defendant's intoxication at the time of the crime.

4. Drunkenness which does not amount to insanity is no defense in a prosecution for assault with intent to murder.

5. Where an application for a new trial on the ground of newly-discovered evidence is not supported by the affidavits of witnesses, and such evidence might have been ascertained before the trial by the use of reasonable diligence, the evidence given tending to show that defendant was guilty of assault, a new trial was properly refused.

Appeal from district court, McLennan county; Sam R. Scott, Judge.

Abe Little was convicted of assault with intent to murder, and he appeals. Affirmed.

J. B. Scarborough, for appellant. D. E. Simmons, Acting Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of an assault with intent to murder, and his punishment assessed at three years' confinement in the penitentiary, and prosecutes this appeal.

The court did not commit any error in regard to the jury. The regular panels for the week were out, considering two other cases. No motion was made to postpone to await their return into court. But appellant simply objected to the court ordering talesmen to be summoned to fill out the

panel, in connection with those of the regular jury who were present. This, as we understand it, is in accordance with the practice under our statutes. *Leslie v. State* (Tex. Cr. App.) 47 S. W. 367.

Nor did the court err in refusing to permit defendant to prove by the officer statements which he made to the officer several hours after the alleged offense. This was no part of the *res gestæ*, nor was it any portion of any conversation brought out by the state.

Appellant complains of the court's charge on the subject of insanity produced by the recent use of intoxicating liquors, which is in accordance with the provisions of our Penal Code (article 41), and also complains of the action of the court in refusing to give certain special requested instructions with reference to the state of mind of defendant, produced by intoxication, in connection with his intent. That is, the court was requested to instruct the jury, if they believed from the evidence that defendant's mind was in such condition, from any cause, that he was incapable of forming the deliberate intent to kill the assaulted party, to acquit of assault with intent to murder. Appellant, in this connection, insists that where intent enters into an offense, and the evidence tends to show that the condition of the person's mind from the use of whisky is such as to show him incapable of forming the intent necessary to commit the crime, the jury should be fully instructed to this effect. In murder cases, evidence of temporary insanity produced by the recent use of intoxicating liquors is admitted for the purpose of determining the degree of murder, and also in mitigation of the penalty, so that this character of evidence will not reduce a homicide which would otherwise be murder in the first degree below murder in the second degree; and, inasmuch as an assault with intent to murder may be either upon express or implied malice, the only effect this character of testimony would have, in a case of assault with intent to murder, would be to mitigate the penalty. That is, conceding that article 41, Pen. Code, defining the rights of a defendant who sets up temporary insanity produced by the recent use of intoxicating liquor, does not unduly limit or abridge some fundamental right of the citizen. At common law, drunkenness produced by the recent use of whisky, although it produce temporary insanity, was no defense to crime; and our statute on the subject seems to have been passed with that idea in view. And in *Evers v. State*, 31 Tex. Cr. R. 318, 20 S. W. 744, the legality of this statute appears to have been the subject of consideration. In that case it was held valid, and the rule there laid down has since been followed. Appellant, however, insists that in a case of assault with intent to murder the party must have the specific intent of his malice aforethought

to take life, and that an insane person, whether the insanity is produced by drunkenness or other cause, is incapable of forming the specific intent. As we have seen, this specific intent need not be formed in a cool and deliberate mind, but may originate in a mind inflamed or ruffled by passion; and in this character of case, where the act indicates the purpose, the intent is presumed. That is, where the law imputes specific intent from the commission of the particular act, the fact that defendant was intoxicated at the time he committed the act will not be considered. The authorities all seem to hold that temporary insanity produced by the recent use of whisky is no answer to a charge of murder in the second degree. For collation of authorities, see 17 Am. & Eng. Enc. Law (New Ed.) p. 413, note 9. Aside from this, all of the authorities hold that mere drunkenness, short of insanity, is no defense to crime; and this is in harmony with our statute on the subject. An examination of the record here does not show or tend to show a case of insanity, but merely shows an ordinary case of voluntary drunkenness; and we do not feel called upon to review the question, much less to overrule our former decisions construing article 41, Pen. Code.

We do not think there was anything in the newly-discovered evidence. By the use of reasonable diligence, it appears, appellant might have ascertained how the shot was fired before the trial. There is not appended to the application the affidavits of the witnesses to the newly-discovered testimony. Besides this, the evidence showed that appellant had already assaulted the prosecutor and snapped his pistol at him once or twice before the shot was fired; and, even if the newly-discovered evidence would show that the shot was fired in the ground, this might merely suggest evidence of bad markmanship. The judgment is affirmed.

DE LA GARZA v. STATE.

(Court of Criminal Appeals of Texas. March 13, 1901.)

HOMICIDE—EVIDENCE—DECLARATIONS—CONSPIRACY—CIRCUMSTANTIAL EVIDENCE.

1. Where, on a prosecution for murder, it appeared that there had been a quarrel between the mother of deceased and the father of accused relative to certain land, and that the quarrel had been taken up by deceased and accused, evidence that the latter had stated that they would win the land by law or by bullets was admissible; the threat evidently including deceased.

2. On a prosecution for murder, it appearing that there had been a quarrel relative to land between deceased and his brother on one side, and accused and his brother on the other, testimony of the brother of deceased having been admitted to the effect that the brother of accused told him before the killing (accused not being present) that, if they could not win the land by law, they would by bullets, it was prejudicial error not to instruct that the state-

ment was not evidence against accused, unless a conspiracy had been shown, and it should be found that the threat was made in pursuance thereof.

3. On a prosecution for murder, it was not error to refuse to allow the introduction of accused's habeas corpus proceedings on his application for bail, for the purpose of showing that the court had, after hearing the testimony, fixed the bail at \$750.

4. On trial of a prosecution for murder, the killing having been done with a pistol, the caliber of which did not appear, it was not error to admit evidence that accused had possessed a .45-caliber pistol.

Appeal from district court, Atascosa county; M. F. Lowe, Judge.

Frilan de la Garza was convicted of murder in the second degree, and he appeals. Reversed.

W. A. H. Miller and F. H. Burmeister, for appellant. D. E. Simmons, Acting Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of murder in the second degree, and his punishment assessed at 25 years' confinement in the penitentiary; hence this appeal.

The state's case is dependent solely on circumstantial evidence. The testimony for the prosecution shows there was a grudge between the deceased, Juan Garza, and Cheno Castillo, on the one side, and Frilan de la Garza and his brother Rafael de la Garza, on the other side, with reference to a piece of land, both parties claiming it, or, rather, the controversy was between the mother of the deceased, Nicholas Hernandez, and Jose Hernandez, the father of appellant, and Rafael Garza, and the parties aforesaid took up the quarrel. It appears there was some sort of a suit before a justice of the peace in regard to the land,—probably forcible entry and detainer proceedings,—in which the mother of the deceased was successful. Appellant and his brother Rafael both made threats against deceased in connection with the land controversy, stating that if they could not win it at law they would by bullets. For some weeks prior to the homicide the parties did not speak to each other. On the night of the homicide, deceased, Juan Garza, had left his home, some three miles north of the village of Tobey, and went to church at or near the latter place. Appellant, who also lived north of Tobey, and some half mile from deceased, left his home, and also went to Tobey. It appears that Rafael Garza, who had been to Uvalde for several days, returned, and was also at Tobey on the night of the homicide. About 9 o'clock appellant approached deceased, who was at church, under the arbor, and spoke to him. Deceased followed him out from under the arbor, and these two parties were seen going towards the Lagunillas road, which runs by Tobey, about 100 yards from the church arbor, in a westerly direction. Deceased was riding, and appellant was walking. Subsequently Rafael de la

Garza and appellant and Juan (deceased) were all seen riding on horseback along the lane in the Lagunillas road. Deceased was riding between them. It was shown that there was a fence on both sides of the road, and no opening until the gate in West's pasture was reached, about one mile west of Tobey. On the next evening, deceased not coming home, search was made for him. His horse was found in West's pasture, and his body was found about a half mile from the pasture gate, near the Lagunillas road, which seems to run through the pasture here. This was substantially the testimony on behalf of the state. Appellant relied on an alibi, and proved by witnesses—his father, mother, sister, and sister-in-law—that he left home late that evening to go to Tobey, and returned about 10 o'clock, bringing a letter with him to his father from the post office at Tobey. In this connection it was shown that appellant must have been killed about 11 o'clock, and that the place where he was killed was about $4\frac{1}{2}$ miles from where appellant lived with his father. It was also shown that Rafael came home about 8 o'clock. Both parties remained at home the balance of the night after their arrival. It was also proven that Rafael left the next morning, and has not since been seen in that part of the country.

We think the testimony of Samuel Garza with reference to the declaration of defendant made some two or three weeks previous to the killing, to the effect that, if they could not win the land by law, they would by bullets, was admissible in evidence. It was a threat made by defendant, and evidently included deceased, Juan Garza.

Appellant's second bill of exceptions is in regard to the admission of the declaration of Rafael de la Garza made to Cheno Castillo, brother of deceased, about two weeks before the killing, of exactly the same character as the declaration testified to by Samuel Garza, as presented in the preceding bill; that is, Cheno Castillo testified that Rafael de la Garza told him about two weeks before the killing of deceased that, if they could not win the land by law, they would by bullets. This testimony was objected to on the ground that it was irrelevant, illegal, and incompetent. The court, in explaining the admission of the testimony, states that when it was offered the district attorney said he would connect the same. Whatever defect may exist in the bill appears to be cured by the reference made by the judge to the statement of facts, to which we are authorized, in the explanation, to refer. An examination of the statement of facts fails to show that Frilan de la Garza, appellant, was present at the time Rafael de la Garza made the alleged statement, so that it was not admissible on the ground that appellant was present and participated in the statement. If admissible at all, it was admissible as the declaration of one co-conspirator made in the absence of the

other, and in pursuance of the conspiracy. If it be conceded that it was admissible on this ground, then it became the duty of the court to guard the effect of this testimony; that is, to instruct the jury that they could not consider it as evidence against appellant unless they believed the conspiracy had been established, and that the threat was made in aid of and in pursuance of such conspiracy. In this connection exception was reserved to the failure of the court to instruct the jury on the subject of conspiracy, especially with regard to this declaration of Rafael de la Garza. In the view we take of this question, this failure of the court was such error as to cause a reversal of this case.

Appellant also complains of the refusal of the court to permit him to introduce the habeas corpus proceedings of Frilan de la Garza on his application for bail. The purpose of this testimony was to get before the jury the fact that the court, after hearing the testimony, fixed appellant's bail at \$750. This testimony was clearly inadmissible. It would serve no useful purpose to get before the jury the opinion of the judge who tried the case as to its character,—whether bailable or not.

It occurs to us that the testimony to the effect that Rafael de la Garza was the owner of, and had in his possession, a 45-caliber pistol, was admissible. Deceased was killed with a pistol, and while we are not informed as to whether or not, from the nature of the wounds, they were inflicted with a 45-caliber bullet, the evidence does not exclude the idea that the wounds may have been inflicted with such bullet.

In the motion for new trial, appellant set up as a ground thereof that his attorney at the trial, to wit, George M. Martin, was during the trial in such condition, both physically and mentally, as to wholly incapacitate him from trying said cause. Inasmuch as this case will be reversed on other grounds, heretofore stated, it is not necessary to decide this matter.

For the error of the court in admitting the declaration of Rafael de la Garza, made to Cheno Castillo, to the effect that, if they could not win the land by law, they would by bullets, made in the absence of appellant, and for the error of the court in failing to instruct the jury in regard thereto, the judgment is reversed and the cause remanded.

CATLETT v. STATE

-(Court of Criminal Appeals of Texas. March 13, 1901.)

ASSAULT—COMPLAINT—MISNOMER—EVIDENCE—DECLARATIONS OF PERSON ASSAULTED—OPINION EVIDENCE—DEFENDANT'S FRAME OF MIND.

1. If the person assaulted is once correctly named in the complaint in a prosecution for the assault, a misstatement of his name subsequently in the pleading is no ground for quashal.

2. Evidence of statements before the trial by the person assaulted are inadmissible where the latter does not testify.

3. A witness was properly permitted to state that at the time of the assault complained of accused seemed to be angry.

Appeal from Hill county court; J. B. Reynolds, Judge.

Wiley Catlett was convicted of assault, and he appeals. Affirmed.

W. E. Spell and Nelson Phillips, for appellant. D. E. Simmons, Acting Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of an aggravated assault upon a woman, and his punishment assessed at a fine of \$50. He moved in arrest of judgment. The complaint charged that "defendant unlawfully, in and upon Mazie Pryor did commit an aggravated assault, the said Wiley Catlett then and there being an adult male, and the said Mazie Catlett then and there being a female," etc. His attack is based upon the fact that in attempting to set out Mazie Pryor's name the second time the pleader made a mistake, and called her Mazie Catlett. Where the name in the information or indictment or criminal pleading has been once correctly stated, although it is misstated in subsequent portions of the said pleading, and referred to by the word "said," the misstatement of the name will not be ground for quashal. *Ford v. State* (Tex. Cr. App.) 54 S. W. 761; *Dechard v. State* (Tex. Cr. App.) 57 S. W. 813.

On cross-examination of the witness McKinnon, appellant proposed to prove what Mazie Pryor stated to him on the morning of and prior to the difficulty with respect to instituting suit against the Missouri, Kansas & Texas Railway. The witness was an attorney. Without going into the details in regard to this matter, it is sufficient to say that Mazie Pryor did not testify, and her statement to McKinnon was not admissible testimony.

The witness Case was permitted to answer that at the time of the difficulty appellant seemed to be in an angry frame of mind. This was objected to as being the opinion of the witness. This evidence was permissible.

Appellant tendered one Woodall, and proposed to prove by him that on the morning of the difficulty, at his house, he overheard a conversation between Mazie Pryor and another party in the room of her house, only a few feet distant from witness' house, in which Mazie Pryor stated, as she saw the physician coming for the purpose of making an examination: "Yonder comes the doctor. I had better run and jump in bed." This testimony was offered for the purpose of showing that no violence had been used by appellant upon the person of Mazie Pryor. As before stated, Mazie Pryor did not testify, and this was not evidence. If, in

fact, no injury was inflicted upon Mazie Pryor, that fact was easily susceptible of proof by parties who examined her. In our opinion, an examination of this record shows a clear case of assault by appellant upon the female named in the information. No reversible error having been committed upon the trial, the judgment is affirmed.

MARTIN v. STATE.

(Court of Criminal Appeals of Texas. March 13, 1901.)

INTOXICATING LIQUORS—LOCAL OPTION LAW—TRIAL—CONTINUANCE—EVIDENCE.

1. Where, on trial for violation of the local option law, alleged absent testimony would merely tend to show that defendant was keeping whisky of alleged purchasers in his cold-storage establishment, and handed it out to them by the drink or plate, they paying for it at the time it was handed out, and not at the time it was ordered, a continuance was properly refused where there was evidence of like character, on which defendant was rightly convicted.

2. On trial for violation of the local option law, a United States revenue license taken out by defendant, and bearing date prior to the filing of the complaint, and which was posted in his place of business, was admissible in evidence against him, whether or not it was shown to have been in his possession prior to the filing of the complaint.

3. On trial for a violation of the local option law, evidence was admissible on the part of the state showing the defendant's manner of taking orders for whisky, the sales, etc., and his general system of transacting the business.

Appeal from Jack county court; Thomas F. Horton, Judge.

J. W. Martin was convicted of violating the local option law, and appeals. Affirmed.

J. C. Houts and Y. B. Dowell, for appellant. D. E. Simmons, Acting Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of violating the local option law, and his punishment assessed at a fine of \$100, and 60 days' confinement in the county jail. Motion is made to quash the information. This pleading is in accord with the decisions of this court. Appellant's application for continuance was overruled. It is rather lengthy, but, in our opinion, presents no reason why the cause should have been continued. The substance of the alleged absent testimony would show, or tend to show, that he was keeping whisky of the alleged purchaser and others in his cold-storage establishment, and handed it out to them, as they called for it, by the drink or in larger quantities, and that the particular whisky mentioned in the information was owned by one Cooper, and at the time of the sale Cooper had it in appellant's cold storage, and brought his friend (one of the witnesses) to appellant's house, and there treated him to a drink of whisky. The case, as made by all the testimony, shows substantially that ap-

pellant bought out the cold-storage concern of one Leach, and ran his cold-storage upon the order system; that is, parties would order whisky in such quantities as desired through appellant, he keeping blanks for that purpose. Upon the arrival of the whisky, appellant notified the parties who sent the orders. So far as shown by the record, none of the parties who ordered the whisky ever paid for it in advance, or tendered appellant money with which to pay for the whisky ordered. But the testimony is practically harmonious, if not entirely so, to the effect that the whisky obtained on these orders was left with appellant, and that the parties ordering it would come to appellant's house and get it by the drink, occasionally by the pint, always paying for the amount obtained at the time it was obtained. For instance, where one of the parties had ordered whisky, he would go into appellant's cold storage, call for glasses and whisky, and, upon drinking, would pay 10 cents per drink. If desired by the pint, the party purchasing would get a pint, and pay a quarter of a dollar for it. The testimony, therefore, of the absent witnesses would tend to fortify and strengthen the state's case; for it was placed beyond cavil that this order system was a sham, and was only intended to cover up an ordinary saloon business. All of the parties who ordered whisky bought and paid for it over the counter, just as they did in the old-fashioned way. The court was correct in refusing the application.

The United States revenue license taken out by appellant was introduced in evidence over objections. The contention of appellant was that the license was not admissible, unless it was shown to have been in possession of appellant prior to the filing of the complaint in this cause. The license bore date April 24, 1899, which was some time prior to the filing of the complaint. The contention is not tenable, whether appellant was seen in possession of it or not prior to the filing of the complaint. It was shown that he had the license, and it was posted up in a conspicuous place in his saloon or cold storage.

There was testimony offered by the state showing appellant's manner of taking orders and disposing of the whisky upon its receipt; in fact, showing his general system of doing business. Objection was interposed to this evidence. We have frequently had occasion to discuss the admissibility of such evidence in cases of this character, and have uniformly held it admissible.

The refusal of special charges requested by appellant was correct on part of the court, and the requested charges given were certainly favorable to him. The evidence justifies the conviction, and shows as clear an evasion of the law as has been presented to this court by any record. The judgment is affirmed.

MOORE v. STATE.

(Court of Criminal Appeals of Texas. March 13, 1901.)

APPEAL—STATEMENT OF FACTS—BILL OF EXCEPTIONS.

On appeal, in the absence of a statement of facts or bill of exceptions, questions relative to the admission of testimony, the refusal to give special instructions, and the charge of the court cannot be reviewed.

Appeal from district court, Tarrant county; W. D. Harris, Judge.

George Moore was convicted as an accomplice to murder in the first degree, and he appeals. Affirmed.

D. E. Simmons, Acting Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted as an accomplice to murder in the first degree, and his punishment assessed at confinement in the penitentiary for life; hence this appeal.

There is neither statement of facts nor bill of exceptions contained in the record. We cannot consider questions raised in the motion for new trial with reference to the admission of testimony, there being no exceptions reserved. Nor can we consider the refusal of the court to give certain special charges, as none are contained in the record. The objections to the charge of the court as contained in the motion for new trial do not appear to be well taken; that is, the charge seems to be a proper legal charge on its face, and applicable to a state of facts provable under the indictment. In the absence of a statement of facts, we cannot say that the same is erroneous. The court appears to have properly answered the question propounded to him by the jury. No error appearing in the record, the judgment is affirmed.

GARTRELL v. STATE.

(Court of Criminal Appeals of Texas. March 13, 1901.)

LANDLORD AND TENANT—MALICIOUS MISCHIEF—CAUSING STOCK TO GO ON INCLOSED LAND.

1. Under Sayles' Civ. St. art. 3250, providing that a lessee of lands shall not sublease without first obtaining the consent of his landlord, a sublease by a tenant is void if made without the landlord's consent, and the legal status of the tenant is the same as if no attempt to sublease had been made.

2. If a tenant, after breach of his rental contract, and after the landlord has assumed control of the cultivated land, turns his cattle into the inclosure he has rented, and they go upon the cultivated land, he is liable to be prosecuted under Pen. Code, art. 794, making it unlawful to cause stock to go on the inclosed land of another without his consent.

Hepderson, J., dissenting

Appeal from Hood county court; Phil Jackson, Judge.

Dave Gartrell was convicted for causing stock to go on the inclosed land of another, and appeals. Affirmed.

D. E. Simmons, Acting Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted for causing stock to go on the inclosed land of another, and his punishment assessed at a fine of \$10.

The prosecuting witness, T. P. Boyet, testified for the state: That he rented land to appellant for the year 1900. There were a house, barn, and outhouse on the land. Defendant was to use and occupy them during his tenancy. The land was all in one inclosure. The house and lot was cut off by a fence from the field. There were about 30 acres of cleared land and 10 acres wood land in the field. The cleared land was to be planted in corn and cotton by defendant, who was to work the crop. Witness was to have one-third the corn and one-fourth the cotton as rents. Defendant planted about 20 acres in corn, and prepared for planting 10 acres in cotton. About April 1st defendant quit his crop and refused to work it. Witness tried to get him to work, but he would not. On the 12th of April defendant sold the growing corn crop to J. E. Crites, and all his lease rights for 1900 in and to the land. Crites sold same to Smith on April 13th. Witness did not agree to sale by defendant to Crites, and did not make any tenancy contract with Crites or Smith, but refused to let either of them have the crop and premises. On May 1st witness took charge of the field and crop, and told defendant, if he was not going to carry out his rental contract, to get out of witness' house. Defendant refused again to work the crop, and did not get out of the house. Witness worked the corn crop out, and planted the cotton. Defendant turned his horses in the field, and they ran over the crop and damaged and destroyed some corn. The wood land was used for pasture. Witness agreed for defendant to graze the wood land in the spring, but after defendant quit his crop and refused to carry out his contract, and after witness had taken possession of the crop, witness forbade defendant turning his stock in the field at all. That defendant's horses were seen in the corn land on the 12th of May, 1900. That the wood land was not separated from the cultivated land. Witness Crites testified: That, under his purchase of the rental contract of defendant, defendant was not to leave the place, but to let witness have the entire crop for the year. Next day Crites sold his rental contract to Wheeler Smith, but Boyet would not let Smith work the crop, but stated he would work it himself, and did so. Defendant remained in possession of the house, barn, lot, and premises, and pastured his horses on the uncultivated land. Defendant testified: That he rented the

land in controversy from Boyet, and under the rental contract Boyet promised to have the pasture land wired off from the cultivated land, but did not do so. That witness turned his horses into the wood or pasture land, or else had them staked upon the land. When they were turned upon the land, he had parties to look after them, so that they would not run upon the planted land. That Boyet took charge of the land without the consent of defendant. At the time defendant sold his lease to Crites, he did not intend to leave the place, but to use the house and lot, and to graze his horses on the pasture land.

Article 3250, Sayles' Civ. St., provides, "If lands or tenements are rented by the landlord to any person or persons, such person or persons renting said land or tenements shall not rent or lease said lands or tenements during the term of said lease to any other person, without first obtaining the consent of the landlord, his agent, or attorney." Under the provisions of this article, the lease of the land by defendant to witness Crites, and by Crites to Smith, was void, because the landlord, Boyet, did not consent to such sublease of the land. This sublease being, therefore, void, the legal status of the defendant is the same as if he had never attempted to lease the lands. Then we have the proposition submitted to us, under the above state of facts, as to whether a tenant who turns stock into an inclosure he has rented for the entire year, after breach of rental contract, and after the landlord has assumed control of cultivated land, can be prosecuted, under article 794, Pen. Code, for causing stock to go upon the inclosed land of another. In *Hurlbut v. State*, 12 Tex. App. 252, we held that one joint owner was not justifiable in breaking the fence without the other's consent. From the evidence as disclosed above, Boyet assumed control of the cultivated land. Appellant remained in possession of the house, and used the wood land as a pasture. On any phase of the case, the most that can be said in behalf of appellant is that he was a joint possessor with the landlord for the year 1900. If so, whenever he turned the stock within the inclosure, and they went upon the cultivated land being worked by the landlord, then he violated the letter and spirit of this statute. If he had entirely abandoned the contract, then he would be guilty under any phase of the statute. We think the evidence amply supports the verdict.

We have reviewed appellant's various assignments as contained in his motion for new trial, and do not think any of them are well taken. The charge of the court is correct, and the judgment is in all things affirmed.

HENDERSON, J. (dissenting). The opinion of the court is based on the idea that the evidence showed the parties were joint ten-

ants, or, as said by the court, "appellant was a joint possessor with the landlord [who was the prosecutor] for the year 1900," and that therefore one joint tenant or joint possessor had no right to turn his stock on the property in joint possession; and reference is made in support of this proposition to *Hurlbut v. State*, 12 Tex. App. 252. That was a case where the proof showed the fence which was alleged to have been breached was a partition fence between the parties, and was jointly owned by appellant and the prosecutor; that is, neither had any individual separate interest in the fence, but they were in fact joint owners. The fence, however, divided the tracts of land owned severally by appellant and prosecutor, and the decision rightly holds that the breaking of the joint fence, which was kept up for the protection of the several crops of these two persons, was inhibited by the statute. But I do not believe this doctrine would apply where the inclosed land, as well as the fence, was owned jointly; each tenant in common being entitled to the enjoyment of the entire premises, and neither being liable to the other for the use of the property. *Osborn v. Osborn*, 62 Tex. 495; *Boone v. Knox*, 80 Tex. 642, 16 S. W. 448. But, as stated above, the opinion of the court finds as a fact that the parties (appellant and his landlord) were joint tenants or joint possessors of the land in question. Mr. Blackstone, in defining who are joint tenants, quoting from Littleton, uses this language: "Where there is a joint or common interest, no man can certainly tell which part is his own." 2 Bl. Comm. 191. Now, referring to the evidence as contained in the opinion, it will be seen that the landlord, Boyet, who was the owner in fee of the premises, rented the entire tract, including the house, pasture, and the cultivated land, for the year 1900, to appellant, Gartrell. The latter, after planting the crop of corn on 20 acres, and preparing the balance of the cultivated land (10 acres) for planting cotton, sublet the land to another party. The landlord did not approve this, and, it appears (without the consent of his tenant), took possession of the cultivated land; the tenant holding possession of the house and tenements and the pasture land, which adjoined the cultivated land, and which the record shows the landlord had agreed to fence off from the cultivated land. The landlord had not ousted his tenant, except as to the cultivated land,—about 30 acres,—and this he seems to have held against his tenant's consent. The only logical deduction that can be drawn from the facts is that the landlord having regained actual possession of the cultivated land, and his tenant holding possession of all the other land, they were not joint tenants or joint possessors of the entire tract, but each possessed a definite portion of the entire tract, and held the same in severalty. Then it follows that each had a right to use his own;

and, under the laws of this state (the common law with reference to cattle running on the uninclosed land of another not being in force here), it was the duty of Boyet, prosecutor, if he desired to protect his corn patch (which he had seized from appellant and held in severalty) from the depredations of appellant's stock, to place a fence around the same for his protection. *Davis v. Davis*, 70 Tex. 123, 7 S. W. 826; *Agency Co. v. McClelland*, 86 Tex. 179, 23 S. W. 576, 1100, 22 L. R. A. 105. I do not deem it necessary to discuss the civil rights and remedies between landlord and tenant where the latter has sublet the premises, or a part thereof, without authority of the written contract. But certainly where, on such breach of the rental contract, the landlord has seized a part of the rented premises, leaving his tenant in possession of another part, he cannot claim to be a joint tenant or joint possessor of the entire premises with his tenant, invoking the protection of a criminal statute against depredations of stock of his tenant, where the portion of the land held by him is uninclosed by a separate fence.

DAWSON v. STATE.¹

(Court of Criminal Appeals of Texas. Feb. 6, 1901.)

LARCENY—THEFT OF CATTLE—INDICTMENT—UNKNOWN OWNERS—PROOF—DEGREE OF PROOF—LOSS BY KNOWN PERSON.

1. The fact that an indictment for cattle theft alleges that the cattle were the property of an unknown owner does not relieve the state from the necessity of proving that they were cattle belonging to an unknown owner, and that the defendant took them from the unknown owner without his consent, and with intent to appropriate them.

2. Where an indictment for cattle theft alleges the animals to have been stolen from an unknown owner, testimony that cattle had been lost by certain parties was inadmissible.

3. Where, on a prosecution for a theft of cattle of an unknown owner, there is no evidence that any unknown owner possessed any cattle in that part of the country, and no evidence to show that animals found in defendant's possession had belonged to any unknown owner, the conviction cannot be sustained.

Appeal from district court, Floyd county; S. I. Newton, Judge.

T. E. Dawson was convicted of cattle theft, and he appeals. Reversed.

Wilson & Kinder, for appellant. Cowan & Burney and D. E. Simmons, Acting Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of cattle theft, and his punishment assessed at two years' confinement in the penitentiary. We quote from appellant's brief a statement of the facts, which we deem substantially correct, to wit: "The sheriff of the county and his deputy went to defendant's house about August 22d, and some 10 days before

¹ Rehearing denied March 20, 1901.

the court convened at which defendant was indicted, for the purpose of examining defendant's stock of cattle. They reached defendant's home about 9 o'clock at night, and, after the usual salutation, stated to him their business; to which, so far as the sheriff and his deputy state, defendant made no objection, but willingly gave them his assistance. They made an examination of the cattle in the corrals of defendant, and claimed to have found 24 calves for which they saw no mothers. These witnesses testify, in substance, that defendant claimed all the cattle they saw, although no animal or animals were especially pointed out to him. Defendant, when court convened, was brought before the grand jury, and interrogated as a witness, after being warned. Whether he was warned before or after he was sworn seems to be in dispute. At any rate, defendant was then and there called upon to state why he had 24 motherless calves in his corrals and about his place at the time of the sheriff and his deputy's nocturnal visit. He answered that if he had that many calves it was strange, and made no further explanations, if any were sought by the grand jury. The evidence of the sheriff and his deputy, as to the excessive number of calves, is corroborated by Sam Moore, who some time previous to the sheriff's visit examined defendant's cattle on the open range, about one-half mile from defendant's house, and counted defendant's cattle. Neither defendant, nor any one representing him, was present, and this seems, upon the part of the witness Sam Moore, to have been strictly an ex parte proceeding. At any rate, he testifies he found more calves than there were cows. This is about the state's case, showing the number of cattle claimed by defendant. Then the state shows where defendant obtained said cattle by the testimony of the witness Sam Moore, and A. G. Ligertwood, general manager of the Matador Cattle Company. Sam Moore says he was possessed of about 200 head of cattle, and during that year he lost only 3 calves. Two of them he never saw, but only knew they had been born by his cows to increase his fold by their appearance when they came up. The other calf he saw by the assistance of a field glass. He saw a cow about $1\frac{1}{2}$ miles from his house, on the prairie, with a freshly-gotten calf by her side. He saw the cow next day, but she was minus the calf. These, the state claims, were cogent circumstances to show defendant's guilt, although Moore testifies that his three calves might have died or have been eaten by the wolves, as calves in that locality occasionally died or were destroyed by the wolves. He does not testify that any of the calves for which defendant was convicted appeared to be his. Moore also testifies that upon another occasion he saw three cows inside the Matador pasture, about $1\frac{1}{2}$ miles from defendant's house, and

looking and lowing in the direction of defendant's. He said these cows seemed to have lost their calves. It will be understood that defendant's place, also Sam Moore's, as well as others, were on the open range, just outside the Dutchman pasture of the Matador ranch. Ligertwood testified he was general manager of the Matador ranch, and in said ranch there were eight subdivisions, of which the Dutchman pasture was one, and that he knew from different circumstances he lost cattle from said ranch by theft. * * * In this pasture he branded some 1,800 calves in the year of the theft, and he stated that he saw three cows that had lost their calves during that year. He knew so by their general appearance. He was not prepared to say, however, what became of these three calves,—whether they were stolen, eaten by wolves, or died of black leg. He did not know any of the calves defendant had to be his. These are, in substance, the facts of the state's case. No evidence was introduced showing that any one lost cattle in that neighborhood, or that there were any cattle in that locality belonging to unknown owners."

Appellant's first and second grounds of his motion for new trial insist that the verdict of the jury is contrary to, and not supported by, the law and evidence. It will be seen, from an inspection of the foregoing statement of facts, there is no proof in the record that any unknown owner had any cattle in the range. Nor is there any proof that any unknown owner had any cattle in that particular part of the country. There is proof that a man named Moore had lost cattle, and the Matador Cattle Company had lost calves. It is permissible, under our statute, for the grand jury, after making diligent inquiry as to the true owner of cattle, and not being able to find the owner after such inquiry, to allege in the indictment that said cattle were taken, being then and there the property of an owner unknown to the grand jury. But this does not absolve the state from proving that there were cattle belonging to an unknown owner; nor does it absolve the state from proving the usual and customary requisites of theft, to wit: It must be proved that defendant took the animal; that the animal belonged to an unknown owner; that it was taken without the will, knowledge, or consent of said unknown owner, and with the intent to appropriate it to the use and benefit of the party so taking. In other words, the usual requisites of theft must be established as thoroughly where the property is taken from an unknown owner as when taken from an owner whose name is alleged.

The learned counsel for the state insists that there is less proof required where the prosecution is based upon the idea of an unknown owner than where the allegation is that the property was taken from a certain known person. We cannot agree to this

contention, but, as stated above, the same requisites must be proved in each instance. The fact of the taking, as well as the lack of consent, may be established by circumstantial evidence; nevertheless, it must be established. Certainly, if the grand jury did not know who the owner of cattle was, then it follows as a logical sequence that they could not establish by positive evidence the lack of consent on the part of the unknown owner. But this does not absolve the state of the duty to establish this lack of consent as indicated by circumstantial evidence.

The learned counsel for state also insist that it was permissible that other parties, whose names were known to the grand jury, to wit, the Matador Cattle Company and Moore, had themselves lost some calves. We do not think this evidence admissible. It is insisted the testimony is admissible by virtue of a clause in *Melton v. State* (Tex. Cr. App.) 56 S. W. 67, as follows: "The difficulty all along seems to be the failure of the state to identify some particular animal, and to prove that such animal belonged to some unknown owner. No witness proved the loss of an animal in that section which belonged to an unknown owner." Instead of there being any ambiguity in this, it is a perfect basis for the reversal of the judgment herein. In this case the proof shows that no unknown owner had lost any property. The excerpt from the *Melton* case would clearly not authorize the introduction of evidence showing that parties who were known to the grand jury had lost cattle. This, indeed, would be a strange proceeding,—to say that, the grand jury, after diligent inquiry, not being able to find out to whom the cattle alleged in the indictment did belong, the state should then be permitted to prove that other parties had lost cattle, and convict appellant, by implication, upon their loss. This certainly could not be tolerated. If appellant stole the cattle of Moore, he should have been indicted for that; if he stole the cattle of the Matador Cattle Company, he should have been indicted for that; if he stole cattle belonging to an unknown owner, he should have been indicted, tried, and convicted for that, if the evidence was sufficient. These are all separate and different distinct offenses, and absence of proof of one cannot be supplemented by proof of another or circumstantial evidence of another. In *Melton v. State*, supra, we said "that where it appeared, in the prosecution for the theft of a head of cattle belonging to an unknown owner, that there were no stray cattle in that section, refusal to charge that the jury must acquit, unless the state identified the animal as one taken out of the possession of such unknown owner, was error, since the jury might have found that no such animal had been lost." This is decisive of the case at bar. The evidence failed to show that

an animal of an unknown owner had been lost or stolen. There being a total failure on the part of the state to identify the animal, we cannot permit this verdict to stand. Counsel for the state insists this brings about a disastrous result. We cannot agree to this, since it cannot be disastrous to the state of Texas to require proof of guilt before the conviction and punishment of a defendant. The evidence failing to support the conviction, the judgment is reversed, and the cause remanded.

OSBORN v. STATE.

(Court of Criminal Appeals of Texas. March 18, 1901.)

CRIMINAL LAW—BURGLARY—PRIVATE RESIDENCE—INDICTMENT—EVIDENCE—VARIANCE.

Under Pen. Code, art. 839a, added to the Code by Acts 26th Leg. p. 818, which defines burglary of a private residence, and makes it a separate offense from ordinary burglary, fixing a different penalty, a judgment of conviction under an indictment charging burglary, which does not allege the burglarized house to be a private residence, must be reversed, where the evidence was of a burglary of a private residence, since there is a fatal variance between the allegations of the indictment and the evidence adduced in support of it.

Appeal from district court, Young county; A. H. Carrigan, Judge.

Brit Osborn was convicted of burglary, and he appeals. Reversed.

John C. Kay, for appellant. D. E. Simmons, Acting Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of burglary, and his punishment assessed at two years' confinement in the penitentiary. The indictment is in the ordinary form, and charges a daytime breaking by force, threats, and fraud. There is no allegation in the indictment that the house was a private residence. The evidence shows beyond controversy that it was a private residence; but by the act of June 5, 1899 (Acts 26th Leg. p. 318), article 839a was added to the Penal Code, making the burglary of a private residence a separate and distinct offense from that contained in articles 838, 839, Pen. Code. This act prescribes a different punishment for the burglary of a private residence than an ordinary burglary, to wit, for any term of years not less than five. We are of opinion that, in order to constitute a valid indictment under this act, it must allege the burglarized house to be a private residence. This is a part of the definition itself; and, whether the legislature had expressly stated it should be a distinct and separate offense, the definition of the offense itself would necessarily make it a different offense, because it is composed of different elements and is differently defined from the ordinary burglary. In support of our views in reference to the necessary alle-

gations of the indictment under the act of 1899, *supra*, we cite White's Ann. Pen. Code, § 1502, for collation of authorities; also Rice v. State, 37 Tex. Cr. R. 38, 38 S. W. 801; Bice v. State, 37 Tex. Cr. R. 38, 38 S. W. 803; Edwards v. State, 37 Tex. Cr. R. 242, 38 S. W. 996, 39 S. W. 368; Dudley v. State, 37 Tex. Cr. R. 543, 40 S. W. 269. The evidence shows burglary of a private residence. Because the evidence does not support the judgment,—in other words, because there is a variance between the allegations in the indictment and the evidence adduced in support of it,—the judgment is reversed and the cause remanded.

HARVEY v. STATE.

(Court of Criminal Appeals of Texas. March 13, 1901.)

CRIMINAL LAW—BURGLARY—PRIVATE RESIDENCE—INDICTMENT—PROOF—VARIANCE.

Under Pen. Code, arts. 839a, 845a, and 845b, added by Acts 1899, p. 318, defining burglary of a private residence, making it a separate offense, and fixing a different penalty from that of other burglary, a judgment of conviction under an indictment charging burglary, but not alleging that it was of a private residence, must be reversed, where the proof shows that the accused burglarized a private residence.

Appeal from district court, Bexar county; John H. Clark, Judge.

Henry Harvey was convicted of burglary, and appeals. Reversed.

D. E. Simmons, Acting Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of burglary, and his punishment assessed at two years' confinement in the penitentiary. It appears from an inspection of this record that appellant was indicted under article 838, Pen. Code. The 26th legislature (see Acts 1899, p. 318) added to the Penal Code articles 839a, 845a, and 845b. Article 845b reads: "Nothing in articles 839a and 845a of this chapter, shall be construed to alter or in any manner repeal articles 838 and 839 of this chapter, nor any part thereof; but shall be construed to make burglary of a private residence at any time a separate and distinct offense from burglary as defined in articles 838 and 839 of this chapter." The proof in this case shows that appellant burglarized a private residence under an indictment in the usual form as authorized by article 838, Pen. Code. This character of prosecution cannot now be maintained for burglarizing a private residence, since the legislature has by express words created a separate and distinct offense where one burglarizes a private residence. This being true, it becomes absolutely necessary to indict defendant for burglarizing a private residence, if the proof shows that he burglarized a private residence. In other words, the indictment should be drawn under article 839a, instead of article 838, Pen. Code. See *Osborn v.*

State, 61 S. W. 491, and *Cleland v. State*, *infra*, just decided. There being a fatal variance between the indictment and the proof, the judgment must be reversed and the cause remanded.

CLELAND v. STATE.

(Court of Criminal Appeals of Texas. March 13, 1901.)

CRIMINAL LAW—BURGLARY—PRIVATE RESIDENCE—INDICTMENT—PROOF—VARIANCE.

Under Acts 1899, p. 318, which adds articles 839a, 845a, and 845b to the Penal Code, defining burglary of a private residence, and declaring it to be a separate offense from burglary as defined by article 838, and providing a different punishment therefor, a conviction under an indictment charging burglary, but not alleging that the house burglarized was a private residence, must be reversed, where the proof shows that the burglary was of a private residence.

Appeal from district court, Upshur county; J. G. Russell, Judge.

Bluford Cleland was convicted of burglary, and he appeals. Reversed.

F. J. McCord, W. R. Heath, and Sam D. Snodgrass, for appellant. D. E. Simmons, Acting Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of burglary, and his punishment assessed at six years' confinement in the penitentiary. The indictment is in the usual form, under article 838, Pen. Code, charging a burglary, and does not contain an allegation that it was a private residence. The evidence adduced on the trial shows that the burglary was of a private residence. By the acts of the 26th legislature (Acts 1899, p. 318), articles 839a, 845a, and 845b were added to the Penal Code, whereby the burglary of a private residence at any time is made a separate and distinct offense, and providing a different punishment from burglary under article 838, Pen. Code. This being true, it becomes absolutely necessary to indict a defendant for burglarizing a private residence, if the proof shows that he burglarized a private residence. In other words, the indictment should be drawn under article 839a, instead of article 838, Pen. Code. This matter has been discussed in the cases of *Osborn v. State*, 61 S. W. 491, and *Harvey v. State*, *Id.* 492, just decided. Because there is a fatal variance between the allegations in the indictment and the proof, the judgment must be reversed and the cause remanded.

CREIGHTON v. STATE.

(Court of Criminal Appeals of Texas. March 13, 1901.)

SEDUCTION—EVIDENCE—CORROBORATION OF PROSECUTRIX—CIRCUMSTANTIAL EVIDENCE.

1. On a prosecution for seduction, the testimony of the prosecutrix as to the promise of

marriage may be corroborated by circumstantial evidence.

2. On a prosecution for seduction, prosecutrix testified that she submitted under promise of marriage. Defendant had for some months been her suitor, and on one occasion she had remarked to her mother, in the presence of defendant, that she and defendant were going to marry, to which defendant acquiesced; and defendant had stated that he intended to debauch the prosecutrix, if he had to make her believe that he would marry her. *Held*, that the evidence was sufficient to sustain a conviction.

Appeal from district court, Tom Green county; J. W. Timmins, Judge.

Cliff Creighton was convicted of seduction, and he appeals. Affirmed.

T. A. Blair, D. T. Averitt, and B. W. Himes, for appellant. Sims & Snodgrass and D. E. Simmons, Acting Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of seduction, and his punishment assessed at two years' confinement in the penitentiary.

There were no bills of exceptions reserved during the trial, and the main question submitted for our consideration is the alleged insufficiency of the evidence to support the conviction. The prosecutrix is fully corroborated by appellant as to the act of sexual intercourse, and we are of opinion that the facts and circumstances sufficiently corroborate her as to the promise of marriage. This can be done by circumstances. As was said in Wright's Case, 31 Tex. Cr. R. 354, 20 S. W. 756: "Corroborative evidence need not be direct and positive, or such evidence as is sufficient to convict independent of that of the prosecutrix, but simply such facts or circumstances as tend to support her testimony, and shall satisfy the jury she is worthy of credit. And, when there is other testimony fairly tending to support the prosecutrix upon facts essential to constitute the offense, it is for the jury to say whether she is corroborated. Prosecutrix testified she yielded to defendant because he faithfully promised her to marry." So, in this case, prosecutrix testified that during several months appellant was her suitor, and finally she engaged herself to him; that he immediately began importuning her to have sexual intercourse; and that finally, on the 9th of July, 1897, under the promise of marriage repeated to her at the time of the sexual intercourse, she yielded to his desires. She is fully corroborated as to the fact that he was her suitor during the time testified by her; that on one occasion, sitting on the gallery with appellant at her father's residence, her mother passed them, and she remarked to her mother that she and "Cliff" (meaning defendant) were going to marry, to which appellant assented. The mother corroborates her in this, except that she did not fully understand his answer, but seemed to be well pleased with the remark. Appellant

stated to Jess Adams that he expected to have intercourse with the girl, even if he had to go to the extent of making her believe he was going to marry her. In cases of this character it is only necessary, under our statute, to introduce other testimony than that of the prosecutrix tending to connect defendant with the offense charged. The statement by the girl, and the acquiescence in the statement by defendant in the presence of and to her mother, that they were going to marry, and the fact that he was for months her suitor, and his statement to Adams that he intended to debauch her, even though he had to induce her to believe he was going to marry her, are circumstances tending to prove the promise of marriage, independent of the positive testimony of the prosecutrix that the engagement did exist. See State v. Timmens, 4 Minn. 325 (Gil. 241); State v. Hill (Mo. Sup.) 4 S. W. 121; State v. Brinkhaus, 34 Minn. 285, 25 N. W. 642; Files v. State, 36 Tex. Cr. R. 207, 36 S. W. 98; Anderson v. State, 39 Tex. Cr. R. 83, 45 S. W. 15.

There was testimony pro and con as to the character of prosecutrix for chastity, as well as other matters tending to show she was impure. But these matters were all submitted to the jury, and decided adversely to appellant. They are the judges of such matters of fact. We have read the record carefully, and are not prepared to say the jury were wrong in their conclusion. If the state's evidence is true,—and the jury so found,—it supports the conviction. The judgment is affirmed.

NORRIS v. STATE.

(Court of Criminal Appeals of Texas. March 13, 1901.)

HOMICIDE — EVIDENCE — MANSLAUGHTER — JOINT ASSAULT—SELF-DEFENSE—WRITS —INSTRUCTIONS—EVIDENCE.

1. Defendant had a heated quarrel with deceased and his brother, in which the parties armed themselves with clubs, and then went to the house, where defendant and the brother secured guns, while deceased carried a stone in his hands, and all started to return to the place of the quarrel. On the way the controversy was renewed, ending in a scuffle in which defendant shot deceased. *Held*, that defendant was entitled to a charge on manslaughter.

2. An instruction that, when a sudden and unjustifiable killing occurs under the immediate influence of passion, the test as to whether the killing was murder or manslaughter is whether there was adequate cause to produce such passion, and that any condition creating sudden passion is adequate cause, and if defendant shot deceased when the actions and words of deceased, in connection with those of his brother, the relative strength of the parties, the weapons used, and demonstrations made, were of such nature as to produce adequate cause, then defendant, if not acting in self-defense, might be found guilty of manslaughter, was proper.

3. Where defendant engaged in a quarrel with deceased and his brother, in which defendant and the brother armed themselves with guns, and deceased picked up a rock, and the

difficulty ended in a scuffle, in which defendant shot deceased. It was not error to refuse to instruct that if, from defendant's standpoint, it would reasonably appear to him that he was in danger of death or serious bodily harm from deceased or his brother, he had the right to kill deceased, since defendant would not have a right to kill deceased if he did not believe it necessary to protect himself from the brother, though the brother advised deceased to join in the difficulty.

4. It was error to refuse to instruct that if deceased was present during a difficulty between defendant and a brother of deceased, but was not participating therein, but that if, after defendant shot the brother in self-defense, deceased made an attack on defendant which indicated to him that he was in danger of death or serious bodily harm, he would have the right to kill deceased.

5. If defendant shot at the brother of deceased with intent to kill, and under circumstances which would have rendered a killing murder, and, to prevent the defendant from further injuring the brother, deceased assaulted defendant, if defendant then shot deceased, the offense, if committed with malice, would be murder.

6. Where defendant shot and wounded a brother of deceased immediately before shooting and killing deceased, on trial for the killing it was error to instruct that if defendant knew of threats made against him by the brother, and if at the time defendant shot the brother he or deceased (if deceased was present and acting with him) showed intention to carry out such threats, and if defendant shot the brother to prevent apparent injury to himself, then defendant was guilty of no offense, so far as the shooting of the brother was concerned, since defendant was not on trial for shooting the brother, and if the brother made threats as stated, and deceased was present, acting with him, deceased was bound by the threats, and they were available to defendant as a defense.

7. Where defendant shot and wounded a brother of deceased immediately before shooting and killing deceased, it was error to limit evidence of the wounding of the brother to establishing the *res gestæ* or defendant's intent.

Appeal from district court, Wilbarger county; G. A. Brown, Judge.

B. J. Norris was convicted of murder in the second degree, and appeals. Reversed.

Huff Hall, for appellant. D. E. Simmons, Acting Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of murder in the second degree, and his punishment assessed at five years' confinement in the penitentiary.

In order to properly understand the various questions discussed, it becomes necessary to make a short statement of the salient features of the evidence: Appellant was the landlord of John Brewer, and Ed (a brother of John Brewer) lived with John Brewer. Appellant lived in the same house with the Brewers, and used adjoining lots. The difficulty out of which the killing occurred arose over the placing of John Brewer's cattle in what was known as the "Little Lot" by defendant the night previous to the shooting. On the morning of the difficulty, defendant went out in his field and got an arm load of cut corn in the stalk to feed his horses, in the big lot. When he got inside the big lot

he saw Ed Brewer (deceased) and his brother John in the big lot, near the gate of the little lot, and all of the cattle of the Brewers in the big lot, where he was going to feed his horses. When appellant first saw the Brewers, they were walking close together, with their backs to him. When he got within 10 or 15 feet back of them he said, "John, I wish you would put the cows into the lot until I can feed my horses." John Brewer said, "By God! you build me a lot." Defendant said, "I did not contract to do that." Brewer said, "You are a God-damn liar." Defendant turned loose the corn, pushed up his sleeves, and started towards Brewer. John Brewer stepped back to the calf pen by the little lot, and pulled off a slat. Deceased went to where there were some bushes, and picked up a rock weighing about two or three pounds. When deceased got the rock, and John the plank, defendant started to the gate. They cursed defendant, whereupon defendant called to his son Bruce to bring his gun. The boy did not obey. Appellant then started to the house, where he and John Brewer both lived, but in different rooms. Both of the Brewers followed defendant. Defendant went to his room, John Brewer saying, "Ed, get your six shooter;" and, before defendant reached his door, John Brewer ran into his (Brewer's) room. Defendant obtained his gun and returned to the front door, and stuck his head out. John Brewer was standing in his door, with his gun pointed towards defendant's door. Defendant stepped out into the yard. John Brewer was cursing him,—calling him a God-damn liar. Deceased was standing out within 10 or 12 feet in front of John's door. Defendant walked between them, going to the lot, with both of them following him,—John with his gun in his hand and deceased with a rock. As appellant passed out of the yard gate, two or three steps beyond it, John ran in ahead of him; and defendant stepped to the west of the path a step or two, and deceased started to go in behind him, between defendant and the fence. Defendant motioned to him not to get behind him, and told him to stay in front. Then something was said about the contract. John Brewer said: "I will call Lottie [his wife], and prove it by her." Then he said to deceased: "Get around him. Get around him. God damn him! we will fix him." He motioned his gun two or three times, like he was going to strike defendant, then raised it like he was going to shoot defendant; and defendant shot as quick as he could. As soon as the gun fired, deceased ran in, striking at defendant with the rock. Defendant threw up his arm, knocked the lick off, and the rock fell out of deceased's hand. Deceased then grabbed the gun, and defendant and deceased began to scuffle, and directly they came close to an ax. Deceased was looking at the ax as if he was going to get it. Defendant told his son Bruce to get the ax. Deceased turned the

gun loose with one hand, reaching for the ax, and Bruce put his foot on it. Defendant then slung deceased loose, and deceased grabbed for a stick, and, as he came up with it, defendant shot. Deceased staggered for a step or two and fell. The above is, in substance, the testimony of defendant. John Brewer contradicts defendant in many and very material points, but states that he followed appellant from the lot to the house, got his gun, and then followed defendant to the yard gate, together with his brother; both following behind defendant to the yard gate. When they got there all stopped and entered into a discussion of the contract. John Brewer told defendant he could prove the contract as he understood it by his wife. Defendant stated: "If his [Brewer's] wife would swear that, she would lie." John Brewer turned to go to the house, and told defendant he was going to have him arrested. After he had gone a step or two, he heard a noise, turned his head, and defendant fired, knocking him down on his knees and hands. He fell with his back to defendant and his brother, and his face to the house. "When I turned around, my brother was on the west side of the path; and, when defendant shot me, my brother grabbed the gun and began to scuffle with defendant over it. They scuffled awhile. Defendant called for Bruce to bring the ax. When Bruce got the ax and ran up to them, my brother turn the gun loose and started away. When he got about three or four steps away, defendant shot him. I saw my brother when he was shot, and he just reeled and fell, and said, 'Oh Lordy me!' or something like that. I saw defendant after the shot was fired. He walked off a few steps, and called for shot and powder, and reloaded his gun. Defendant then walked around to where my brother lay, and said not to be uneasy; 'You are mine now, and I am too game to shoot a man when he is down.' This latter statement, as well as many others, was contradicted by defendant. Deceased in his dying declaration in many respects corroborates his brother John Brewer.

Complaint is made in bill of exceptions No. 4 to the refusal by the court of the following requested charges: "(1) When an unlawful killing takes place under the immediate influence of sudden passion, and no cause exists which will, under the law, justify or excuse its commission, then, in order to determine whether such homicide is murder in the second degree or manslaughter, the true test is, was there adequate cause to produce such passion? If such adequate cause existed, the homicide, if not justifiable, would be manslaughter. (2) And you are further instructed that any condition or circumstance which is capable of creating and does create sudden passion, such as anger, rage, sudden resentment, or terror, rendering the mind incapable of reflection, whether accompanied by bodily pain or not, is, in law, adequate cause. (3)

And in this case, if you should find from the evidence that the defendant shot and killed Ed Brewer, and that at the time he did so the actions and words of Ed Brewer, taken in connection with the words and actions of John Brewer, the age and relative strength of the parties, the weapons used by each, if any, and the demonstrations, if any, made by either at the time, was of such a nature as to produce adequate cause, as above explained, and did produce such adequate cause, sufficient to render defendant's mind incapable of cool reflection; and if, under the immediate influence of anger, rage, sudden resentment, or terror, the defendant shot and killed Ed Brewer; and if you are satisfied from the evidence, beyond a reasonable doubt, that the defendant did not kill said Ed Brewer in self-defense,—then you may find him guilty of manslaughter." We think the evidence on the part of appellant raised the issue of manslaughter, and the above-quoted charge should have been given to the jury. As indicated above, appellant and the main prosecuting witness testify that, just immediately prior to the difficulty in which deceased was killed, appellant and John Brewer (brother of deceased) were in a heated colloquy over the terms of a rental contract made by appellant with John Brewer; and, just prior to the time this colloquy occurred, appellant and John Brewer had had another difficulty at the lot, in reference to the turning out of some cattle. Each had returned to the house and secured a gun. Both, together with deceased, were on their way back to the scene of the first difficulty, a few yards from the house. Certainly all these facts and circumstances were reasonably calculated to produce in the defendant's mind a degree of anger, rage, sudden resentment, or terror such as would likely render his mind incapable of cool reflection. At any rate, the evidence is amply sufficient to raise that issue, and the court should have so charged. *Gilcrease v. State*, 33 Tex. Cr. R. 619, 28 S. W. 531; *Baltrip v. State*, 30 Tex. App. 545, 17 S. W. 1106; *Hawthorne v. State*, 28 Tex. App. 212, 12 S. W. 603; *Cochran v. State*, 28 Tex. App. 422, 13 S. W. 651.

Appellant also complains that the court erred in refusing to give a special charge requested, as contained in bill No. 3, as follows: "If the defendant killed Ed Brewer, he would be justified in doing so if he acted upon the reasonable appearances of danger of death or serious bodily injury to himself, which reasonable appearances are to be considered and determined from his standpoint. It matters not whether the danger was real, whether in fact it existed, or whether it was merely colorable. If, from defendant's standpoint, taking into consideration all of the circumstances of the case, it would reasonably appear to him that he was in danger of death or serious bodily injury from the deceased or from his brother John Brewer, he had the right to kill the deceased, although no such

danger existed. If to the defendant it reasonably appeared that the danger in fact existed from the deceased or his brother, he had the right to defend against it to the same extent and under the same rules which obtain in the case of real danger." We do not think the court erred in failing to give the charge as worded, since the same does not present a correct proposition of law. It appears from said charge that appellant insists that if, from the defendant's standpoint, taking into consideration all the circumstances of the case, it would reasonably appear to him that he was in danger of death or of serious bodily injury from deceased or, his brother John Brewer, he had a right to kill deceased, although no such danger existed. If to defendant it reasonably appeared that the danger in fact existed from deceased or his brother, he had the right to defend against it to the same extent and under the same rule which would obtain in case of real danger. Defendant has a right to defend himself against real or apparent danger, as viewed from his standpoint, against either Ed or John Brewer, if acting together; and in doing so, if he thinks it is necessary, as viewed from his standpoint, to kill either Ed or John Brewer, in order to protect his own life or his person from serious bodily injury, then, in that event, he would have the right to slay either Ed or John Brewer. But the Brewers may have been acting together, yet, if appellant did not believe it was necessary to slay Ed Brewer in order to protect himself from death or serious bodily injury, the fact that Ed Brewer advised his brother John to engage in the difficulty, and was present at the time of the difficulty, and was not making any demonstration to assist in the difficulty, and it so appeared to defendant, then the mere fact that Ed Brewer did advise his brother to engage in the difficulty with defendant, and was present at the time of the difficulty, would not authorize defendant to kill Ed Brewer; but the killing would be unlawful, and would be murder in either the first or second degree, or manslaughter, according as the evidence might show. In other words, appellant would have no right to kill Ed Brewer because he was a brother of John, and advised John to engage in the difficulty with appellant, and was present after so advising. The above-quoted charge requested by appellant seems to imply he would have such a right, and hence the court did not err in refusing to give the same.

Appellant also requested the court to give the following charge, which was refused, to wit: "If you shall find that the defendant shot John Brewer in order to prevent said John Brewer from taking his life or doing him some serious bodily injury, and that at the time he did so his life was in danger, or he was in danger of serious bodily injury, from the said John Brewer, or from the standpoint of defendant it reasonably appeared to defendant that he was in such dan-

ger; and you further find that, up to the time of said shooting, deceased, Ed Brewer, was not participating in the difficulty, and it did not so appear to defendant that he was so participating,—yet if you find that after said shooting the deceased made an attack on defendant which indicated to the defendant's mind, from all the circumstances then surrounding him, that such was his purpose, and that his life was in danger, or serious bodily injury to himself was threatened, or if, from all the circumstances then surrounding the defendant, viewed from his (defendant's) standpoint, such an attack was about to be made on him by deceased, and, that when such attack or apparent attack was made on the defendant, he shot and killed the deceased, Ed Brewer, then the court charges you that in such an event he would have the right to do so in his own defense, and in that event you will acquit defendant." Certainly, if deceased was present and saw defendant shoot his brother, and thereupon made an attack upon defendant which indicated to him, from all the circumstances surrounding defendant at the time, that he was in danger of death or serious bodily injury, he would have the right to act on appearances and kill deceased. The court should have instructed the jury as requested by appellant.

By bill of exceptions No. 6, exception was reserved to the following portion of the charge of the court, to wit: "In this case, if the jury find that at the time of and just prior to the shooting of Ed Brewer by defendant, while in carrying distance of his gun, he shot at deceased's brother John Brewer, with intent to kill the said John Brewer; and you further find that, had defendant killed the said John Brewer by such shot, he (defendant) would have been guilty of murder of the said John Brewer; and if it reasonably appeared to deceased, Ed Brewer, that said John Brewer was in danger of being then and there further injured by defendant,—then, I instruct you, the deceased had a right to disarm defendant, to prevent such apparent injury to the said John Brewer; and, if necessary to prevent such further injury to his brother, the deceased had the right to assault the defendant, and to use all the force upon the defendant reasonably necessary to prevent such injury; and if, under such circumstances, and while deceased was so endeavoring to prevent defendant from inflicting further injury upon his brother John Brewer, the defendant shot him (Ed Brewer), from the effect of which he died, the offense, if committed with express malice, will be murder in the first degree, and, if not committed with express malice, it is murder in the second degree, although at the time the defendant fired the shot that killed the deceased he (the deceased) was about to assault the defendant, to prevent further injury to his said brother John, if he was about to do so. And if you find from the evidence that

defendant shot at John Brewer under the circumstances above mentioned, and that had he thereby killed said John Brewer, the offense would have been murder, under the court's charge; and you further find that, to prevent the defendant from further injuring or shooting the said John Brewer, deceased, Ed Brewer, attempted to get possession of defendant's gun, whereon a struggle ensued between defendant and said Ed Brewer, and that therein defendant caused his son Bruce Norris to make an attack on deceased with a deadly weapon, or instrument calculated to inflict serious bodily injury; and you find that, to prevent serious bodily injury to himself, and under said circumstances, the said Ed Brewer then and there attempted to strike defendant with a stick, or if the said Ed Brewer when so attacked by defendant's son abandoned the struggle for defendant's gun and fled therefrom, and the defendant then and there shot the said Ed Brewer with intent to kill him, and from the effect of which shot he died,—then the defendant cannot justify the killing on the ground of self-defense, and the killing will be unlawful, although the deceased would have killed or seriously injured defendant with said stick had defendant not shot him, and though at the time defendant fired the shot that killed deceased the latter was making the attack upon defendant under the circumstances and in the manner above stated, if he was doing so, the offense will be murder in the second degree; and if the shot that killed deceased was fired by defendant after deceased had abandoned the attempt to disarm defendant, and defendant there knew deceased had so abandoned said attempt to disarm him, and shot deceased with express malice, the offense will be murder in the first degree." This charge is not the law. Under the Penal Code of this state, the guilt or innocence of defendant depends upon the intent with which defendant acts, and is not predicated upon the intent of deceased or some one else. If appellant shot at John Brewer and failed to kill him, as the evidence in this case shows, his guilt or innocence must depend upon the animus with which he acted towards John Brewer. If he shot at Ed Brewer subsequent to having shot at his brother, and from the wounds so inflicted Ed Brewer died, then the guilt or innocence of defendant must be judged from the criminal intent he had at the time he shot Ed Brewer; and his guilt or innocence cannot depend in one instance upon his guilt, or innocence in the other. If he shot Ed Brewer with malice aforethought, either express or implied, he would be guilty of murder in either the first or second degree. If he shot him in a sudden transport of passion, aroused by an adequate cause, he would be guilty of manslaughter. If he shot him in self-defense, as that term is defined by law, he would be guilty of no offense. The learned judge has hinged appellant's defense upon the intent of Ed Brewer. Ed Brewer's in-

tent cannot control defendant's intent, for Ed Brewer's intent was unknown to appellant. At least, the proof does not show such fact. If appellant knew that Ed Brewer was simply attempting to disarm him, with no intent of injuring him in the least, and knowing such fact he killed Ed Brewer, he would be guilty of murder in the first or second degree, or manslaughter, as the evidence might warrant. It follows, therefore, that the learned judge should not have given the above-quoted charge.

In bill of exceptions No. 8 appellant complains of the following portion of the charge of the court, to wit: "In this case the defendant has introduced testimony tending to prove threats made by John Brewer against defendant prior to the shooting mentioned in the indictment; and in this connection you are instructed that, where threats are made against the life of a defendant who shoots and kills, or attempted to kill, the person making such threats, the threats shall not afford a justification for the offense, unless it be shown that at the time of the shooting the person making such threats, or some person acting with him, by some act then done, manifested an intention to then and there execute the threats so made. And in this case, if you believe from the evidence that prior to the shooting at John Brewer by defendant the said John Brewer had threatened to take the life of defendant or to do him some serious bodily harm, and that defendant knew of such threats, if any, and that at the time defendant shot at John Brewer he or Ed Brewer (if you believe Ed Brewer was present and acting with John Brewer, or was by words, acts, or gestures encouraging him), by some acts then done, or words spoken, coupled with acts, if any, showed an immediate intention to carry such threats into execution; and if, from all the facts and circumstances known to defendant, he had reason to believe and did believe he was then about to suffer death or serious bodily injury at the hands of John or Ed Brewer, and that acting under such fear of danger, if any, as the same reasonably appeared to him from his standpoint, the defendant shot at John Brewer to prevent such apparent injury to himself,—then the requirements of the law would be satisfied, and the defendant guilty of no offense, so far as the shooting at John Brewer is concerned." This charge is erroneous. Appellant is not being tried in this case for shooting at John Brewer; and if John Brewer had made threats to take the life of appellant, and deceased was acting with John Brewer in the execution of those threats, as contended by appellant, then deceased would be bound by the threats of John Brewer, and appellant may use said threats in his defense. And if, coupled with the threats of John Brewer, and the active co-operation on the part of deceased in the execution of the threats on the part of John Brewer, appellant believed, or had reason to

believe, judging from all the circumstances surrounding him at the time, that his life was in danger at the hands of deceased as well as John Brewer, then he would have the right to shoot and kill deceased. Or if deceased was present, aiding, advising, and assisting in carrying on the quarrel and difficulty, and his presence and demeanor was such as reasonably produced in the defendant's mind a reasonable fear or expectation of death or serious bodily injury either at the hands of deceased or John Brewer; and if defendant's mind, by the circumstances surrounding him, and by the acts and conduct of the deceased while co-operating with his brother, was aroused, by an adequate cause, either to anger, rage, sudden, resentment, or terror, such as rendered his mind incapable of cool reflection, and while so aroused he shot deceased, he would not be guilty of any higher grade of offense than manslaughter. *Casner v. State* (Tex. Cr. App.) 57 S. W. 822.

In bill of exceptions No. 10 appellant complains of the charge of the court in instructing the jury that they could not consider the shooting at John Brewer by defendant for any purpose, except to establish the *res gestæ* or to show defendant's intent. The shooting of John Brewer by defendant was immediately preceding the shooting at deceased, as indicated by the statement of facts, and was a part and parcel of the *res gestæ*. We know of no rule authorizing the court to limit its consideration by the jury. *Thornley v. State*, 36 Tex. Cr. R. 118, 34 S. W. 264; *Wilson v. State* (Tex. Cr. App.) 36 S. W. 587.

In the view we take of this record, we do not deem it necessary to consider other assignments of error. But, for the errors discussed, the judgment is reversed and the cause remanded.

ST. LOUIS S. W. RY. CO. OF TEXAS v. LAWS.

(Court of Civil Appeals of Texas. March 27, 1901.)

RAILROADS—CROSSING ACCIDENT—EVIDENCE—ADMISSIBILITY—OPINION OF PHYSICIAN—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS THEREON—DAMAGES—FAILURE TO GIVE INSTRUCTIONS.

1. The attending physician of a person injured in a railroad crossing accident may give his opinion as to what caused the injury.

2. The refusal to give certain special charges will not be considered on appeal, when the contents of such special charges are not set out in the assignment of error or in the briefs.

3. When the petition in an action for personal injuries to plaintiff's wife alleges that the wife is unable to perform her household duties, or manual labor of any kind, and that the injury is permanent, and that she is unable to earn money as the result thereof, it is not error to charge that damages may be allowed for the decreased earning capacity of the wife.

4. Where instructions limit plaintiff's right to recover to the causes of negligence alleged in the petition, the failure to give a further charge thereon is not error, in the absence of a request therefor.

Appeal from district court, Hunt county: L. A. Clark, Judge.

Action by A. L. Laws against the St. Louis Southwestern Railway Company of Texas for injuries received in a crossing accident. From a judgment in favor of the plaintiff, defendant appeals. Affirmed.

S. H. West and Perkins, Gilbert & Perkins, for appellant. Evans & Elder, for appellee.

FISHER, C. J. This is an action for damages arising from injuries sustained by the wife of appellee being struck by the cars of appellant at the crossing of a street in the city of Greenville. Plaintiff recovered judgment in the court below, from which appellant appeals.

We find that the averments of negligence pleaded by appellee in his first amended original petition are substantially supported by the evidence, and find as a fact that the appellant was guilty of negligence as alleged, and that by reason thereof the appellee's wife sustained many of the injuries alleged in the petition. The averments of the petition describing the injuries sustained by appellee's wife were sufficiently definite and certain, and the court committed no error in overruling appellant's demurrers. We do not think the evidence complained of in the fourth assignment of error subject to the objection urged. The question was not leading. There could be little doubt from the evidence that appellee's wife was at the time suffering to some extent, and if she knew that her husband was aware of that fact she could so testify. The only objection urged to the admission of the evidence is based upon the ground that the question asked was leading. It was proper for Dr. Peak, the attending physician who waited upon the wife of appellee, to give his opinion as to what caused her injuries. Permitting the question to be asked the witness Laws and the answer thereto, as set out in the sixth assignment of error, was a matter within the discretion of the court, and we cannot say that the ruling complained of was reversible error. The charge complained of in the eighth assignment of error is not subject to the objection there raised. In view of the facts, it was a proper charge. In response to the questions raised under the ninth, thirteenth, and fifteenth assignments of errors, it is sufficient to say that the general charge of the court did instruct the jury that plaintiff could not recover if he and his wife were guilty of contributory negligence. We decline to pass upon the question whether the court erred in refusing to give special charges upon this subject, because there is nothing stated in the assignments of errors, or in statements thereunder in the briefs of appellant, which attempts in any manner to set out or state the contents of these charges. The charge of the court on the subject of the appellee being entitled to compensation for the physical pain and mental anguish suffered by his wife

is not subject to the criticism urged in the tenth and eleventh assignments of errors. The twelfth assignment of error is not sustained by the record. The assignment is as follows: "The court erred in charging the jury that they could allow plaintiff damages for decreased capacity of his wife to perform labor, because this was not warranted by the pleadings and evidence, and was speculative." There were facts introduced in evidence from which the jury could estimate the damages sustained. The petition alleges "that she is unable to perform her ordinary household duties, or to perform any kind of manual labor, * * * and that said injuries are permanent, and in consequence thereof she is unable to perform labor and earn money." We cannot agree with appellant in the contention urged in the fourteenth assignment of error. The charge of the court limited the plaintiff's right to recover to the causes of negligence alleged in the petition, and, if any further charge was desired upon this subject, the appellant should have requested it. Our findings of fact dispose of the fifteenth assignment of error. There is evidence which shows that appellant was guilty of the negligence alleged, and that the appellee and his wife were not guilty of contributory negligence. We find no error in the record, and the judgment is affirmed. Affirmed.

WHITAKER v. ZEIHME et al.

(Court of Civil Appeals of Texas. March 9, 1901.)

CONTRACTS—PRINCIPAL AND AGENT—OFFER—ACCEPTANCE—COUNTERMAND—CHARGE—PRESUMPTIONS—APPEAL—JUDGMENT.

1. Where plaintiff's salesman was supplied with printed order blanks, and had no authority to vary the terms stated therein, an order taken on one of the blanks, in which conditions are written changing the printed terms, is merely an offer on the part of the purchaser not binding until accepted by plaintiff, and may be withdrawn at any time before it is accepted.

2. Where plaintiff's salesman, who was supplied with printed blank orders having no authority to vary the terms stated therein, took an order in which conditions were inserted in writing changing such terms, plaintiff could not make a contract with the purchaser by ignoring the writing and accepting the order according to the printed terms, since such contract would not be the one the purchaser offered to make.

3. Plaintiff furnished his salesman with printed order blanks containing his printed signature. The agent, who had no authority to vary the printed terms, took defendant's order. When produced in evidence by plaintiff, the order contained written conditions changing the printed terms. *Held* that, in the absence of any evidence as to when the writing was inserted, there is no presumption that defendant signed the order as printed, and that the writing was inserted afterwards by plaintiff.

4. In an action for breach of contract for the sale of goods, judgment should not be ordered for defendant in the appellate court on reversing a judgment against him for the price of the goods, unless the case appears to have been fully developed at the trial.

Appeal from district court, Cass county; J. M. Talbot, Judge.

Action by A. E. Zeihme, doing business as A. E. Zeihme & Co., against H. D. Whitaker. From a judgment for plaintiff, defendant appeals. Reversed.

Oneal & Allday, for appellant. Henderson & Robison, for appellee.

TEMPLETON, J. The appellee, A. E. Zeihme, is a wholesale dealer in jewelry, doing business in Chicago, Ill., under the firm name of A. E. Zeihme & Co., and the appellant, H. D. Whitaker, was a retail merchant doing business at Hughes Springs, Tex. On July 5, 1899, appellant gave to appellee's agent, one Gus Less, an order for certain goods. The order, as it appears in the transcript, reads as follows: "A. E. Zeihme & Co., Wholesale Jewelry, Chicago, Ill. [Here follows a complete description of the jewelry ordered, and cut of show case, giving price of every article of the bill, amounting to \$130.] The case to be oak or walnut. Terms of sale [the following words and figures were written in the contract]: Oak case, ship August 1st. 1st payment, November 1st, '99; 2d payment, January 1, 1900; 3d payment, March 2, 1900; 4th payment, May 1, 1900." The balance of the contract was printed. The printed part which follows contained stipulations as to payments to the effect that the bill was to be paid in four equal payments, due in 90 days, 4 months, 6 months, and 8 months, respectively, from date of shipment. It was further provided that the purchaser should have 60 per cent. off for cash if paid within 10 days; otherwise, he was to give notes to cover the four payments, and, in case of failure to give such notes, the whole account was to mature at once. Then follows a warranty not necessary to be set out. It is then stated that the jewelry is to be shipped by express, and the show case by freight, and the order continues as follows: "Orders of this assortment are not subject to countermand. Verbal or outside written agreements not stipulated in this order, made with any of our travelers, are not binding on us. It is understood * * * that the goods listed above shall constitute the assortment, in addition to which we furnish show case, special exchange privilege, * * *. We ship all goods ordered from us at our earliest convenience. A. E. Zeihme & Co." Then follows an instrument which reads thus: "Hughes Springs, Texas, July 5, 1899. A. E. Zeihme & Co., 56 Fifth Ave., Chicago, Ill.—Gents: Please ship us, at your earliest convenience, your one hundred and thirty dollar assortment of jewelry on the above terms, all of which we have read, and found same to be satisfactory. W. H. Whitaker." It does not appear whether this instrument was written or printed. It is a curious fact, worthy of notice, that the instrument is signed by W. H. Whitaker, and not by H. D.

Whitaker, who is the appellant, and the person with whom the contract is alleged to have been made. As appellant testified that he signed the order, and as no question is raised concerning the matter, it need not be considered. A few days after the order was given appellant sold out his business, and at once wrote to appellee countermanding the order. Appellee disregarded the countermand, and shipped the goods on September 1, 1899, and appellant refused to receive or pay for them. Appellee brought suit against appellant in the proper justice's court to recover the contract price of the goods. Appellant pleaded as a defense that his countermand was received by appellee before he accepted the order or shipped the goods, and contended that appellee could recover, if at all, only for the damages sustained by him as a result of the breach of the contract, and could not maintain a suit for the contract price of the goods. In due course, the case reached the district court, where a trial before the judge, without a jury, resulted in a judgment in favor of appellee for the amount sued for. The defendant, Whitaker, has appealed from said judgment.

On the trial the facts above stated were established by the evidence. The plaintiff, Zelhme, also testified: "I did employ one Gus Less to represent said firm of A. E. Zelhme & Co., and he received instructions as to selling our goods. He was furnished with a line of samples showing exactly what they are, also with a list of goods contained in said samples, and prices of same, and also with an order sheet, and was instructed to take orders only upon such order sheets, in accordance with the terms printed thereon, which he must not vary in any way. This order was printed upon the same sheet containing the list of goods, with prices, and it was required that the customers should sign said order sheet in the presence of the salesman before we would ship any goods to him." Whitaker testified that Zelhme never notified him of the acceptance of the order.

It appears from the foregoing that appellant ordered from the appellee, through appellee's salesman, a lot of jewelry, for which he agreed to pay the sum of \$130, and that he, before the goods were shipped, countermanded the order. It further appears that the goods were nevertheless shipped on September 1st, and that appellant refused to receive or pay for the same. There seems to be a conflict in the terms of the order as to the date of shipment and time of payment. The written part of the contract specifies August 1st as the date of shipment, while in the printed part it is declared that the shipment is to be made at the convenience of appellee. The written and specific part of the contract will prevail over the printed and indefinite part, and August 1st must be held to be the contract date of shipment. The printed part of the contract provided that the payments should be made in 2, 4, 6, and

8 months after date of shipment, which, treating August 1st as the contract date of shipment, would make each payment fall due one month sooner than the date of payment specified in the written part of the order. In determining the time of payment, as in fixing the date of shipment, the written part of the contract will control. We have, then, a contract for shipment to be made on August 1st, with payments to be made in 3, 5, 7, and 9 months thereafter, instead of a contract as per the printed order sheet, making the date of shipment depend on the convenience of appellee, and fixing the time of payments at 2, 4, 6, and 8 months after the actual date of shipment. Both these changes from the printed to the written contract were material. It not being shown that appellee accepted the order before he received the countermand, it becomes important to know whether the agent of appellee, who took and sent in the order, had authority to make the changes in the contract above specified. It seems to be conceded by the appellee, and we think it is fairly established by appellee's own testimony and by the order itself, that the salesman, Less, had no authority to change the terms of the printed contract, or to take orders for goods, on any other terms than those specified in the printed order sheet. It follows, therefore, that until the order had been accepted by appellee, he was not bound to fill the same, and that the countermand of the order by the appellant, before such acceptance, had the effect to release appellant from his offer to buy.

It appears that the order was simply an offer on the part of appellant to buy the goods therein specified, on the terms stated, and could be withdrawn, at any time before it was accepted by appellee, without rendering appellant liable for the contract price of the goods or for damages for breach of the contract. It was no contract until it was accepted by appellee. It seems, in fact, that appellee never accepted the order as made, as he did not ship the goods at the time provided by the written part of the order, but ignored that part of the contract, and treated the printed part of the order relating to date of shipment and time of payment as being the binding part of the contract in those respects. This he could not legally do, as he was bound to accept the order as given, else it would not be the contract appellant had offered to make. *Summers v. Mills*, 21 Tex. 88. The action of the appellee in disregarding the changes made in the printed order by his salesman also tends to show that the salesman had no authority to make such changes, and that changes, when made, were only binding on him after the order had been accepted.

It is contended by appellee (1) that, as there is no evidence to show when the written part of the order was made, it will be presumed that it was made by appellee himself, and that the order came into the hands

of the salesman in the condition in which it was executed; and (2) that, as the name of A. E. Zelhme & Co. appeared in print at the foot of the order sheet, the same amounted to a signing of the contract by the firm, and rendered the contract binding on it. It was doubtless upon these theories that the learned trial judge acted in rendering judgment for appellee. We think that a careful examination of the order will show that the contention as to the fact asked to be presumed is not well taken. The inconsistency between the written and printed parts of the order indicates that it was not given to the salesman by appellee in that condition, and the language of the written part shows that it was inserted in the order as the result of negotiations between the salesman and the purchaser. Besides, the appellee testified that none but printed order sheets were furnished to the salesman, and that he was not authorized to vary the terms as printed, and that no orders were accepted on any other terms. The order is dated at Hughes Springs on July 5, 1899, and it is obvious that this was done at the time of its execution; also, the written words concerning the show case must have been inserted at the same time, and immediately following these words are the written provisions relating to the date of shipment and time of payment. We think the inference is certain that the written part of the order was inserted at the time the order was given by appellant. The contention that appellee had signed the order, and that the same was therefore binding on him, may be disposed of with one observation. If the printed terms of sale had not been changed, the contention would be sound; but the change in the terms of sale made in the printed form of contract by the insertion of the writing concerning the date of shipment and time of payment made the proposed contract another and different one from that appellee had signed, and the substituted contract was not binding on him until it was accepted by him. As the salesman is not shown to have had authority to bind appellee by taking the order in question, and as appellee is not shown to have accepted the order before he received the countermand, he has failed to establish his right to recover in this suit.

We are asked by appellant to render judgment for him in this court because, even if it should be held that a contract of sale binding on both parties had been concluded, the same was executory, and, if it has been breached by appellant, the remedy of appellee is by an action for damages for the breach, and not by suit on the contract. The proposition of law contended for by appellant is supported by the authorities. *Tufts v. Lawrence*, 77 Tex. 526, 14 S. W. 165; *Alder v. Kiber*, 5 Tex. Civ. App. 415, 27 S. W. 23; *Benj. Sales*, 758, and American note at foot of chapter. However, as the case does not appear to have been fully developed in

respect of these matters, we have concluded that we would not be warranted in rendering judgment for appellant as requested. The judgment is reversed, and cause remanded.

THOMAS v. WESTERN UNION TEL. CO.¹
(Court of Civil Appeals of Texas, Feb. 27, 1901.)

TELEGRAMS—DAMAGES FOR FAILURE TO DELIVER—MENTAL SUFFERING—LAWS APPLICABLE.

1. Where a telegram, which is not delivered, is sent from a point in a sister state to another point therein, mere residence in another state does not authorize a recovery in the latter for mental anguish caused by failure of the company to deliver a message as authorized by the laws of the latter state, where such suffering is not an element of damages recognized in the former state.

2. Where the laws of the state in which mental anguish is caused by failure of a telegraph company to transmit and deliver a message between different points within the state does not allow damages for such suffering, such damages will not be allowed in an action in another state acquiring jurisdiction of the parties, since the law giving immunity from certain damages is a substantial right, and is governed by the law of the place where the injury occurs, and not by the law of the forum.

3. Where the failure to transmit and deliver a telegram between points in a state whose laws do not allow damages for mental anguish causes such anguish to a citizen of Texas, the fact that such suffering continues after his return to the latter state does not authorize a recovery for such suffering.

Appeal from district court, Camp county; J. M. Talbot, Judge.

Action by H. C. Thomas against the Western Union Telegraph Company for damages for negligence in failing to deliver a telegram. From a judgment in favor of the defendant, plaintiff appeals. Affirmed.

The action was brought in the district court of Camp county, Tex., alleging negligence in failing to properly transmit and deliver a message dated August 11, 1899, delivered to defendant's agent at its office in Texarkana, in Arkansas, addressed to plaintiff at Hatfield, Ark., as follows: "Hattie is very low. Come at once. C. C. Buckner." The petition alleged that the sum of 25 cents was paid defendant for said message, and alleged mental distress resulting to him from said negligence, laying the damages therefor at \$2,000. The case went off on a plea in abatement to the jurisdiction of the court upon the ground that damages for mental anguish in such cases cannot be recovered under the laws of Arkansas, and that a demand for the sum of 25 cents was not within the jurisdiction of the court to try and determine. The court sustained the plea, and rendered judgment for defendant thereon. The evidence taken shows these facts: That at the time of this transaction Thomas resided in Texas, and had left home, and was in Hatfield, Ark. When he left home he

¹ Rehearing denied March 27, 1901, and writ of error denied by supreme court.

knew that his daughter, Hattie, the wife of O. C. Buckner, was sick at Ft. Lynn, Ark. The message was delayed in transmission and delivery, and he thereby lost the opportunity to reach his daughter before her death. It was in testimony that C. C. Buckner had telephoned from Ft. Lynn, Ark., to W. R. Lambeth, at Texarkana, Ark., who, from his store in Texarkana, Ark., telephoned to defendant's office in Texarkana, Ark. That defendant's agent declined to take the message by telephone, and requested him to come to the office, which he did, and the message was received and paid for. No conversation of any kind relative to the message was had. After the message was delivered to Thomas at 6:15 p. m., August 12th, he sat up all night, and took the 5:40 passenger train on August 13th, reached Texarkana about 10:40 a. m., and telephoned from Texarkana, Ark., to Ft. Lynn, and ascertained that his daughter had died, and was then being buried. That he suffered great disappointment and distress. It was shown that Texarkana has a population of about 20,000; that the state line about equally divides the city; that defendant had no office on the Texas side, but had its office on the Arkansas side; and that these conditions remain the same. It was proved that damages for mental distress alone are not a subject of recovery in Arkansas; that defendant company was chartered under the laws of New York, and had its domicile and principal office in New York City, where its president resides; that it was not chartered under the laws of Texas or Arkansas; that its wires connect and traverse all the states of the Union, and that it does business in Texas and elsewhere. After experiencing disappointment and grief over this matter in Arkansas, plaintiff came back to Texas, and continued so to suffer.

T. E. Webber, Sheppard & Sheppard, and J. F. Jones, for appellant. George H. Fearons and M. R. Geer, for appellee.

JAMES, C. J. (after stating the facts). The contentions of appellant are: (1) That defendant is liable to be sued by appellant, and according to the rules governing in Texas, because at the time of his injuries and when this suit was brought he was and is a citizen of Texas and defendant was and is a corporation doing business in Camp county, Tex., and had and has an agent in Pittsburg, Camp county, Tex.; (2) that defendant is liable because the courts of Texas will not deny a citizen a right given him by the laws of Texas when the office of the defendant where the citizen lives is situated in the same city, but just across the state line, in Arkansas, when he is compelled to go into said office to send the message; (3) that the suit is for damages arising from a breach of contract sounding in tort, and in such a case the laws of Texas will govern in the matter of damages; (4) that the mental anguish and

disappointment were suffered in Texas, and therefore the redress should be made under the laws of Texas, although the wrong that caused them was committed in Arkansas; and (5) that this was a transitory action, and was cognizable by the courts of Texas, regardless of whether the cause of action is *ex contractu* or *ex delicto*. All the facts connected with this transaction occurred in Arkansas, and the facts that are claimed to have the effect of making the case one determinable by the laws in force in Texas are that plaintiff was a citizen of Texas, and was only temporarily in Arkansas; that plaintiff, after learning of the death of his daughter in Arkansas, returned into Texas, and his grief continued there; and the fact that defendant, under the circumstances, maintained its office for Texarkana and that neighborhood on the Arkansas side, and Texas citizens were compelled to go there to send messages. We are of opinion that, so long as the laws of this state do not require, under such conditions as exist at Texarkana, that defendant must have an office within this state, defendant had a perfect right to have and maintain the office on the Arkansas side; and, until we have legislation on the subject, there is no ground for saying that this interferes with any public policy of this state. The mere fact that plaintiff was and is a citizen of Texas cannot be given the effect of drawing to the courts of this state the power to give redress for a matter which was not actionable or remediable in the foreign jurisdiction where it took place. The cause of action, so far as it is for mental suffering, has the appearance of tort in being injury to the person. The demand for the price of the telegram is strictly for breach of contract. *Telegraph Co. v. Adams*, 75 Tex. 537, 12 S. W. 857, 6 L. R. A. 844. The statute of limitations applicable to a demand based on mental suffering is that applied in cases of personal injuries. *Kelly v. Telegraph Co.*, 17 Tex. Civ. App. 344, 43 S. W. 532. Nevertheless, the cause of action is for damages growing out of a breach of contract. *Telegraph Co. v. Coffin*, 86 Tex. 96, 30 S. W. 896; *Garland v. Telegraph Co. (Mich.)* 76 N. W. 762. We are of opinion, whether we view this case from the standpoint of a tort or a breach of contract, that plaintiff has no right of action here for damages sustained from mental anguish alone. That the law of the forum will govern in matters pertaining to the remedy is the statement of a familiar rule. By "remedy" in this connection is meant such matters as the character and form of action, the admissibility of evidence, procedure, the mode of redress, limitations, execution of judgments, and the like. The right acquired, and the obligations created, and all matters pertaining to the essence of the contract, are determined by the *lex loci contractus*. The damages to be allowed, if fixed or limited by such law, pertain to the right, and not to the remedy. This affects

both the cause of action and the liability of defendants. This rule cannot, for any reason that we can conceive, be different in cases of contracts and torts. *Dyke v. Railway Co.*, 45 N. Y. 113; *Consequa v. Wellings*, 6 Fed. Cas. 336 (No. 3,128); *Pritchard v. Norton*, 106 U. S. 132, 1 Sup. Ct. 102, 27 L. Ed. 104; *Burnett v. Railway Co.* (Pa. Sup.) 34 Atl. 972; *Curtis v. Railway Co.*, 74 N. Y. 116; *Railway Co. v. Brown* (Ark.) 54 S. W. 867; *Telegraph Co. v. Preston* (Tex. Civ. App.) 54 S. W. 650; *Car Co. v. Lawrence* (Miss.) 22 South. 53; *Walsh v. Railroad Co.* (Mass.) 36 N. E. 584; *Railroad Co. v. Babcock*, 154 U. S. 190, 14 Sup. Ct. 978, 38 L. Ed. 958. We regard the case of *Railway Co. v. Jackson*, 89 Tex. 115, 33 S. W. 857, 31 L. R. A. 276, as strongly in favor of the doctrine that immunity from certain damages by the law of the place where the matter arose is a substantial right. The transaction in question took place wholly in Arkansas, and, in accordance with the views above expressed, the amount of recovery, or the subjects in reference to which damages are to be allowed, will be governed by the law of that state. The testimony shows that damages for mental suffering alone cannot be recovered there. The court did not err in sustaining the plea. *Haddock v. Taylor*, 74 Tex. 216, 11 S. W. 1093; *McFadin v. City of San Antonio*, 22 Tex. Civ. App. 140, 54 S. W. 48. We further conclude that the fact that Thomas, after the failure to deliver the telegram in time to enable him to go immediately to his daughter, and after receiving the news of her death, all of which took place in Arkansas, where his disappointment and distress begun, came into Texas, and continued there to suffer disappointment and distress, does not alter the case. The judgment is affirmed.

COLE et al. v. HORTON.

(Court of Civil Appeals of Texas. March 6, 1901.)

VENDOR AND PURCHASER—VENDOR'S LIEN—ACTION TO FORECLOSE—EVIDENCE—ADMISSIBILITY—INSTRUCTIONS.

1. Evidence of declarations of the deceased owner of land that he has paid certain vendor's lien notes thereon is not admissible in a suit to foreclose such lien.

2. The fact that notes reserving a vendor's lien are dated January 1st, while the deed to the property and a trust deed thereon are dated February 23d, is not sufficient evidence of usury to warrant an instruction as to the effect of usury.

3. Where suit is brought against the widow and children of a deceased person to foreclose a vendor's lien on his homestead, and there is some evidence of the existence of a will, it is not error to refuse to instruct that plaintiff cannot recover, if deceased left other property and owed other debts, and has not been dead for four years.

4. When admissible evidence is intermingled with that which is inadmissible, it is not error to exclude the whole.

Appeal from district court, Dallas county; Richard Morgan, Judge.

Suit by N. E. Horton against Frances Cole and others to enforce a vendor's lien. From a decree in favor of plaintiff, defendants appeal. Affirmed.

G. G. Wright, O. N. Brown, and H. F. Lively, for appellants. Hill & Dabney, for appellee.

JAMES, C. J. The suit was to foreclose vendor's lien notes on 181 acres of land. The note and deed of trust were given by Sam Cole and his wife, Frances. The notes were dated January 1, 1894, and bore interest from that date. The deed and the deed of trust were dated February 23, 1894. The land was the homestead of Cole and wife when he died. No administration had been taken out on Cole's estate, and there appear to have been some other debts of his estate. The action was brought directly against the wife and children to foreclose the lien. The decree was for plaintiff.

There is no force in the first assignment of error, which complains of the court's refusal to admit declarations of Sam Cole to a third party to the effect that he had paid off certain of the notes.

The third and fourth assignments are also not well taken, because the testimony admitted, and now complained of, was, in effect, admissions by Sam Cole that the notes had not been paid.

The fifth assignment complains of the refusal of the following charge: "You are instructed that if you believe from the evidence that the notes and obligations sued on were made and executed on the 23d day of February, 1894, and dated January 1, 1894, and you further believe from the evidence that February 23, 1894, was the date of making and consummation of the trade, then you are instructed that said notes and contracts are usurious contracts, and plaintiff, if entitled to recover for any amount in this suit, is not entitled to recover any interest on the said notes and obligations herein sued on; and you are instructed to apply all payments and credits on the notes to the payment of principal of said notes and obligations, and find what balance, if any, of the principal is due, and for attorney's fees of 10 per cent. on any such sum you may find due." The charge was correct as matter of law, but was not warranted by the testimony. The only testimony that can be claimed to relate to the question of usury was what appeared from the face of the papers, viz. that the deed and deed of trust were dated February 23, 1894, and the notes January 1, 1894, from which date they bore interest. The simple fact that a note bears interest from a time anterior to its date does not make out a case of usury. *Rutherford v. Smith*, 28 Tex. 323. For aught that appears, it may be the trade was made January 1, 1894, and the execution of the instruments for some reason delayed until February 23d. The presumption, when the

transaction is capable of that solution, is that it was lawful. It devolved on defendants to prove the contrary by facts or circumstances. *Andrews v. Hart*, 17 Wis. 297. Facts throwing light on the entire transaction might have developed usury, but no such testimony was offered.

The sixth assignment is that the court improperly refused to instruct the jury that if they believed from the evidence that Sam Cole died leaving a will, and owed debts other than the one sued on herein, and owned property other than the property in controversy at the time of his death, and that four years have not elapsed since his death, to find for defendants. There was some testimony of a will, but none appears to have been filed for probate. The land upon which a foreclosure was sought was the homestead. Defendants were the widow and children of deceased. It appears to us that *Solomon v. Skinner*, 82 Tex. 345, 18 S. W. 693, decides against this assignment.

The seventh, eighth, and ninth assignments complain of the verdict, and they are found not to be tenable.

The second assignment is as follows: "The court erred in sustaining plaintiff's objection to the testimony of Frances Cole, by deposition, about seeing John Keller, a witness for plaintiff, get certain papers from her husband, where husband told him they were, and about making the will, and about telling her daughter Clara to get the papers, and about said Keller taking said papers off with him and her never having seen them any more; which testimony was substantially as follows: 'John Keller was at our house just a few days before my husband, Sam Cole, died, at the time the will was written. John Keller was talking to my husband about some papers, and my husband told my daughter Clara to get that box down that had his papers in it, and hand it to Mr. John Keller; and she did it. Keller looked over the papers, and took out a paper, looked at it, and my husband asked him if it was all right. Keller said he would take it over to the court house at Dallas, and see if it was. He then put the paper in his pocket, and carried it off, and he has never given me the paper back. This was just a few days before my husband, Sam Cole, died. I have never seen the paper since,'—as is shown by bill of exceptions No. 2." Some of this testimony was improper, to wit, the conversation between Cole and Keller. *Parks v. Caudle*, 58 Tex. 217. Defendants did not offer that which may have been admissible separate from that which was improper, and the court was not in error, under these circumstances, in excluding it as a whole. It would seem that defendants wanted it all introduced or none. Besides, defendants Clara Cole and Ransom Cole testified fully as to so much of the transaction as related to Keller looking over the papers of her father, and taking off papers with him; in

fact, so much of the testimony sought to be given by Frances Cole as was admissible was detailed by her witnesses; and doubtless Frances Cole would have been allowed to testify to the same, had not her testimony, as offered, been mixed with improper evidence. This seems, from the bill of exceptions, to have been the reason the testimony was excluded. The judgment is affirmed.

HOLMES v. THOMASON et al.¹

(Court of Civil Appeals of Texas. Feb. 27, 1901.)

APPEAL—EXCEPTIONS—INSURANCE—DELIVERY OF POLICY.

1. Exceptions not shown from the record to have been presented to and ruled upon by the trial court will not be considered on appeal.

2. A delivery of a policy to the broker or agent appointed by the insured to procure it is a delivery to the latter.

3. Where insured applied to an insurance broker to procure a policy as his agent, and such broker agreed to procure such policy, and did so, and paid the premium thereon, he can recover the same from the insured.

4. Where insured did not apply to a broker to obtain a policy for him, or the broker never agreed so to do, he cannot recover for premium paid by him on the policy procured.

Appeal from Hunt county court; R. D. Thompson, Judge.

Action by Bishop Holmes against Thomason Bros. From a judgment for defendants, plaintiff appeals. Reversed.

H. Carpenter, for appellant.

NEILL, J. This suit was brought by the appellant in the justice court against the appellees to recover \$90, the premium on an insurance policy, alleged to have been paid by appellant for appellees on a fire insurance policy on their property, procured by the appellant for the appellees upon their written application therefor to appellant as their broker and agent. On appeal to the county court the appellant amended his pleadings by adding an item of five dollars alleged paid by him as a policy fee in procuring the alleged insurance. The trial of the case then resulted in a verdict and judgment in favor of the defendants, from which this appeal is prosecuted.

There are a number of assignments complaining of the rulings of the court upon exceptions taken by appellant to appellees' pleadings which cannot be considered, because it does not appear from the record that such exceptions were presented to and ruled upon by the court. The other assignments are directed to the charge of the court, and to its action in refusing certain special charges requested by appellant's counsel, and to the sufficiency of the evidence to support the verdict. It is useless to consider these assignments separately. It is sufficient to say that the court's charge

¹ Rehearing denied March 27, 1901.

submitted to the jury and required their findings in favor of appellant upon several irrelevant and impertinent issues before they could return a verdict in his favor. The special charges asked by appellant's counsel and refused by the court, while unnecessarily prolix, seek to strip the case of the impertinent issues presented in the main charge, and to have the substantial and essential issues, with the law arising from them, submitted to the jury. If the appellees, in the manner and form alleged by appellant, applied to him, as an insurance broker, to procure an insurance policy upon their property, and he, as their agent or broker, agreed with them and undertook to procure such policy as they applied for; and if, in pursuance of such employment and agreement, he procured for them such policy of insurance, and in its procurement paid the company issuing the same \$90 as the premium therefor, and the further sum of \$5 as a policy fee; and if said sums paid as the premium and policy fee were reasonable,—then he is entitled to recover from appellees the money sued for. If, on the other hand, the appellees never applied to appellant to procure an insurance policy upon their property, or, if they did make such application, he never agreed with them to undertake to procure it, then, in either event, he is not entitled to recover, even though the evidence should show that he procured a policy of insurance on their property, and paid the premium and policy fee therefor. The delivery of the policy to appellant, if he was appellees' broker or agent to procure it, would be a delivery to them. The issues of fact, and the law upon them, are as above stated. They should, in the manner indicated, have been submitted to the jury, and the jury not have been required to pass upon matters foreign to the issues in the case. The judgment is reversed, and the cause remanded.

MASTERSON v. MANSFIELD et al.¹
(Court of Civil Appeals of Texas. Feb. 7, 1901.)

PARTNERSHIP—BORROWING MONEY—IMPLIED POWER—REAL-ESTATE PARTNERSHIP—EVIDENCE—BILLS AND NOTES—PURCHASER—NOTICE—BONA FIDES—SUBMISSION TO JURY—BANKING PARTNERSHIP—APPEAL—FINDINGS—SETTING OUT EVIDENCE—NECESSITY.

1. Where a firm was engaged in banking under one name and in the real-estate business under another name, notes for borrowed money, given by one partner in the name of the real-estate firm without express authority, were not valid, because as a partner in the banking business he would have implied power to borrow money in the firm name unless he would have such implied power under the real-estate partnership.

2. A real-estate firm, consisting of three persons, did no business after the withdrawal of one of the partners, and the evidence was conflicting as to whether a partnership existed between the remaining members after the withdrawal, but strongly supported a contention

that they proceeded to wind up the affairs of the old firm. Thereafter one of the partners gave notes in the firm name, payable to their order, and indorsed them to another to procure money for the firm, and the indorser afterwards negotiated them to plaintiff. The firm dissolved on June 22d following, and notice thereof was published. The money procured was never used for the benefit of the firm, and the other partner was not informed of the making of the notes until long afterwards. *Held*, in an action against the firm on the notes, that the evidence was sufficient to support a finding that the partner making the notes had no implied power to bind the firm thereby.

3. The person furnishing the money on the notes was a lawyer living in a town 30 miles from the place of business of the partnership, connected therewith by telegraph, telephone, and railroad. The notice of dissolution was published in a paper in the town in which he resided, and a few days thereafter the partner making the notes sued the other for damages in the district court of the county in which such attorney resided. He knew that the person negotiating the notes was a mere go-between, and that they were coming direct from the makers. He did not inform the other partner that he had the notes until 14 months after their date. *Held*, in an action on the notes, that the evidence authorized the submission to the jury of the question of notice, purchase in good faith, and as to the date of the purchase.

On Rehearing.

1. Where the articles of a banking firm provided that all business of the bank should be conducted under the firm name of the "Bank of L.," the facts that checks and notes were headed "Bank of L.," with the names of the partnership following, and were signed either "Bank of L.," or with the partnership name, or by one or the other of the owners as cashier or assistant cashier, and that there was an account with another bank in the name of the partners, are not inconsistent with a finding that all the business of the bank was done in the firm name of the "Bank of L."

2. Since, on a writ of error to the supreme court, the record goes up, and the finding of the court of appeals on a question of fact will not be accepted as final, a finding by such court that there is no evidence on an issue without setting out the testimony is not prejudicial to a party's rights, and the evidence on which such finding is based need not be set out as a part of the finding by the court of civil appeals.

Appeal from district court, Harris county: William H. Willson, Judge.

Action by H. Masterson against H. P. Mansfield, W. B. Root, and another. From a judgment against all of the defendants except Root, plaintiff appeals. Affirmed.

H. & A. R. Masterson and Love & McCord, for appellant. E. P. Hamblen, for appellees.

GILL, J. Appellant, H. Masterson, sued H. P. Mansfield and W. B. Root as partners and makers of two promissory notes payable to their own order, and indorsed by them and one J. L. Hudson to the appellant. The appellee W. B. Root filed a separate answer, in which he denied the execution of the notes sued on, and denied the partnership as alleged by the plaintiff, and also denied the authority of Mansfield to bind him or the alleged partnership by the execution of the notes. A trial by jury resulted in a

¹ Writ of error denied by supreme court.

verdict and judgment in favor of plaintiff against defendants Mansfield and Hudson for the amount sued for, but that plaintiff take nothing against the defendant W. B. Root. The plaintiff alone has appealed.

The facts about which there is no dispute are, briefly, these: In 1898, Kuehner, Mansfield, and Neese were operating a bank at Laporte, Tex., under the firm name of the "Bank of Laporte." They also engaged in the real-estate business under the firm name of the "South Texas Land Company." In February, 1898, W. B. Root bought the interest of Kuehner both in the bank and real-estate business, and thereafter, on May 7, 1898, Neese withdrew from both enterprises. Neither the bank nor the real-estate business had prospered, and at the date of the withdrawal of Neese the bank was in difficulties on account of the demands of depositors. After Neese's withdrawal, Mansfield and Root, after some difficulty, borrowed from T. W. House the sums of \$500 and \$503.65 upon notes signed "Bank of Laporte, Mansfield & W. B. Root." No other sums were borrowed by the firm in aid of the bank. Mansfield did not put in his pro rata in the bank while it was owned by Mansfield, Neese, and Root, so the latter induced Mansfield to go to Ft. Worth, and borrow money on his own responsibility, to make his deficit good. Mansfield went to Ft. Worth about the — day of June, 1898, and succeeded in borrowing \$2,500 by pledging collateral belonging to his wife. This relieved the necessities of the bank, and enabled them to meet the demands of depositors. The deposits had never averaged more than \$2,000, and in all its history it made only two small loans to customers. The only money ever borrowed on the bank's account was that procured from T. W. House on the two notes above mentioned. All the business of the bank was done in the name of the "Bank of Laporte," Mansfield being cashier, and Root occasionally acting as assistant cashier. The real-estate concern did no business after the withdrawal of Neese, but its business had theretofore been done sometimes under its own firm name and sometimes in the names of the partners composing the firm. The testimony of Mansfield and that of Root is conflicting as to whether any partnership actually existed between them after the withdrawal of Neese, but the circumstances strongly support the statement of Root that they proceeded at once to wind up the affairs of the old partnership, and that their association thereafter had no other object. The notes sued on were drawn by Mansfield, and were dated the 13th day of June, 1898. Mansfield signed them "Mansfield and Root," and they were payable to the order of "Mansfield & Root." They were each for the sum of \$2,500, due, respectively, 12 and 18 months after date, bore 8 per cent. interest, and contained the usual 10 per cent. attorney's fee clause. Mansfield wrote

across the back of these notes, "Mansfield and Root," and turned them over to one J. L. Hudson, to procure money thereon. Hudson, who officed in the same building as Masterson, negotiated them to Masterson for \$4,000; \$2,500 being paid in cash, and Masterson giving his duebill, without interest, due in 30 days, for \$1,500. Masterson had Hudson to indorse the notes also. According to the testimony of Masterson and Hudson, the duebills were paid at the end of the 30 days. According to Mansfield, they were paid in a week or two from the negotiation of the notes. Certain statements in the ex parte deposition of Masterson, and other facts and circumstances appearing in evidence, were sufficient to require the court to submit the issue as to whether the notes were made and negotiated subsequent to the publication of notice of dissolution of the partnership, which occurred on June 22, 1898. Mansfield had no express authority from Root to issue the notes, and Mansfield borrowed the money for his own purposes, and not for the benefit either of the banking partnership or the real-estate concern. According to his own testimony, he held the money to protect himself against his individual note made at Ft. Worth, and none of the money borrowed ever went to the use of either partnerships. He did not advise Root of his acts, nor did Masterson advise Root of the existence of the notes, or of the fact that he held them, until 14 months after their date, and this though there was published notice of the dissolution of the partnership on June 22, 1898, in the Houston Post and other papers, and though Mansfield sued Root for \$30,000 damages on account of the dissolution of the partnership, about the 1st of July of that year, in the district court of Harris county. Masterson resided in Houston, Harris county, and was a lawyer. Laporte is within 30 miles of Houston, and is connected with it by telephone, telegraph, and rail. Masterson loaned the money on the notes without inquiry of Root, and without consulting any person but Hudson and Mansfield. The latter was insolvent at the time, and Root was amply solvent. Masterson knew that he was acquiring the notes direct from Mansfield, and that Hudson was not the owner, but a go-between. The controverted questions are: (1) Was the partnership in whose name the notes were issued of such a character as to clothe the partner, Mansfield, with the implied power to borrow money in the partnership name? (2) Were the notes acquired before the dissolution of the partnership and the publication of notice to that effect? (3) Did Masterson loan the money on the notes in good faith, acquiring them in the usual course of trade, and without notice of Mansfield's fraud or want of authority to issue them?

The facts of this case present some extraordinary features, but the rights of the par-

ties must be measured by the rules ordinarily applicable to partnerships, and which control the power of a partner to borrow money and bind the firm. The assignment of error first urged in appellant's brief complains of that part of the charge of the trial court which instructs the jury that there is no evidence of Mansfield's express authority to issue the notes sued on, and directing them to address their investigation to the question of implied authority resting upon the nature of the partnership for the benefit of which the notes purport to have been issued. In this, we think, the court committed no error. It is insisted that certain portions of Mansfield's evidence present the issue, but, after a careful examination of his entire testimony, we are of opinion that, considered in its entirety, it negatives the idea that he had express authority. The matters to which he refers as clothing him with express authority culminated in the Ft. Worth loan, and that loan relieved the exigency which rendered it necessary, and his testimony as to facts and circumstances occurring after his return from Ft. Worth could, if it were true, and not nullified by other statements of his, at most present the issue of implied power or estoppel. The financial statement of the affairs of the firm was made in view of the proposed Galveston or Houston loans, and had served its purpose when the Ft. Worth loan was consummated.

The tenth assignment complains of a portion of the court's charge, which it quotes, as follows: "The nature of the business must have been such as made the frequent resort to borrowing a necessity for the advantageous prosecution of even a prosperous business, and which contemplated the periodical borrowing of money, regardless of any necessity for borrowing." The assignment does not accurately quote the portion of the charge assailed. The exact language used is here given: "For an implied power to exist in a partner to bind the firm by partnership notes, the business must be of a character which makes frequent resort to borrowing a necessity not existing by reason of embarrassment or the happening of some fortuitous event, but for the advantageous prosecution of even a prosperous business." The objection urged to this portion of the charge is that it erroneously defines the nature of a partnership from which the right of a partner to borrow money and bind the firm may be implied. In *Randall v. Merideth*, 76 Tex. 669, 13 S. W. 576, Justice Stayton quotes with approval the following from *Kimbro v. Bullitt*, 22 How. 268, 16 L. Ed. 317: "Whenever the business, according to the usual mode of conducting it, imports in its nature the necessity of buying and selling, the firm is then properly regarded as a trading partnership, and is invested with all the powers and subject to all the obligations of that relation." Quoting from *Bates' Law on Partnership* (section 327), he continues: "If the

partnership contemplates the periodical, or continuous, or frequent purchasing, not as incidental to an occupation, but for the purpose of selling again the thing purchased either in its original or manufactured state, it is a trading partnership; otherwise not." Justice Stayton adds: "If there are those not embraced within this definition in which each partner is clothed with power to borrow money, they may be recognized by the character of the business pursued, which makes frequent resort to borrowing a necessity not existing by reason of embarrassment, or on account of some fortuitous event, but for the advantageous prosecution of even a prosperous business." The implied power is dependent, not on whether the act be necessary, but on whether it be necessary to carry on the business in the usual way. *Bates, Partn.* § 320. In giving the charge complained of, the court evidently sought to apply the rules of an ordinary trading partnership to a firm engaged in the real-estate or banking business, in order that the jury might determine whether the firm in question came within the definition. Neither banking nor buying and selling real estate on commission comes strictly within the definition of a trading partnership, and yet either may be so conducted as to clothe the partners with all the implied powers of members of a trading partnership. In the case of *Freeman v. Carpenter*, 17 Wis. 126, the court held that under the facts of that case the business of the defendant firm, consisting of a land agency and banking and money brokerage, carried with it the implied power of each partner to borrow money and bind the firm; but the court recognized the general rule for ascertaining what were trading partnerships, and used the following language: "All the authorities say that, if the act of borrowing is necessary for the successful carrying on of the business of the firm, then the law implies an authority to do it. * * * If the note was executed for anything for which the firm had use, or which, from the nature of the company, was necessary and usual to the successful prosecution of its operations, then it becomes a charge against the firm." The portion of the charge quoted in the assignment does not even contain an entire sentence, but is part of a lengthy paragraph, and should not be construed as standing alone. The entire paragraph 4 is lengthy, and need not be set out here. Considered in its entirety, it furnished the jury with clear and sound rules for their control in determining the nature of the partnership and the existence of the implied power to borrow. The assignment is without merit.

Appellant insists that the firm of Mansfield & Root were engaged in the banking business, and that the nature of the banking business is such as to carry with it necessarily the implied power of the partners to borrow money. We are not required to decide the question. The articles of the co-

partnership, of which W. B. Root and Mansfield were the successors, declared, among other things, that the banking partnership should be carried on under the firm name of the "Bank of Laporte," and the undisputed evidence is that the business of the banking partnership was invariably done under that name. In executing these notes, Mansfield did not use the name of the banking firm, nor the names of the individual members of the banking firm, but used, both in signing and indorsing them, the name "Mansfield & Root," a name which had been sometimes used by the partners in the transaction of the business of the real-estate firm, but never in the business of the bank. It seems to be fairly well settled that, in order for a partner to bind his firm by the issuance of commercial paper, in the absence of express authority, or some other fact fixing the firm's liability, the paper must be executed in the firm name, or else in a name commonly used by the firm in transacting the firm's business. This rule is recognized in *Freeman v. Carpenter*, supra, and is laid down by Tiedeman in his work on Commercial Paper (sections 104, 105). Here Masterson, if acting in good faith, dealt with a partnership, whose firm name, by the purport of the paper, was "Mansfield & Root." If any such firm existed at that time, it was a real-estate firm, and not a banking firm. Masterson, in lending the money upon the notes in question, was chargeable with notice of the nature of the business in which the firm was engaged; and, the note not being in fact executed for partnership purposes, but in fraud of the other partner, his right to recover in any event must depend on whether the nature of the business in which the firm of Mansfield & Root were engaged clothed each partner with the implied power to borrow money on the firm's name. The test is not in what enterprises the individuals H. P. Mansfield and W. B. Root were embarked, but in what was the firm in whose name the notes were given engaged. According to appellant's contention, the jury, by their verdict, clearly indicated that they decided in favor of appellee Root upon the issue alone of implied power, that part of their verdict being in response to paragraph 4 in the latter part of the court's charge, and in which that issue was clearly and correctly submitted. We are of opinion that the facts are sufficient to sustain their finding that no such power existed. If it be true, as contended by appellant, that the jury found in favor of W. B. Root alone on the issue of want of implied power, then the complaints against other portions of the charge bearing on the question of notice, purchase in good faith, and as to the date of the purchase by Masterson become immaterial; but we are of opinion that the assignments complaining that there was no evidence authorizing the submission of those issues are without merit. There were facts and circumstances in evidence which

required their submission, and it would have been error on the part of the trial court to refuse to do so.

We deem it unnecessary to notice at length any of the other assignments. They present no reversible error, and the judgment will be affirmed. Affirmed.

On Motion for Rehearing and to Correct Findings of Fact.

(March 13, 1901.)

We have carefully considered the motion for rehearing, and in connection therewith have again examined the record. We have found no reason to change our opinion as to the proper disposition of the appeal. Appellant complains, among other things, of our finding that it was shown without dispute that all the business of the bank was done in the firm name of the Bank of Laporte, and directs our attention to the testimony of the witnesses Heyne and Moody, and to the checks, notes, etc., in evidence. The testimony of both Moody and Heyne sustains the finding. The checks, notes, etc., are headed "Bank of Laporte. Mansfield & Root," and are signed either "Bank of Laporte, Mansfield & Root," or by one or the other of the owners as cashier or assistant cashier. The articles of co-partnership provide that the business of the bank be conducted under the firm name of the "Bank of Laporte." We have simply held that the addition of the names of the owners of the bank did not change the legal effect of the proof. Nor does the existence of an account in the name of Mansfield & Root on the books of the T. W. House Bank change the result. We have found the facts as we construe the record. Whether there is any evidence on an issue is a question of law, and our finding that there is none without setting out the testimony itself cannot prejudice appellant's rights on writ of error to the supreme court. The same may be said of our other findings of which appellant complains. The record goes up on writ of error, and the supreme court, in disposing of the question, will not accept our finding, but will inspect the record. Were it otherwise, we would willingly and patiently set out the evidence upon which our findings of fact are based. It is well known, however, that this is neither usual nor necessary. We are of opinion that the motion should be overruled, and it is so ordered. Overruled.

MURRAY GINNING SYSTEM CO. et al. v. EXCHANGE NAT. BANK OF DENTON.

(Court of Civil Appeals of Texas. Feb. 23, 1901.)

CONTRACT—CONSTRUCTION—PARTNERSHIP—AGENCY—ESTOPPEL AGAINST CORPORATION.

1. A party agreed in writing with a ginning company to take charge of a gin plant belonging to it, and run it through the cotton season

of 1895, the company to furnish him with everything necessary to fit it up, and to pay him \$50 per month until ginning began, and \$60 per month throughout the entire season, together with one-tenth of the net proceeds. The contract otherwise provided that it was not to prevent a sale of the property being made. *Held*, that it did not make him a partner, but only an agent of the company in the business.

2. The principle of estoppel cannot be invoked against a private corporation in favor of a bank seeking to hold it liable for having held a third party out to it as its partner, since the bank was bound to know that such a corporation could not form a partnership.

Appeal from Denton county court; I. D. Ferguson, Judge.

Action for debt by the Exchange National Bank of Denton against the Murray Ginning System Company and another. From a judgment for plaintiff, defendants appeal. Reversed.

Wood & Hudson, for appellants. Ousley & Ragdale, for appellee.

STEPHENS, J. Unless the Murray Ginning System Company, a private corporation, can be said to have been liable to appellee bank for the amount of the overdrafts sued for as partner of W. F. Bachman, who obtained the money, the judgment must be reversed, since the charge of the court submitted the issue of partnership to the jury as a ground of recovery. The relation between them was established by the following written instrument: "This agreement, entered into by the said Murray Ginning System Company, the party of the first part, and W. F. Bachman, party of the second part, witnesseth: The said W. F. Bachman, party of the second part, is to go at once to the town of Denton, Denton county, Texas, there to take charge of a gin plant belonging to the party of the first part, to do all necessary repairs on the same, to get it in order for ginning the cotton crop of A. D. 1895, to run said gin through the entire season of 1895. The Murray Ginning System Company, party of the first part, agree to furnish said W. F. Bachman everything necessary to fit up said gin in good order, all tools and extra labor necessary to perform said work, and to pay him the said sum of \$50.00 per month until ginning begins, and \$60.00 per month throughout the entire season of 1895, together with one-tenth of the net proceeds of said gin. It is understood that there is nothing in this contract to prevent sale of the above property being made. [Signed] Murray Ginning System Company. W. F. Bachman." This contract did not make Bachman a partner, but only made him the agent of the Murray Ginning System Company, and the court should have so instructed the jury. *Buzard v. Bank*, 67 Tex. 83, 2 S. W. 54. While there was conflict between Bachman, testifying for the bank, and Burr, testifying for the defendant company, as to the authority of Bachman to enlarge the scope of the business so as to include the purchase and sale of cot-

ton, and as to his authority to borrow money from the bank for any purpose, there was none as to the fact that the written contract above quoted established the relation of Bachman to the ginning company, for Bachman himself testified, "This was the contract I operated under all during the season." They differed only as to the construction to be placed upon it, and as to what was done under it.

The further contention, which was also submitted to the jury, that the ginning company, if not liable as partner of Bachman, was yet liable for holding him out as its partner, is equally untenable. The principle invoked is one of estoppel. We need only add that the bank was bound to know that a private corporation could not form such a partnership. *Tram Co. v. Bancroft* (Tex. Civ. App.) 40 S. W. 837; *White v. Water Co.* (Tex. Civ. App.) 45 S. W. 207, and cases cited.

Because the court erred in submitting these two issues to the jury as grounds of recovery, the judgment is reversed, and the cause remanded for a new trial upon the other grounds of liability alleged.

HENKE et al. v. STACY.

(Court of Civil Appeals of Texas. Feb. 14, 1900.)

MORTGAGES—TRUST DEED—DESCRIPTION INSERTED AFTER ACKNOWLEDGMENT—RECORDING AND REGISTRATION—EFFECT.

A trust deed was given by L. to the defendants, in which the description of the property was not inserted until after it had been signed, sealed, and acknowledged by L. The deed was properly recorded, and thereafter plaintiff, without examining the record acquired title to the property by the purchase of a judgment in favor of L., rendered in an action to determine L.'s title. Defendants, without any knowledge of plaintiff's title, foreclosed their trust deed after L.'s decease, and became purchasers at the foreclosure sale. *Held*, in trespass to try title to the land, that the insertion of the description of the property in the deed after its acknowledgment did not render the recording thereof inoperative, third parties being precluded from questioning the notarial certificate; and hence defendants, by the foreclosure proceedings of their prior lien, acquired a perfect title to the property.

Error from district court, Liberty county; L. B. Hightower, Judge.

Action by William Stacy against H. Henke and another. From a judgment in favor of plaintiff, defendants bring error. Reversed.

A. C. Bullitt, for plaintiffs in error. Martin & Douglass and M. D. Rayburn, for defendant in error.

GILL, J. This suit was brought by defendant in error in the form of an action of trespass to try title to recover of plaintiffs in error 492 acres of land situated in Liberty county, Tex. The trial below resulted in a judgment in favor of defendant in error, and that judgment is here assailed under appropriate assignments of error.

One S. Liken executed to plaintiffs in error

a deed of trust upon the land in controversy and other lands to secure the payment of a debt due by him to them. The attorney who prepared the deed of trust did not have at hand an accurate description of the Woodbury tract, which comprised the land in question, so he forwarded same through plaintiffs in error to Liken, with the request that he (Liken) should insert the proper description, sign and acknowledge it, and forward to Henke and Pillot. Liken signed and acknowledged the paper before a notary public, but did not insert the description of the Woodbury tract until after the instrument had been acknowledged and duly certified, and had passed from the notary's hands back to his. When the additional description had been inserted by Liken, he himself forwarded the paper by mail to Henke and Pillot, and they, having no knowledge or reason to believe that the description of the Woodbury tract had not been inserted prior to acknowledgment, accepted the deed of trust, and placed it promptly of record in Liberty county on the 9th day of April, 1895. On January 30, 1895, Lucian Minor, as guardian of the Opperman heirs, sued Liken for the land involved in this suit, asserting the superior title thereto to be in said heirs. Liken being advised by his attorney that the title asserted by the Opperman heirs was superior to his, decided to end the litigation by payment to them of an agreed sum of money. The amount agreed on was \$1,400. Not being possessed of this sum, he represented the situation to Stacy, the defendant in error, and induced him to pay the \$1,400, and take a deed to himself from the Opperman heirs. These heirs were minors, and the guardianship of their estates was pending in Galveston county. To avoid the delay and expense involved in procuring a deed from the guardian, it was agreed between Stacy, Liken, and all concerned that the money should be paid, and judgment rendered in favor of and in the name of Liken, but that Stacy should be the owner of the judgment and the land because of his payment of the money by which it should be procured. This was accordingly done. Stacy had no actual notice of the Henke and Pillot deed of trust, though at the date of the transaction the deed of trust had been placed of record. Stacy, relying upon the assurance of Liken that the land was unincumbered, did not examine the records. Henke and Pillot were not parties to the Opperman suit, and had no knowledge of these transactions until after they had foreclosed the deed of trust as hereinafter shown. Liken died in November, 1895, and one B. F. Cameron was appointed administrator of his estate. Upon application of Henke and Pillot the land was, by the probate court, ordered sold to satisfy their lien, and they became the purchasers at administrator's sale. This sale occurred on April 16, 1897, and the same was duly approved, and deed made to them by the administrator. On the date of the execution

of the last-named deed this suit was instituted by Stacy, who, to sustain his allegation of title in himself, relies alone upon the transaction by which the judgment was procured in the case of the Opperman minors against Liken, and his want of notice, either actual or constructive, of the Henke and Pillot deed of trust. Stacy contends that by reason of the fact that the description of the land in controversy was not inserted in the deed of trust until after its acknowledgment before a notary, its record was not constructive notice of its contents as affecting that land. Henke and Pillot contend that, as the description of the land in controversy was inserted before it left the hands of Liken, the maker, and in such a way as to bind him, and as they were without knowledge of the time and manner of its insertion, and without fault in the premises, the deed of trust and its record were in all respects valid and effective as constructive notice of its contents. Thus is presented the question upon which the rights of the respective parties rest. The trial court held that, if the description was inserted after acknowledgment, its record was not constructive notice, and this holding is assigned as error.

It seems to be conceded that the transaction by which the Opperman judgment was procured, and the agreement that it should inure to the benefit of Stacy, placed the equitable title to the land in him. Inasmuch as that judgment effectually vested in Stacy such title as the Opperman heirs had, the above concession is correct, at least to that extent; and, as Liken induced Stacy to purchase the Opperman title, representing that it was superior to his, Liken, in a contest between him and Stacy, would, perhaps, have been estopped to assert that his title was in fact superior to the one purchased by Stacy. But no evidence was adduced tending to establish the strength of the Opperman title, so this appeal must be disposed of on the theory that the title mortgaged to Henke and Pillot was paramount. The apparent title was, therefore, in the estate of Liken at the date of the administrator's sale for the satisfaction of the deed of trust; and, if the record of the deed of trust was constructive notice, Henke and Pillot, having no notice of Stacy's claim at the date of foreclosure, acquired a perfect title through that proceeding, against which the secret interest of Stacy cannot now be permitted to prevail. Did the record of the deed of trust in question constitute constructive notice to Stacy? When the deed of trust was delivered to Henke and Pillot, it contained the description, was in all respects regular, and ready for registration. It was presented to the county clerk in this condition, and he did no more than his duty in placing it of record. Had Stacy inspected the record, it would have advised him of the existence of the lien, and he would have discovered nothing upon the face of the record, nor, indeed, upon the face of the original in-

strument itself, to excite suspicion as to its validity. It was, in fact, valid, and binding upon Liken, who executed it. In determining the question at issue it is proper to treat the deed of trust as covering only the Woodbury tract, and as containing no description of any land at the time it was acknowledged. We have been cited to but one authority bearing exactly upon the question, and that is from another state. In discussing registry as proof, Mr. Dembitz, in his work on Land Titles, uses the following language: "To make registry proof, the following circumstances must concur: The instrument must be one which under the law is fit to be recorded. Second. It must bear on its face evidence that it was admitted to record upon a proper certificate of acknowledgment. * * * Third. It must have been entered * * * in the proper county." Measured by this rule,—and it is clearly sound,—a certified copy of the record, the instrument in question being lost, would have been proof of its execution as against the grantor, and he would not be permitted to show, in order to defeat such proof, that the deed of trust did not contain the description when acknowledged. It is clear, therefore, that both the instrument and the record of it were valid as between the parties. To declare a different rule would impose upon purchasers the duty to look not alone to the deed and certificate of the officer, but to interrogate the notary himself, in whatever land the notarial act may have been done, in order to ascertain whether the deed had undergone some material change since its acknowledgment and authentication. Even should this precaution be taken, the notary's assurance that the deed had undergone no change would be extraofficial, and he might not answer truthfully. If third parties were permitted to question the truth of the certificate, with how much greater ease might they overthrow his oral representation? The statute requiring the notary to enter the facts and a description of the lands affected in a record kept for that purpose are directory only, and his failure to perform such duty would invalidate neither the deed nor the certificate of acknowledgment. The line of cases holding that the acknowledgment by a married woman of a deed in which a blank was left for the subsequent insertion of the name of the grantee is void as to her, base the holding upon a different principle, and mainly upon the rule that a feme covert cannot authorize another to perfect her deed. See 1 Dembitz, Land Tit. p. 338, and Drury v. Foster, 2 Wall. 24, 17 L. Ed. 780. In the case last cited, however, it is said: "Although it was at one time doubted whether parol authority was adequate to authorize an addition or alteration to a sealed instrument, the better opinion at this day is that the power is sufficient." In Cribben v. Deal, 21 Or. 211, 27 Pac. 1046, a firm made a deed of general assignment, and duly acknowledged same, leaving a blank for the name of the assignee

to be filled by a third party to whom the instrument was delivered. The blank was filled, and the instrument duly placed of record. The deed was assailed by a subsequent attaching creditor, but the court, after an exhaustive review of the authorities, upheld the deed. In the authorities cited in that opinion the validity of the instruments themselves were involved, and the force of their registration was not directly up for decision; but it seems to us that the principle is much the same. Many of the decisions cited in Cribben v. Deal, supra, were rendered in states where the old common-law rule as to sealed instruments still prevails; hence the filling of the blank must have been held to relate back to the sealing of the instrument. The doctrine of the power to authorize another to fill blanks in a deed after signature and acknowledgment has been carried even further in this state. Threadgill v. Butler, 60 Tex. 599; Ragsdale v. Robinson, 48 Tex. 379; Runge v. Schleicher (Tex. Civ. App.) 21 S. W. 423.

Another view of the question involves the right of either a party or a stranger to the instrument to question the truth of the notarial certificate, when, upon its face, it is in all respects sufficient and regular. In Hartley v. Frosh, 6 Tex. 208, Chief Justice Hemphill said: "It seems to me on principle and authority that the certificate [of the notary] must be conclusive of the facts therein stated, unless fraud or imposition is alleged." In Peterson v. Lowry, 48 Tex. 408, Chief Justice Roberts said: "Nor are we prepared to hold that a certificate regular on its face, upon which an instrument has been recorded, could be set aside as a nullity by proof of extraneous facts, so as to prevent the record of the instrument from being notice to subsequent purchasers. No authority has been cited or found to that effect." In Pierce v. Fort, 60 Tex. 469, it is held not to be the duty of the grantee to see to it that the notary does his duty in taking the acknowledgment of a married woman, his grantor. In Freiberg v. De Lamar (Tex. Civ. App.) 27 S. W. 151, Hartley v. Frosh, supra, is cited as establishing the rule that recitals in a notary's certificate are conclusive unless assailed for fraud. To the same effect are Davis v. Kennedy, 58 Tex. 516, and Webb v. Burney, 70 Tex. 323, 7 S. W. 841. It thus appears that in this state even a married woman cannot assail the acknowledgment, except for fraud; and that a vendor, acting in his own right, who delivers to an innocent vendee a deed purporting on its face to have been regularly executed and acknowledged, cannot thereafter question either its execution or acknowledgment, and that its record is good as against him. It has also been shown that the courts of this state have extended the doctrine permitting vendors to execute and acknowledge deeds with blanks to be thereafter filled. In the case of Insurance Co. v. Corey, 135 N. Y. 326, 31 N. E. 1095, the doctrine as to the binding force

of a deed prima facie valid and ready for registration, as affecting the grantor, is clearly announced, and it is declared with equal directness that the record of such an instrument will constitute constructive notice to the subsequent vendees of the grantor. In that case the acknowledgment was assailed for want of jurisdiction on the part of the notary. We therefore conclude that the trial court erred in holding that the insertion of the description subsequent to the acknowledgment rendered its record inoperative as constructive notice. The cases cited by appellee do not appear to be in conflict with the conclusion reached. Other assignments presenting minor questions require no extended notice at our hands. They are believed to present no error. For the error indicated, the judgment is reversed, and the cause remanded. Reversed and remanded.

PARLIN & ORENDORFF CO. v. COFFEY, Sheriff, et al.¹

(Court of Civil Appeals of Texas. Jan. 12, 1901.)

TRIAL OF RIGHT OF PROPERTY—BOND—RETURN OF PROPERTY—INSTRUCTIONS.

1. A claimant who seeks to discharge a judgment against him in a trial of right of property, by complying with his bond conditioned that he shall return the property in as good condition as he received it, and pay the reasonable value of the use thereof, as provided by Sayles' Civ. St. art. 5288, is not entitled to return the property in a damaged condition, though such damage is caused by reasonable wear and tear incidental to a careful use thereof.

2. Where the court, in its general charge, had properly submitted to the jury the issue whether the property when tendered back was in as good condition as he received it, there was no error in refusing a special charge to the same effect.

3. Where the issue was whether an unsuccessful claimant in a trial of right of property had offered to return the engine in as good condition as he received it, as required by his bond, and the pleadings and evidence showed that the engine was composed of a carriage, boiler, steam engine, etc., the fact that the court described the property as a steam engine, carriage, boiler, etc., did not render the instruction objectionable.

Error from district court, Collin county; J. E. Dillard, Judge.

Action by the Parlin & Orendorff Company against W. S. Coffey and another. From a judgment for defendants, plaintiff brings error. Affirmed.

McCormick & Spence, for plaintiff in error. G. R. Smith and Abernathy & Beverly, for defendants in error.

BOOKHOUT, J. The Parlin & Orendorff Company filed its petition in the district court of Collin in January, 1898, against W. S. Coffey, sheriff of that county, and B. F. Houston, alleging, in substance, that on November 4, 1897, said B. F. Houston recovered a judgment against petitioner in a claim-

ant's suit in which petitioner was claimant in the sum of \$700, the value of an engine, with 10 per cent. damages on said sum, and the judgment further found the value of the use of the engine while in the possession of the claimant to be \$300. A copy of the judgment was made a part of the petition. No objection was made in the pleading to the judgment or its form. The petition alleged that within 10 days after the judgment was rendered, and on the 18th day of November, 1897, the plaintiff tendered to said W. S. Coffey, sheriff, the property mentioned in said judgment (a traction engine) in as good condition as the same was in when plaintiff received it, and also tendered \$370, with interest thereon and costs, in the suit in which said judgment was rendered; that the tender was refused by said sheriff; that an execution had issued in said judgment, and had been levied by the sheriff, on certain of plaintiff's property, and he was about to sell same. Plaintiff prayed for an injunction pendente lite, to restrain said sale, and for a final judgment perpetuating same, and for costs and general relief. An injunction was ordered and issued. Defendant W. S. Coffey answered March 24, 1898, admitting all the allegations of the petition, except as to the condition of the property tendered; denying that the property when tendered was in as good condition as when received; adopting, on information and belief, the allegations of the answer of his co-defendant; alleging that he was not willing to receive the property unless his co-defendant would first authorize him to do so; and disclaiming any interest in the suit. Defendant Houston answered also, on March 24, 1898, admitting the allegations of the petition, except as to the condition of the property when tendered; pointing out defects alleged to have existed therein when tendered; also alleging that the money tendered had been conditionally tendered on the machinery being also taken, and alleging that he or his attorney had notified plaintiff that the money tendered would be received as a credit; that he had instructed the sheriff not to receive the engine; that the injunction was sued out for delay; and asking for damages equal to 10 per cent. of his judgment. There was a verdict and judgment for defendant, from which plaintiff appealed.

Appellant's first assignment of error complains of the action of the court in refusing the following special charge requested by it: "You are instructed that, in determining the condition of the property when tendered to the sheriff, you will not consider reasonable wear and tear incident to the careful use of the property by claimant after execution of the claim bond, and before November 4, 1897, as deterioration in the value of the property." The court refused to give the above charge, and upon this phase of the case charged the jury as follows: "The jury are in-

¹ Writ of error denied by supreme court.

structed that if they believe from all the evidence before them that the steam engine, carriage, boiler, etc., was in as good condition when plaintiff tendered same to defendants as it was when plaintiff received the same, then it will be the duty of the jury to find in favor of the plaintiff. On the other hand, if the jury should believe from the evidence that said property was not in as good condition as it was when plaintiff received it, your verdict should be for defendants on this, the main issue in the case."

The contention of the appellant is that if the property, when tendered back, was in as good condition, reasonable wear and tear thereof resulting from careful use of the same excepted, then it meets the requirements of the statute. The statute prescribes the conditions of a claimant's bond as follows: "That the party making such claim, in case he fails to establish his right to such property, shall return the same to the officer making the levy, or his successor, in as good condition as he received it, and shall also pay the reasonable value of the use, hire, increase and fruits thereof from the date of such bond, or in case it falls to so return said property and pay for the use of the same, he shall pay the plaintiff the value of said property, with legal interest thereon from the date of the bond, and shall also pay all damages and costs that may be awarded against him." There are two conditions set out in the bond. The claimant may discharge his obligation by the performance of either of these conditions. He may return the property to the officer making the levy, or his successor, in as good condition as he received it, and pay to the officer the reasonable value of the use of said property; or, if he fails to do this, then the statute requires him to pay the plaintiff the value of the property, with legal interest thereon from the date of said bond, and also all damages and costs that may be awarded against him. *Sayles' Civ. St. art. 5288*. His right to discharge the judgment by return of the property within 10 days, and upon paying the damages, and the value of the use of the property, and costs and damages, is an absolute right. *Willis v. Chowning* (Tex. Sup.) 40 S. W. 395. It is further held that the judgment should fix the value of the use of the property so as to enable the claimant, if he should wish to return the property in satisfaction of the judgment, to know what amount he is required to pay for its use. *Publishing Co. v. Hitson*, 80 Tex. 233, 14 S. W. 842, 16 S. W. 551. The statute, however, requires that that property, when tendered back, shall be in as good condition as when the claimant received it. This is the condition upon which the claimant is permitted to satisfy the judgment by return of the property. The condition is absolute. It does not admit of the construction sought to be placed upon it by the plaintiff in error. We conclude that the court did not err in refusing the charge re-

quested, and appellant's first assignment of error is overruled.

Appellant's second assignment of error complains of the refusal by the court of the following special charge requested by it: "In determining the relative condition at different times of the steam traction engine, consideration should be had of the machine as a whole. Such a machine consists of a number of parts, which, disconnected with each other, are property, but are not, until assembled and placed in proper relation to each other, an engine." There was no error in refusing the above charge. The court in its general charge had explicitly submitted to the jury the true issue in the case, i. e. whether the property when tendered back was in as good condition as when claimant received it. The requested charge was not called for by the evidence, and could only have served to confuse the jury.

There was no error in refusing special charge No. 3, requested by plaintiff in error, and made the ground of its third assignment of error. Hence we overrule the third assignment.

Appellant's fourth assignment of error reads: "The court erred in charging the jury concerning the condition of the steam engine, carriage, boiler, etc., because the only property claimed by the plaintiff, as shown by the claimant's bond and affidavit, was an engine, and the court, by including other articles in the charge, misled the jury, and imposed on plaintiff a liability greater than the law imposed, and a liability not supported by the pleadings or proof in the case." The claimant's affidavit and bond described the property as "one Geiser engine, No. 3.881, Engine Peerless." The petition in this suit describes the property as one engine. The answer speaks of the property as one engine, and sets up in detail the defects therein which it was claimed showed that the same was not in as good condition as when received by the claimant. It was alleged that the boiler had been cracked, band wheel was gone, fire box was sprung, flue sheet sprung, steam gauge bursted, driver broken, part of traction wheel broken, etc. No objection was made to the pleading on the ground that the property was not sufficiently described or that it was misdescribed. The evidence was admitted without objection, which went to show that the engine was composed of different parts, that it had a carriage, boiler, steam engine, etc. The fact that the court in charging the jury described the property as steam engine, carriage, boiler, etc., in view of the record, could not have misled the jury. The parties have treated the carriage, boiler, and steam engine as parts of the engine. We conclude that there is no merit in the fourth assignment, and the same is overruled. These remarks fairly dispose of appellant's fifth assignment of error, and the same is overruled. Finding no reversible error in the record, the judgment is affirmed.

FANT v. WRIGHT et al.

(Court of Civil Appeals of Texas. Feb. 18, 1901.)

MORTGAGES—FORECLOSURE—MORTGAGE DEBT—ASSUMPTION—AVERMENT—SUFFICIENCY—AGREEMENT TO PURCHASE MORTGAGED PROPERTY—LIABILITY FOR DEFICIENCY—OBJECTION TO TITLE—WAIVER—ACCEPTANCE OF DEED—FRAUD—REFUSAL TO CHARGE—PLEADINGS—ISSUES—CONFUSING INSTRUCTION—COMMENT ON EVIDENCE—PEREMPTORY INSTRUCTION—TITLE BY ADVERSE POSSESSION.

1. Where mortgaged property was sold subject to the mortgage debt, an allegation in the petition to foreclose that the mortgage had been assumed by defendant in a contract between the sole devisee of the mortgagor and defendant was a sufficient averment of the assumption, as against a general demurrer.

2. W. executed a mortgage, and after his death F. purchased the mortgaged property from defendant, who was W.'s sole devisee and the executrix of his will. F. assumed payment of the mortgage debt, and agreed to pay defendant \$2,500 for her equity. *Held*, that the contention that the assumption of the mortgage did not render F. liable for any deficiency of the mortgaged property to pay the mortgage debt, because defendant would not have been personally liable for such deficiency, cannot be sustained, since the \$2,500 due defendant, and any other assets of W.'s estate in her hands, would have been liable for the deficiency.

3. Where F. purchased property of defendant, and with knowledge that the deed was not signed by the children of defendant's husband by a former wife, did not object to it for insufficient signature, but repudiated it, after several months' negotiation, for other reasons, the objection that the deed was not properly signed was waived, and the purchaser was estopped from repudiating the purchase on that ground.

4. Defendant contracted to convey land to F. subject to a mortgage and taxes, and prior to the execution of the deed F. was informed that there were back taxes on the property other than those for the year 1895; and on foreclosure of the mortgage defendant filed a cross bill against F. for the contract price, and F. sought to repudiate the contract on the ground that he agreed only to pay the taxes for 1895. *Held*, that an instruction that if the jury should believe that the agents of the defendant represented to F., or to any one acting for him, that no other taxes were due and unpaid on the property, except those for the year 1895, and that such representations were false and were a material inducement to F. to sign the contract, and that neither F., nor any one authorized to act for him, knew at the time F. signed the contract of the existence of other taxes on the property, then they should find that neither the mortgagee nor defendant could recover against F., unless they should further find that F., with full knowledge of the fact that there were other taxes due and unpaid, was nevertheless willing and intended to accept the deed to the property, was not objectionable as inconsistent with the facts.

5. The instruction was not objectionable on the ground that the fraud could not be waived unless the deed was accepted, since, if there was no fraud to vitiate the contract, it was binding, and the acceptance of the deed was immaterial.

6. A requested instruction, the subject-matter of which was substantially embodied in the charge of the court, was properly refused.

7. Mortgaged property was owned by defendant, H., and W.; and F. agreed to pay defendant \$2,500 for her equity, and to convey other property to H. and W. for their interest,—H. and W. to assume a mortgage there-

on. On foreclosure of the mortgage, defendant filed a cross bill to recover the \$2,500, and F. filed an answer, alleging that through fraud or mistake the contract provided for the assumption of the mortgage by H. and W., but that the agreement was that a release was to be secured, relieving F. from liability for such mortgage, and sought to avoid the contract because of such fraud or mistake. *Held*, that an instruction, in an action to foreclose the mortgage assumed by F., that if the jury should find that, as a part of the consideration for the original agreement made between the parties thereto, H. and W., or either of them, agreed that they would cause F. to be released from all liability on the mortgage indebtedness on the property to be conveyed to H. and W., and that such stipulation was omitted from such agreement, when reduced to writing, either through a mutual mistake or fraud, and that "neither F., nor any one authorized to act for him, did not know that such stipulation was left out of the written agreement," then neither plaintiff nor defendant could recover against F., was not erroneous on the ground that no such issue was raised by plaintiff's pleadings, since the issue was raised by F.'s answer, and a special pleading was not necessary to raise it.

8. F.'s attorney, who drew a contract for an exchange of property between F. and defendants, testified that he first drew it so as to require defendants to obtain a release of a mortgage on property which F. was to convey to them, but, on objection of defendants, changed it so that the mortgage was merely assumed by defendants. *Held*, that an instruction that if defendants agreed that they would cause F. to be released from all liability on the mortgage indebtedness on the land to be conveyed to defendants, and that a stipulation to that effect was omitted from the agreement when it was reduced to writing, either through a mutual mistake or fraud, then F. was not bound by the contract, unless the jury should find that F., with full knowledge of the facts, was willing and intended to accept the contract without being released from liability on the mortgage, was not erroneous, on the ground that there was no evidence to warrant the submission of such an issue.

9. F. sought to repudiate an agreement to exchange property with H. and W. on the ground that, through fraud or mistake, the contract was written merely requiring H. and W. to assume a mortgage on the property which F. was to convey to them, while the real agreement was that they were to secure a release relieving F. from all liability for such mortgage indebtedness. *Held*, that an instruction that in order to find for F. it was necessary for the jury to find that "neither F., nor any one authorized to act for him, did not know that such stipulation was left out of the written agreement," was not erroneous on the ground that the instruction was uncertain and calculated to confuse the jury, and as constituting a comment on the weight of the evidence.

10. F. agreed to purchase property subject to a mortgage, and pay the taxes thereon, and the mortgagor agreed to furnish a perfect title; and, in an action to foreclose the mortgage, the mortgagor filed a cross bill for \$2,500 due on the contract with F., who sought to repudiate it on the ground that, unknown to him, a suit by the city for trespass was pending at the time the contract was made. Subsequently the city dismissed the action for trespass, and brought a suit for the taxes which F. had agreed to pay. *Held*, that a peremptory instruction that F. was not bound by the contract, because of the action of trespass, was properly refused.

11. Defendant sold F. real property, and agreed to furnish a perfect title, and showed title by adverse possession since 1851. *Held*, that the fact that there were defects in defend-

ant's written title did not annul the contract, since the title by adverse possession was sufficient.

Appeal from district court, Bexar county; J. L. Camp, Judge.

Action by the United States Mortgage Company against Pink Gates Wright, D. R. Fant, and others, in which defendant Wright filed a cross bill against defendant Fant. From a judgment in favor of defendant Wright against defendant Fant, the latter appeals. Affirmed.

Ogden & Terrell, for appellant. Upson, Newton & Ward and Denman, Franklin, Cobbs & McGowen, for appellees.

JAMES, C. J. The suit was brought by the United States Mortgage Company of Scotland, Limited, against Pink Gates Wright individually and as the independent executrix of the estate of W. B. Wright, and against R. L. Summerlin and D. R. Fant, upon a principal note and interest notes executed by W. B. Wright and R. L. Summerlin, and for foreclosure of the lien of a deed of trust on property in San Antonio known as the "Wright Building," which was executed by W. B. Wright and his wife, Pink Gates Wright. The said notes were executed to Francis Smith, and are now held by plaintiff. The petition alleged that since the execution of the deed of trust the defendant Fant had, under a contract between him and Mrs. Wright and Hart & Wright, a firm composed of Claude Wright and Archibald Hart, assumed said mortgage debt. Execution was asked on the judgment if there proved to be a deficiency after sale of the property. Mrs. Wright, by her answer, admitted the execution of the notes, and that the same were due and unpaid, as alleged. Further answering, she asked for affirmative relief against defendant D. R. Fant, and alleged that on or about the 3d day of March, 1896, the defendant P. G. Wright, D. R. Fant, and Wright & Hart entered into a written agreement whereby she, though signing the instrument in her individual capacity, yet in fact acting as the independent executrix of the estate of W. B. Wright, deceased, as party of the first part, and D. R. Fant, as party of the second part, and Wright & Hart, party of the third part, agreed that she would convey the property in controversy to the said D. R. Fant, in consideration of which he assumed and agreed to pay the certain indebtedness of \$34,750 on said property, as described by plaintiff's petition, originally in favor of Francis Smith, together with all taxes thereon, and furthermore agreeing to pay to the said defendant the sum of \$2,500 in cash upon the delivery of the deed. She further alleged the other portions of the contract. She alleged that she was the independent executrix of the estate of W. B. Wright, deceased, and the sole beneficiary under his will, and made a deed to the said Fant at his request, conveying to him the

said property, and that she in all respects complied with the terms of her contract, and prays that in the event plaintiff recovers a judgment against her, and a decree of foreclosure as independent executrix of the estate of W. B. Wright, deceased, she have a judgment against the said D. R. Fant. She also prayed a recovery of the said Fant of the sum of \$2,500 and interest. Defendant Fant, after demurrers, answered substantially as follows: That an agreement containing substantially the terms and conditions set out in the contract attached to the third amended original answer of the defendant Wright was signed by the parties whose names appear signed thereto; but he alleged that, as a consideration for the execution of said instrument, Wright & Hart would not only assume the mortgage of indebtedness that then existed on the land referred to in said contract, situated in Buchel and Pecos counties, amounting to \$30,500, but it was also agreed and understood, as a part of the consideration of said agreement, that they were to cause him, the said Fant, to be released and discharged from all liability on said mortgage indebtedness. He pleaded that they had failed to do it, and that therefore there was a failure of consideration. He also pleaded that while it was true he agreed to pay a certain indebtedness of \$34,750 on said property, together with interest thereon, and the taxes on said property, and that the particular indebtedness was not referred to, yet, at the time said contract was entered into, Wright & Hart, acting as agents for the said Pink Gates Wright, and for the purpose of inducing him to enter into said contract, falsely and fraudulently represented to him that no other taxes were due or unpaid upon said property except the taxes for 1895, amounting to the sum of about \$1,000; that, reposing trust and confidence in the representations so made to him by the said agents, he signed said contract, as well as the instrument dated March 3, 1896, and that at the time said agreement was made the particular taxes referred to in said agreement were the taxes of 1895. He further alleged that said representations were false, and were made for the purpose and intention upon the part of the defendant Pink Gates Wright and her said agents of deceiving and defrauding him and inducing him to enter into said agreement; that the amount of taxes upon said property at said time were greatly in excess of the amount that the defendant Wright and her agents represented to him was due; that a suit had been instituted by the city of San Antonio to recover the taxes, and that judgment had been rendered in that suit for \$2,334.83, adjudging the suit to be a lien upon the property; that the property had been sold under said judgment, and that Francis Smith & Co. had bought it, in July, 1898; that at the time said agreement was made he had no knowledge or information in re-

gard to the back taxes, and did not know that portion was due and unpaid. He further pleaded that, if said provision in said contract in regard to the payment of taxes should be construed to bind him to pay all taxes upon said property, the said provision was inserted by mutual mistake or was fraudulently inserted by the said Hart in writing out said agreement, and that the clause providing the defendant should only assume and pay the taxes for 1896, amounting to about \$1,000, was omitted from said agreement, either through mutual mistake, or was fraudulently omitted by the said A. Hart; that the defendant Wright had agreed to give him a perfect title to the property, and a deed signed by all the heirs of W. B. Wright, and that she did not tender such a deed; that at the time the deed was tendered to him he did not know that all the children of W. B. Wright, deceased, had not signed the same; that he never entered into the possession of said property or accepted the deed thereto, and never enjoyed the use, rental, or revenue of said property; that the said Wright has failed and refused to abide by the terms and provisions of the contract; and that for that reason she is not entitled to recover against him. Plaintiff filed a supplemental petition, in which it alleged fully the contract between Mrs. Wright and Fant, and prayed as in the original petition. Mrs. Wright filed a supplemental answer, in which she alleged that she signed the agreement theretofore set out in her pleading, which had been reduced to writing, after considerable negotiation between the parties, Wright & Hart and Fant; that she was not present, the language of said agreement being selected and dictated by said Fant, his agent and attorney, and she signed the same believing that it was the agreement of the parties; that before it was accepted by Fant he caused the same to be read over to her by his agent and attorney, to whom she stated emphatically and clearly that she agreed to the contract, with the understanding that Fant was to pay off the entire debt and mortgage and all taxes that might be against the property, and pay her \$2,500; that the agent and attorney of Fant, whom he had employed to read over the agreement to her, stated that was the true meaning of the contract and the intention of his principal, and thereby led her to so believe, and, relying upon that, she permitted said contract to be delivered to said Fant, and but for this understanding she would not have signed or permitted the same to be delivered, and that after signing said contract, and with full knowledge of her understanding and explanation of the same, and after they had full opportunity to make any inquiry they deemed necessary, Fant caused the deed to be prepared, selecting his own language, and presented the same to her for her signature, knowing her understanding of the agreement, and, fearing she would not sign such

deed if such understanding was not expressed therein, he affirmed such understanding again by the use in said deed of the following language, expressing the consideration to be paid by Fant: "In consideration of the sum of \$2,500 to us in hand paid by D. R. Fant, and in further consideration of the payment by said Fant of all indebtedness existing on the property herein conveyed to him, including the indebtedness of Francis Smith, interest and principal, and the payment of all taxes due on the same," etc.; that she, relying upon such being the meaning and intent of all the parties, executed said deed and delivered the same, and it was accepted by the said Fant and acknowledged by him as a full compliance with said contract. The defendant Pink Gates Wright further alleged a full compliance by her with every part of the contract entered into between her and Fant; that Fant secretly was then contriving for an undue advantage of her, and as soon as he secured her deed and tied her property he began to quibble about things to be done by him and Wright & Hart, respectively; and that in pursuance of this fraudulent scheme he failed to put the money in bank as required. And then follows an allegation of the failure on the part of Fant to comply with the terms of the contract entered into between her and him. She prayed that the mortgage be foreclosed, and that she have judgment against Fant for the said \$2,500, and that she be held only as a surety on said mortgage, and that Fant be held as principal.

The principal question at issue was whether or not the performance by Mrs. Wright of what the contract required of her was, under the facts and circumstances, such as bound Fant to comply with what it provided he should do in her favor.

We must, in due order, first consider the assignments which relate to appellant's general and special demurrers, viz. the first, third, and fourth assignments. The first assignment of error is that the court erred in overruling appellant's general demurrer to plaintiff's petition. The petition contained an allegation that by a contract between Fant and Mrs. Wright the former had assumed plaintiff's mortgage debt. This was sufficient on a general demurrer. For better reason, the general demurrer to Mrs. Wright's pleading, which sets forth the facts relative to such assumption, was properly overruled, so far as this objection is concerned. The proposition advanced under the first assignment is substantially this: That the alleged assumption by Fant of the mortgage debt was of no effect as imposing an obligation upon him, either in favor of Mrs. Wright or plaintiff, for the reason that Mrs. Wright, his alleged vendor, was not personally liable for the debt. The weight of authority, as expressed in the opinions, is to the effect that such an assumption will inure to the benefit of the third party only

in cases where the vendor is himself personally liable for the debt. In a recent Oregon case the authorities are collated, and we will be content with citing it. *Association v. Croft*, 55 Pac. 439. In this state the question appears not to have arisen, and, so far as our supreme court has applied the rule holding that such assumptions give the third party a right of action thereon, it has been in cases where the debt assumed was that of the vendor. *Mathonican v. Scott*, 87 Tex. 398, 28 S. W. 1063. We fail to see that a person who holds property which is subject to a mortgage debt not given or assumed by him has any interest or concern whatever in having his vendee discharge the debt, when he sells it subject to the mortgage. In such a case he really sells his equity only, for which he is paid. After the property is exhausted by the mortgage creditor, he cannot be disturbed by any judgment for a deficiency. In such a case it may be that the rule invoked by appellant would be applied. The opposite doctrine, however, prevails in many jurisdictions. See *McKay v. Ward* (Utah) 57 Pac. 1025, 46 L. R. A. 623. But Mrs. Wright occupies a peculiar attitude. She held W. B. Wright's estate as his sole devisee, and she was also his independent executrix. The presumption is that this was community property, and the debt a community debt. If there should have been a deficiency judgment, and she had any other property of the estate, it would be subject to execution for its satisfaction. Any showing heretofore that there was other property belonging to the estate subject to be seized, or which the mortgage creditor would have had a right to look to in the satisfaction of such a deficiency, would personally affect Mrs. Wright. The \$2,500 which she claims to be due her from Fant, over and above the mortgage debt, as the net consideration for the property, would, in her hands, have been assets of the estate, and presumably subject to debts of the estate. It would have been her duty to apply it to the satisfaction of debts of the estate, and if she misapplied it she would be personally liable. She clearly had an interest in Fant's assumption of this mortgage, to the extent, at least, of protecting her title to said \$2,500. Under these facts, which appear in the pleading of Mrs. Wright, we are of opinion that the demurrer was not good on this ground. The pleading of Mrs. Wright was adopted by plaintiff. Had there been no other allegation in the pleadings of either than the general allegation contained in plaintiff's petition, we think a general demurrer should not have been sustained upon the ground above indicated, inasmuch as it was legally possible for Mrs. Wright, who was both sole devisee and executrix of W. B. Wright, to bind Fant by his contract to assume the mortgage. This disposes, also, of the twenty-seventh assignment in appellant's brief. Considering all the pleadings of

Mrs. Wright, we conclude that the general demurrer and the special demurrers referred to in the third and the fourth assignments, and subdivisions thereof, were properly overruled; also the demurrers mentioned in the seventh and eighth assignments.

The tenth, thirteenth, and thirty-seventh assignments of error ignore the issue of waiver by Fant of signatures to the deed that was signed and deposited, and the issue that he, by his conduct, dispensed with any further conveyance.

The thirtieth assignment objects to the charge submitting this issue of waiver, and the thirty-eighth complains of the refusal of a further charge asked upon the subject. We think the charge given is subject to criticism, and the refusal of the one asked probably error; yet we need not enter upon a discussion of the merits of these instructions, from the view we take of the testimony. The following facts are uncontroverted: In the contract signed by Fant and Mrs. Wright and Hart & Wright, she agreed to convey by a good deed of conveyance, and that all the heirs of W. B. Wright, deceased, should sign, acknowledge, and deliver to Fant a perfect and complete title to the property, except as to the incumbrance which Fant was to assume. Fant agreed in this contract to assume and pay said incumbrance and the taxes on the property, and to pay Mrs. Wright \$2,500 in cash upon delivery of deed to the same, and also to convey to Claude Wright and Archibald Hart, by his warranty deed, certain lands in Buchel and Pecos counties; the said Wright & Hart to assume the indebtedness thereon. The contract provided further that each party was to furnish abstracts within one month from date, and further that they should make deed one to the other as soon as it might be determined that the title to the two properties was good. It was also provided in this contract that the sum of \$1,000 should be deposited by Fant in the bank of D. Sullivan & Co., there to be held subject to the drafts of Mrs. Wright upon the delivery of deed by her to Fant in accordance with the stipulation of this agreement, and that the contract, together with the deposit, be placed in said bank at the same time. At this time it appears that Fant was on his way to Mexico, and afterwards, on same day, a deed was prepared by Fant's attorney; it being a conveyance of the Wright Building to Fant, stating as the grantors Mrs. Wright and her several children by W. B. Wright. This Fant caused to be signed and acknowledged by them, he testifying that he wanted Mrs. Wright bound and tied up, to secure the matter; and this deed, with the \$1,000 check of Fant, and another check of his for \$1,500, as representing the \$2,500 which he was to pay Mrs. Wright under the contract, were deposited in the bank of D. Sullivan & Co., to await the return of Fant from Mexico. Upon his

turn from Mexico, about 20 days thereafter, the matter was taken up, and he was then informed of the fact that W. B. Wright had children of a previous marriage. The objections he then made to taking the deed and paying Mrs. Wright the \$2,500 were (1) that it was his understanding that he was not to assume all the taxes on the Wright Building, but only the taxes of one year (1895); and (2) that Hart & Wright, to whom he was to deed his Buchel and Pecos lands, were to not only assume the mortgage thereon, but to pay off and get him released therefrom, and that these two matters had been erroneously stated in the contract, either through mistake or fraud. Upon the subject of the deed not having been sufficiently signed, he, with knowledge at the time of the fact that Wright had other children, did not make any question. His testimony is lengthy and diffuse, but he directly and distinctly testified on cross-examination that these were the only two things he was standing on,—that Hart & Wright could not raise the money to stave off the mortgage on the Buchel and Pecos lands, nor could the parties pay the back taxes he was contending for; that these were his reasons for not consummating the trade, and the only reasons he had or gave. It appears, also, that he kept the matter open for several months afterwards, to enable Hart & Wright to provide for releasing or carrying this mortgage, which they endeavored to do, but failed in, and finally he declared the trade off. During all these proceedings he did not call on Mrs. Wright, or on any one for her, to do anything further in respect to the deed or title. In view of these facts, and especially under Fant's own testimony, it seems to us that he was not in a position to claim that the contract had not been sufficiently performed by Mrs. Wright in reference to questions concerning the deed to the property she was to convey him. Treating it as an executory contract, which is the view most favorable to appellant, he having thus, with full knowledge of the fact, indicated his satisfaction with the deed as executed, so far as the signatures of other parties were concerned, and maintaining this attitude during the transaction, he cannot now defend upon that ground, and claim that she should have prepared and tendered to him a further conveyance. *Taul v. Bradford*, 20 Tex. 261; *Hurt v. McReynolds*, Id. 595. This disposes of the fortieth and fifty-eighth assignments.

Mr. Fant undoubtedly had a right to insist upon performance by Mrs. Wright, and also by Hart & Wright, of everything the contract required of them, unless he waived it, before becoming bound to assume the plaintiff's mortgage or to pay Mrs. Wright the \$2,500. If he was right in his position that the real agreement was that he was to assume the taxes for a certain year only, or that Hart & Wright were to relieve him

from his indebtedness on the Buchel and Pecos lands, and that the contract, which provided differently, was in either case so worded by mistake or through fraud, he had, in our opinion, a good defense. We will now consider the record with reference to these defenses. The twenty-ninth assignment of error complains of the following charge, which submitted the issues as to taxes: "You are further instructed that if you find from the testimony that the said Archibald Hart and Claude Wright, or either of them, acting as the agent of the defendant Pink Gates Wright, represented to the said Fant, or to any one acting for him, that no other taxes were due and unpaid upon said Houston street property, known as the 'Wright Building,' except the taxes for the year 1895, and that such representations, if any, were false; and further find that the said Fant relied upon such representation, if any, and that such representation, if any, was a material inducement to the said Fant to sign said contract; and you further find that neither the said Fant, nor any one authorized to act for him, knew at the time said Fant signed said contract, nor at the time said checks and deed were deposited with D. Sullivan & Co., of the existence of other taxes due upon said property than the taxes for the year 1895,—then I charge you that neither the plaintiff nor defendant Pink Gates Wright can recover herein, as against the defendant Fant, and you will so find by your verdict, unless you further find that said Fant, with the full knowledge of the fact that there were other taxes due and unpaid on said Houston street property besides the taxes for 1895, should you find that Fant was not to pay any taxes on said property except the taxes for 1895, was willing and intended to accept said deed and title to the said property as it was prepared and signed, knowing there were other taxes than the taxes for 1895." The correctness of this charge is attacked by appellant's counsel. The charge was not inconsistent with the testimony, as one of the witnesses (Claude Wright) testified he informed Fant of the existence of the back taxes on the property during the day prior to the execution of any papers. Fant's knowledge of the facts before the signing of the contract was averred. This, we think, is sufficient to dispose of the first and second propositions of appellant under the twenty-ninth assignment. The third and fourth propositions under the same assignment complain of the charge because appellant could not be held to have waived the fraud unless he did in fact actually accept the deed, instead of merely being willing and intending to accept it. The question, we take it, is not whether or not he accepted the deed. He entered into the contract. It is immaterial whether he accepted the deed or not, if performance by the other parties was complete or waived, and there was no fraud to vitiate it. If

such performance was complete, Mr. Fant could not arbitrarily set the transaction aside, and deny the obligations that by the terms of the contract devolved on him. We think there is no merit in the twenty-ninth assignment. The forty-first and forty-second assignments relate to refused charges on this issue, which were substantially embodied in the court's charge.

Under the twenty-eighth assignment are presented various objections to the charge submitting the issue of fraud or mistake in that part of the contract which stipulates for the assumption by Wright & Hart of the indebtedness on the Pecos and Buchel lands. We copy this charge: "You are further charged that if you find from the testimony that, as a part of the consideration for said original agreement made and entered into by and between the parties hereto, the said Archibald Hart and Claude Wright, or either of them, agreed and stipulated that they would cause the defendant Fant to be released from all liability on the mortgage indebtedness on the land in Buchel and Pecos counties, and that such stipulation, if any, was omitted from said agreement when the same was reduced to writing, either through a mutual mistake, or was fraudulently omitted from said written agreement by the said Hart in writing out said agreement; and you further find that neither Fant, nor any one authorized to act for him, at the time he signed the check in evidence before you, and the same was deposited, with the deed to the Houston street property, in the bank of D. Sullivan & Co., did not know that such stipulation was left out of said written agreement,—then I charge you that neither the plaintiff herein nor Mrs. Pink Gates Wright can recover herein, as against the said defendant Fant, and you will so find by your verdict, unless you find that said Fant, with a full knowledge of the facts that he was not to be released from all liability on the mortgage indebtedness on the land in Buchel and Pecos counties, if you find such stipulation is a part of the contract, waived said stipulation, if any, and was willing and intended to accept said deed and title to said land without being released from liability on said mortgage indebtedness on said lands in Pecos and Buchel counties." The first proposition under this assignment is that the court below erred in that portion of its charge to the jury set out in this assignment of error wherein the court instructed the jury that it could only find for the appellant upon the issue referred to in this portion of the charge in the event that the jury should further find that "neither Fant, nor any one authorized to act for him, at the time he signed the check in evidence before you, and the same was deposited, with the deed to the Houston street property in the bank of D. Sullivan & Co., did not know that such stipulation was left out of the

written agreement," because there was no pleading upon the part of either the plaintiff or the appellee which raised such an issue. There was no ambiguity in the contract on this subject. It bound Hart & Wright to assume the indebtedness, which has a definite meaning. Fant, in order to relieve himself against this plain language, pleaded what he claimed was the real understanding of the parties in this respect, and the fraud or mistake, and the burden was on him to establish this; and it was incident to such issues that plaintiff could show, without special pleading, that Fant's knowledge of facts was such as to defeat his right to make such defenses. If he knew that the contract was worded as it was, and he signed it with such knowledge, he did not sign it under mistake; nor could he, with such knowledge, claim that he was misled or induced thereto by fraud. There is no evidence in the record tending to show that any device was practiced in obtaining his signature. The second proposition under this twenty-eighth assignment is that there was no evidence to authorize the submission of the issue above pointed out. Cahill testified that he first drew a contract obligating Hart & Wright not only to assume, but to obtain for Fant a release of, the Pecos and Buchel counties mortgage; that the parties knew what the agreement contemplated; that Hart objected to the contract witness drew, and the point of difference between him and Hart was that he (Cahill) had written in the contract that Wright & Hart were not only to assume said mortgage, but were also to secure Fant's release therefrom; that Hart then wrote the contract in question, which was read by him (Cahill), who understood its language, and understood the legal significance of the term "assume" in such contract. Cahill was Fant's attorney in the matter. There is evidence that the contract was read to Fant and understood by him. The wording of the obligation on Hart & Wright's part to assume was the same as that on his part to assume. There is testimony that Fant had knowledge of these facts, as well as Cahill, at the time the contract was entered into. The third proposition under the same assignment is to the language of the charge in saying that, in order to find for appellant, it was necessary for the jury to further find that "neither Fant, nor any one authorized to act for him, * * * did not know that such stipulation was left out of the written agreement," because such expression was uncertain, calculated to confuse the jury, and was on the weight of evidence. Appellant does not seem to rely on the use of the double negative in this charge; and, if he did, we think the jury could not have misunderstood the evident meaning of the court, or been confused thereby. As already stated, there was evidence that both Cahill and Fant knew the facts. There is a question raised in appe'

lant's assignment, under this proposition, which might give us difficulty, viz. whether or not it was proper to charge that knowledge of some one authorized to act for Fant would affect Fant on this issue, but there is nothing on the face of this proposition or the assignment which raises such question. The fourth proposition under this assignment is that there was error in that part of the charge which reads, "unless you find that said Fant, with a full knowledge of the fact that he was not to be released from all liability in the mortgage on the land in Bachel and Pecos counties, * * * waived said stipulation, if any, and was willing and intended to accept said deed and title to said land without being released from liability on said mortgage." The objection is that there was neither pleading nor evidence to authorize it. We have shown that there was evidence, and that special pleading by plaintiff of such matter was not necessary. In our opinion, the charge would have been sufficient if it had submitted the question on Fant's knowledge alone. His intention to accept the contract and deed was not essential, if he did enter into it, which is established, and in this respect the charge was favorable to appellant. We regard the sixth and seventh propositions under this same assignment as untenable.

The substance of the forty-fifth assignment was embraced in the court's charge. We deem it unnecessary to discuss a number of appellant's assignments, in view of what has been stated. The fifty-third, sixtieth, forty-third, and thirty-fourth are among these.

The thirty-sixth assignment refers to a peremptory instruction asked for appellant, because the evidence discloses that a suit for trespass to try title by the city of San Antonio against Pink Gates Wright for the Wright Building was pending at the time of this transaction, and was unknown to Fant. The charge was properly refused, for the reason that the pending action referred to appears to have been really for the enforcement of back taxes on the property, which Fant is claimed to have assumed, and the same was since dismissed by the city, and suit filed by the city for the taxes.

We have been careful not to say that Fant could not at this trial avail himself of any substantial defect in the Wright title. Mrs. Wright's contract was to convey the property to Fant by good and perfect title. Ordinarily the law would have required her, in a suit on said contract for the purchase money, or to enforce performance by Fant, to allege and prove that such a title was tendered. But, according to undisputed facts, and the testimony of Fant himself concerning the transaction, it became unnecessary for Mrs. Wright to furnish any further abstracts or deeds. She was not expected to make any deed until after the title was found good, and one month was allowed for

making and examining abstracts of title. But it appears that on the very day of the contract Fant had Mrs. Wright and her children execute the deed, as he wished it, and had it deposited. The transaction was kept in this situation for months afterwards, he contending for matters not relating to the title to this property, and not asking for further abstracts; and, as we understand his testimony, he was satisfied with that conveyance. This uncontroverted state of facts showed satisfaction and *prima facie* sufficient performance on the part of Mrs. Wright, so far as title was concerned. While we believe this would not have cut Fant off from showing at the trial that the title (except as to defects that he had knowledge of) was not such a one as he was to get, still he would have had to show the insufficiency of the title, and in some substantial particular.

The pending suit by the city of trespass to try title was shown to have been soon afterwards dismissed. *Wat. Spec. Perf. Cont. p. 549.* Afterwards the city brought its suit to foreclose for back taxes. This makes it appear that the defect indicated by the pending suit was in reference to the taxes which it was contended, and the jury has found, Fant was to assume. It appears that Mrs. Wright undertook to show the Wright title to the property in question, and, in addition to muniments of title, she showed adverse possession of the property in favor of such title since about 1851. Appellant has pointed out matters in the written title proved by Mrs. Wright, as defects. We have considered these, and regard them as insubstantial. The courts of this state have always treated title to land by limitation as good and perfect title,—as much so as where based on deeds. *Hubert v. Grady, 59 Tex. 506.* We think the several assignments based on apparent imperfections in plaintiff's title are not well taken.

The assignments in this brief which we do not specifically discuss we do not think disclose any reversible error. Some (the twenty-first and twenty-third, for example) are not briefed so as to entitle them to be considered.

The issues of fraud and mistake raised by appellant: (1) In regard to the provision in the contract as to taxes to be assumed by him; and (2) as to Hart & Wright's assumption in the same contract,—have been determined against him. As to the conveyance to be made him, his own testimony shows that he, with knowledge that Wright had children by a former marriage, whose signatures had not been affixed to the deed, dispensed with the necessity of obtaining them, if, under the facts and circumstances, such signatures could be considered as of any importance to a good and perfect title. The title, as represented by the deed that was signed and deposited, does not otherwise appear to have been defective. The matter of

taxes, and of Hart & Wright having agreed to obtain a release for Fant, have been found to be groundless. Performance by Mrs. Wright appears to have been sufficient in all things, and nothing remained to be done but acts on the part of Fant, viz. the acceptance of the deed deposited, the execution of his deed to Hart & Wright, and payment by him of \$2,500 to Mrs. Wright. It appears that Hart & Wright were willing to accept a deed from Fant to them requiring them to assume the indebtedness on the Buchel and Pecos lands. This seems not to be questioned, and it appears that they were willing to do more, and endeavored to comply with Fant's demand and secure his release therefrom.

The twentieth assignment, as to an alleged leading question, if well taken, should not reverse the judgment, for the reason that the answer was in accordance with all the testimony on the subject. The twenty-fifth, seventeenth, and eighteenth raise the point of questions being leading which we think were not. The thirty-second, thirty-third, and thirty-first complain of the charge, which in the matters complained of stated the law. The forty-first and forty-second assignments are in reference to refused charges, which the charge of the court substantially contained. The judgment is affirmed.

LEAGUE v. SCOTT et al.¹

(Court of Civil Appeals of Texas. Feb. 23, 1901.)

DEEDS—DESCRIPTION—FEDERAL COURTS—JUDGMENTS—RECITALS—CONCLUSIVE—NESS—COLLATERAL ATTACK.

1. Where an uncertain description of land in a deed refers to a patent for further description, giving the correct number of the patent and the name of the patentee, and the patent correctly describes the land, such reference renders the identity of the land intended to be conveyed sufficiently certain.

2. Recitals of appearances in judgments are conclusive only in courts of domestic jurisdiction.

3. Judgments of federal courts are not domestic judgments, in the sense that it cannot be shown on collateral attack that the court failed to acquire jurisdiction over defendant's person; and the fact that he was a resident of the state does not change the rule.

Appeal from district court, Eastland county; N. R. Lindsey, Judge.

Action by W. T. Scott and others against J. C. League. From a judgment for plaintiffs, defendant appeals. Affirmed.

J. J. Butts, for appellant. Looney & Hamner, for appellees.

CONNER, C. J. This is an appeal from a judgment in appellees' favor for a section of land in Eastland county. Both parties claim under W. T. Scott, Sr., as common source of title. Appellant's claim of title depends upon the effect to be given an amended decree of the circuit court of the United States for the Eastern district of

Texas entered on February 18, 1889. This decree recited that appellee, W. T. Scott, who was therein sued as an heir of W. T. Scott, Sr., appeared by his attorney, James Turner, and consented to said decree, which directed the sale of certain lands therein described, including the section involved in this suit. At the sale so directed, appellant became the purchaser. Appellee claimed by deed from W. T. Scott, Sr., to James Turner, and from James Turner to Peter Youree, and by further mesne conveyances to himself, all antedating said decree. The conveyance from Turner to Peter Youree described the land therein conveyed as "all that certain lot, tract, or parcel of land, containing six hundred and forty acres, situated in Eastland county, Texas, and known as survey No. 480, patent No. 96, Southern Pacific R. R.; reference being made to the patent for further description." If this description does not render the deed from James Turner to Peter Youree void for uncertainty, it is, in effect, admitted that appellee was entitled to recover, unless barred by the decree mentioned; said decree having never been set aside or annulled in any proceeding having that end in view. The survey in controversy is survey No. 473 of the Southern Pacific Railroad Company surveys in said county, and is properly described in its patent number, which is 96. There is also a Southern Pacific Railroad Company survey No. 480 in said county, the patent number of which is not shown. We are of opinion that the uncertainty or apparent uncertainty of description thus presented is not such as to authorize us to declare the deed from James Turner to Peter Youree void. It is a familiar maxim that "id certum est quod certum redi potest," and we think the reference to the patent for further description a reference to patent No. 96, and that such reference rendered certain the identity of the land intended to be conveyed. No other patent was referred to. No other patent of that number was ever issued to the Southern Pacific Railroad Company. It correctly described the land in controversy, which may possibly, also, have been known as survey No. 480; the contrary not affirmatively appearing from the record. Survey No. 480 was an even-numbered section that, under the law, became a part of the public free school fund, and could not have been patented to the Southern Pacific Railroad Company. We therefore approve the ruling of the court in admitting said deed. See *Cleveland v. Sims*, 69 Tex. 153, 6 S. W. 634; *Arambula v. Sullivan*, 80 Tex. 615, 16 S. W. 436; *Cartwright v. Trueblood*, 90 Tex. 535, 39 S. W. 930; *Kenyon v. Knipe* (Wash.) 13 L. R. A. 143, and note (s. c. 27 Pac. 227); *Cattle Co. v. Whitefort* (Tex. Civ. App.) 50 S. W. 1043.

On the second question presented, appellee offered evidence to the effect that he was not cited in the proceeding in which said

¹ Writ of error denied by supreme court.

amended decree was rendered; nor was James Turner authorized to appear and answer for him, or to consent to such decree. This evidence is undisputed, but it is insisted that in a collateral proceeding, as this was, the decree is conclusive, and that such evidence was inadmissible. It is held in some of the authorities that, where the decree recites appearance by attorney merely, this fact may always be disputed. *Black, Judgm. §§ 272, 903; Freem. Judgm. § 499.* In a number of states, also, in exception to the general rule, it may always be shown that the court did not acquire jurisdiction over the person. See, *Black, Judgm. § 275*, and authorities cited,—particularly the case of *Ferguson v. Crawford*, 70 N. Y. 253, where, in an able review of authorities, the court so concludes, on the ground that there law and equity, as with us, are both administered by the same courts, and that in equity it might always be shown that the court never acquired jurisdiction over the person. See, also, *Freem. Judgm. §§ 484a, 486, 495, 499; also Black, Judgm. § 276.* But, however this may be, it is universally held, so far as we are advised, that the recitals of service or appearance in judgments are conclusive only in courts of domestic jurisdiction; and, while we have heretofore expressed some doubt as to the wisdom of such conclusion, yet, in harmony with the cases hereinafter cited, we conclude that the amended decree under consideration was not a domestic judgment, in the sense that it could not be shown that the court failed to acquire jurisdiction over the person of appellee. See *Black, Judgm. § 275; Cooper v. Newell*, 173 U. S. 555, 19 Sup. Ct. 506, 43 L. Ed. 808; *Railway Co. v. Barton* (Tex. Civ. App.) 57 S. W. 292; *Harby v. Patterson* (Tex. Civ. App.) 59 S. W. 63,—where the subject is fully discussed.

Nor do we think the fact that appellee was a resident of the state of controlling effect. The decisions cited, holding that judgments of state and federal courts are not domestic, rest upon the ground, not of adverse citizenship, but diverse derivation of powers; viz. on the fact that they "derive their jurisdiction and authority from different governments."

We conclude by saying that we have found no reversible error in the proceedings, and we accordingly adopt the trial court's findings of fact and conclusions of law, and affirm the judgment.

MARTIN v. McALLISTER et al.¹

(Court of Civil Appeals of Texas. Feb. 23, 1901.)

COMMUNITY PROPERTY—INSURANCE—LIFE POLICY—PROCEEDS—COMMUNITY DEBTS.

A surviving husband is not entitled, as against the surviving children, to absolute title to the homestead and other exempt property, because of his having paid community debts

from the proceeds of a policy issued during the marriage on the life of the wife, in his favor.

Appeal from district court, Tarrant county; Irby Dunklin, Judge.

Suit by Thomas P. Martin against John U. McAllister and others. From a decree in favor of defendants, complainant appeals. Affirmed.

A. A. Henderson, for appellant. Welsh, Smith & Chapman, for appellees.

STEPHENS, J. This suit was brought by appellant, the surviving husband of Cornelia Martin, deceased, against the surviving children, to establish in himself, for having paid community debts out of his separate estate, absolute title to the community homestead and other exempt property. The action was founded upon a line of decisions in this state holding that the community survivor, without qualifying as such, may sell even the homestead to pay community debts; the contention being that it results from this holding, as indicated in some of the opinions cited, that such survivor may retain as his own such community property, to reimburse him for the application of his separate estate to the payment of community debts. *Ashe v. Yungst*, 65 Tex. 631, and cases there cited; *Leatherwood v. Arnold*, 66 Tex. 414, 1 S. W. 173; *Fagan v. McWhirter*, 71 Tex. 569, 9 S. W. 677; *Watts v. Miller*, 76 Tex. 15, 13 S. W. 16; *Davis v. Harmon* (Tex. Civ. App.) 29 S. W. 492; *Nelms v. Nagle* (Tex. Civ. App.) 35 S. W. 60; *Burkitt v. Key* (Tex. Civ. App.) 42 S. W. 231. These cases undoubtedly hold that the survivor may sell the community homestead to pay community debts, and, if they be in conflict, as counsel for appellees contend, with the following cases cited by them: *Zwernemann v. Von Rosenberg*, 76 Tex. 522, 13 S. W. 485; *Hoffman v. Hoffman*, 79 Tex. 189, 14 S. W. 915, 15 S. W. 471; *Lacy v. Lockett*, 82 Tex. 190, 17 S. W. 916; *Roots v. Roberts* (Tex. Sup.) 55 S. W. 308,—it is evident that the two lines of decision were not understood by the court rendering them to be in conflict. We will not, therefore, undertake to give them a different construction. But whether, as appellant contends, the decisions can be said to have also established the right of the surviving husband to retain as his own the community homestead and other exempt property, where he has used his separate property to pay community debts, we, perhaps, need not now determine.

The case was tried below without a jury, and is submitted here upon the judge's findings of fact, without a statement of facts. These findings fail to establish, we think, that the insurance money used by appellant to pay community debts was his separate property. The following are the findings affecting this issue: "Sixth. The only property now on hands belonging to such community estate is the homestead above mentioned, one piano of the value of \$150, and

¹It of error granted by supreme court.

household and kitchen furniture to the value of \$400, all of which property is in the possession of the plaintiff, and one cemetery lot in Jefferson, Texas, of the value of \$25. Seventh. At the death of Mrs. Martin there was outstanding debts amounting to \$8,840, which had been contracted by plaintiff for the benefit of said community estate, and of this amount the sum of \$500 was due for taxes on said homestead. Eighth. In addition to the community property in plaintiff's possession as above shown, plaintiff has received as proceeds of other property belonging to such community estate the sum of \$817.33, which he has applied towards the payment of the aforesaid indebtedness, and in addition thereto had also paid on said indebtedness the further sum of \$6,178.26, of which last amount the sum of \$5,667.25 was a part of the proceeds collected on insurance policies in plaintiff's favor on the life of Mrs. Martin, and the sum of \$511.01 was acquired by him by his own exertions after the death of his wife. The taxes due on the homestead, as shown above, were included in the indebtedness paid by plaintiff; but the evidence does not show whether the same was paid out of the aforesaid funds of \$875.35, or out of the funds used in the payment of the said \$6,178.26. Plaintiff also paid funeral expenses for the burial of his wife, amounting to \$332.75, out of the money derived from said insurance policies, but he makes no charges for the same. Ninth. After making the aforesaid payments on said indebtedness, plaintiff elected to retain said community property, including the homestead now in his hands, to reimburse himself for the payment of said sum of \$6,178.25 mentioned above, and acquired as above shown. Tenth. The said homestead, together with the improvements thereon, are now, and were at the death of Mrs. Martin, of the value of \$4,000, and is situated in the city of Ft. Worth." It thus appears that the bulk of the money used to pay community debts "was a part of the proceeds collected on insurance policies in plaintiff's favor on the life of Mrs. Martin," to whom he was married October 12, 1865, and who died March 19, 1896. The question is, does this finding establish that the fund so arising was appellant's separate property? We think not. The contracts with the insurance companies were evidently made during the marriage, and, in the absence of a finding to the contrary, it is to be inferred that the premiums were paid with community funds. The right to the proceeds of the policies was acquired during the marriage, and was consequently community property, unless that presumption was rebutted by the fact that the policies were payable to the husband after the death of the wife. Where the husband has policies issued on his own life payable to his wife, the presumption of community right is as clearly rebutted as where he purchases prop-

erty with his own or community funds and has it conveyed to his wife. But the relation of the wife to the community estate during the marriage is different from that of the husband; for he alone has the control and disposition of that estate, and consequently the power to make contracts respecting it. The wife is under coverture, and cannot bind herself by contract, except to a limited extent or in a prescribed manner. Their rights to community property are, however, otherwise equal; and the presumption that whatever is acquired during the marriage, except by gift, descent, or devise, belongs to the community estate, is the protection the law gives her for her share of the common acquisitions, and this the husband can by no act of his take from her or her heirs. His power of alienation, it is true, may enable him to waste and squander the entire estate; but he is not allowed to so use it as to transfer her share, either directly or indirectly, to himself, without her consent. True, it is held that the wife may make a gift of personal property to the husband, and indirectly of real estate. *Pitts v. Elsler*, 87 Tex. 347, 28 S. W. 518; *Ballard v. Carmichael*, 83 Tex. 358, 18 S. W. 734; *Riley v. Wilson*, 86 Tex. 240, 24 S. W. 394. But it requires some affirmative act on her part to do this. Mere silence or acquiescence is not sufficient. So, if appellant made contracts with the insurance companies during the existence of the marriage, using community funds to pay the premiums, and making the policies payable to himself on the contingency of his wife's death, the right so acquired was presumptively community property, and nothing short of a valid gift from her would have changed its character. See the opinion of Justice Head in *Martin v. Moran* (Tex. Civ. App.) 32 S. W. 904, in which this question is ably discussed. Was such gift to be inferred merely because policies of insurance were taken out on her life, payable to him at her death? We think not. The burden was on the husband to affirmatively and clearly show that he had paid community debts with his separate property, and not thus leave to inference and conjecture the circumstances attending the issuance of the policies. For aught that appears, his wife had nothing to do with the matter, except to furnish the subject of insurance. The insurance companies were the makers, and appellant was the payee, of the policies; and while the companies were bound to pay him the proceeds thereof, just as the maker of a promissory note would be bound to pay its proceeds to the husband, something more than appears from this record must be shown by him, since he seeks a recovery in equity upon the ground that such proceeds were his separate estate. He should at least have shown who made application for the policies, or at whose instance they were made payable to himself. Possibly it should be presumed that

the wife consented to have her life insured, as policies otherwise issued would seem to be void on the ground of public policy, although it seems that policies have not infrequently been issued without the knowledge or consent of the assured,—as, for instance, upon the life of the husband, at the instance of the wife, without his knowledge or consent. *Insurance Co. v. Smith* (Ky.) 59 S. W. 24, and cases there cited. We very much doubt, therefore, whether, merely because the policies were issued on the life of the wife, her consent should be presumed. The record is also silent as to the kind of policies those in question were; that is, whether they were endowment or only ordinary life policies, if, indeed, that would make a material difference, which perhaps need not be determined. The question, however, naturally suggests itself whether an ordinary life policy, which is, unlike an endowment policy, nothing more than a contract of indemnity for the loss of the life insured, when taken out by the husband on the life of his wife, should be distinguished from other contracts of his made during the existence of the marriage, which are held to inure to the benefit of the community estate. Unless it be shown that such policies were so issued as to entitle the husband alone to the benefits of the indemnity, we incline to the opinion that the presumption should be indulged that they were intended for the common benefit of both the surviving husband and the children, who have a common insurable interest in the life of the deceased, community funds having been used to pay the premiums. Even damages recovered on account of the injuries to the wife's person are held in this state to be community property, and why should not the right, when acquired during the marriage, to indemnity for the loss of her life be treated the same way? But be this as it may, the case ought to be clearly proven, to entitle the surviving husband to take from his children the entire community estate of himself and their deceased mother because he has paid community debts out of his separate estate; and we are of opinion that this is not done by merely showing that he has paid them with the proceeds of policies of insurance on her life issued to himself during marriage, and paid for out of the common earnings. The court found, however, that about \$500 of appellant's separate estate went to the payment of the community debts, and possibly the taxes on the property in controversy; but the judgment allowed him the use of the exempt personal property, worth about that sum, which, from its nature, is likely to become of little or no value when appellant ceases to use it. Besides, there is nothing to show that appellant elected to take any particular property or share of property to reimburse him for this outlay, and we are not asked to grant any such relief. The judgment is therefore affirmed.

MISSOURI, K. & T. RY. CO. OF TEXAS v. CHUMLEA.

(Court of Civil Appeals of Texas. March 27, 1901.)

**MASTER AND SERVANT—PERSONAL INJURIES
—RELEASE OF MASTER.**

Where a servant, injured while in the employment of his master, executed a release to the master in part consideration of being retained in the same capacity in the master's employ, and returned to work in such capacity, but afterwards voluntarily accepted other work from the master, which was less remunerative, and retained the other consideration paid by the master for the release, he cannot withdraw from such employment, and maintain an action against the master for such injuries.

Appeal from district court, Hill county; J. M. Hall, Judge.

Action by A. H. Chumlea against the Missouri, Kansas & Texas Railway Company of Texas for injuries received while in the employ of defendant. From a judgment in favor of the plaintiff, defendant appeals. Reversed.

T. S. Miller and Ramsey & Odell, for appellant. Wear, Morrow & Smithdeal, for appellee.

KEY, J. This is a personal injury suit resulting in a verdict and judgment for the plaintiff. The defendant has appealed, and we sustain the sixth assignment of error, complaining of the action of the court in refusing the following special instruction: "If in this case you find from the evidence that, as a consideration in part of the release read in evidence by the defendant, the plaintiff was promised work in the service of the defendant in the same capacity in which he had heretofore labored, and that this was one of the moving causes inducing plaintiff to execute said release, and that plaintiff did thereafter return to the employment of the defendant company in the same capacity in which he had before that time labored, but that thereafter, at the instance of the defendant, he accepted employment in a different line of work, less remunerative, with full knowledge of such fact, and of the nature and compensation of the work, and entered upon same retaining the consideration paid by defendant, this, in law, would constitute an election to engage in such different service; and if thereafter the plaintiff resigned from such service voluntarily, he will be without remedy as to any right of recovery against the defendant; and, if you so believe, you will find for the defendant." This charge stated the law correctly on a phase of the case presented by the evidence and not covered by the court's charge. We also think the evidence referred to in the first assignment of error should not have been excluded. The other questions of law presented in appellant's brief may not arise upon another trial. We make no ruling upon the merits

of the case as disclosed by the testimony in the record. Judgment reversed, and cause remanded.

STATE NAT. BANK OF DALLAS v. HATHAWAY et al.

(Court of Civil Appeals of Texas. Feb. 23, 1901.)

EXECUTION—SALE—SETTING ASIDE—JURISDICTION.

Where lands were advertised for sale under an alias execution on a judgment of the county court, and the sheriff, contrary to the directions of the owner of the judgment, sold the land, when he was not present, to one who did not pay his bid, and to whom no deed was made, the county court has jurisdiction of a motion to set aside the sale, and have the lands resold under the original levy.

Appeal from Dallas county court; Kenneth Foree, Judge.

Action by the State National Bank of Dallas against J. F. Hathaway and others. From an order sustaining a demurrer to his motion to set aside a sale on execution on a judgment in favor of plaintiff, J. D. Aldredge, the assignee of the judgment, appeals. Reversed.

Geo. A. Titterington, for appellant. F. D. Cosby, for appellees.

TEMPLETON, J. On June 20, 1893, the State National Bank of Dallas recovered a judgment in the county court of Dallas county against J. F. Hathaway for the sum of \$349.80. An alias execution issued on said judgment was, on October 30, 1900, levied on certain lands as the property of Hathaway. The lands were duly advertised for sale on the first Tuesday in December following. J. D. Aldredge, who had become the owner of the judgment, instructed the sheriff who held the writ not to sell until 3 o'clock p. m. on sale day, and the sheriff promised to obey the instructions. He, however, disregarded the instructions, and put the lands up for sale before that hour, when J. A. K. Parks bid the sum of \$5, and the bid was accepted by the sheriff. It seems that Parks did not pay the amount of his bid, and that the sheriff made no deed to him. By reason of the sale being made in disobedience of the directions of Aldredge, he was prevented from being present thereat, and from protecting his interests. Aldredge immediately filed a motion in the county court in the original cause, alleging the facts above stated, and that the lands were of the value of \$1,000. He sought to have the attempted sale set aside, and the lands sold under the original levy. Hathaway, Parks, and the sheriff were made parties to the motion. Parks demurred to the motion on the ground that the county court had no jurisdiction to hear and determine same. The demurrer was sustained, and Aldredge has appealed.

The general rule is that the court out of

which an execution issues has jurisdiction of motions to set aside sales made under the writ. *Owen v. City of Navasota*, 44 Tex. 522; *Wilson v. Aultman* (Tex. Civ. App.) 39 S. W. 1104; *Freem. Ex'ns*, § 310. It is insisted that the rule does not apply to this case, as the effect of the motion is to put in issue the title to the lands in question. See *Weaver v. Nugent*, 72 Tex. 272, 10 S. W. 458. The facts of that case are not similar to the facts of the case here presented. There the purchaser had paid his bid, received a deed from the sheriff, and brought suit in the district court to recover the lands. He held the legal, if not the equitable, title, and his suit could be defeated only by permitting the defendants to set up and establish facts which would avoid the sale. It was held that this could be done in such suit. In this case it does not appear that Parks acquired either the legal or equitable title to the lands attempted to be sold, or that he is in a position to put the question of title in issue. The object of the motion seems to be to vacate an incomplete sale, so that the writ may be properly executed. We think that the county court has jurisdiction of such motion, and that the demurrer was improperly sustained. The judgment is reversed, and the cause remanded.

BAGGS v. HALE.

(Court of Civil Appeals of Texas. Feb. 23, 1901.)

COMPROMISE BY AGENT—FRAUD—FOREIGN JUDGMENT—ACTION.

1. Evidence showed that a judgment debtor transferred lands to his wife after personal judgments against him rendered in another state. The judgment creditors and their agent knew of the existence of such lands, and that they could be subjected to the payment of the judgment. The agent, under authority, made a settlement with the debtor; and subsequently the creditors brought suit on the judgments, claiming that such settlement was obtained by defendant's false representation that he was insolvent. *Held*, that a verdict for plaintiffs was not justified by the evidence.

2. In a suit on judgments recovered in another state, by an assignee thereof, the execution of the transfer of such judgments should first be proved to render them admissible in evidence.

Error from district court, Taylor county; N. R. Lindsey, Judge.

Action by H. C. Hale against Montgomery Baggs. From a judgment in favor of plaintiff, defendant brings error. Reversed.

Bomar & Bomar and Cockrell & Hardwicke, for appellant. John Bowyer, J. F. Cunningham, and Leggett & Kirby, for appellee.

HUNTER, J. This suit was brought April 12, 1895, on two judgments, amounting in the aggregate to about \$9,000, rendered by the superior court of Stanislaus county, Cal., on the 16th day of November, 1893, in favor of H. B. Davis and his wife, Elizabeth C.

Davis, against Montgomery Baggs. These judgments revived two certain previous judgments in favor of same parties against same defendant rendered in the same court on the — day of —, 1883, in suits commenced in said court on June 22, 1886. Appellee, Hale, alleges that he is the legal owner of said judgments, but that said Davis and wife have an equitable interest therein, and that he sues for their benefit as well as his own. A writ of attachment was sued out, and levied on 8 sections of land in Runnels county. The defendant answers by general denial, and specially that the judgments sued on had been satisfied in full and released and satisfied of record on the 29th day of June, 1894, by virtue of a settlement made by and between defendant and one R. A. Prouty, agent and attorney in fact for the said Davises, duly authorized in writing so to do, whereby defendant paid the said Prouty \$1,000, which was accepted by him in full settlement of said judgments. The reply of plaintiff to this plea was that the release and satisfaction pleaded by defendant was obtained by false representations, in that the defendant represented to said Prouty that he was insolvent and had no property out of which said judgments, or any part thereof, could be made, and that he had no means with which to pay said judgments, when in truth and in fact he was then, and is now, the owner of the 8 sections of land, of 640 acres each, attached in this suit, and which were then and are now of the value of \$3 per acre. The case was tried by a jury, and verdict and judgment went against Baggs; and he has appealed to this court, assigning errors on the charge, on the admission of evidence, and that the verdict of the jury was contrary to the evidence.

The evidence was uncontradicted that the settlement and release of the judgments were made as alleged, and upon the representations of Baggs, as alleged; but it also tended to prove that the Davises and Prouty knew at the time the settlement was made, and long before, that these sections of land had been purchased by Baggs in February and March, 1883, and that on the 28th day of October, 1885, he conveyed them to his wife for the expressed consideration of "love and affection," and at the time of the settlement, which was made in San Francisco, Cal., Prouty asked him about these Texas lands, and Baggs told him they belonged to his wife, and were her separate property. The indebtedness upon which the California judgments were rendered arose in October, 1883, after Baggs became the owner of the lands, and before he conveyed them to his wife, but no lien was fixed upon them in favor of the indebtedness until the levy of the attachment in this case. Prouty had been advised, it seems, by lawyers in Texas, a few months before the settlement was made, that the lands could be subjected to the payment of the debt, and the judgments were revived

with the view of suing on them in Texas and attaching the lands. These are facts which were testified to by Prouty and Davis, and as recited in letters written by Prouty to Davis a short time before the judgments were revived and the settlement made. It seems, then, from this evidence, that both the Davises and Mr. Prouty knew as much about the lands in Texas then as they knew at the trial. They knew about the consideration in the deed from Baggs to his wife, and, it seems, about the Texas law governing such transactions between husband and wife, as affecting the rights of creditors; and, knowing all these facts, the wonder is why the settlement was made at \$1,000. But, however that may be, it is difficult to see how Mr. Prouty could have been misled by Baggs' statement that he had no property out of which the judgments could be made. He was justified in stating that the lands were his wife's separate property; for so they were, under that deed of gift, though they may have been subject to the payment of the Davises' debt, whenever a lien was fixed upon the lands to secure it, by the levy of judicial process, which Prouty, it seems, understood, and contemplated doing. We conclude, therefore, that the verdict of the jury is contrary to the evidence, and a new trial should have been granted upon this ground, as presented in the motion therefor. We also think that the execution of the transfer of the judgments should have been proved before they were admitted in evidence. The charge, we think, is also subject in some respects to some of the criticisms made against it in appellant's brief, under the 4th, 5th, 6th, 9th, 10th, 12th, 15th, and 16th assignments of error. We are, therefore, of opinion that the judgment in this cause ought to be reversed, and the cause remanded for a new trial, and it is so ordered.

VANDEWEGHE v. AMERICAN BREWING CO.

(Court of Civil Appeals of Texas. March 27, 1901.)

MONOPOLIES—TRUSTS—CONTRACTS.

An agreement by a brewing company not to sell beer to any one except defendant within a certain designated territory, contributory to defendant's place of business, is not within Rev. St. 1896, art. 5313, which defines as trusts all combinations of capital, skill, or acts to create or carry out restrictions in trade, or to prevent competition in the sale or purchase of commodities.

Appeal from Bowle county court; R. H. Jones, Judge.

Action by the American Brewing Company against B. C. Vandeweghe. From a judgment for plaintiff, defendant appeals. Affirmed.

R. W. Rodgers, for appellant. Smelser & Mahaffey, for appellee.

KEY, J. This is a suit on a contract for the sale of beer. The only defense relied on in this court is that the contract violates the anti-trust statute of this state. The only fact relied upon to show a trust is an agreement by the plaintiff not to sell beer to any one else within a certain designated territory, contributory to the defendant's place of business. We think the case is distinguishable from the cases heretofore held to violate the anti-trust law, and within the doctrine announced in *Gates v. Hooper*, 90 Tex. 563, 39 S. W. 1079. Judgment affirmed.

RUTHERFORD et al. v. COX.

(Court of Civil Appeals of Texas. March 27, 1901.)

HOMESTEAD—ACQUISITION—INTENTION—SALE ON EXECUTION—INJUNCTION.

Where plaintiff and intervener, who were husband and wife, traded their home in town for a farm, intending to use it as their homestead, and never abandoned such intention, they may restrain a sale of the farm under execution.

Appeal from district court, Collin county; J. E. Dillard, Judge.

Suit by J. D. Cox against N. R. Rutherford and J. W. Pafford. From a judgment in favor of plaintiff and Ulsey Cox, intervener, defendant Rutherford appeals. Affirmed.

F. E. Wilcox and G. R. Smith, for appellants. Abernathy & Beverly, for appellees.

FISHER, C. J. This was an injunction suit brought by appellee, J. D. Cox, seeking to restrain appellant and J. W. Pafford, sheriff of Collin county, Tex., from selling under execution a tract of 51 $\frac{1}{2}$ acres of land in Collin county, Tex., levied on by virtue of an execution for \$403.48 issued from the county court of Collin county in favor of N. R. Rutherford against J. D. Cox. Appellee claimed said land as his homestead. Ulsey Cox, wife of appellee, intervened, and claimed said land as her separate property, and that the same was the homestead of herself and husband. Trial before a jury, and verdict for the appellee, J. D. Cox, and judgment entered enjoining perpetually the sale of said tract of land, and judgment in favor of appellees (plaintiff and intervener) for all costs of suit.

The only question of fact we deem it necessary to make any finding upon is the issue of homestead. We find that the property in controversy was the homestead of J. D. Cox and wife at the time that the levy of the execution was made. The property in controversy was a farm, for which Cox and wife traded their home in McKinney in the fall of 1898. At the time of the trade they acquired the property in controversy intending to use it as their homestead, and such intention was never abandoned. These facts bring the case within the rule announ-

ced by this court in the case of *Evans v. Daniel* (Tex. Civ. App.) 60 S. W. 1012. We have carefully considered all of the assignments of error, and are of the opinion that none of them are well taken. Therefore the judgment of the court below is affirmed. Affirmed.

GANS et al. v. MARX et al.¹

(Court of Civil Appeals of Texas. March 27, 1901.)

FRAUDULENT CONVEYANCES—SETTING ASIDE—LIMITATION OF ACTIONS.

Where a judgment debtor previous to the recovery of a judgment conveyed land to his daughter, and paid the consideration for other land conveyed to her, a suit by the judgment creditors to have the land declared the property of the debtor, and liable to the judgment, brought more than four years after the recovery of the judgment, is barred by Rev. St. art. 3358, providing that every action other than for the recovery of real estate, for which no limitation is otherwise prescribed, shall be brought within four years next after the accrual of the right to bring it.

Appeal from district court, McLennan county; John G. Winter, Special Judge.

Suit by Gans Bros. and others against S. Marx and others. From a judgment in favor of defendants, plaintiffs appeal. Affirmed.

John W. Davis, S. E. Stratton, Robt. H. Rogers, and Sleeper & Kendall, for appellants. L. W. Campbell and H. N. Atkinson, for appellees.

KEY, J. This is a creditors' bill brought by several creditors of S. Marx to enforce liens alleged to be secured by registration of abstracts of judgments against Marx. The suit was brought against S. Marx and his daughter, Mollie Lowenthal, and her husband, Paul Lowenthal. Some of the creditors sued as plaintiffs, and others intervened, setting up similar rights. Marx disclaimed as to all of the property, except one piece claimed by him as his homestead. Lowenthal and wife, among other things, by demurrer, pleaded the four-years statute of limitation. The trial court sustained the latter plea, and that ruling is assailed by the appellants.

The lands involved are situated in McLennan county, and appellants pleaded the recovery and registration in said county of their several judgments in 1893, 1894, and 1896, and the issuance of executions, with returns nulla bona thereon. They also alleged that in 1892 S. Marx, being the owner of some of the property, and intending to defraud his creditors, among whom were appellants, conveyed the same to his daughter, Mollie Marx, now Mollie Lowenthal; that in 1892 and 1893 S. Marx purchased the other tracts of land, paying the consideration therefor himself, but caused conveyances thereto to be made to Mollie Marx, with like intent to defraud creditors.

¹ Writ of error denied by supreme court.

pellants also charged that S. Marx has continuously remained in possession of the property, and was in possession of it when the suit was brought; also that since the registration of appellants' judgments S. Marx, on his voluntary application, was adjudged a bankrupt; that he scheduled no assets, and claimed that he had none; and that none of the claims of plaintiffs and interveners were filed or approved in the bankruptcy proceeding. The prayer of the bill is that the lands described be declared to be the property of S. Marx, and held in trust by his daughter, Mollie Lowenthal, and liable to the payment of the judgments of the suing creditors; that said lands be sold for the payment of said judgments, and for the benefit of any other creditors who may join in the suit and bear their portion of the expense, and for any other order that may be found necessary for the full protection of the rights of the creditors, and for all special, general, and equitable relief to which they may be entitled. The original petition was filed October 13, 1900.

Article 3358 of the Revised Statutes reads thus: "Every action, other than for the recovery of real estate, for which no limitation is otherwise prescribed, shall be brought within four years next after the right to bring the same shall have accrued, and not afterward." There is no other provision of the statute that could possibly apply to suits of this character, fixing the period of limitation at a greater length of time than four years, unless it could be held that this is an action for the recovery of real estate; and that it is not such an action is well settled by former decisions of our supreme court. This being the case, the article quoted has application to this suit, and it must be held that the cause of action was barred. If the pleadings under consideration disclose any cause of action, they show, in the absence of averments of concealment of material facts, that such cause of action sprang into existence immediately after the registration of the several judgments referred to, which occurred more than four years before the suit was brought. For an elaborate and satisfactory discussion of the four-years statute of limitation, as applicable to suits of this nature, see *McC Campbell v. Durst* (decided by the court of civil appeals at Galveston) 40 S. W. 315. No reversible error having been pointed out, the judgment of the district court is affirmed. Affirmed.

PEOPLE'S NAT. BANK v. MULKEY et al.
(Court of Civil Appeals of Texas. March 9, 1901.)

BILLS AND NOTES—DEPOSITIONS—ADMISSIBILITY—FRAUDULENT ISSUE—BONA FIDE HOLDER—AMOUNT RECOVERABLE.

1. Depositions, taken in another case in which the parties and issues were substantially the same, cannot be used in evidence.

2. Where a note was fraudulently put in circulation by one of the makers thereof, and defendants, sued as co-makers, show that fact, the burden of proof is on the plaintiff to show that it is a bona fide holder.

3. Where plaintiffs are innocent holders of a note fraudulently put in circulation, they will be entitled to recover only the amount paid for it, with interest from the date of payment.

Appeal from Ellis county court; J. E. Lancaster, Judge.

Action on a note by the People's National Bank against J. A. Mulkey and others. From a judgment for defendants, plaintiff appeals. Reversed.

Singleton & Bisland, for appellant. S. C. McCormick, for appellees.

RAINEY, C. J. The court below erred in permitting to be read as evidence on the trial of this cause the depositions of certain witnesses that had been taken in another cause, in which the parties and issues were substantially the same. Depositions can only be used as evidence upon the trial of the suit in which they are taken. See opinion of supreme court in *Bank v. Mulkey* (Tex. Sup.) 60 S. W. 753, delivered February 14, 1901, on certified questions from this court.

The question of burden of proof is settled by our supreme court in the case of *Hart v. West* (Tex. Sup.) 42 S. W. 544. If the note sued on was fraudulently put in circulation by McCarty, and defendants show that fact, then the burden is on plaintiff to prove that it had acquired the note before maturity, in ordinary course of business, and for a valuable consideration.

If plaintiff is an innocent holder of the note, and it was fraudulently put in circulation, then plaintiff would be entitled to recover only the amount it paid for same, with interest from date of payment. *Oppenheimer v. Bank* (Tenn. Sup.) 36 S. W. 705, 33 L. R. A. 767; *Campbell v. Brown* (Tenn. Sup.) 48 S. W. 970. The judgment is reversed, and cause remanded.

ROE et al. v. THOMASON et al.

(Court of Civil Appeals of Texas. Jan. 19, 1901.)

NEGLIGENCE—PROXIMATE CAUSE—INJURY TO EMPLOYE.

Deceased was employed at the bottom of a mine shaft in shifting empties and placing loaded cars on the cage. The timber supporting the cage, and the sheet-iron surface surrounding it, had become decayed or misplaced, so that loaded cars could not be placed thereon without some one getting on the cage to pull them on and adjust them. While deceased was so engaged, the cage, without negligence of the mine owners, was suddenly hoisted, and deceased was caught between the cage and shaft, and injured. *Held*, that the untimely hoisting of the cage, and not defendants' negligence in permitting the timbers and sheet-iron surface surrounding the cage to become misplaced, was the proximate cause of the injury, and hence there could be no recovery.

Appeal from district court, Parker county; J. W. Patterson, Judge.

Action by L. L. Thomason and others against A. J. Roe and others. From a judgment for plaintiffs, defendants appeal. Reversed and rendered.

Greene & Stewart, for appellants. Haney & McKinsey and Albert Stevenson, for appellees.

HUNTER, J. The statement of the nature and result of this case is correctly and truly made by appellants' counsel, and also the grounds of recovery as set forth in the plaintiffs' petition, and are as follows: This suit was instituted by L. L. Thomason against appellants, A. J. Roe, G. E. Bennett, Paul Waples, and W. Burton, the American Coal-Mining Company, and the Strawn Coal-Mining Company, in the district court of Palo Pinto county, August 29, 1898, to recover damages for alleged personal injuries received by him while working in a certain coal mine alleged to have been operated by said defendants. It was afterwards removed, by consent of parties, to the district court of Parker county. Said L. L. Thomason died before trial, and his widow, Mrs. L. C. Thomason, filed an amended petition, making herself and minor children parties plaintiff, she suing for them as next friend. The cause was submitted to the jury on special issues, and upon the answers of the jury thereto defendants moved for judgment in their favor, which motion was overruled by the court, and defendants excepted, and thereupon, on motion of plaintiffs, the court entered in their favor personal judgment against A. J. Roe, G. E. Bennett, Paul Waples, W. Burton, and the American Coal-Mining Company for \$7,600, and against the Strawn Coal-Mining Company, decreeing said above judgment a lien on certain real estate of said latter company, and that the same be foreclosed, and said real estate sold for payment of said judgment. From this judgment this appeal is taken. By the petition plaintiffs aver that A. J. Roe, G. E. Bennett, Paul Waples, W. Burton, and the American Coal-Mining Company were on December 22, 1897, operating a coal mine at Mineral City, Palo Pinto county, Tex., being interested together therein; that on that day L. L. Thomason was in the employ of said company, and had been placed at the bottom of the mine shaft, where it was his duty to assist in shifting empties, and placing loaded cars on the cage preparatory to the same being hoisted to the surface; that while engaged in placing a loaded car on the cage, he being on the cage for that purpose, the said cage was, without fault on his part and by the negligence of the defendants, suddenly hoisted, and he (said Thomason) caught between the cage and shaft timbers, and thereby received the injuries complained of. The petition further alleges, in substance, that the negligence of the defendants, causing the in-

juries of said Thomason, consisted—First, in that the engineer, who operated the engine at the top of the shaft by which the cage was hoisted, suddenly, and without warning, hoisted and jerked the cage up, and thereby caught and injured said Thomason; second, in that the bottom timbers supporting the cage, and the sheet-iron surface surrounding it, had been allowed to become decayed or misplaced, so that the loaded cars could not be placed thereon without help from some one on the cage to pull on and adjust the same; third, in that the bottom of the cage and the platform were allowed to become wet and slippery, and the bottom of the shaft not sufficiently lighted; fourth, in that the lever by which the signals were given to the engineer above was negligently placed, so that employes, in the performance of their duties at bottom of shaft, were liable, without fault on their part, to give the signal for hoisting accidentally. The petition does not charge any connection whatever between the injuries received by said Thomason and the alleged condition of the timbers under cage and platform, as set out in item No. 2 above, nor with alleged condition of the bottom of cage and platform, as set out in item No. 3 above, except that said conditions rendered it necessary for Thomason to be on the cage at the time he was hurt. The petition alleges that after the institution of this suit said L. L. Thomason died, and that his death was caused by the injuries received by him as aforesaid. The answer contained a general denial, and some special matters, which it is not necessary to note. The case was submitted to the jury on 17 special issues, but it will only be necessary to notice the following, with the findings of the jury thereon: "3d issue: If the said L. L. Thomason was hurt and injured while working for the said defendant the American Coal-Mining Company, was or was not such hurt and injury caused by the negligence of the defendant American Coal-Mining Company or by its agents and employes? To the third issue we find that it was. 4th issue: Did or did not the engineer at the top of the shaft receive a signal to hoist the cage at the time L. L. Thomason was hurt? To the fourth issue we find that he did. 5th issue: Was or was not the signal to hoist the cage given from below by any employe of the company (if any was given at all) at the time the said Thomason was injured, and, if so, by what employe was the same given, and was the same given purposely or by accident? To the fifth issue we find no, unless by accident. 5½ issue: Was or was not the arrangement for signaling from the foot of the shaft to the engineer at the top, as it existed at the time Thomason was hurt, the same or different from that usually and customarily used in coal mining for that purpose? On this issue we find it was the same. 6th issue: Did or did not the defendant the American Coal-Mining Company furnish the said L. L. Thomason a reasonably

safe place to work, and reasonably safe appliances with which to work? And, if you find they did not, then did or did not said company use ordinary care to furnish the said Thomason a reasonably safe place to work, and to furnish said Thomason safe appliances with which to work? And, if said company failed to use such care, was the said Thomason hurt and injured by reason of such failure to so use such ordinary care? To the sixth issue we find they did not; and we find, further, that they did not furnish a reasonably safe place to work, or safe appliances to work with, and such failure causing said Thomason to get hurt or injured. 7th issue: Was or was not the American Coal-Mining Company guilty of negligence in hoisting the cage in which said Thomason was at work at the time of his injuries? And was or was not said company guilty of negligence in the manner and place in which it kept and maintained the signal wire and lever at the bottom of the shaft? And, if so, did such negligence cause the injury to said Thomason, and without negligence on the part of the said Thomason that contributed to his injuries? To the seventh issue we find that it was not negligence in the hoist, nor was it negligence in the manner and place in which the wire and lever was kept at the bottom of the shaft, but find that the fault or negligence was in the construction of the cage bottom or car track, or by allowing same to get out of repair, causing said car to hitch or get off of said track; thereby placing, or causing to be placed, the said Thomason in an unsafe place to work, and in a place where he might, by accident, have caused said signal to be given without negligence on the part of the said Thomason. 8th issue: Did or did not the said Thomason, at the time of the hurt, give a signal to hoist the cage, and, if so, was he guilty of negligence in so giving the same? And did such negligence contribute proximately to the injury of the said Thomason? To the eighth issue we find, if the said signal was given by the said Thomason, it was given by accident on said Thomason's part, and not negligence. 9th issue: Did or did not the said Thomason, at the time he was hurt, attempt to leave the cage, and, if so, was he guilty of negligence in so attempting to leave said cage at the time? And did or did not such negligence contribute proximately to the injury of the said Thomason? To the ninth issue we find that he attempted to leave the cage, but was not guilty of negligence on his part in doing so." Upon these special findings, the defendants moved the court to render judgment for them, which was overruled, and errors are assigned to the refusal of the court to grant said motion, and to the action of the court in rendering judgment for the plaintiffs on said verdict, it being contended by appellants' counsel that the proximate cause of the injury, both as alleged and proved, was the untimely hoisting of the cage, and that the jury had

found no negligence in that; that the negligence of the defendants in allowing the car track and space around the bottom of the shaft to be out of repair was not the proximate cause of the injury, but only the occasion making it necessary for Thomason to go upon the cage to work, which was properly constructed and equipped, and as safe, with proper care on his part, as such things can be made in a coal shaft.

We are of opinion that these assignments ought to be sustained, and that the district court erred in refusing to render judgment in favor of the defendants upon the findings of the jury. The sudden and untimely hoisting of the cage was the proximate cause of the injury, and the jury found that the defendants were not guilty of negligence in that act. It matters not, then, how negligent they were or may have been in allowing the car tracks to rot and get out of repair, since such negligence caused no injury to the plaintiffs. It is true that if the car track had been in good repair, and therefore on a level with the bottom of the cage, the necessity for Thomason to go onto the cage to pull it up might not have occurred; but he was not hurt by reason of this act. To illustrate: If he had gone upon the cage, and taken hold of the car as he did, and by reason of the defect in the track the car had turned over upon him and injured him, then the defect in the track would seem to be the proximate cause of the injury, and, if he was free from negligence, it would seem that he might recover on account of the impaired condition of the track. But here there was no injury caused by the condition of the track. If the cage had not been hoisted, he had not been injured; hence it is clear that an intervening cause—the hoisting of the cage—produced the injury, and, the jury having found no negligence in that act, it becomes, in law, one of those unfortunate accidents, the risk of which is ordinarily incident to the employment, and is assumed by the employé. We therefore conclude that it is our duty to reverse the judgment appealed from, and to render such judgment on the verdict as the district court should have rendered, and that is that the plaintiffs take nothing by their suit, and that the defendants go hence without day, and recover all their costs in this behalf expended, both in this court and in the court below.

BAILEY v. ROCKWALL COUNTY NAT. BANK.

(Court of Civil Appeals of Texas. March 2, 1901.)

EVIDENCE—VARYING WRITTEN INSTRUMENTS—CONTRACTS—CONTEMPORANEOUS AGREEMENT—INDEFINITENESS.

1. In an action on a note, proof of a contemporaneous parol agreement that the payee would credit on the note a certain debt due the

maker, as soon as the amount due on the note was reduced to the amount of the debt, is inadmissible, as varying a written contract.

2. Such agreement was properly excluded; the maker not bringing himself within the terms of the agreement, by showing that he had paid the note down to where the crediting thereon of the debt would extinguish it.

3. In an action on a note, evidence that the payee had agreed, as part of the consideration for the note, to furnish the maker for three years with such sums as he might need to enable him to properly conduct his business, but failed to keep the agreement after the first year, was properly excluded; it not being alleged or shown how much money was needed, and no facts being stated which would form a basis for determining what sums would be required, or were in contemplation of the parties or probably necessary, to accomplish the purposes for which the agreement was made.

Error from district court, Rockwall county; J. E. Dillard, Judge.

Action by the Rockwall County National Bank against J. T. Bailey. From a judgment for plaintiff, defendant brings error. Affirmed.

Hartman & Austin, Wm. N. Allen, and Ed Foree, for plaintiff in error. Stroud & Ridgell and Word & Charlton, for defendant in error.

TEMPLETON, J. T. W. Bailey was engaged in the mercantile business, and became indebted to the defendant in error, the Rockwall County National Bank, in the sum of \$5,000. He failed in business, and transferred his stock of goods to a trustee to secure the bank and other creditors. The trustee sold the goods to the bank and others, who conducted a business for about a year, and then sold the goods remaining on hand to the plaintiff in error, J. T. Bailey. At that time, which was on the 27th day of March, 1895, the bank had realized only about \$2,000 on the debt owing to it by T. W. Bailey, leaving a balance unsatisfied on said indebtedness of \$3,000. It is to be inferred from the record that the bank simply held the goods as security for its said debt. The goods transferred to J. T. Bailey were of the value of \$4,000. In consideration of the transfer the Baileys executed and delivered to the bank their note for \$3,000, the amount of the said balance owing to the bank by T. W. Bailey. The note was payable on October 1, 1895, and bore interest from maturity at the rate of 10 per cent. per annum, and provided for the payment of 10 per cent. of the amount thereof as attorney's fees in case of suit. Some partial payments were made on the note, and the bank brought this suit to the May term, 1899, of the district court of Rockwall county against the Baileys to recover the balance due on the note. T. W. Bailey pleaded a discharge in bankruptcy, and was dismissed from the suit. On a trial by the court without a jury, judgment was rendered against J. T. Bailey for \$2,056.17, the balance found to be due on the note in suit.

It was alleged in the answer of the plain-

tiff in error that at the time of the execution of the said note the cashier of the bank, one Frank Jones, was indebted to plaintiff in error in the sum of \$718, and that the bank agreed that said indebtedness of Jones should be credited on the note as soon as plaintiff in error had paid an amount thereon equal to the excess of the note over said indebtedness; that thereafter, on May 29, 1895, Jones executed and delivered to him two notes to cover said indebtedness to him,—one due on January 15, 1896, and the other on January 15, 1897. Plaintiff in error sought to have the note sued on credited with the amount for which the Jones notes were given. It was not alleged or proved that plaintiff in error still held the Jones notes, or that the same had not been paid, or that Jones was insolvent, or that the Jones notes had ever been tendered to the bank as a credit on the note sued on, or that the excess of the note in suit over and above the Jones notes had been paid. The Jones notes were not tendered on the trial, and there was no offer to pay whatever sum might be found due on the note sued on, over and above the amount of the Jones notes. It was affirmatively shown that the note sued on had not been reduced by payments to an amount equal to the Jones notes. In this state of the case, the court did not err in excluding evidence to the effect that the alleged agreement was in fact made. Bailey contracted in writing to pay his debt to the bank in money, and a contemporaneous parol agreement that he might satisfy it in part by having credited thereon an indebtedness owing to him by Jones would have the effect to vary the written contract, and such agreement would not be enforceable. *Roundtree v. Gilroy*, 57 Tex. 180; *Self v. King*, 28 Tex. 553. But, if it should be conceded that the agreement was valid and binding, it would constitute no defense to the suit of the bank, as Bailey did not bring himself within the terms of the agreement alleged, by showing that he had paid the note sued on, down to where the crediting thereon of the Jones indebtedness would extinguish it.

Another defense pleaded by J. T. Bailey was that at the time of the execution of the note sued on, and as part of the consideration therefor, the bank agreed with him that it would furnish him, for the term of three years, such sums of money as he might need in order to enable him to profitably conduct his business, he being a man of limited capital and credit; that the bank kept the agreement for one year, but thereafter failed and refused to carry out the agreement, whereby he was damaged in the sum of \$2,000, which sum was asked to be set off against the note sued on. It was not alleged that he was induced to buy the goods from the bank by reason of said agreement, and it is beyond controversy that the goods received by him from the bank, and for which the note was given, were worth more than

the amount of the note. It was not alleged how much money was needed by Bailey in order to enable him to profitably conduct his business, and no facts are stated which would form a basis for determining what sums would be required or were in contemplation of the parties at the time of making the agreement as probably necessary to accomplish the purposes for which the agreement was made. On the trial Bailey offered to prove the naked agreement alleged, to the effect that the bank promised to furnish him for three years with such sums of money as he might need, in order to enable him to profitably conduct his business, and the failure of the bank to keep the agreement after the first year. The proposed testimony was, on objection made by the bank, excluded, and Bailey complains of the exclusion of this evidence as error. Had the testimony excluded been admitted, it would not have defeated a recovery by the bank. The agreement as alleged and as offered to be proved was too general to be enforced. Without some criterion for determining the necessity of furnishing money, or the amount necessary to be furnished, or the amount contemplated by the parties as probably necessary to be furnished, it is impossible to say what acts of the bank would constitute a breach of the agreement. So far as is shown by the record before us, it may have been unnecessary, had Bailey conducted his business properly, for the bank to have furnished him with any money after the first year, or the amount demanded of the bank by Bailey may have been in excess of the sum required by the needs of the business, or the business may have gotten in such condition that the sums contemplated by the parties as probably necessary to carry on the business profitably were utterly inadequate to that end. While we do not want to be understood as holding that such agreement, general and indefinite as it is in its terms, could not be enforced in any case, we do hold that the party seeking to enforce such agreement must show such a state of facts surrounding the making of the agreement as will enable the courts to properly interpret it, and such conditions attending the execution of the agreement as to enable the courts to determine what acts will constitute a breach of the contract. There has been no attempt to show such facts or conditions in this case. Besides, Bailey did not show or offer to show any facts by which the court could ascertain the damages, if any, sustained by him as a result of the alleged breach of the agreement, and such facts were not even alleged. It may be contended that, unless he was permitted to prove the agreement, it would be useless for him to show or attempt to show a breach of it, or the resulting damages. Ordinarily there would be some force in such contention. But the plea in this case is as indefinite and indeterminate as the proof offered, and the presumption is that Bailey

pleaded and offered to prove all the facts he was able to establish. It may be doubted if his plea was sufficient to have authorized proof of facts that would make out a defense to the suit of the bank, but, conceding that it was sufficient, Bailey ought to have shown himself able to prove such facts. We conclude that the court did not err in excluding the proposed evidence, and, no other questions being presented, the judgment is affirmed.

LAING v. SHERLEY et al.

(Court of Civil Appeals of Texas. March 27, 1901.)

EVIDENCE—WRITTEN INSTRUMENT—FAILURE TO PRODUCE—PLEAS—NON EST FACTUM—BURDEN OF PROOF.

In an action on a written instrument, the execution of which was denied by a plea of non est factum, the fact that defendant failed to produce the same did not relieve the plaintiff of the burden of proving its execution, nor preclude defendant from introducing evidence establishing his plea.

Appeal from district court, Dallas county; Richard Morgan, Judge.

Action by Z. M. Sherley and others against Joseph Laing. From a judgment in favor of plaintiffs, defendant appeals. Reversed.

Joseph M. Dickson, for appellant. Dudley & Robertson, for appellees.

FISHER, C. J. Appellant's first and only assignment of error is well taken. The ruling of the court there complained of was erroneous in that the evidence of witness Joseph Laing should have been admitted. The failure or refusal of Laing to produce the contract upon which plaintiff based his suit did not relieve the plaintiff of the burden of proving the execution of that instrument, in view of the fact that its execution was denied by a plea of non est factum. Nor did the failure to produce it estop Laing from introducing evidence establishing his plea of non est factum. For the reasons stated, the judgment is reversed, and the cause remanded. Reversed and remanded.

WATKINS et al. v. STATE.¹

(Court of Civil Appeals of Texas. Feb. 13, 1901.)

TAXATION—SUIT BY STATE—UNKNOWN OWNERS—SEPARATE TRACTS—CONSOLIDATION OF SUITS—RIGHT OF DEFENDANTS—JUDGMENT AGAINST UNKNOWN OWNERS—APPEAL.

1. Where the owners of property appeared and filed answers in a suit by the state for taxes, the fact that the suits were commenced against unknown owners, when the county records disclosed that the property belonged to defendants, will not sustain a plea in abatement.

2. Where 22 parcels of land were assessed against defendants as separate tracts, and the state brought 22 suits to enforce the collection

¹ Rehearing denied March 27, 1901.

of the taxes, it was not error to refuse to consolidate them.

3. Sayles' Civ. St. art. 5232c, provides that the lists of land sold to the state for taxes, prepared by the tax collector and certified by the county judge, and assessment rolls and books on file in the collector's office, shall be prima facie evidence that the requirements of the law had been complied with, and that the amount claimed as taxes is a correct charge. *Held*, that where the list prepared by the tax collector was alone introduced in evidence without proof of the assessment and other requirements to subject the land to taxes, a judgment for the taxes must be reversed.

4. Where a suit for taxes was brought against unknown owners, and defendants appeared and filed answers, and the judgment was entered against unknown owners, an appeal by defendants will not be dismissed on the ground that they were not parties to the judgment.

Appeal from district court, Brewster county; J. M. Goggin, Judge.

Action by the state of Texas against J. B. Watkins and others. From a judgment in favor of plaintiff, defendants appeal. Reversed.

W. W. Van Sickle, for appellants.

JAMES, C. J. This suit was in the name of the state, against "unknown owners" for state and county taxes, penalties, and interest for the years 1893, 1894, 1895, 1896, and 1897, on a certain 640 survey, in what was formerly known as "Buchel County," an unorganized county, which was in 1897 incorporated into Brewster county. Notice appears to have been given by publication, as the law requires. J. B. Watkins, T. H. Chalkley, and M. Summerfield, claiming to be owners of the land, appeared, and pleaded in abatement that when this suit was filed they were the owners of this survey and 21 other surveys, in reference to which the county attorney had filed in the district court 22 separate suits for delinquent taxes, penalties, etc.; that interveners' title was disclosed on the county records, and was readily ascertainable by exercise of any diligence, and therefore there was no excuse or authority for him to file separate suits against alleged "unknown owners," but it was his duty, under the circumstances, to have filed one suit only against interveners, and not file many suits, as was done, to oppress interveners with fees and costs; wherefore they prayed that the suit be dismissed, or, in the alternative, that the court enter an order consolidating the 22 suits. The court overruled the plea.

Upon the question presented, we are of opinion that interveners cannot say that they have been prejudiced by the fact that the proceeding was brought against unknown owners, as they obtained notice of the suit and became parties, and when that was done the situation was no better or worse for them than if the suit had been brought directly against them. As to the refusal of the court to consolidate the suits, there was no

error. This probably would have been a matter of right, had it appeared that all the surveys had been assessed together to interveners or to "unknown owners." But each of the tracts, it seems, was assessed by itself, and the suits were not improperly brought separately, and interveners, in our opinion, had no right to insist upon a consideration of them.

We think there was no error in overruling the special exception to the petition on the ground that the petition and exhibit failed to properly specify what amounts were due as penalties and as interest. The amount of taxes was alleged, and the penalties and interest were fixed by law, and based on the amount of taxes.

The fifth assignment is well taken. There was no effort to make proof of the assessment and other requirements to subject the land to taxes for the years claimed. Article 5232, Sayles' Civ. St., enacts that a certain record or list therein provided for, and the assessment rolls and books on file in the tax collector's office, shall be prima facie evidence that all the requirements of the law had been complied with, and that the amount claimed was a true and correct charge. In *Rouse v. State* (Tex. Civ. App.) 54 S. W. 32, we held that the list referred to in this article was not of itself prima facie case of said facts. We are unable to determine from the statement of facts precisely what the particular record was which was introduced,—whether it was the one referred to by said article or not,—but, if it was, it was not enough of itself to make a case. We notice that, in article 5232j, either the list therein provided for or the assessment rolls or collector's books is made prima facie evidence. This list is, however, not the one dealt with by article 5232e, applicable here.

There was a motion filed in this case to quash the appeal bond, and also to dismiss the appeal, for the reason, among others, that appellants are not parties to the judgment entered herein, and that they did not ask to be made parties to the suit. The motion has been overruled. It is clear from the record that appellants became parties by filing pleadings, and were recognized as such by the court in acting upon their pleas and demurrers. They also signed the statement of facts which was approved by the judge. It was not essential that the judgment should have been rendered against them by name. The petition was not against them by name, but against "unknown owners," which embraced interveners and all others. So does the judgment, which is in conformity with the petition, and is against "unknown owners." Interveners' title was bound by the judgment, and they had the right of appeal, and could assign in the court any errors properly raised and presented. We find in the statement of facts proof of title in interveners to the land. The judgment is reversed, and the cause remanded.

O'KEEFE et al. v. McPHERSON.¹

(Court of Civil Appeals of Texas. Feb. 23, 1901.)

PUBLIC LANDS — PURCHASE BY SETTLER — ABANDONMENT — SALE TO MINOR — FORFEITURE — INDORSEMENT OF "LAND FORFEITED" — ON THE MARKET — LISTING WITH COUNTY CLERK.

1. Sayles' Civ. St. art. 4218i, provides that, if any purchaser of public land shall fail to reside on it, he shall forfeit such land in the same manner as for nonpayment of interest, and further that, if the interest due on any obligation for such land remains unpaid at a certain date, the commissioner of the general land office shall indorse on such obligation "Land forfeited," and such land "shall thereby be forfeited to the state." Article 4218j declares that, under certain conditions, purchasers forced to abandon their land temporarily on account of drought shall not "have the forfeiture declared against them" for nonoccupancy. *Held*, that lands sold by the original purchaser from the state to a minor, and not lived on thereafter by the vendor, were not forfeited for nonoccupancy, in absence of the land commissioner's indorsement on the obligation of the words "Lands forfeited," though the sale to such minor be assumed to have been unlawful and void, and a subsequent settler could not claim the right to purchase such lands from the state as forfeited lands.

2. Under Sayles' Civ. St. art. 4218i, providing that, after forfeiture of public land for nonoccupancy, such land shall be again for sale, as if no such sale and forfeiture had occurred, such land will not be subject to sale till the land commissioner has listed the same with the county clerk.

On Rehearing.

Under Sayles' Civ. St. art. 4218k, authorizing original purchasers of land from the state to have new purchasers substituted, where an original purchaser sold his claim to a minor he did not thereby put the land again on the market, assuming such sale to the minor to be void, since the statute merely authorizes sale to the vendee selected by the purchaser.

Error from district court, Mitchell county; W. B. Smith, Judge.

Action by Richard McPherson against J. S. O'Keefe and others to establish a right to land purchased from the state. From a judgment in favor of plaintiff, defendants bring error. Reversed. Motion for a rehearing denied.

Jeffress & Hooper, Earnest & Shepherd, and Tarlton & Ayres, for plaintiffs in error. Martin Dies, for defendant in error.

STEPHENS, J. O. D. Holloway was the original purchaser from the state of the school land in controversy; that is, section 20, and the N. $\frac{1}{2}$ of 32, block 26, Mitchell county. The controversy as to section 10, block 27, need not be noticed. The date of Holloway's purchase, which was valid and not questioned, was August 28, 1897; he being then an actual settler on section 20. May 20, 1898, he sold the land so acquired and surrendered possession to J. S. O'Keefe, a minor over 18 years old, who at once became an actual settler on section 20, and a purchaser from the state of that section, and the north half of 32 by the substitution

of his own affidavit and obligation for those of Holloway. March 29, 1900, Richard McPherson, having invaded the possession of O'Keefe, made application to purchase the land in controversy as an actual settler on section 20, but his application was rejected by the commissioner of the land office. This suit was consequently brought by him against O'Keefe to establish his right to the land. The only issue submitted to the jury was whether or not McPherson was an actual settler when he made his application to purchase. The evidence warranted the verdict rendered in his favor upon this issue, and upon all other issues of fact the evidence was such as to warrant the court in treating them as not open to controversy. We proceed, therefore, to consider the questions of law arising upon the established facts.

McPherson evidently undertook to acquire the land from the state, and prevailed in the trial below, upon the assumption that the transfer from Holloway to O'Keefe, because of the minority of O'Keefe, and because of the abandonment of possession by Holloway, had the effect of placing the land again upon the market; but in so holding, we think, the court erred. If it be conceded that the substitution of O'Keefe for Holloway as purchaser from the state was not authorized by law, that did not, of itself, or together with the surrender or abandonment of possession by Holloway, work a forfeiture of the Holloway purchase, and place the land back upon the market. The decisions of our supreme court have established the proposition, as the law of this state, that any valid purchase of public-school lands may be canceled by the state for default on the part of the purchaser in the payment of annual interest, without re-entry or judicial ascertainment, upon the ground that as the superior title remains in the state, and the contract is executory, the state has the same right as any other vendor upon default of the vendee to elect to treat the contract of sale as broken and terminated. *Friscoe v. Blum* (Tex. Sup.) 45 S. W. 998; *Standifer v. Wilson*, 93 Tex. 232, 54 S. W. 898. But we know of no decision of that court warranting a third party—an intending purchaser—to make this election for the state. One recent decision has been found which holds that it is not necessary for the land commissioner to make the indorsement "Land forfeited," as prescribed by law. *Bank v. Dowlearn* (Tex. Civ. App.) 59 S. W. 308. This requirement of the statute is held in the case just cited to be merely directory, but we cannot accept this view. We note, also, that a writ of error seems to have been granted in the case, which is doubtless now pending in the supreme court. See footnote, 59 S. W. 308. The land commissioner is not the owner of the land, but merely the agent of the state, acting under a limited power of attorney, and must act in the manner prescribed. It is by taking such action on

¹ Writ of error denied by supreme court.

his part that the state elects without suit to rescind, and not otherwise. This is clearly shown by the expressed will of the state as declared by the legislature, to the effect that the commissioner "shall" make the indorsement, "and thereupon said land shall thereby be forfeited to the state," etc. Sayles' Civ. St. arts. 4218^l, 4218^{ll}. It is only after this is done that the land can be resold; and so important is it, that the time allowed a purchaser, by the last of these articles, in which to contest the forfeiture by suit is fixed by the date of the indorsement "Lands forfeited."

But it is contended in behalf of McPherson that the default of the purchaser in failing to reside on the land as required by law and in the contract of purchase, unlike the default in payment of interest, itself works a forfeiture, and places the land again on the market, without any action on the part of the land commissioner. This contention involves a construction of the following language of section 11 of the act of 1895 (Sayles' Civ. St. art. 4218^l): "And if any purchaser shall fail to reside upon and improve in good faith the land purchased by him, he shall forfeit said land and all payments made thereon to the state, in the same manner as for nonpayment of interest, and such land shall be again for sale as if no such sale and forfeiture had occurred." Just preceding this sentence are the provisions for forfeiture for failure to pay interest. Section 9 of the same act (Sayles' Civ. St. art. 4218^l) provides that, under the conditions there named, for any temporary abandonment of the land on account of drought, purchasers "shall not have the forfeiture declared against them under the law providing for the forfeiture of such lands for non-occupancy." Unless by the clause, "in the same manner as for non-payment of interest," the legislature meant to refer to the next preceding sentence of that section for the manner of declaring the forfeiture, we are unable to explain why it was inserted at all, as it was not in the previous act on the subject of forfeiture, which was otherwise identical, or what it means, or what was meant in the quotation above made from the ninth section of the same act by the use of the word "declared" in connection with forfeiture for nonoccupancy. What was said in the opinion of Chief Justice Tarlton in *Atkeson v. Bilger* (Tex. Civ. App.) 23 S. W. 415, and by Justice Head in *Metzler v. Johnson* (Tex. Civ. App.) 20 S. W. 1116, was with reference to the act of 1887, which contained no such clause. In *McKnight v. Clark* (Tex. Civ. App.) 58 S. W. 146, we were considering the effect of the failure of a bona fide owner of and resident upon other lands than school lands to reside upon the same or a part of the additional lands purchased as provided in article 4218^{ff}, to which the clause of forfeiture above quoted does not seem altogether applicable; for such purchaser might fully com-

ply with the article last named, and his land be subject to forfeiture under article 4218^l, which makes the failure to reside upon the land purchased, and not upon "other land," the ground of forfeiture. But, however this may be, we are of opinion that it required action on the part of the commissioner to forfeit the purchase of Holloway; it being legal and valid till it was in some way set aside at the instance of the state. We are also of opinion that the case is within the spirit, if not the letter, of the decision in *Willoughby v. Townsend* (Tex. Sup.) 53 S. W. 581. True, the language, "and such land shall be again for sale as if no such sale and forfeiture had occurred," is quite comprehensive and explicit, but not more so than the language in article 4218^l, which declares that, when any portion of the school land has been classified to the satisfaction of the commissioner, it "shall be subject to sale"; and yet it was held in the case last cited that it is not really subject to sale till the commissioner has notified the county clerk of the fact. What probably was meant is that it is again "subject to sale," as it originally was when classified to the satisfaction of the commissioner,—to be put upon the market and sold in the same manner. While it is not expressly declared that it shall be placed upon the market and sold as provided in the act, nothing else could have been contemplated; for there is no authority elsewhere prescribing how the commissioner is to proceed. If the case be one not provided for in the act as to the manner of placing the land on the market, then it was incumbent on McPherson to show that some regulation had been adopted by the commissioner covering such cases, and that he had complied with it. As the commissioner rejected his application, the burden was on him to show that he was not warranted in doing so, especially as he was the plaintiff in the action. *Reeves v. Smith* (Tex. Civ. App.) 58 S. W. 185.

In view of these conclusions, it becomes unnecessary to consider the effect of O'Keefe's minority upon his rights in the premises. Lest, however, our silence upon a question vitally affecting so many school land titles in Texas should be misconstrued, as it seems to have been a custom or regulation of the general land office, of long standing, to sell such lands to minors over the age of 18, we will add that we are disposed to adhere to the decision made by this court in *Weatherford v. McFadden*, 51 S. W. 548, notwithstanding the subsequent decision of the supreme court in *State v. Rogan*, 54 S. W. 1018. While there may be conflict between the opinions in these cases, the facts of the two cases were quite different, and they arose under different statutes. It seems to us that cogent reasons may be given why a sale to a minor who is old enough to become an actual settler under statutes making that the sole qualification of a purchaser should be upheld, as

was done in *Weatherford v. McFadden*, supra, especially where such statute has been repeatedly re-enacted without change in this respect after being construed by the land department of the state government for a series of years as authorizing such sales. To now overturn a construction so long acted upon by the land commissioner, and apparently sanctioned by the legislature, will probably disturb numerous titles to school lands in this state, not merely of minors old enough to become, and who have become, actual settlers, but also of many others who deraign title from such purchasers. The decision in *State v. Rogan*, supra, does not, we think, require of us such a course. But, not finding it necessary in this case to discuss the merits of that question, we abstain from doing so. Upon the conclusions already stated, the judgment will be reversed, and here rendered against defendant in error.

On Motion for Rehearing.

(March 16, 1901.)

It is urged in the written argument submitted with the motion that in the conclusions already filed we "failed to distinguish between an abandonment of the purchase by one who files his voluntary conveyance, and an abandonment of the land" by failure to reside on it as required by law. But we fail to see how this distinction is to benefit defendant in error. If the action of Holloway in making or attempting to make a transfer of his right to O'Keefe is to be construed as an abandonment of the original purchase, so as to authorize the state, like any other vendor, to elect to treat the contract of sale as broken and terminated, there is no evidence in this record that the state or any of its officers ever made any such election. The acceptance by the land commissioner of O'Keefe as purchaser in lieu of Holloway was an affirmation, rather than a repudiation, of the original sale; and if, by reason of the minority of O'Keefe, this substitution was not authorized by law, the act of the land commissioner in assenting to it was in no sense the act of the state, and did not affect the question one way or the other. If, then, without any election on the part of the state, a purchaser like Holloway can put an end to his obligation as such purchaser by his own voluntary abandonment of the contract, what becomes of the argument that a minor cannot become a purchaser of school land, because he can only execute a voidable obligation? In other words, if the law is to receive the construction that any purchaser of school land may terminate his contract with the state at will, what ground is left for the contention that the disability of minority is a bar to the right of an actual settler, otherwise competent to purchase such land from the state? The question admits of but one answer, for the obligation, whether it be that

of an adult or a minor, would be voidable at the pleasure of the maker. The argument proves too much for defendant in error, for it establishes the validity of the transfer to O'Keefe notwithstanding his minority. It is, however, insisted that, as Holloway was authorized by article 4218k of the Revised Statutes to have a new purchaser substituted, what was done in this instance to accomplish that result had the effect of placing the land again on the market. But, manifestly, there is no merit in this contention. If the land can be sold, in such case, to be again placed on the market, it is certainly in a very limited sense; for it can only be sold, under this article of the statute, to the person selected by the original purchaser. As to the difficulty of declaring a forfeiture where the obligation of a minor has been substituted for that of the original purchaser, and the original obligation has been canceled or surrendered, we need only add that if the land commissioner has, by doing what the law did not authorize, placed it out of his power to declare a forfeiture as provided by law, the state is not without a remedy, or at least not without power to create one. The motion will be overruled.

GERMAN-AMERICAN INS. CO. v. EVANTS.¹

(Court of Civil Appeals of Texas. Feb. 9, 1901.)

INSURANCE—VACANCY OF PREMISES—FORFEITURE—WAIVER.

An insurance adjuster knew that the policy had been forfeited by breach of a condition therein, and, insured having refused to sign an agreement stipulating that the insurer waived no rights by investigating the loss, the adjuster then stated that he did not waive any conditions, but proceeded to adjust the loss. He required insured to make a list of destroyed property, etc., and went away without having claimed a forfeiture, and insured went to the expense of employing lawyers to make out his proofs of loss. *Held*, that the forfeiture was waived.

Appeal from district court, Cooke county; D. E. Barrett, Judge.

Action by S. S. Evants against the German-American Insurance Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Ledbetter & Bledsoe and Eldridge & Gardner, for appellant. Cruce & Cruce and Potter & Potter, for appellee.

HUNTER, J. This was an action filed on the 7th day of April, 1899, in the district court of Cooke county, Tex., by the plaintiff, S. S. Evants, against the defendant, the German-American Insurance Company, upon a fire insurance policy to recover the sum of \$1,850. The property insured consisted of a dwelling house occupied by the plaintiff as his home at the time the policy was issued.

¹ Writ of error denied by supreme court.

and his household and kitchen furniture. The policy was issued at Marietta, Ind. T., September 15, 1898, and the fire which destroyed the house and property occurred on the 21st day of November, 1898. One of the grounds upon which the company refused to pay the loss and defended the action was that, after the policy was issued, the plaintiff moved out of his dwelling, and left it vacant and unoccupied for more than 10 days, in violation of the provisions of the policy. He moved, with his family, into the upper story of a stone building owned by him, situated about 400 yards from his residence, to stay there during the ensuing winter. The trial judge charged the jury, in substance, that the plaintiff had forfeited his right to recover on the policy, but submitted to the jury the issue as to whether or not the defendant had waived its right to claim the forfeiture by certain negotiations and consultations which took place between the adjuster for the insurance company and the plaintiff. The trial resulted in a verdict in favor of the plaintiff for the full amount of the policy sued on and interest, and the insurance company has appealed.

The question presented by appellant is whether the evidence warranted the court in submitting the issue of waiver of forfeiture to the jury. The evidence tended to establish the material allegations in the plaintiff's petition, and was sufficient to entitle the plaintiff to recover the full amount of the policy, unless the policy had been forfeited by reason of the plaintiff's removal from the premises and vacating the same for more than 10 days, and the forfeiture had not been waived. The facts on this issue are, briefly, these: The plaintiff and his family, at the time the policy was issued, in September, 1898, occupied the premises as a residence,—a home. They had a negro man servant, who occupied a servant's house in the back yard. The family left the premises about the 1st of November, and moved into rooms over the plaintiff's stone storehouse about 400 yards from the insured house for the purpose of remaining there during the winter months, as the stone building was warmer than the wooden house insured. They left nearly all their household furniture in the insured house, and had the negro servant to stay and sleep in a side room, which was part of the house. After the family had been moved into the stone storehouse for more than 10 days, the insured house was burned down, and the household goods almost totally destroyed by fire. The property insured was situated at Marietta, Ind. T., and the contract of insurance was made there. The policy contained the following stipulations: "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the hazard be increased by any means within the knowledge or control of the assured; * * * or if a building herein de-

scribed, whether intended for occupancy by owner or tenant, be or become vacant or unoccupied, and so remain for ten days." "If fire occur, the insured shall give immediate notice of any loss thereby in writing to the company, protect the property from further damage forthwith, separate the damaged from the undamaged property, put it in the best possible order, and make a complete inventory of the same, stating the quantity and cost of each article, and the amount claimed thereon: * * * and shall furnish, if required, verified plans and specifications of any building." "This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements, or conditions as may be indorsed hereon or added hereto; and no officer, agent, or other representative of this company shall have power to waive any provision or condition of this policy except such as, by the terms of this policy, may be subject of agreement indorsed hereon or added hereto, and as to such provisions and conditions no officer, agent, or representative shall have such power, or be deemed or held to have waived such provisions or conditions, unless such waiver, if any, shall be written upon or attached hereto; nor shall any provision, privilege, or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached." The fire occurred November 21, 1898. On the 23d of same month the appellant's adjuster arrived at Marietta, and began an investigation of the extent of the loss. Before beginning his investigation, however, he endeavored to get appellee to sign a printed form of agreement, in which it was stipulated that appellant company waived no rights of the company under the policy by reason of the investigation; but appellee refused to sign it, informing the adjuster, however, of the fact that he and his family had moved from the premises into the stone building more than 10 days before the fire, but had left the negro in the house; giving him a true and full statement of all the facts upon which the forfeiture was afterwards and is now claimed. The adjuster, upon failing to get the appellee to sign this agreement, announced to appellee, and called on others present to witness, that he would make the investigation as to the extent of the loss, but that in doing so he desired it distinctly understood that he did not and would not waive any of the conditions of the policy, or rights of his company to which it might be entitled thereunder; and then proceeded, in company with appellee, to investigate the loss. He requested appellee to make out a list of the personal property destroyed, together with a list of that saved, which appellee did by two or three hours' work. He and appellee went upon the site of the burned building, and he took the dimensions of the building, and requested appellee to meet him at

hotel after supper, which he did; and they then and there discussed the loss, and the adjuster offered to settle it at \$1,020, which offer appellee declined to accept, and the adjuster left, having never claimed that the policy had been forfeited by reason of the removal nor for any other reason. Some 10 or 15 days after the adjuster left Marietta, not having heard from him nor the company, the appellee employed lawyers to make out his proofs of loss, as required by the policy, and on the 15th day of December, 1893, forwarded them by mail to the appellant company at New York, claiming the full amount of \$1,850. The company received this letter, and answered it, notifying appellee that the matter was referred to Mr. Drumm, the adjuster aforesaid, "who had charge of the company's losses in the Indian Territory." Mr. Drumm received the papers referred to him, and also wrote appellee's attorneys that he would call on them soon in reference to the matter; but in none of these letters did the company or the adjuster claim a forfeiture of the policy. If this temporary absence of the family from the dwelling house, with a servant left in charge, can be held to be a vacancy, within the meaning of the contract,—which it is not necessary now to decide; but see *Insurance Co. v. Kempner* (Tex. Civ. App.) 34 S. W. 393; *Id.* (Tex. Sup.) 35 S. W. 1069; *McMurray v. Insurance Co. (Iowa)* 54 N. W. 355; *Hill v. Insurance Co. (Mich.)* 58 N. W. 359; *May, Ins. § 249*; *2 Beach. Ins. § 721*; *Bryan v. Insurance Co.*, 8 W. Va. 605; *Insurance Co. v. Smith*, 3 Colo. 422; *Harrington v. Insurance Co.*, 124 Mass. 126; *Woodruff v. Insurance Co.*, 83 N. Y. 133; *Cummins v. Insurance Co.*, 67 N. Y. 260,—this evidence required the court to submit the issue to the jury whether the forfeiture had been waived by appellant, and was sufficient to warrant the jury in finding that it had been so waived. The acts of the adjuster, after being fully informed of the facts upon which the claim of forfeiture is now predicated, authorized the jury to conclude that he did not claim a forfeiture, but elected to go on with his investigation of the amount of the loss. He required appellee to make out at some labor and trouble a list of the property lost, and a list of what he had estimated the loss to be, as the facts authorize us to conclude; left without claiming any forfeiture; allowed appellee to go to the expense and trouble of employing lawyers and of making out his proofs of loss, at no time up to this period claiming the forfeiture. The acts are inconsistent with a claim of forfeiture. At that time the policy was either valid or void, and, if the adjuster had intended to claim a forfeiture, he should have done so promptly, and not required the appellee to do things which could only be required of him under the contract, thus treating it as still valid and binding. His conduct was such as to leave the appellee

under the belief that no forfeiture would be claimed, and he was thus induced to incur expense and perform labor in complying with the terms and stipulations of the policy, which he was not required to do if liability under the policy had been denied. *Insurance Co. v. Loyd* (Ark.) 56 S. W. 44; *Insurance Co. v. Gibson*, 53 Ark. 494, 14 S. W. 672; *Insurance Co. v. O'Neal* (Tex. Civ. App.) 38 S. W. 62; *Phoenix Assur. Co. of London v. Munger Improved Cotton Mach. Mfg. Co.* (Tex. Civ. App.) 49 S. W. 271; *Insurance Co. v. Moriarty* (Tex. Civ. App.) 37 S. W. 628; *Insurance Co. v. Eggleston*, 96 U. S. 572, 24 L. Ed. 841; *Insurance Co. v. Kuhlman* (Neb.) 78 N. W. 936; *Kingman v. Insurance Co. (S. C.)* 32 S. E. 762. But it is insisted that the adjuster declared to appellee that his conduct and conversation and offers of compromise must not be taken as a waiver of any of the rights of the company under the stipulations in the policy. The answer to this is, appellee refused to agree to such proposition. This refusal to agree was tantamount to saying to the adjuster: "You know the law and the facts and you must either treat the policy as void or as valid. You cannot do both, and you know it. Now take your choice;" and he chose to treat it as valid by requiring the appellee to perform such stipulations as were binding upon the insured. This must be treated as an election to waive the forfeiture and hold the policy valid, notwithstanding he declared at the time he was not waiving it. The adjuster in this case is to be commended for his efforts to avail himself and his company of both horns of the dilemma, and his faithful struggle to that end reminds us not a little of Byron's description of how Julia did it under an equally pressing emergency:

"A little still she strove, and much repented,
And, whispering 'I will ne'er consent,' consented."

His acts were totally inconsistent with his declarations, and in the common affairs of men they say, "Actions speak louder than words," and sometimes the law takes the same sensible view of the proposition. We find no error in the judgment or proceedings prejudicial to the appellant, and order that the judgment be affirmed.

WATSON v. MIRIKKE

(Court of Civil Appeals of Texas. Feb. 23, 1901.)

PLEA IN ABATEMENT—WAIVER—AMENDED PETITION—AMOUNT IN CONTROVERSY—JURISDICTION—LANDLORD AND TENANT—CROP RENT—DAMAGES—DISTRAINT—EXEMPTION—DOCUMENTARY EVIDENCE—STAMP TAX.

1. Under *Sayles' Civ. St. art. 1269*, providing that pleas to the jurisdiction shall be determined during the term at which they are filed, if the business of the court will permit, and rule 24, governing the practice in county courts (20 S. W. xiii.), requiring that such a plea shall

be tried at the first term to which the attention of the court shall be called to the same, a plea to the jurisdiction is waived by permitting three terms of court to pass without calling the court's attention to it.

2. Where the plaintiff has amended his petition so as to claim a larger amount than that originally demanded, the amended petition fixes the amount in controversy, for the purpose of determining the jurisdiction of the court.

3. In an action for rent payable in products, the measure of damage is the market value of these products at the time the rent was due, with interest thereon from that date to the date of trial.

4. A clause in a lease providing that, if the landlord should distrain, he is to be free from any claim for damages alleged by the tenant for any cause whatever, is valid, and sufficient to exempt the landlord from a claim for damages arising from a just and legal suit for distraint.

5. The United States internal revenue law of 1898, providing that certain documents shall not be admissible in evidence unless bearing revenue stamps, affects their use in federal courts only.

Appeal from Ellis county court; J. E. Lancaster, Judge.

Action by S. H. Watson against T. M. Mirike. From a judgment in favor of defendant, plaintiff appeals. Reversed.

C. M. Supple, for appellant. Templeton & Harding, for appellee.

BOOKHOUT, J. On September 12, 1899, appellant, S. H. Watson, instituted distress proceedings against appellee, T. M. Mirike, in justice court for precinct No. 6, Ellis county, Tex., for \$200 rent, consisting of claim of \$75 for failure to break stubble land, and \$125 for the value of agricultural products appellee failed to deliver in kind, and also for \$38.66 worth of advances, all for the year 1899. Appellant alleged, as grounds for suing out the distress warrant, that \$38.66 for advances and \$130 of rent for year 1899 was due, and that appellee had removed and was about to remove from the rented land, without appellant's consent, products raised on the rented land. All papers were sent to the county court of Ellis county by the justice of the peace, and in the county court of Ellis county, on September 30, 1899, appellant filed his original petition against appellee, asking judgment against him for \$200 for rent for year 1899, and also for \$38.66 for supplies for year 1899, and setting up the issuance and levy of the distress warrant, and existence of landlord's lien on products levied on to secure said rent and advances, and asking foreclosure of his landlord's lien to secure said rent and advances. On October 3, 1899, at October, 1899, term of court, appellee filed his original answer, setting up a plea to the jurisdiction of the county court on the ground that appellant had fraudulently stated his claims in excess of \$200 for the purpose of conferring jurisdiction on the county court of Ellis county, and in the alternative denying the existence of any of the grounds for distress warrant, and reconvening for \$390 actual and \$500 exemplary damages for

the alleged wrongful and malicious suing out of the distress warrant, and denying that any supplies to make a crop were bought of appellant at all, and claiming a payment of \$18.38 on the \$38.66 account sued on, made prior to filing this suit. The property levied on, under agreement of parties, was sold on October 28, 1899, by the constable, for \$328.95; and of this sum \$255.95 was turned over to the clerk of the county court of Ellis county, and \$73 was applied to expenses. Appellant filed four amended and two supplemental petitions, and appellee one original and three supplemental answers. In each supplemental petition, appellant excepted to appellee's plea to the jurisdiction of the county court on the ground that the same had not been called to the court's attention, for its action or attention, within the time required by the statutes of Texas, and rules governing county and district courts. The case was submitted to the jury, and the jury found with appellee on his plea to the jurisdiction of the court. Judgment was accordingly entered dismissing the suit for want of jurisdiction, and ordering the money in the hands of the clerk turned back to appellee, and ordering the constable, who was not a party to the suit, to refund the \$73 to appellee paid out by the constable for expenses in gathering crops, unless the appellant filed a supersedeas bond in manner and time required by law. Appellant filed his supersedeas bond in time required by law, and assigned errors, and has perfected his appeal.

Appellant's exception to the defendant's plea to the jurisdiction of the court was overruled at the July term, 1900, to which the appellant excepted. Thereupon the case was submitted to the jury, and the jury found in favor of the defendant on his plea to the jurisdiction. Upon this verdict judgment was entered dismissing the suit for want of jurisdiction, and ordering the money in the hands of the clerk turned back to the defendant. From this judgment plaintiff has prosecuted an appeal to this court.

Appellant's first contention is that the court erred in overruling his exception to the plea of jurisdiction. This plea was filed October 7, 1899. At the October term the cause was continued under a rule for costs. At the January term, 1900, the cause was continued because of the absence of a witness. At the April term the cause was continued without any order made of record. At the July term the case was called for trial, and the appellant presented his exceptions to said plea, based upon the ground that it had been waived by defendant's failure to call the court's attention to the plea and have the same determined at the term of the court at which it was filed. The plea to the jurisdiction of the court, alleging that plaintiff has fraudulently stated his cause of action at an amount greater than the amount really due for the purpose of conferring jurisdic

tion on the court, is a plea in abatement, and is required to be filed in due order of pleading. *Hoffman v. Association*, 85 Tex. 409, 22 S. W. 154. The statute requires that such a plea shall be determined during the term of the court at which it is filed, if the business of the court will permit. *Sayles' Civ. St. art. 1269*. Rule 24 (20 S. W. xiii.), governing the practice in district and county courts, requires that such a plea shall be tried at the first term to which the attention of the court shall be called to the same, unless passed, by the agreement of parties, with the consent of the court, and all such pleas shall be first called and disposed of before the main issue on the merits is tried. In discussing the time at which a plea of this character should be presented, our supreme court, in an opinion delivered by Judge Denman, said "that the law imposes upon the party relying upon such plea the duty of demanding the action of the court thereon at the time the statute and rule require it to act in the particular case, and that his failure to do so is a waiver thereof." *Aldredge v. Webb*, 92 Tex. 122, 46 S. W. 224. It is clear that, by the terms of this statute and the rule, a party relying on such plea is required to call it to the attention of the court during the term of the court at which the same is filed. Had the plea been called to the court's attention at the October term, and the business of the court were such as to prevent its determination at that term, then the court could have made such an order as would have prevented its waiver and authorized its consideration at the next term. Where a defendant has permitted three terms of the court to pass without calling the court's attention to his plea in abatement, he must be held to have waived the plea. *Blum v. Strong*, 71 Tex. 328, 6 S. W. 167; *Machinery Co. v. Smith* (Tex. Civ. App.) 44 S. W. 592; *Aldredge v. Webb*, supra. We conclude that the court erred in overruling defendant's exception to the plea in abatement.

2. The amount for which the distress warrant issued was \$238.66. The original petition sought a recovery for this sum, claiming that \$200 of it was for rent, and \$38.66 was for money advanced to make a crop on the rented premises. By amendment, plaintiff set up additional demands not embraced in the original petition, and also increased the amount sought to be recovered for the items set out in the original petition. The plaintiff had the right to amend in these particulars. *Sayles' Civ. St. art. 1188*; rule 12 of practice in district and county courts, 20 S. W. xii.; *Boren v. Billington*, 82 Tex. 188; 18 S. W. 101; *Connell v. Chandler*, 11 Tex. 253. The amount of the demand as set up in the amended petition upon which plaintiff goes to trial is the amount in controversy, and this amount prima facie determines the jurisdiction of the court. The court ought not, in submitting the issue raised by defendant's plea to the jurisdic-

tion, to have restricted the jury to the demand set up in the original petition. It is true that, if plaintiff relied upon the distress warrant and levy to preserve his lien, he could only foreclose upon the property levied upon by that writ. His lien was given by statute. The office of a distress warrant is to seize and hold the property in order to preserve the lien. If this were not done, he might lose his lien by the removal of the property from the rented premises, in which event the lien would only remain in force for one month after such removal. *Sayles' Civ. St. art. 3237*. Cases may arise where a foreclosure could be had without the aid of a distress warrant. *Bourcier v. Edmonson*, 58 Tex. 675.

3. In the seventh assignment of error complaint is made of the fourth paragraph of the court's charge prescribing the measure of damages. It was shown that the rent was to be paid in cotton, corn, and wheat. The measure of damage in such a case is the market value of these products at the time the rent became due, with legal interest thereon from that date to the date of trial. *Sedg. Meas. Dam.* § 319; *Tayl. Landl. & Ten.* (8th Ed.) § 891; *Van Rensselaer's Ex'rs, v. Jewett*, 5 Denio, 185.

4. The defendant pleaded in reconvention for damages alleged to have been sustained by him by reason of the suing out and levying of the distress warrant. The plaintiff replied to this plea that he was exempted from all damages arising from the suing of the distress warrant, under the following clause of the lease contract: "If he [the landlord] should institute suit for distraint, he is thereby made and declared free from any damage or alleged damages to said crop or crops, from whatever cause claimed or alleged by me [the tenant], and from all damages alleged by me in any wise whatever." The appellant asked a charge to the effect that, by the terms of the above clause of the lease, plaintiff was exempted from damages arising from the suing out and levy of the distress warrant. The court refused the charge, and to this action appellant has assigned error. In view of the fact that the construction of this clause of the lease will arise upon another trial, we feel it our duty to consider this assignment. We have not been cited to any authority in which a similar contract has been construed by the courts. It has been held that a public carrier may make a contract which will relieve him from liability for loss or injury to property received for transportation unless claim be made within a named period after the loss occurs. *Westcott v. Fargo*, 61 N. Y. 551; *Express Co. v. Caldwell*, 21 Wall. 264, 22 L. Ed. 556. It has also been held that contracts made between persons, other than carrier and shipper, by which a shorter period than that prescribed by the statute of limitations had been fixed within which actions must be brought, or the right

to do so was barred, were valid. *Railway Co. v. Trawick*, 68 Tex. 814, 4 S. W. 567; *Greenh. Pub. Pol.* pp. 505, 507. It has been held by the supreme court of this state that a stipulation contained in a promissory note authorizing any attorney to appear for the maker in any competent court at any time and confess judgment in favor of the owner or holder of the note, waiving service of citation and copy of petition, and agreeing that execution may issue at once on the judgment, was valid and binding. *Strasburger v. Heldenheimer*, 63 Tex. 5. This decision was rendered previous to the adoption of the statute of 1885 prohibiting a contract of this character. The clause is not against public policy, and is such a contract as the parties had a right to make. Our statute expressly recognizes the right of the landlord and tenant to enter into such stipulations and contracts in regard to the rents as they may see proper. *Batts' Ann. Civ. St. art. 3249*. While the clause is valid, it is not entitled to the broad construction sought to be placed upon it by the requested charge. By the terms of the lease contract, it must have been contemplated by the parties thereto that circumstances might arise which would require a distraint for the purpose of securing the landlord in the payment of his rent. They had in contemplation the circumstances which authorized the suing out of this writ under the statute, and entered into the contract in view of these circumstances. They had in contemplation a distraint in accordance with the statute. If the circumstances arose which authorized a legal distraint, then the tenant agreed to waive all damages arising therefrom. It will not be presumed that they contemplated a waiver of damages arising from an illegal and unjust suing out of the writ. Such a construction would require us to presume that the parties took in contemplation the doing of an illegal act. We will not indulge such a presumption.

5. Appellee has cross-assigned error, and contends that the trial court erred in admitting in evidence the written lease, because it did not have the proper revenue stamps affixed thereto, as required by the act of congress of 1898. The instrument is without a revenue stamp, and was admitted in evidence over defendant's objection. We have not been cited to any decision in which the act of 1898 has been construed by the appellate courts of this state. The supreme court, in construing the act of congress of 1864 and that of 1866 which stipulated that instruments of this character should not be admissible in evidence until a legal stamp or stamps were affixed thereto, held that they had reference only to the courts of the United States, and not to state courts. *Dalley v. Coker*, 33 Tex. 815; *Shipman v. Fulcro*, 42 Tex. 248. This holding is in accord with the construction placed upon those acts by nearly all the states. *Clemens v. Conrad*,

19 Mich. 170; *Sammons v. Halloway*, 21 Mich. 162; *Latham v. Smith*, 45 Ill. 29; *Craig v. Dimock*, 47 Ill. 308; *Bunker v. Green*, 48 Ill. 243; *Hanford v. Abrecht*, 49 Ill. 146; *Bowen v. Byrne*, 55 Ill. 467; *Wallace v. Cravens*, 34 Ind. 534; *Duffy v. Hobson*, 40 Cal. 240; *Hunter v. Cobb*, 1 Bush, 239; *Sporrer v. Elifer*, 1 Helsk. 633; *Davis v. Richardson*, 45 Miss. 499; *Carpenter v. Snelling*, 97 Mass. 432; *Moore v. Quirk*, 105 Mass. 49; *Griffin v. Ranney*, 35 Conn. 239; *Haight v. Grist*, 64 N. C. 739; *Weltner v. Riggs*, 3 W. Va. 445. The act of congress of 1898, in so far as it seeks to affect the admissibility of unstamped instruments in evidence, is similar to the act of congress of 1866, and, we think, only applies to the courts of the United States, and not to the state courts. *Cassidy v. St. Germain* (R. I.) 46 Atl. 35; *Knox v. Rossi* (Nev.) 57 Pac. 179. There is no merit in appellee's cross assignment. For the errors indicated, the judgment is reversed, and the cause remanded.

SCHNEIDER et al. v. SELLERS et al.¹

(Court of Civil Appeals of Texas. Dec. 8, 1900.)

ACTION TO RECOVER LAND—JUDGMENTS IN PARTITION—COLLATERAL ATTACK—PETITION—SUFFICIENCY—VENUE—PLEA TO JURISDICTION—SUFFICIENCY—MISJOINDER OF ACTIONS—HUSBAND AND WIFE—TRUST DEED—WIFE'S SEPARATE PROPERTY—PLEADING—LACHES OF CREDITORS—COMMUNITY PROPERTY—BONA FIDE PURCHASERS—APPEAL—REVIEW—ISSUES NOT RAISED BELOW—SUBROGATION.

1. Plaintiffs, in an action to recover land, sought to set aside, on the ground of fraud, judgments in partition affecting their title. All parties to the judgments were made parties to the action, the tribunal in which the pending action was brought had rendered the judgments, and had jurisdiction to set them aside. *Held*, that the attack on the judgments was not collateral, but direct, though third parties, defendants to the action, claiming under the judgments, had become possessed of the land.

2. A petition to avoid judgments in partition between plaintiffs, the minor heirs, and a defendant, the widow of a decedent, alleged that plaintiffs were the minor children of decedent; that after his death defendant S. married their mother, and they were in his care, custody, and control when the judgments were rendered; that both their mother and stepfather knew that the land partitioned was the separate property of decedent, and fraudulently withheld the facts from the court, etc.; and that defendants claiming under the judgments had notice of the fraud. *Held* to state sufficient grounds for vacating the judgments as to their mother and stepfather and as to the other defendants referred to claiming under the judgments.

3. In an action to recover land, certain defendants pleaded residence in a county other than that in which action was brought, and that plaintiffs' alternative plea for damages sought to recover for a tort, and hence they were entitled to be sued in the county of their residence. *Held* that the land in controversy being situated in the county where suit was brought, defendants' plea was properly overruled, as it did not negative the fact, on which

¹ Writ of error dismissed by supreme court for want of jurisdiction.

plaintiffs' claim for damages was based, that an alleged fraudulent conversion or sale of the land was made in the latter county.

4. An exception that a plea for damages in the alternative, in an action to recover land, constitutes a misjoinder of actions, is without merit.

5. Where a husband and wife execute a deed of trust on community property, and also separate property of the wife, to secure a debt of the husband, she is entitled to have the community property first exhausted to pay the debt before resort is had to her separate property; and allegations that the secured creditors in such a case permitted the community property to be squandered by the husband's other creditors and otherwise, though notified to foreclose, charge laches on their part constituting cause for relief against the incumbrance to parties claiming the separate property through a conveyance from her.

6. Land deeded to a husband after marriage is presumed to be community property.

7. Purchasers of land are not affected by fraud in the procurement of judgments in partition on which their title depends, if such fraud only appears from evidence dehors the record, and they had no notice thereof.

8. Whether the effect of a transaction disclosed by the evidence in the record was, as claimed by appellees, to release land in controversy from a trust deed, will not be determined, if, conceding that it did have such effect, there were no pleadings relating thereto on which a verdict or judgment could be based, and no issues submitted to the jury relating thereto.

9. Where, after a purchase of land under a trust deed, the purchasers, to protect their title, paid notes secured by a lien on the land superior to theirs, believing it necessary, they are not volunteers, and are entitled to be subrogated to the rights of their payee.

Appeal from district court, Ellis county; J. E. Dillard, Judge.

Action by Leonard Sellers and others against Jules Schneider and others. From a judgment for plaintiffs, defendants appeal. Reversed.

Templeton & Harding and W. P. Ellison, for appellants. Sims & Snodgrass, for appellees.

RAINEY, C. J. This suit was instituted by plaintiffs against W. C. Walker and wife, Sarah E. Walker, Jules Schneider, Alfred Davis, and the Schneider-Davis Company, a private corporation. The object of the suit is to recover a certain tract of land situated in Ellis county, which it is claimed plaintiffs inherited from their father, Teole Sellers, and a direct attack is made upon two judgments of the district court of Ellis county partitioning the estate of Teole Sellers between plaintiffs and Sarah E. Walker, the surviving widow of said Teole Sellers, who, after the death of said Sellers, intermarried with said W. C. Walker. Various grounds are urged why said judgments should be held void. It was alleged that Schneider & Davis had bought the land set apart to Mrs. Walker under a sale by virtue of a deed of trust executed to them by Walker and wife, and that same had been deeded by Schneider & Davis to said Schneider-Davis Company in fraud of plaintiffs' rights, and plaintiffs pray for damages, etc. Defendants Schneid-

er & Davis and the Schneider-Davis Company pleaded a general demurrer, a number of special exceptions, general denial, the five-years statute of limitation, and that they were innocent purchasers, etc., and also the payment by them of a certain incumbrance on the land given by Walker and wife to the guardians of plaintiffs. In reply to said answer, plaintiffs pleaded the minority of plaintiffs and the coverture of Mrs. Walker, denying that Schneider & Davis and said company were innocent purchasers; that the deed of trust given by W. C. Walker and Sarah E. Walker to Schneider & Davis included certain personal property, which was of value more than sufficient to pay off and discharge the debt secured, and that by their gross negligence they permitted said personal property to be squandered and lost, by which the lien upon the land was released, it being the separate property of Mrs. Walker, and stood only as surety, and that the sale of the land under the trust deed was, as to Mrs. Walker, void and of no force, the same having been bid in by said Schneider & Davis; that the sale to the Schneider-Davis Company was fictitious and fraudulent. It was further alleged that W. C. and S. E. Walker had conveyed said land to plaintiffs, and assigned to them all claims for damages against said Schneider & Davis growing out of said transaction. In reply to this last supplemental petition of plaintiffs, defendants pleaded a general exception, several special exceptions, the statute of two years' limitation to the claim for damages, general denial, and various special answers. Special issues were submitted to the jury, and, upon the findings, a judgment for the land was entered for plaintiffs.

Appellants, by exceptions to plaintiffs' petition, which the court overruled, and which action of the court is here complained of, questioned the right of plaintiffs to prosecute in this suit an action for the recovery of the land, and to set aside for fraud certain judgments affecting the title to said land; the contention being that, as third parties have become possessed of said land, such an attack upon the judgments is collateral, although made in the court rendering same, and, further, that a suit attacking a judgment for fraud can only be maintained against the parties to the judgment, or at least to the fraud.

We are of the opinion that the court properly overruled defendants' exceptions in this particular. It is true that the main object of the suit is a recovery of the land in controversy, but before a recovery could be had it was essential that the judgments should be set aside; for, if they stand, plaintiffs cannot recover as heirs of their father. A direct attack is made upon the judgments in this suit. All the parties to said judgments are made parties to this proceeding, and, as Schneider & Davis and the Schneider-Davis Company claim through said judg-

ments, it was proper to litigate their validity in this proceeding, and such an attack cannot be held to be collateral. *Heldenheimer v. Loring* (Tex. Civ. App.) 26 S. W. 90. In the case of *Crawford v. McDonald*, 88 Tex. 626, 33 S. W. 825, Justice Denman clearly makes the distinction between a direct and collateral attack upon a judgment. He says a direct attack "is an attempt to amend, correct, reform, vacate, or enjoin the execution of same, in a proceeding instituted for that purpose, such as a motion for a rehearing, an appeal, some form of writ of error, a bill of review, an injunction to restrain its execution," etc. A collateral attack "is an attempt to avoid its binding force in a proceeding not instituted for one of the purposes aforesaid, as where, in an action of debt on a judgment, defendant attempts to deny the fact of indebtedness, or where, in a suit to try title to property, a judgment is offered as a link in the chain of title, and the adverse party attempts to avoid its effects," etc. This action partakes of a dual character. While the main object is to recover the land, it at the same time makes a direct attack to vacate the judgments through which Schneider & Davis and the Schneider-Davis Company claim the land as innocent purchasers. In order to affect defendants' claim to the land, it was necessary to make them parties to the action to vacate said judgments. This being so, we see no good reason, under our system of practice, why in the same action the title to the land and the validity of the judgments should not be adjudicated, all those interested being parties to the suit, and the judgments having been rendered by the tribunal in which the suit is instituted, and having full and complete jurisdiction of all the matters sought to be adjudicated. Had plaintiffs brought an action of trespass to try title, and not made an attack upon the judgments, then they could not show the invalidity of the judgments, unless they appeared to be void on their face.

The court overruled defendants' exception to plaintiffs' petition which assailed the petition on the ground that it did not show sufficient facts to avoid said judgments. It alleges, in substance, that plaintiffs were the children of Teole Sellers and S. E. Sellers; that, after the death of Teole Sellers, S. E. Sellers married W. C. Walker; that plaintiffs were minors, and in the care, custody, and control of said S. E. Walker and husband, W. C. Walker, at the time of the rendition of said judgments; that said Walkers knew that said land was the separate property of Teole Sellers, and was not the community property of said Sellers and the said S. E. Walker, and that they, the said Walkers, fraudulently withheld the facts from the court, etc. Notice of the fraud on the part of Schneider & Davis is also alleged. We are of opinion that, owing to the relation existing between the plaintiffs and the Walk-

ers, it was incumbent on them to at least not take advantage of the plaintiffs' condition, and the allegations stated sufficient grounds for vacating the judgments as to the Walkers, and also as to Schneider & Davis, it being alleged that they had notice of the fraud.

The plaintiffs, by amended petition, set up, in addition to their claim to the land as heirs of Teole Sellers, a claim to the land by conveyance to them from S. E. Walker, and also charged that Schneider & Davis had fraudulently converted the land by selling same, and prayed, in the alternative, for the value of the land, if the land itself could not be recovered. The defendants Schneider & Davis and the Schneider-Davis Company pleaded their residence in Dallas county, that the alternative plea for damages sought to recover for a tort, and that they were entitled to be sued in the county of their residence. This plea of privilege was overruled, and is here assigned as error. The land in controversy is situated in Ellis county, where the suit was brought, and, in order for said plea to prevail, it should have negatived the fact that the conversion, or rather the sale, of the land was made in said county. This it does not do. *Boothe v. Feist* (Tex. Sup.) 15 S. W. 800.

We do not consider that there is any merit in defendants' exception that the plea for damages in the alternative in this suit was not permissible, as it would constitute a misjoinder of actions.

The court overruled defendants' exception to that portion of plaintiffs' petition which alleges the sale of the land under the trust deed to be void, in that the land was a mere security, and Schneider & Davis were bound to exhaust the personal property in the payment of their debt before resorting to the land for that purpose, said personal property being community property; that said Schneider & Davis had permitted said personal property to be squandered by the creditors of W. C. Walker and otherwise, though they had been notified to foreclose upon said personal property, but failed to do so, and that by reason of such failure said property had been squandered, and said Schneider & Davis, by their wrongful and fraudulent acts in refusing and failing, though requested, to realize upon same, released said land of said S. E. Walker which stood in relation of surety for the debt; that said Walker, joined by her husband, had conveyed said land to plaintiffs, and at the same time assigned to plaintiffs all her right of action for damages, etc., arising from the sale and appropriation of said land by said Schneider & Davis under said deed of trust, etc. The ground of exception was, in substance, that said property, being community property, was taken to pay community debts, and S. E. Walker would not be heard to complain if said property was so appropriated. Where the husband and wife execute a deed of trust conveying

community property, and also separate property of the wife to secure the debt of the husband, the wife is entitled to have the community property first exhausted before resort to her separate property is had to pay such debt. *James v. Jacques*, 26 Tex. 320. The allegations charge such laches on the part of Schneider & Davis which, if true, constitute cause for relief. The exception was properly overruled.

There are various other assignments which we deem unnecessary to discuss in detail, but the material questions raised will be treated under the assignment that the judgment is contrary to the law and evidence.

The evidence shows that the plaintiffs were the children of Teole Sellers and wife, S. E. Sellers, who, after Teole Sellers' death, married W. C. Walker; that the land in controversy was the separate property of Teole Sellers. This being so, plaintiffs inherited said land, subject, of course, to the surviving spouse's interest under the law, which it is unnecessary to notice here. After the death of Teole Sellers, and after the marriage of the surviving wife to W. C. Walker, suit was brought in the district court of Ellis county in behalf of these plaintiffs by Wade H. House, as next friend, against S. E. Walker and her husband, W. C. Walker, in which the court determined that the land in controversy was a part of the community property of Teole Sellers and his wife. But as a part of said land, to wit, 200 acres, constituted the homestead, no partition was made of this 200 acres. Subsequently Bascom McDaniel, who was appointed guardian of these plaintiffs, brought suit as such in said district court against said S. E. Walker and her husband, seeking a partition of said 200 acres between plaintiffs and said Walkers. The court entered judgment upon an agreement between said guardian and the attorneys of said Walkers, by which the land in controversy, 100 acres, was set apart to said S. E. Walker, and the other 100 acres was set apart to plaintiffs.

Appellees insist that these judgments are void for various reasons, which appear from the record thereof, and that same do not support Schneider & Davis' claim of innocent purchasers. The judgments were rendered by a court of competent jurisdiction, in suits brought by parties who were authorized by law to represent the minors, and there is nothing appearing from the face of the record to put Schneider & Davis upon notice of any fraud. There is no evidence to show that they had notice of any fraud in the procurement of same, and the jury found that at the time they took the deed of trust they did not have notice of any fraud. The deed to the land was made to Teole Sellers after his marriage, and the presumption of law is that it was community property. Besides, the first judgment of the district court of Ellis county adjudged it to be community property of said Sellers and wife. Schneider

& Davis not having notice of fraud, or of any fact to put them on notice, we hold that they are protected in their purchase of the land under said trust deed, and entitled to recover, unless by their conduct subsequent to the execution of the deed of trust, and prior to the sale thereunder, their lien on said land was released. The evidence was sufficient to warrant the court in vacating said judgments as to the Walkers, but, as the fraud in procuring the same appears from evidence dehors the record, Schneider & Davis are not affected thereby, they not having notice of the fraud.

It is also urged by appellees that there was a failure of consideration for the execution of the deed of trust, in that Schneider & Davis, in order to get a pre-existing debt due them by W. C. Walker secured, agreed to advance said Walker \$1,000 with which to buy cattle, and that upon the faith of said agreement S. E. Walker was induced to execute said deed of trust, but that Schneider & Davis failed to advance said sum as agreed upon. It does appear from the evidence that the agreement was made as stated, but as to the amount advanced there is some conflict in the evidence. The jury found that \$500 was advanced, and this, we think, is supported by the evidence. We also think the evidence shows that Schneider & Davis were ready to advance the balance for the purpose of buying cattle as per the agreement, but that a trade W. C. Walker had pending for the purchase of cattle fell through, and he could not use the balance for that purpose. At least, the evidence fails to show any demand on Schneider & Davis for said balance to be used for that purpose, or that said Schneider & Davis ever refused to advance said balance for the purpose stated in the agreement. Under the facts, we are of the opinion that a consideration passed, and that S. E. Walker is in no condition to complain; for it does not appear to be the fault of Schneider & Davis that W. C. Walker did not see proper to or could not invest the balance in cattle.

We will now consider the proposition that the evidence fails to show that Schneider & Davis, by their conduct and laches in dealing with the personal property, released the lien upon the land. It appears from the evidence that some time after the execution of the deed of trust, and after the maturity of the debt it was given to secure, Walker's creditors were levying executions on the personal property covered by the deed of trust to pay the community debts of Walker and wife. W. C. Walker notified Schneider & Davis in writing that said property was being thus disposed of, and urged a foreclosure of their lien. It is stated by said Walker that this notice was to protect his wife's land, though this object was not stated in the notice to Schneider & Davis, and it was shown that the value of said personal property was of sufficient value to have paid off

the debt due Schneider & Davis. They took no action in the premises, and the most of said property was finally appropriated by other creditors. It is contended by appellee that Schneider & Davis' conduct in the respect stated had the effect to release the land from the lien, and that the sale of same under the trust deed was of no force. It is insisted, on the other hand, that the notice given by Walker was not sufficient to inform Schneider & Davis that it was intended for the protection of Mrs. Walker, and that, if so, it was ineffectual, as she could not legally require Schneider & Davis to act, but, if she desired protection, the law required her to pay off the debt, and then proceed against the personal property to reimburse herself. Under the authority of *James v. Jaques*, supra, we are of the opinion that Mrs. Walker had the right, under the circumstances, to require Schneider & Davis to first exhaust the personal property before resorting to the land to pay the debt; but the question arises as to the sufficiency of the notice given by Walker to require any action upon the part of Schneider & Davis to make their debt out of the personal property. In a case decided by the court of appeals of Kentucky (*Medley v. Tandy*, 4 S. W. 308), it was held that a notice given by the husband to the creditor to bring suit was sufficient to require the creditor to act, though the interest of the wife was not mentioned. If it be conceded that notice given by the husband alone, and the interest of the wife is not mentioned therein, is sufficient to require the creditor to first exhaust the community property mortgaged before resort can be had to the separate property of the wife which is included in the same mortgage, yet we are of the opinion that the notice given by W. C. Walker in this case did not impose any duty upon Schneider & Davis in the premises. It appears from the evidence that prior to the giving of said notice said personal property had been released from the trust deed by an agreement between Schneider & Davis and W. C. Walker, and another mortgage executed thereon by W. C. Walker in favor of said Schneider & Davis; hence the notice given by Walker did not relate to a foreclosure of the trust deed on said personal property, but could have had reference only to a foreclosure of the subsequent mortgage executed by Walker.

The evidence of witness Ellison, relating to the execution of the subsequent mortgage by Walker, is as follows: "The cattle that I sold to Walker, after he sold them to me, were taken by me in the first place as a credit on the \$2,831.26 that he owed Schneider & Davis, and he owed them that amount of money, less \$500 secured by a mortgage on the cattle and a second mortgage on the land. The object was to get them out from under a heavy mortgage. They were in one big mortgage, and the object was to take

them out from under that, and put them in a separate mortgage, to themselves. I took them from him by a bill of sale, and immediately sold them back to him, and reserved a lien on them. I don't know whether I got \$1,000 worth of cattle or not, because I took them on the range. I agreed to take them at \$1,000, and sell them back to him at that price, thereby shifting the security, and relieve the land to that extent, and also made the security on the cattle so that he could handle them." It is insisted by appellees that the effect of this transaction was to release the land from the trust deed. While the evidence shows that the personal property was released from the original trust deed by said transaction, there is no plea by plaintiffs relying upon said transaction as a release of the land as surety; hence, if it should be conceded that said land was released by reason thereof, there is no pleading upon which a verdict or judgment could be based. No issues were submitted to the jury relating to this transaction, and we do not deem it proper to determine whether or not the effect of same was to release the land as security for the debt.

Appellants complain of the failure of the court in not subrogating them to the lien on the land given by W. C. and S. E. Walker to Bascom McDaniel, guardian of plaintiffs, and in not rendering judgment for the amount of the notes paid by them, and foreclosing the lien securing same. After Schneider & Davis purchased the land under the trust deed, they paid the McDaniel notes secured by the lien on the land. It appears that said lien was superior to theirs, and after their purchase of the land they paid said claim to protect their title, believing it was necessary to do so. Under these circumstances, Schneider & Davis should not be considered volunteers in paying off said claim, but were entitled to be subrogated to the rights of the holders of said notes and lien. *Davis v. Farwell* (Tex. Civ. App.) 49 S. W. 656. The judgment is reversed, and cause remanded.

O'NEAL v. CLYMER.¹

(Court of Civil Appeals of Texas. Nov. 3, 1900.)

LIMITATIONS OF ACTIONS — ABSENCE FROM STATE — TRUSTS — ACTIONS — PARTIES — FRAUDULENT CONVEYANCES — FRAUD — SUBSEQUENT CREDITORS — GRANTOR — EVIDENCE.

1. Where a debtor leaves the state of Texas before the debt has been due for four years, the running of the statute of limitations against the claim is suspended during his absence.

2. Where a debtor conveys his land to his wife to defraud his creditors, and to hold in secret trust for his benefit, the statute of limitations does not run in her favor against the claims of his creditors, since the title never vested in her.

¹ Writ of error denied by supreme court.

3. Where a debtor has conveyed his land to his wife in secret trust for his benefit, she may be joined as a defendant in an action by a creditor to collect a debt due from the husband, in which the land has been attached as the husband's property, since, though the action might proceed without her, her rights may be determined in the same action, and thereby avoid a multiplicity of suits.

4. A deed of gift made by an insolvent husband to his wife to protect his land from his then existing creditors is not fraudulent as to a creditor to whom he subsequently became indebted, unless the deed was made with the view of contracting such debt, and intent to defraud such creditor.

5. Where a conveyance in ordinary form of a warranty deed contained, after the description of the land, a special stipulation that at the death of the grantee the property, or the proceeds thereof, remaining in her, should revert to the bodily heirs of the grantor, no interest in the land remains in the grantor subject to execution for his debt.

On Rehearing.

6. Where, by a warranty deed in ordinary form, a husband conveyed land to his wife, and there is no evidence outside the deed as to the intent of the parties or understanding of the wife in accepting the deed, she cannot be adjudged to hold the land in trust for her husband at the suit of a subsequent creditor of the husband, since the burden is on such creditor to clearly contradict the terms of the deed by showing that such terms do not express the real transaction between the husband and wife.

7. Where a husband conveyed land to his wife by a warranty deed, and afterwards managed and controlled the land, such management and control are not evidence against the wife that the conveyance was in trust for the husband's benefit, since he had the right to manage and control her separate property; and his conduct in this particular would be the same whether the land was a bona fide donation or not.

8. Where a husband conveyed land to his wife by a warranty deed, his afterwards rendering the land in his name for taxation is not evidence against her that the conveyance was in trust for his benefit, since what he might do or say as to her separate property without her authority could not prejudice her title.

Appeal from district court, Hunt county; Howard Templeton, Judge.

Action by J. M. Clymer against Minnie S. O'Neal and others. From a judgment for plaintiff, defendant Minnie S. O'Neal appeals. Reversed, and motion for rehearing denied.

Montrose & Pierson, for appellant. J. G. Matthews and Finley, Etheridge & Knight, for appellee.

RAINEY, C. J. Appellee instituted this suit against J. C. O'Neal and T. E. Byrd to recover on a note executed by said O'Neal as principal and said Byrd as surety. Plaintiff caused a writ of attachment to issue, and levied on the land in controversy. Appellant, Minnie S. O'Neal, the wife of J. C. O'Neal, was made a party for the purpose of litigating her right to the land levied on, it being alleged that she held same by virtue of a deed executed to her by said J. C. O'Neal in fraud of creditors, and that she held it in trust for her said husband to save it from forced sale. Defendants interposed

several exceptions to plaintiff's petition, and answered by general denial and special pleas, which will be noticed hereafter. Judgment was rendered for plaintiff for his debt against J. C. O'Neal, and foreclosing the attachment lien on the land as to all the defendants, from which Minnie O'Neal appeals.

It is contended that plaintiff's cause of action as to the debt and as to subjecting the land to the payment of same was barred by limitation of four years, and that the court erred in not so holding. More than four years elapsed from the maturity of the debt till the bringing of this suit, but it was shown that before the four years expired J. C. O'Neal left the state, and remained absent therefrom until this suit was instituted. O'Neal's absence from the state suspended the running of the statute; therefore plaintiff's debt was not barred. *Ayres v. Henderson*, 9 Tex. 539; *Wilson v. Daggett*, 88 Tex. 375, 31 S. W. 618. We are also of the opinion that the right, if any, to subject the land to plaintiff's debt was not barred. This phase of the action is based upon the theory that title never vested in Minnie O'Neal, but that she held it in trust for J. C. O'Neal. If so, then the statute does not apply.

It is urged that there was a misjoinder of parties and actions in making Minnie O'Neal a party, and in seeking to litigate her right to the land. In this contention we do not concur. While plaintiff could have prosecuted his suit without making her a party, and foreclosed the attachment lien on the land, etc., but without making her a party it would not have affected her rights in the land, and another suit would have been necessary against her to have determined her rights in the land, we think it was proper to make her a party, and litigate her claim to the land, as was done, and thereby avoid a multiplicity of suits.

It is assigned as error that the evidence fails to support the verdict, in that it fails to show that the transfer of the land was made to defraud plaintiff, his claim having been contracted subsequent to said transfer. The deed of gift to Minnie O'Neal was executed by J. C. O'Neal on September 9, 1891, and the debt sued on was incurred on December 4, 1891, nearly three months subsequent to the execution of the deed. The evidence warrants the conclusion that at the time of the execution of the deed of gift to his wife he was insolvent, and executed the deed for the purpose of protecting it from his then existing creditors. There is no proof that he at that time intended to contract this or any other debt in the future, or that he had any idea of borrowing money from plaintiff, and made the deed to defraud him. In *Cole v. Terrell*, 71 Tex. 549, 9 S. W. 668, it is held that a mere voluntary conveyance cannot be attacked by a subsequent creditor unless such conveyance is satisfactorily shown to have been made with the express intent to defraud such creditor. The case

under consideration comes within the principle there announced, as the evidence fails to show an express intent to defraud the plaintiff. For this reason the judgment of the lower court must be reversed as to Mrs. O'Neal.

Another question arises, which is, does the terms of the deed reserve to the grantor such an interest as is subject to the writ of attachment? The deed from J. C. O'Neal to his wife, Minnie, recited a consideration of one dollar and the further consideration of love and affection, and then proceeds in the usual way to grant, sell, and convey unto Minnie S. O'Neal his interest in the land. Immediately following the description of the land in the deed are these words: "And it is hereby made a special stipulation that at the death of my said wife, Minnie S. O'Neal, the above-described property, or the proceeds thereof remaining in her, the said Minnie S. O'Neal, shall revert to me and my bodily heirs;" and the deed closes with the usual form of a warranty deed to land, wherein he binds himself, his heirs, executors, and administrators, to warrant and forever defend, all and singular, the said premises unto the said Minnie S. O'Neal, her heirs and assigns, against every person whomsoever lawfully claiming or to claim the same, or any part thereof. The terms of the conveyance to Minnie O'Neal vested in her a fee-simple title to the land, limited only by the condition that, if she had not disposed of it at her death, it should revert to J. C. O'Neal. This gives to Minnie O'Neal the absolute power to dispose of the land, and a conveyance by her, properly executed, would pass the title, and vest in the grantee a fee-simple title to the land. *Lockridge v. McCommon*, 90 Tex. 234, 38 S. W. 33. Such being the effect of the terms of the conveyance to her, no interest remained in J. C. O'Neal to the land, or, if so, it was so remote and contingent as not to be subject to execution for his debts. *Chase v. Bank*, 89 Tex. 316, 36 S. W. 406, 32 L. R. A. 785. The judgment is affirmed as to J. C. O'Neal and T. E. Byrd, and reversed and remanded as to Minnie O'Neal.

On Motion for Rehearing.

(Jan. 19, 1901.)

The appellee concedes that the principles of law announced by this court in the opinion heretofore rendered is correct when applied to an appropriate state of facts, but contends that said principles are not applicable to the issue made by the pleadings and evidence in this case. The issue which the appellee insists governs the case is whether or not, by the execution of the deed to Mrs. O'Neal, it was intended that the title to the land should vest in her, or that she should hold it in trust for her husband. Accepting this as the true issue, we are still of the opinion that the evidence is not sufficient

to overcome the import of the deed as shown on its face. There can be no question, if Mrs. O'Neal was holding the land in trust for her husband, but that it would be subject to the payment of the debt due by him to appellee. There is, however, no evidence showing what her understanding was when the deed was executed, or that she knew the intention of her husband was that she should hold it in trust for him, if such was his intention, and that she so received it. The appellee being a subsequent creditor, and the evidence failing to show an express intention on the part of the husband to defraud him, it is immaterial to him what the other motive of the husband was in executing the deed, unless the wife accepted the deed to the land for the purpose of holding it in trust for the husband. The burden of showing that the deed did not speak the truth was upon appellee; and the evidence introduced, in our opinion, fails to show that the terms of the deed do not express the real transaction between the husband and wife. The transaction not being fraudulent as to appellee, to ingraft upon the deed a trust the evidence should be clear and satisfactory. That the husband managed and controlled the land and rendered it for taxes, in our opinion, should not weigh against the rights of the wife. Under the law he had the right to manage and control her separate property, and his conduct in that particular would have been the same whether the land was a bona fide donation or not. His rendering it in his name for taxation does not affect her title. What he might do or say as to her separate property without her authority could not prejudice her title. The case of *Rives v. Stephens* (Tex. Civ. App.) 28 S. W. 707, is cited in support of appellee's contention that the evidence is sufficient to support the judgment in this case. In that case the deed to the wife purported a consideration of \$1,200, which the husband explained on the stand to be that he owed his wife's sister, and that she had died, intending everything she had to go to the wife, and that the conveyance was based upon that consideration. There was other evidence of insolvency, fraud, etc., on the part of the husband, which, when taken together, was sufficient, we think, to warrant the court in holding that the title did not pass for the want of consideration. There is a marked difference between that case and this, in that it was there shown what the transaction was between the husband and wife allunde the deed, while in this case there was no evidence as to the transaction between the husband and wife except the deed, and that shows a gift which the husband had a right to make at that time as against appellee. In this connection we will consider appellee's motion for conclusions of fact, it being stated that the decision of the court practically settles the case, and he desires to apply to the supreme court for a writ of error. We will

not set out the facts at length, as the statement of facts will show the evidence, deeming it only necessary to conclude that at the time O'Neal made the deed to his wife he was insolvent, and made the deed with the intent to place the land beyond the reach of his then existing creditors. Before the execution of the deed he had disposed of most, if not all, of his other property for the purpose of placing it beyond the reach of creditors. He had told parties that he intended to convey this tract to his wife, that it would be valuable some day, and that he would have something to fall back on if the worst came. Whether or not he executed the deed as a gift to his wife thinking that would protect it from his creditors, or it was understood between them that she should hold it in trust for him, we do not conclude, but simply hold that the evidence is not sufficient to contradict the terms of the deed. The debt due appellee was contracted subsequent to the execution of the deed, and same was not made to defraud appellee. Motion for rehearing overruled.

WESTERN UNION TEL. CO. v. BRYSON.¹
(Court of Civil Appeals of Texas. Jan. 19, 1901.)

TELEGRAPHS—MESSAGES—PROMPT DELIVERY—RECIPIENT'S FAILURE TO ACT—EXCUSE—EVIDENCE—INSTRUCTIONS—OFFICE HOURS—REASONABLENESS—QUESTION FOR JURY—APPEAL—ASSIGNMENTS—DUPLICITY.

1. A message announcing the serious illness of plaintiff's brother was received at the place of delivery at 7 o'clock p. m., but was not delivered to the addressee for plaintiff until 8 a. m. the next day. Plaintiff, who lived on a ranch some distance from the town, received the message at 11 o'clock, when, after waiting an hour for an answer to a message sent by him, he returned to his ranch for suitable clothes in which to go to his brother, and to take medicines to his sick son, and give instructions to his employees at the ranch, which necessitated a delay until an evening train, by reason of which he was not able to arrive in time to attend his brother's funeral. Had he not returned to the ranch, he might have taken an earlier train, by which he would have arrived in time. If the message had been delivered promptly, plaintiff could have attended the funeral, and he was able to have purchased new clothes in town, and written instructions, though such course would not have been satisfactory. *Held*, in an action for failure to deliver the message promptly, that the evidence showed a reasonable excuse for plaintiff's failure to take the first train after receiving the message, and hence it was not error to refuse to direct a verdict for defendant.

2. In an action for failure to promptly deliver a telegram, the fact that plaintiff missed the first train, and was thereby prevented from attending his brother's funeral, by reason of his return to his ranch to change his clothes and carry back medicines to his sick son and give directions to his employees, it was not error to refuse to charge that defendant was not liable if, by reasonable expenditure of money, plaintiff could have lessened or prevented the injury, since plaintiff's excuse for delay involved more than an expenditure of money.

3. In an action against a telegraph company for failure to promptly deliver a message, evidence that the office was kept open until 12

o'clock at night, and no regular office hours had been fixed, though it was the usual custom to keep such office open from 8 a. m. to 6 p. m., authorized the submission of the question as to what defendant's office hours were to the jury.

4. Where a telegraph company requested an instruction, in an action for delay in the delivery of a message, that if reasonable office hours were established at the receiving office, and the message was not received until after such hours, defendant was not compelled to deliver the same, they cannot object to the submission to the jury of the question whether such office hours were reasonable.

5. Where objections relating to different issues are grouped in the same assignment to the sufficiency of the evidence to support the verdict, such assignment is insufficient to authorize a review on appeal.

Appeal from district court, Cooke county; D. E. Barrett, Judge.

Action by G. W. Bryson against the Western Union Telegraph Company. From a judgment in favor of the plaintiff, the defendant appeals. Affirmed.

Wilkins, Vinson & Batsell and George H. Fearons, for appellant. J. T. Adams, for appellee.

STEPHENS, J. Action for damages resulting from delay in the transmission and delivery of a death message. The objections urged to the first, second, and third assignments of error for not being briefed, as required by the rules, under repeated rulings we must sustain.

The fourth, fifth, and ninth assignments raise in different forms the important question in the case, which is, in effect, whether or not the court should have instructed a verdict against appellee upon the ground that, to quote from one of the assignments, "the uncontradicted testimony showed that said message was transmitted to Chickasha, and delivered to Jack Ware, and to plaintiff himself, in time for plaintiff to have gone to Centralia and reached his brother before his burial, if the plaintiff had availed himself of the ordinary means of travel open to him"; the case being one in which appellee was given a verdict for being deprived of attending his brother's funeral in consequence of the failure of appellant to promptly deliver to Jack Ware, at Chickasha, Ind. T., a message sent from Centralia, Mo., to Gainesville, Tex., and forwarded to Chickasha, addressed to appellee in care of Jack Ware, announcing that appellee's brother was not expected to live. The message was received at Chickasha a little after 7 o'clock p. m., August 29, 1899, but was not delivered to Jack Ware until a little after 8 o'clock the next morning. Appellee, whose home was at Gainesville, but who had a ranch and was engaged in feeding cattle about 10 miles from Chickasha, came to town that morning, and received the message about 11 o'clock. By taking a train which left Chickasha that afternoon at 2:30, he could have gone to Centralia, Mo., in time for the funeral of his brother. We must therefore determine whether the excuse offered for not taking

¹ Writ of error denied by supreme court.

that train was such as to warrant the court in withdrawing the case from the jury, for it has been held in this state that such an issue is ordinarily one for the jury. *Telegraph Co. v. Lydon*, 82 Tex. 364, 18 S. W. 701; *Telegraph Co. v. Terrell* (Tex. Civ. App.) 30 S. W. 70; *Telegraph Co. v. Elliott* (Tex. Civ. App.) 27 S. W. 219. It is, however, insisted that in this instance the excuse was so clearly insufficient as to bring it within the rule applied in *Telegraph Co. v. Birchfield* (Tex. Civ. App.) 38 S. W. 635, and there is much force in the contention.

Appellee testified "that on the morning of August 30, 1899, he went from his ranch to Chickasha, and arrived there about 11 o'clock that morning; that Mr. Ware told him about the message, and he went to the depot and saw a copy of it; that the message was sent to Chickasha in care of Jack Ware, who was the plaintiff's grocery man; that the depot was 75 or 100 yards from the store of Ware; that when he (plaintiff) received the message he sent a message to his nephew at Centralia that he would start on the first train; that he was in town that morning, and had come to get some medicine for his son, who was sick, and was in his shirt sleeves and overalls, and that he went back to the ranch to deliver the medicine and to change his clothes and give instructions about business; that his son was sick, and nobody was in charge of the ranch; that he had hands working on the ranch; that he did not know that his brother was sick, but that he knew that his general health was bad; that after receiving the message he went back to the ranch, and fixed up some matters hastily, and returned to Chickasha, and took the night train at 2 o'clock on the morning of August 31, 1899; that he went from Chickasha to Kansas City, and from there to Centralia, arriving there about 10 o'clock p. m., August 31st; that when he got there his brother was dead; that he died at about 4 o'clock on the evening of August the 30th." He further testified, on cross-examination, "that it was prairie country between his ranch and Chickasha, and that they had a pretty good country road all the way during August, 1899; that at the time he was worth as much as ten thousand dollars, and could have bought a suit of clothes; that he had money on hand to answer his needs, and had credit; that his sick son was 23 years of age, and lived on his ranch, was married and keeping house, and was assisting plaintiff in managing his business at the ranch; that when he (the witness) was away his son would take charge; that his son's wife was well, and that his son was not under the treatment of a doctor; that he had bilious fever, and had been to the doctor, and had been there for medicine; that his son had been sick for a couple of weeks, but was getting better, but was not up; that he had hands on his place; that he went back home after receiving the message to take some

medicine to his son and change his clothes and give instructions as to his business; that he was able to buy a suit of clothes, and that he could have hired some one to take the medicine out to his son; that he could have sent word out to his men by the messenger, giving them instructions about managing his affairs until he could return, but that it would have been a bunglesome way to do it; that after he received the message he could have hired a team at a cost of about two dollars, and driven out to his ranch, and on the way thought of what instructions he wanted to leave; that he knew that a train left Chickasha on the evening of August 30, 1899, at 2:30, bound for Centralia; that after he received the message at 11 o'clock on the morning of August 30, 1899, he did not know whether his brother was dead or alive, and that he knew that it had been sent the evening before, and stated that his brother was not expected to live; that if he had gone on the 2:30 train on the evening of August 30, 1899, he would have arrived in Centralia about 12 noon the next day, August 31, 1899; that his brother was buried about 5 o'clock on the evening of August 31, 1899; that, had the message been delivered to Mr. Ware by 8 o'clock of the 29th of August, he (plaintiff) could and would have arrived in Centralia the evening of the 30th, which would have been 24 hours earlier than he did arrive there, and about 18 hours before his brother's funeral." It was admitted that if the message had been promptly delivered he could not have reached his brother before his death. He further testified that no reply was received from the message, "Wire me this evening this place; I start tonight,"—which he sent to Centralia a little after 11 o'clock; that he waited nearly an hour for a reply before he started back to the ranch; "that he had cattle feeding at three different places, and that his son was not able to give them attention; that he could not have given instructions as to their management in writing satisfactory to himself."

The issue was thus submitted in the charge: "Now, if you believe from the evidence that a reasonably diligent and prudent man, possessed of the same information that plaintiff had, and similarly situated and circumstanced as plaintiff was, as shown from all the evidence before you, would have started to his brother on the train that passed through Chickasha about 2:30 o'clock p. m. of that day, then the plaintiff will be precluded from a recovery." Having set out the evidence constituting the basis of this charge, we need not discuss it further than to say that we cannot quite assent to the proposition that it showed conclusively that the conduct of appellee in waiting for the night train was wholly inexcusable; there being a combination of circumstances apparently constraining such postponement of his journey, and a moral impossibility be-

equivalent to a physical one in cases of this kind, and what a person of ordinary prudence and diligence would have done under like circumstances being peculiarly a question for the jury. If the evidence tended to show a reasonable excuse for the failure to take the first train, and we think it did, it was the duty of the court to submit the issue to the jury. We are not required by these assignments to consider the sufficiency of the evidence to sustain the finding that the excuse was reasonable, but only whether or not the issue was raised by the testimony.

The twelfth and thirteenth assignments complain of the court's refusal to charge the jury to find for appellant if by a reasonable expenditure of money appellee could have lessened or prevented the injury, but we hardly think the principle thus invoked was applicable to the facts of this case. Something more than expenditure of money was involved in the excuse for the delay, and the requested charges, if given, would have taken this from the jury. The charge above quoted was all that was required.

The sixth and seventh assignments complain of the charges submitting the defense of office hours for delivering telegrams at Chickasha. It is first insisted that the evidence established beyond question the existence of such office hours from 8 a. m. to 6 p. m., and consequently that the court erred in submitting that as a controverted issue of fact to the jury. But we do not so interpret the record. The telegraph office at Chickasha was kept with the railroad office, and the call boys in the service of the railroad company, it seems, also delivered messages for the telegraph company, and, while the evidence tended to prove that they were not required to do so after 6 o'clock, the operator testifying that the messenger boy employed by him went off duty at that hour, it also tended to prove that they often did so. The telegraph office was kept open till 12 o'clock at night, and it seems to have been the duty of operators at such offices as that kept at Chickasha to deliver messages themselves, and the company does not seem to have fixed any delivery hours for them, although there was evidence tending to show hours fixed by custom at such offices from 8 a. m. to 6 p. m., this being left, however, to the discretion of local operators, while at offices of a higher grade the hours were from 8 to 8. We doubt if it can be fairly said that appellant had any established hours for delivering messages at Chickasha, although the operator there testified that it had. At any rate, the evidence warranted the submission of the issue to the jury.

It is next insisted that the court erred in submitting the reasonableness of the office hours for delivering messages to the jury. It is perhaps a sufficient answer to this contention to make the following quotation from appellant's third special charge, as an invitation to the court to submit the issue to the

jury: "If you believe from the evidence that the defendant company had reasonable office hours during which it delivered telegraphic messages in the town of Chickasha, Ind. T., it was not by law compelled to deliver messages outside of said hours." But if this be not a sufficient answer, and it was the duty of the court, as appellant contends, to pass upon the reasonableness of the hours, we are yet not prepared to hold that the result should have been different. From 6 o'clock p. m. till night, according to railroad or even sun time, at Chickasha, Ind. T., was a long time in August, and must have covered a considerable portion of the business hours of that thrifty business town of 2,500 or 3,000 people. The telegraph office was itself kept open for business till long after that time. The operator was there, and could easily have delivered the message, or had it done (as was his duty),—a message which in its very nature prompted diligence in the effort to deliver it, unless the operator was lost to all sense of the common obligations which humanity imposes. We cannot escape the conclusion that a clear case of negligence was made out.

The last assignment of error complains of the verdict, but is not so made and briefed as to require us to pass upon the sufficiency of the evidence on any particular issue, since the complaints, which relate to diverse issues, are grouped in the assignment, and no one is separately briefed, unless it be that of the excessiveness of the verdict, in which we find no merit. The judgment is therefore affirmed.

SHERMAN, S. & S. RY. CO. v. EAVES.¹

(Court of Civil Appeals of Texas. Feb. 9, 1901.)

RAILROADS—ACCIDENT AT CROSSING—NEGLIGENCE—WARNING—CONTRIBUTORY NEGLIGENCE—INJURIES TO WIFE—AMOUNT RECOVERABLE—EXPERT WITNESS—EXAMINATION—HYPOTHETICAL QUESTIONS—INSTRUCTIONS.

1. Plaintiff's wife was driving north on a public highway which crossed defendant's railroad track at right angles. The view of the track towards the east from the highway was obstructed until a point 20 feet from the track was reached, but the track at the crossing was visible along the road for 300 yards. A train was coming from the east, up grade, making noise by the exhaust of the engine, audible for some distance. An ordinary wind blew from the south. No warning by bell or whistle was given. Plaintiff's wife, on reaching a point about 20 feet from the track, saw the engine within 30 or 40 feet from the crossing, jumped from the vehicle, and ran to catch the horse's rein. The horse, becoming frightened, wheeled around and knocked her down. Held, that the injury was due solely to negligence of defendant's trainmen in failing to blow the whistle or ring the bell.

2. Where plaintiff's wife, a stout, healthy woman, was cut and bruised and injured internally about the stomach and bowels, suffering a prolapsus of the womb and frequent men-

¹ Writ of error denied by supreme court.

strual irregularities, such injuries authorized a verdict for \$3,500 in favor of her husband.

3. The issue in an action for personal injuries was whether or not the condition of the injured person after the accident was due to the injuries she then received, and there was no conflict as to the facts. An expert witness was asked the question, "Assuming the testimony given to be true, to what would you attribute the injuries of E.?" *Held*, that this did not call for his opinion on the evidence given, there being no conflict therein.

4. Hypothetical questions are not necessary where the evidence shows but one state of facts, about which there is no conflict.

5. A qualification of special charges relating to contributory negligence and to defendant's right to recover damages for injuries to his wife by a railroad company's negligence, which charged that "if E. was guilty of any act of negligence (that is, if she did not act as a person of ordinary prudence would have done under the circumstances), and her negligence caused or contributed to her injury, then she would be guilty of contributory negligence, and plaintiff could not recover; but, if she acted as a person of ordinary prudence would have acted under the circumstances, then her acts would not prevent plaintiff from recovering on any of the theories of such special charges,"—correctly stated the law.

6. An instruction on contributory negligence, applicable to other special charges, but given in connection with a charge relating to proximate cause, was not thereby rendered erroneous.

Appeal from district court, Hopkins county; Howard Templeton, Judge.

Action by A. L. Eaves against the Sherman, Shreveport & Southern Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Croddock & Looney, for appellant. Crosby & Dinsmore, for appellee.

RAINEY, C. J. Appellee instituted this suit to recover of appellant damages for personal injuries to his wife alleged to have been caused by the negligent operation of a train. Appellant answered by general denial, and specially that Mrs. Eaves was guilty of contributory negligence, in driving too near the railroad track, without stopping, looking, or listening for the train, etc. Plaintiff recovered, and defendant prosecutes this appeal.

The evidence shows that on September 4, 1899, Mrs. Ophelia Eaves, wife of the appellee, in company with Mrs. B. Odam and the little boy of the latter, were traveling in a single-horse buggy, without a top to it, along the public road leading into Cumby, Hopkins county, from the south, which road crosses the railroad within a few feet of the appellant's depot at Cumby. The railroad track at Cumby and for some distance on either side runs east and west, and the public road, which appellee's wife and those accompanying her were traveling, runs north and south, crossing the railroad at right angles at the depot. Appellee's wife and those with her were coming from the south, and going towards the business part of the town of Cumby, which is located north of the depot. The depot itself is north of the main track, and between the depot and the

main track is a side track, the side track being within 8 or 10 feet of the main track, and the depot platform is quite near the side track. The road which appellee's wife was traveling was a public highway, and the chief one leading into Cumby from the south; was used a great deal by the people of that town, and the country people living south from it. A large portion of the residence portion of Cumby is south of the railway track. The train was approaching from the east, and an ordinary wind was blowing from the south. Along the road for some 300 yards from the crossing the railway track at the crossing could be seen by a person in the highway. On the east of and near the public road were a barn and orchard, which obstructed the view, and a train approaching from the east could not be seen in approaching from the south until reaching a point about 20 feet from the railroad track. Mrs. Eaves and companion were driving in an ordinary gait, and when they reached within about that distance they saw a train coming from the east under full headway, and about 30 or 40 feet from the crossing. Immediately the buggy was stopped, they jumped out, Mrs. Eaves ran to the horse, caught hold of the rein and the horse became frightened, wheeled around, knocked her down, ran over her, pulled the buggy over her,—her feet caught in the lines,—and dragged her some 25 or 30 steps. She was cut and bruised in various places about the body and limbs, and injured internally about the stomach and bowels. She was a stout, healthy woman before the injury, and prior thereto she had no irregularities in her monthly sickness. She has suffered from prolapsus of the womb and has been flooding at frequent periods since. She suffered in other ways, but we deem it sufficient to say that the evidence shows that she was injured in a way that authorized the amount of judgment recovered. The evidence warrants the conclusion that there was negligence on the part of the servants operating the train in failing to blow the whistle and ring the bell in approaching the crossing, and that such negligence was the proximate cause of the injury. It also warrants the conclusion that Mrs. Eaves was not guilty of contributory negligence in approaching the crossing.

On the trial Dr. Dial was asked, as an expert, whether or not he had heard the testimony offered in the case as to the cause of, and the manner in which, the injuries to the shoulder and womb were sustained, to which he replied in the affirmative. Thereupon he was asked by plaintiff: "Assuming the testimony of the witnesses which he had heard to be true, to what did he attribute the injuries to Mrs. Eaves' shoulder and womb, to which question defendant then and there objected because calling for an opinion of a witness upon the evidence as detailed by the witnesses, and requiring him

to pass upon the evidence in the case, which objection was by the court overruled and the witness permitted to answer that, assuming the facts detailed by the witnesses to be true, he would attribute the injury to the shoulder and to the womb to the accident by the fright of the horse by the train." This action of the court is assigned as error. In the case of *Armendal v. Stillman*, 67 Tex. 458, 3 S. W. 678, cited by appellant's counsel in support of their position, the evidence was conflicting as to the issue about which the expert was interrogated; and Justice Stayton, in passing upon the admissibility of the expert opinion in such a case, says: "If such a witness bases his opinion on a state of facts which he has heard other witnesses testify to, the value of his opinion depends upon the actual existence of the facts on which he bases it; and whether the facts so existed must be determined by the court or jury, and not by the expert. In cases in which the evidence is conflicting on the facts on which the opinion of the expert is founded, he cannot be permitted to determine what the facts actually were, and to give an opinion upon his own conclusion upon such conflicting evidence; for it is the province of the court or jury trying the case to determine the existence or nonexistence of the facts on which the expert's opinion is based. The evidence conflicting, if the defendants desired the opinion of the expert upon the state of facts which the evidence offered by them, including the evidence of the expert in so far as he stated facts, tended to establish, then they should have sought his opinion upon the hypothetical case thus made. This they did not. They simply asked for and received an opinion based upon conflicting evidence, which necessarily required the witness to pass upon disputed facts." See, also, *Rog. Exp. Test.* pp. 63-66. It is to be noticed that the rule, announced by Justice Stayton is based upon the fact that the opinion of the expert witness was elicited upon testimony of witnesses as to a condition about which there was a conflict in the testimony as to the cause that produced the condition. In the case under consideration there is no conflict as to the facts. There is no conflict as to Mrs. Eaves' condition before and after the accident, or that she received injuries at the time and in the manner she stated in her testimony. The issue was whether or not her condition after the accident was attributed to the injuries she then received, and the question required the witness to assume that the facts stated in regard to the injury were true. There was no necessity of a hypothetical question being propounded, as in propounding such a question the evidence of the witnesses, in

substance, would have been embraced therein; there being but one state of the evidence, and no conflict of the evidence as to the facts relating to when and how she was injured, and her condition afterwards. *Jones v. Railway Co.* (Minn.) 45 N. W. 444; *Dwinneil v. Abbott* (Wis.) 43 N. W. 496; *Lawson, Exp. Ev.* (2d Ed.) 175; *Gates v. Fleischer*, 67 Wis. 504, 30 N. W. 674; *Wright v. Hardy*, 22 Wis. 348.

The appellant requested the giving of six special charges, which the court gave. Five of these related to contributory negligence, and presented various theories deducible from the evidence as to the conduct and acts of Mrs. Eaves at the time of the accident. The other, which was the second special requested charge, was, in effect, that Mrs. Eaves could not recover unless the negligence of defendant was the proximate cause of the injury. To the sixth special charge the court appended this qualification: "If Mrs. Eaves was guilty of any act of negligence (that is, if she did not act as a person of ordinary prudence would have done under the circumstances), and her negligence caused or contributed to her injury, then she would be guilty of contributory negligence, and the plaintiff cannot recover; but, if she did act as a person of ordinary prudence would have acted under the circumstances, then in no event would her acts prevent the plaintiff from recovering on any of the theories submitted in any of the special charges." The qualification expressed a correct principle of law, and as five of said charges were somewhat similar in their character, and in some respects reiterated the same matter, it was not error as to these. While by a strict construction it applies to the second special charge, relating to "proximate cause," yet it has no application, and was evidently not so intended by the learned trial judge. The acts of Mrs. Eaves could in no event have affected the question of proximate cause, and, as her acts could relate only to the question of contributory negligence, it is not probable that the jury considered it in any other relation, and it was not misled thereby. We find no error requiring a reversal of the judgment, and it is affirmed.

(Feb. 23, 1901.)

At the request of the appellant, we find, in addition to the facts heretofore found, the following: The railroad track going into Cumby from the east is up grade for about one mile, the depot being about the crest. The train that frightened Mrs. Eaves' horse was the local freight, and in ascending the grade made considerable noise by the exhaust of the engine, which could be heard some distance. It was heard by some of the defendant's witnesses one-half mile away.

JONES et al. v. MEYER BROS. DRUG CO.
et al.¹

(Court of Civil Appeals of Texas. Jan. 12,
1901.)

APPEAL—EVIDENCE—VARIANCE—AIDED BY
VERDICT—EXECUTION—RETURN—BANK-
RUPTCY—ACTION BY TRUSTEE—ALLEGATION
OF CAPACITY TO SUE—PARTNERSHIP—RE-
CEIVERS.

1. Objection cannot be first made after verdict that a judgment introduced in evidence was rendered in the county court instead of the district court, as alleged in the pleading; the misdescription being a clerical mistake, which might have been corrected by trial amendment, had objection been made at the proper time, and it not being shown that the opposite party was misled or injured by reason of the mistake, or that the granting of a new trial would place him in any better position, so far as that issue was concerned.

2. The return on an execution against the interest of a partner in firm property is not insufficient for failure to show the manner in which the levy was made, the statute (Rev. St. art. 2352) providing how the levy must be made, but not requiring the return to show how it was made; the presumption being that the officer did his duty, and made the levy in the manner prescribed by law.

3. Conceding a notice of levy on a partner's interest in a stock of firm merchandise to be a part of the return to which it was attached, and controlling as to the description, its omission of the fixtures shown by the return to have been levied on did not affect the validity of the levy as to the other property seized.

4. Objection to a petition of intervention by a trustee in bankruptcy that it failed to allege that the bankrupt had been adjudged a bankrupt is obviated by an answer containing such allegation, though a demurrer to the paragraph of answer containing the allegation is sustained.

5. Bankr. Act 1898, § 38, gives a referee in bankruptcy the authority of a bankruptcy court, except concerning applications for compositions and discharges, when such authority is not denied by other provisions of the act, and no provision prohibits him from appointing a trustee. *Held*, that an allegation by a trustee that he was duly appointed trustee by the referee was equivalent to a declaration that the circumstances existed which empowered the referee to make the appointment.

6. Objection that a trustee in bankruptcy could not intervene in an action without leave of court cannot be first made after verdict.

7. One intervening in his capacity as trustee in bankruptcy need not prove his appointment and qualification unless his right to recover in that capacity is denied under oath, as required by Rev. St. art. 1265, since Bankr. Act 1898, § 70, vests the title to the bankrupt's estate in the trustee.

8. A judgment creditor of a partner having levied on his interest in the firm and purchased it at the sale, the old partners continued the business, selling the old goods and replenishing with new. *Held*, in an action by the creditor for the recovery of the debtor partner's interest, that his recovery was not limited to the goods bought at the sale and actually in stock at the time of trial, but he was entitled to compensation for the property disposed of, as for a conversion.

9. A judgment creditor of a partner, having purchased the latter's interest in the firm property under execution, sued to recover such interest. The trustee in bankruptcy of the partner intervened, and it was agreed between them as to the division of the proceeds. *Held*, that the creditor was not prevented from recov-

ering, as against the debtor, because his proof failed to show the extent of his interest, or the value of the goods converted by the debtor and his partner between the sale and trial, since, even if he was not entitled to recover any of the property, the trustee was entitled to recover all of it.

10. Where A. loans B. money to buy property, and the purchase is made for B., though title is taken in A.'s name for the purpose of protecting the property from B.'s creditors, the property belongs to B., and is subject to his debts.

11. On the question whether A. was the real purchaser of property, or whether B. was the purchaser and it was taken in A.'s name to protect it from B.'s creditors, evidence as to A.'s financial condition before and after the purchase, and statements made by him in relation thereto, are admissible.

12. Evidence concerning B.'s failure in business and insolvency was admissible, as tending to show a reason for his making the purchase in the name of another.

13. Evidence that B., though insolvent, had some money, was admissible, as tending to prove his ability to make the purchase.

14. Statements by B. concerning the purpose of an attempted purchase by him, though made when A. was not present, were admissible; the jury being instructed that they could not consider it unless they found that there was an agreement between A. and B. by which B. was authorized to use A.'s name to cover up property he might buy, and that the statements were made in pursuance of the agreement.

15. Under Rev. St. art. 1485, authorizing the court to appoint a receiver in an action between partners or others jointly interested in any property, where the property is in danger of being lost or materially injured, a receiver is properly appointed after verdict and pending appeal in an action to subject the interest of a partner in firm property to his debts,—he being insolvent and in the possession and management of the property, and likely to misappropriate it,—though the other partner is solvent, and able to respond in damages, should he waste or misappropriate it.

Appeal from district court, Grayson county; Don A. Bliss, Judge.

Action by the Meyer Bros. Drug Company against J. L. Jones and others; Burton Richards, intervener. From a judgment for plaintiff and intervener, defendants appeal. Affirmed.

Barrett, Simmons & Freeman and Gallo-way & Templeton, for appellants. A. H. Culver, Moseley & Smith, and T. B. Eppstien, for appellees.

TEMPLETON, J. The appellant Jones and one Howard were partners in the retail drug business at Denison, Tex. In June, 1895, Howard sold his interest in the business ostensibly to the appellant Simmons, but the appellees contend that the appellant De Gaugh was the real purchaser. The business was thereafter conducted in the name of Jones & Simmons. De Gaugh had been engaged in the drug business at Austin, Tex., and had become indebted to the Meyer Bros. Drug Company. He failed in business, and the drug company reduced its claim against him to judgment. Execution was issued on the judgment, and on April 11, 1896, was levied on De Gaugh's interest in the business, run in the name of Jones & Simmons. There

¹ Writ of error denied by supreme court.

was a sale under the levy on May 5, 1896, and the drug company became the purchaser at the sale, and received a bill of sale from the sheriff. On December 21, 1898, the drug company brought this suit against Jones, Simmons, and De Gaugh, alleging the facts above stated, and, further, that De Gaugh was at the time of the levy the owner of an undivided one-half interest in the said business, by virtue of the purchase from Howard; it being charged that the purchase was made in the name of Simmons for the purpose of covering up De Gaugh's property and preventing its seizure by his creditors. Burton Richards intervened in the suit, and alleged that he was trustee in bankruptcy for the creditors of De Gaugh, and that De Gaugh had an interest in the said business, which he, as trustee, was entitled to recover. There was a trial by jury, which resulted in a judgment in favor of plaintiff and intervening for the recovery of an undivided one-half interest in all the property owned by the firm of Jones & Simmons. Thereupon a receiver was appointed, who qualified and took charge of the business. Jones, Simmons, and De Gaugh have appealed from said judgment and from the order appointing the receiver.

It was alleged by the drug company that the judgment under which it claims was rendered in the district court of Travis county, but the judgment introduced in evidence was rendered in the county court of said county. It is insisted that the variance is fatal, and constitutes fundamental error. We are of the opinion that the objection should have been made when the judgment was offered, and that, as this was not done, it cannot be urged for the first time after verdict. The plaintiff claimed title to the property sued for by virtue of a judgment and execution sale thereunder against De Gaugh. The misdescription of the court in which the judgment was rendered was obviously a clerical mistake, which might have been corrected by trial amendment, had the objection been made at the proper time. It is not shown that appellants were misled or injured by reason of the mistake, or that the granting of a new trial would place them in any better position, so far as this issue is concerned. If appellants desired to take advantage of the mistake of the pleader, they should have interposed their objection on the trial, and, not having done so, cannot now complain.

It is contended that the sheriff's return on the execution is insufficient, for the reason that the manner in which the levy was made is not shown. Article 2352, Rev. St., provides how a levy on partnership property shall be made; and in *Middlebrook v. Zapp*, 79 Tex. 323, 15 S. W. 258, it was held that the statute must be followed by the officer in making the levy. But the statute does not prescribe any form of return, and does not provide that the return shall show the manner in which the levy was made. The return

will be liberally construed, and the presumption that the officer did his duty will be indulged. *Miller v. Alexander*, 13 Tex. 503; *Murfree, Sher.* § 839a. In this case the return shows that the writ was levied, and the presumption is that it was levied in the manner prescribed by law. The legality of the levy was not raised by the pleadings, and the return cannot be attacked collaterally. *Flaniken v. Neal*, 67 Tex. 629, 4 S. W. 212. The title of the purchaser at execution sale does not depend on the return, and any informality or irregularity therein will not affect his title. *Fitch v. Boyer*, 51 Tex. 344.

There was appended to the return a notice of the levy, directed to Jones & Simmons, and signed by the sheriff. This notice is, presumably, a copy of the notice of the levy left by the sheriff with Jones; but it is not referred to in the return, or shown by extrinsic evidence to be such copy. It was not offered in evidence by the plaintiff, but was introduced by the defendants. As the return showed a valid levy, the plaintiff was not bound to produce the notice, and the introduction of it by the defendants would not invalidate the levy, unless it showed that the levy was not made as required by law. The notice was, in form, in substantial compliance with the statute, but, in describing the attached property, omitted the fixtures which were shown by the return to have been levied on. Even if the notice is considered as a part of the return, and as controlling in the matter of description, the levy would still be good, as to the property seized other than the fixtures. The levy and sale thereunder were sufficient to convey to the drug company the title of De Gaugh in and to any of the stock of merchandise held in the name of Jones & Simmons at the time of the levy, and the court did not err in so instructing the jury.

The right of the intervener to judgment is questioned on the ground that his petition and proof are insufficient to show that he, as trustee, had any title to, or right to the possession of, the property sued for. It was alleged by the intervener that he was, by F. B. Dillard, referee in bankruptcy for the Eastern district of Texas, duly appointed trustee for the creditors in the matter of J. A. De Gaugh, bankrupt, pending in the United States district court for said district; that he accepted the appointment, and was duly qualified, and by virtue thereof became entitled to the possession of all the property of the said De Gaugh not exempt from forced sale, for the purpose of holding the same subject to the demands of the creditors and the orders of said court. No exception to the petition was urged before trial, but it is insisted now that the petition is defective, for the reason that it was not alleged that De Gaugh had been adjudged a bankrupt, and that the intervener was appointed trustee by the court or elected by the creditors, and that he had obtained leave of the bankruptcy

court to intervene in this suit. The first ground of objection, conceding it to be well taken, is obviated by the answer of the defendants, wherein it was alleged that De Gaugh had been adjudged a bankrupt. It is true that the plaintiff demurred to that paragraph of the answer, and that the demurrer was sustained, but that fact did not affect the plea as an answer to intervenor's case. The objection that the trustee was not appointed by the court or elected by the creditors is not well taken. It is provided by section 44 of the bankrupt act of 1896 that the creditors shall appoint a trustee. Section 2 provides that a court of bankruptcy may appoint a trustee upon the recommendation of the creditors, or when the creditors neglect to act. Section 38 provides that the referee shall have the authority of a bankruptcy court, except concerning applications for compositions and discharges, when such authority is not denied by other provisions of the act, and there is no provision which prohibits the appointment by him of a trustee. It follows, therefore, that under certain circumstances the referee may appoint a trustee, and the allegation that the intervenor had been duly appointed trustee by the referee is equivalent to a declaration that the circumstances existed which empowered the referee to make the appointment. We think that the trustee had a right to intervene in this suit without obtaining leave to do so from the bankruptcy court, but, in any event, the objection should have been made before trial.

On the trial the intervenor did not prove his appointment and qualification as trustee, and it is contended by the appellants that his failure to do so is fatal to his right to recover. The intervenor's suit was brought in his capacity as trustee, and his right to recover in that capacity was not denied under oath. We are of opinion that article 1265, Rev. St., applies to this case, and that it was not necessary for the intervenor to prove his appointment and qualification as trustee. Under the old bankrupt law, where the title to the property of the bankrupt was vested in the assignee by virtue of a transfer from the register in bankruptcy, it may have been necessary for the assignee to show such transfer. *Dambmann v. White*, 48 Cal. 439. But by section 70 of the present law the title to the bankrupt's estate is vested in the trustee; hence the production of a transfer to him cannot be required. In the case just cited the assignee produced a transfer to him by the register, and this was held sufficient to vest title in the assignee, without proof of his appointment. In this case the law vests the title, and it is therefore not a question of title, but simply of the right of the trustee to recover in that capacity. We conclude that there is no merit in the contention that the intervenor was bound to prove his appointment and qualification as trustee. It may be conceded that

the drug company by its purchase at execution sale acquired title only to De Gaugh's interest in the tangible property of the firm of Jones & Simmons, and that the sale operated as a dissolution of the firm. Upon the sale, Jones and the drug company became joint owners of the stock of merchandise belonging to the late firm. The business was carried on as before, by Jones & De Gaugh, from the date of the sale in May, 1896, to the time of the trial in November, 1896. The stock of merchandise owned by Jones and the drug company was largely sold out by Jones & De Gaugh and the stock was replenished and kept up out of the proceeds of such sales. The business, as conducted by Jones & De Gaugh after the sale, was prosperous, and the property belonging to the business was of greater value at the time of the trial than at the date of the sale. We are of opinion that the drug company should not have been limited in its recovery to the goods bought by it which were actually in stock at the time of the trial. It was not bound to sue for the specific property bought, but could require Jones & De Gaugh to account to it for the interest owned by it in the property converted by them, and the facts above stated would constitute a conversion. The drug company has an interest in some of the property sued for, and is entitled to compensation for its property that has been converted. The evidence is not sufficient to show the extent of plaintiff's interest in the property in controversy, nor the value of its goods that were converted. This might be fatal to its recovery, but for the fact that the intervenor was entitled to recover all of the property sued for, except that part which the plaintiff was entitled to recover. The judgment was in favor of the plaintiff and intervenor for all of the property in controversy, and together they were entitled to such recovery. As between themselves, their respective interests in the recovery could be settled only by trial of the issue or by agreement. There was an agreement between them, which was made a part of the judgment, entered into before the trial, by the terms of which, in case of a recovery by either or both, the proceeds thereof were to be divided between them; the plaintiff to be first paid the sum of \$3,750, and the intervenor the remainder, if any. This agreement obviated the necessity of a finding fixing their several interests in the property recovered. Jones was not injured by it, since none of his property was taken. De Gaugh cannot complain, because, even if the plaintiff was not authorized to recover any of the property, the intervenor was entitled to recover all of it.

The appellant Simmons complains of the charge of the court relating to the issue as to his ownership of the property in controversy, and of many rulings of the court in the admission of evidence, and that the finding on that issue is contrary to the evidence.

We think that the charge fairly submitted to the jury the question as to whether Simmons or De Gaugh was the real purchaser of the interest of Howard in the business owned by Jones & Howard. If Simmons loaned De Gaugh the money to buy the stock, and the purchase was made for De Gaugh, though the title was taken in Simmons' name for the purpose of protecting the property from De Gaugh's creditors, then, as stated in the court's charge, the property belonged to De Gaugh, and was subject to the levy of plaintiff's writ. While the evidence on this issue was slight, it was sufficient to suggest the issue, and we cannot say that it was error to submit that theory of the case to the jury. We think that there is no real ground for the complaint that the charge of the court makes too prominent the issue as to the purchase in Simmons' name being a mere device to cover up De Gaugh's property.

Evidence as to Simmons' financial condition both before and after the alleged purchase by him of Howard's interest in the drug business, and statements made by him in relation thereto, was admissible as tending to prove whether he was the real purchaser, and had the money to pay for the property. And evidence concerning De Gaugh's failure in business and insolvency was admissible as tending to show a reason for his making the purchase in the name of another, and evidence that De Gaugh, though insolvent, had some money, was admissible as tending to prove ability on his part to make the purchase. Statements made by De Gaugh concerning the purpose of an attempted purchase of a stock of drugs by him, though made when Simmons was not present, was admissible; the jury being instructed that they could not consider the same unless they found that there was an agreement between Simmons and De Gaugh by which De Gaugh was authorized to use Simmons' name to cover up property he might buy, and that the statements were made in pursuance of the agreement. The statements made by De Gaugh to Boyd, which were offered by the appellants and excluded by the court, were hearsay and self-serving, and not admissible. They were not shown to have been made in the conversation between De Gaugh and Pergrin, which conversation had been proved by the appellees. If offered for the purpose of impeaching Pergrin, no predicate for their introduction had been laid. The evidence upon the issue as to whether Simmons or De Gaugh was the real purchaser from Howard was conflicting. It was sufficient to have warranted a finding either way. In such case we would not be justified in setting aside the finding of the jury upon the question of fact.

Immediately after the return of the verdict the appellees asked for the appointment of a receiver. The application was heard and granted, and the appellant Jones was appointed receiver, and duly qualified as such;

his disqualification being waived. The appellants complain of the appointment as being unwarranted. It was shown that Jones was solvent, and able to respond in damages, should he waste or misappropriate the property pending the appeal. It is insisted that under article 1403, Rev. St., and the decision of this court in *Bank v. Dunham*, 44 S. W. 605, the application for a receiver should have been denied. On the other hand, it appeared that De Gaugh was insolvent, and was in the possession and had the management of the property; and the trial court was justified in finding that he was likely to misappropriate the property, and that it was, therefore, in danger of being lost to the appellees. Besides, the receiver was appointed after a verdict had been rendered on a final trial, and the interests of the parties in the property in controversy had been legally adjudicated; and the object of the receivership was to carry out the provisions of the judgment, which directed the sale of the property, and the payment of the proceeds of the sale, one half to Jones, and the other half to the appellees. These facts distinguish this case from the case cited, when the application was made before judgment, and its object was simply to preserve the property, and those in possession of it were solvent. There were some objections to the manner in which the appointment was made, but we think there is no merit in any of them.

So many questions are presented that we have found it impracticable to discuss them all. We have, therefore, considered in this opinion only those questions which appeared to us to be of the greatest importance. We find no reversible error in the record, and the judgment is affirmed.

DORSEY PRINTING CO. v. GAINESVILLE COTTON SEED OIL MILL & GIN CO.

(Court of Civil Appeals of Texas. March 2, 1901.)

SALES—CONTRACT—ACCEPTANCE—INSTRUCTION—ISSUES—EVIDENCE—ADMISSIBILITY.

1. Where the whole conversation between plaintiff's traveling salesman and defendant concerning a typewriter which plaintiff had sold defendant showed that defendant had no intention of notifying the agent that he was satisfied with the machine, and the only authority shown on the part of the agent was that he was plaintiff's traveling salesman, it was error to charge that, if defendant notified plaintiff's authorized agent that the machine was satisfactory before plaintiff revoked the offer to sell it, they should find for defendant.

2. Plaintiff wrote defendant he would ship him a typewriter on trial, and, if satisfactory, sell it to him for \$50. On the letter head, in large red letters, were the words, "New Century Caligraph," and plaintiff's name as agent. Defendant wrote to send the machine, and plaintiff shipped a New Century Caligraph, without a statement as to the price. Subsequently plaintiff's traveling agent informed the defendant that the price of the machine was \$102.50, and that the machine offered for \$50 was a secondhand one; whereupon defendant refused

to deal with the agent, and immediately wrote plaintiff accepting the machine, and including a check for \$50, which plaintiff refused to accept. *Held*, that an instruction that if the jury should find that the agent had no authority to revoke the offer, and that defendant's letter constituted an acceptance, the verdict should be for defendant, was erroneous, since it ignored the question as to the identity of the machine, which was the real issue.

3. Plaintiff wrote defendant that he would ship him a typewriter on trial, and, if satisfactory, sell it to him for \$50. Defendant consented to try a machine, and plaintiff shipped a New Century Calligraph, without a statement of the price, and subsequently contended that the price of \$50 quoted in his letter referred to a secondhand machine. *Held*, in an action by plaintiff to recover the price of a new machine, that a prior letter, in which plaintiff quoted New Century Calligraph machines to defendant for \$102.50, was admissible, as tending to show that defendant knew that a new machine could not be purchased for \$50.

Appeal from Cooke county court; D. E. Barrett, Judge.

Action by the Dorsey Printing Company against the Gainesville Cotton Seed Oil Mill & Gin Company. From a judgment in favor of defendant on appeal from a justice court, plaintiff appeals. Reversed.

Hill & Cofer, for appellant. Davis & Garrett, for appellee.

CONNER, C. J. The appellant, the Dorsey Printing Company, sued appellee, the Gainesville Cotton Seed Oil Mill & Gin Company, in the justice court, to recover possession of a No. 6 New Century typewriting machine, of the alleged value of \$102.50, and to which said printing company asserted title. Appellee answered by general denial, pleaded ownership by virtue of a sale of said machine to it, and specially set up the anti-trust law of this state in bar of the suit. The judgment in the justice court was in favor of appellee, and on appeal to the county court the trial before a jury resulted in a like judgment. Hence this appeal.

The facts show that on November 24, 1899, appellant wrote to appellee a letter, the material part of which reads: "If you will permit us, we will ship you an exceptionally good typewriter to examine, and, if it suits you, we will sell it to you at \$50, payable either cash, or \$10 cash and \$5 per month." At the head of this letter was an electrotype picture or fac simile reproduction of a No. 6 New Century typewriter, and the following printed words: "Dorsey Printing Co., General Dealers for Texas, Indian and Oklahoma Territories in the New Century Calligraph,"—the words "New Century Calligraph" being in large red type, in that particular differing from the remaining contents. On November 27, 1899, appellee wrote appellant as follows: "The Dorsey Printing Co., Dallas, Tex.—Dear Sirs: We received your letter of the 24th, and in reply will say that you may ship us one of the New Century typewriters at your own expense, and after we try it thoroughly, and are satisfied with

it, we will pay you for it, and if it don't suit will ship it back at your expense. If this arrangement suits you, send the machine at once. Gainesville Cotton Seed Oil Mill & Gin Co. E. P. Bomar, Mngr. E." On November 30, 1899, upon paper with letter head as before described, appellant wrote appellee the following letter, to wit: "Gainesville Cotton Seed Oil & Gin Co., Gainesville, Texas—Gentlemen: We have your esteemed request of the 27th inst., and will forward to you as quickly as we can one of the No. 6 New Century Calligraphs by prepaid express, because we are satisfied that a fair trial of this machine will convince you it is precisely what you want. Thanking you for your favor, we beg to remain, very truly yours, Dorsey Printing Company. J. W. H." Appellant thereupon shipped to appellee the typewriter involved in this suit, but did not transmit the shipping bill containing the price therefor (\$102.50), or otherwise notify appellee of the price to be charged. December 15, 1899, A. M. Hoyle, a traveling salesman for appellant company, whose authority was not otherwise shown, was in the city of Gainesville, and, having heard that appellee had purchased a New Century typewriter No. 6 for \$50, the regular price of which was \$102.50, went to the office of appellee to inquire about it. He there met Mr. Bomar, appellee's president and manager, and Mr. Easley, the stenographer. There is some difference in the testimony as to the conversation that then took place. Bomar testified that in the beginning, and before he knew for whom Hoyle was acting, he stated to the latter that he did not desire to purchase a typewriter; that he was satisfied with the one shipped him on trial, and would keep it. All parties agree, however, that Hoyle then insisted, in effect, that the machine in controversy could not be sold for \$50, and was not the machine offered therefor in said letter of November 24, 1899. Bomar declined to act with Hoyle, but in about an hour after this meeting wrote appellant, declaring his satisfaction with said machine and his acceptance thereof, and inclosing his check for \$50 in payment as per terms of letter of November 24, 1899. Appellant immediately denied having offered the New Century for \$50, and declined to accept said check, which was tendered in return through Mr. Hoyle, and demand made for return and possession of the typewriter, which being refused, appellant instituted this suit as stated.

We are of opinion that there was error as assigned in the third paragraph of the court's charge. The jury were here authorized to find for appellee if they found that the machine was shipped to appellee on trial, and it proved satisfactory, and appellee "thereafter notified either plaintiff or an authorized agent of plaintiff that said typewriter was satisfactory before plaintiff revoked its offer." This was evidently intended to apply to the evidence of Bomar that, in the begin-

ning of the Hoyle conversation above mentioned, he informed said Hoyle that the machine was satisfactory, and the jury may, and very probably did, construe this as an acceptance that fixed the right of appellee to the machine in controversy. Such construction, in our judgment, would constitute a perversion of the true purport of the conversation. If Bomar, appellee's manager, made the statement relied upon first as stated by him, it was but part of a general conversation, that should be construed as a whole, and was evidently not intended by him as an acceptance of an offer of sale then unclosed. He would hardly thus attempt to formally complete a proposition of sale on the part of appellant with one wholly unknown to him, and not known to have connection with appellant. Hoyle was there vigorously asserting, in effect, that appellant had made no such offer as insisted upon by Bomar; that the offer made in the letter of November 24, 1899, related to a secondhand typewriter, and not to a New Century No. 6, and the words attributed to Bomar in the same immediate connection ought not to be given the effect of such acceptance as was necessary to fix appellee's title to the machine in controversy. In addition to this, authority to accept or reject in Hoyle was not shown. He was shown to be a mere traveling salesman, and the court instructed the jury that, if they so found, Hoyle would not have power to revoke; thus rendering it possible for the jury to find that by reason of Hoyle's want of authority appellant's offer was not withdrawn by him in the conversation with Bomar on December 15, 1899, but that nevertheless Hoyle had such authority as would make effective the asserted acceptance in this conversation.

We think this paragraph of the court's charge subject also to further objection. The jury were therein instructed, in substance, that, if they found that Hoyle was without authority to revoke the offer of appellant, appellee's letter of December 15, 1899, constituted final acceptance of the machine in controversy, and that in such case they should find for appellee. The issue of the identity of the subject-matter of appellant's offer was thus evidently excluded. Ordinarily, it is the duty of the court to construe and declare the legal effect of writings relied upon as constituting a contract. Here the letter of November 24, 1899, read in the light of all the circumstances, was somewhat ambiguous. Appellant was insisting that the machine therein really offered for \$50 was not the one in controversy. Appellee insisted to the contrary, and this was the vital issue in the case, and should not have been excluded in this clause of said section of the charge. If the letter of November 24, 1899, was written with the design that appellee should understand therefrom that a New Century No. 6 was offered for \$50, or if a person of ordinary

care and prudence would have so understood it, and appellee did in fact so understand it, and without knowledge of mistake, if any, and before withdrawal of the offer, accepted the proposition, then appellant cannot plead that the offer was intended in fact to refer to another machine. If, on the contrary, the offer related to, and was intended to be of, some other typewriter, and would have been so understood by the exercise of reasonable care and prudence, there was no sale; for it is unquestionably true in the law of contracts, including sales, that the minds of the parties must meet upon the same thing at the same time. *Benj. Sales*, § 418; *Tied. Sales*, § 33. Or if, under the circumstances, a person of ordinary care and prudence would have understood the offer to be of a New Century No. 6, and appellee in fact so understood it, yet if in fact it was not so intended by appellant, and if appellee, at any time and by any means, prior to due acceptance of it, had notice that the machine in controversy was not the one intended by the offer of November 24, 1899, then no sale took place. *Dunn v. Price*, 87 Tex. 321, 28 S. W. 681.

What we have here said also illustrates the relevancy and importance of certain other correspondence between the parties, and to the exclusion of which appellant assigns error. The first was a letter from appellee to appellant dated March 12, 1899, inquiring for price, etc., of typewriter. On the 13th appellant answered, quoting prices and terms of secondhand machines at \$35 and \$50, and calling attention to a folder accompanying letter, with picture of New Century No. 6 engrossed thereon, giving the price thereof as \$102.50. It is insisted that these letters were too remote in point of time and unconnected with the offer under consideration. This but goes to the weight of the testimony, not to its admissibility. A vital issue was, did appellee in fact understand the offer in controversy to be of a New Century No. 6 for \$50? In the determination of this issue, it was certainly relevant to show, if appellant could do so, that appellee had theretofore received knowledge of the selling price of a New Century and of secondhand machines. It was for the jury to say whether such knowledge had been received by appellee through any authorized agent, and whether such knowledge existed at the time in question.

Under the real issues involved, it is difficult to see what legitimate place in the pleadings the anti-trust law had. The suit was for the recovery of specific property, and not for the enforcement of a contract in violation of any of the provisions of that law. However, the value of the typewriter in question was involved, and we will not undertake to say that the court should reject competent evidence, if such existed, of the existence of an agreement or combination by reason of which

the market price was fictitious, and not the real market value. For the errors noted, the judgment is reversed, and the cause remanded for a new trial.

NEELY et al. v. GRAYSON COUNTY NAT. BANK.

(Court of Civil Appeals of Texas. March 2, 1901.)

APPEAL—FINDINGS—EVIDENCE TO SUPPORT—GARNISHMENT OF BANK—INSOLVENT DEFENDANT—CHECKS DELIVERED BEFORE SERVICE—PAYMENT—EQUITABLE ASSIGNMENT—SET-OFF.

1. Where there is evidence tending to support findings of fact, the latter will not be disturbed on appeal.

2. A check drawn by a wife and delivered to a creditor, in payment of her husband's debt, before the bank on which it was drawn was served with garnishment in a suit against the husband, operated as an equitable assignment of community money of husband and wife in the bank, to the amount of the check, and such bank was authorized to pay the check out of funds in its hands after service of such garnishment.

3. Where a bank held two notes of a depositor, secured by personal indorsement, and such depositor became insolvent prior to service on the bank of a garnishment in a suit against him, which service was before maturity of the notes, the bank was entitled to set off such notes against the deposit.

Appeal from Grayson county court; J. D. Woods, Judge.

Action by J. H. Neely against Frank Schwulst, defendant, and the Grayson County National Bank, garnishee. Defendant was adjudged a bankrupt after commencement of the action. From a judgment in favor of garnishee, plaintiff and defendant's trustee in bankruptcy appeal. Affirmed.

Chas. Orenshaw, for appellants. A. L. Beaty, for appellee.

BOOKHOUT, J. Appellant J. H. Neely recovered a judgment in the county court of Grayson county on September 12, 1899, against Frank Schwulst for the sum of \$317.02, with interest and costs. Execution was regularly issued upon the judgment, and on the 11th day of August, 1900, J. H. Neely filed her affidavit for garnishment, and caused a writ of garnishment to issue against the Grayson County National Bank, a corporation, which writ was served on the 11th day of August, 1900. The bank answered, denying any indebtedness to Frank Schwulst. This answer was controverted by J. H. Neely on the 4th day of September, 1900. On the 25th of August, 1900, Frank Schwulst filed his petition in bankruptcy in the United States court for the Eastern district of Texas, and on the 27th of August was adjudged a bankrupt. H. N. Tuck was appointed trustee of the estate of said bankrupt, and thereafter, on the 24th of September, said trustee was granted permission by the county court to intervene in this suit, on which day he filed his plea of intervention.

On the 25th day of September, 1900, the garnishee filed its amended answer in this suit, admitting, among other things, that Meddle Schwulst, wife of the said Frank Schwulst, bankrupt, had deposited in its bank on the day of the service of the said writ upon it the sum of \$245. It alleged that said bankrupt was indebted to the said bank by two promissory notes,—one for the sum of \$300, dated July 30, 1900, and due 90 days after date; that the other note was for the sum of \$125, dated August 15, 1900, and due September 1, 1900; that both notes were secured by personal security; that the first note, for \$300, was signed by bankrupt, his wife, Meddle Schwulst, and A. A. Fielder, and the second note, for the sum of \$125, was signed by the bankrupt, his wife, Meddle Schwulst, and Frank Hamblin; that on the 10th day of August, 1900, Meddle Schwulst had drawn a check in favor of L. Eppstein & Son, of Denison, for the sum of \$113.36; that because of the indebtedness of the said bankrupt to it in the sum of \$425, and on account of the check which had been drawn upon it and presented to it after the writ of garnishment had been served upon it, it had the legal right to retain all the money deposited with it in the name of Meddle Schwulst, and apply first to the payment of the said check, and then the balance to its own debt, pro tanto. And upon these issues this case went to trial, and was submitted to the court without the intervention of a jury, and resulted in judgment for the defendant garnishee, and that garnishee recover costs, including an attorney's fee for \$20. The trustee, Tuck, and plaintiff have appealed.

The court filed conclusions of fact as follows: "At the time of the service of the writ of garnishment herein there stood on the books of the Grayson County National Bank of Sherman, garnishee herein, a credit in the name of Meddle Schwulst in the sum of \$245, which represented a deposit of money made on that day; the same being an ordinary deposit, and not a special one. On August 10, 1900, which was prior to the service of said writ, said Meddle Schwulst, in payment of a debt of said Frank Schwulst, drew her check in favor of said L. Eppstein & Son, on said fund in said bank, for \$113.36, and delivered the same to said L. Eppstein & Son, which said check was on August 15, 1900, which was after the service of said writ, presented to said bank, paid by it, and charged to said account of said Meddle Schwulst against the credit aforesaid. At the time of the service of said writ, Frank Schwulst, the defendant, who was and is the husband of said Meddle Schwulst, was indebted to the Grayson County National Bank, garnishee herein, in the amount of two promissory notes,—one for \$300, dated July 30, 1900, and due ninety days after date, and one for \$125, dated August 1, 1900, and due August 15, 1900; both

bearing interest after maturity at the rate of ten per cent. per annum. The first note was also signed by Meddie Schwulst and A. A. Flieder, and the second by said Meddie Schwulst and Frank Hamblin. Both were joint and several in form, but said Flieder and Hamblin were sureties. Said Frank Schwulst is insolvent, and has been since prior to the time said writ was served; and on the 25th day of August, 1900, he, the said Frank Schwulst, filed his petition in bankruptcy, and was on the 27th day of August, 1900, duly adjudged, and is now, a bankrupt; and the intervener, H. N. Tuck, was duly appointed trustee of his estate, and qualified as required by law, and is now acting as such trustee, and is authorized to intervene herein. Shortly after the service of said writ, said bank, with the consent of said Frank Schwulst and Meddie Schwulst, applied the amount which is held to the credit of said Meddie Schwulst on the notes hereinbefore mentioned, and the money so applied was the money of said Frank Schwulst, although it had been deposited in the name of his wife. A reasonable fee for preparing and filing the garnishee's answer herein and for representing it on the trial is \$20."

Appellant contends that the trial court erred in finding (1) that the money on deposit in the bank belonged to Frank Schwulst; (2) that Frank Schwulst was insolvent prior to the time the writ of garnishment was served; and (3) that the bank, with the consent of Frank and Meddie Schwulst, applied the amount which it held to the credit of Meddie Schwulst on the notes of Frank Schwulst. The evidence is amply sufficient to show that the money deposited in the name of Meddie Schwulst in the garnishee bank was the community property of Frank and Meddie Schwulst. We think the evidence also fairly supports the court's findings that Frank Schwulst was insolvent prior to the service of the writ of garnishment, and continued so thereafter. There is evidence from which the court was authorized to find that Frank and Meddie Schwulst consented to the application of the money on deposit to the payment of the note. The court's findings of fact will not be disturbed by this court if there be evidence fairly tending to support the same. We conclude that the court's findings are supported by the evidence, and they are adopted by this court.

2. The first question of law arising upon this appeal is, did the check drawn in favor of L. Eppstein & Son prior to the service of the garnishment operate as an equitable assignment of the fund on deposit, to the amount of the check? An order drawn by a debtor on a specific fund and delivered to the creditor is an equitable assignment of the fund, to the amount of such order, although the party upon whom the order is

drawn has no notice thereof. Notice of the assignment to the party upon whom the order is drawn only becomes material in order to prevent payment of the fund to the assignor, or to a subsequent purchaser from the assignor, without notice of the prior assignment. *Harris Co. v. Campbell*, 68 Tex. 22, 3 S. W. 243; *Smith v. Railway Co.* (Tex. Civ. App.) 39 S. W. 969; *Schenber v. Simmons* (Tex. Civ. App.) 22 S. W. 72; *Bank v. Convery* (Tex. Civ. App.) 27 S. W. 828. In this case the check was drawn by Meddie Schwulst upon a specific fund to pay a debt owing by her husband to L. Eppstein & Son, and was delivered to the creditor before the service of the writ of garnishment. This operated as an equitable assignment of the fund, to the amount of such check, and authorized the bank to make payment thereof out of such special fund. The fact that after the date and delivery of said check the writ of garnishment was served upon the bank would not defeat the right of Eppstein & Son to have the amount of the check paid to them. The writ of garnishment only seized such credits and effects as the bank had, belonging to the defendant in garnishment. After the assignment to L. Eppstein & Son, Schwulst had no interest in the money so assigned subject to garnishment. The bank had ceased to be a debtor of Schwulst, by such assignment, and became a debtor of Eppstein & Son.

The next question presented is, did the bank have the equitable right to apply the money on deposit to the payment of Schwulst's notes, he being insolvent, although said notes had not matured and were secured by personal indorsement? The general rule is that only mutual debts which have matured can be set off against each other. *Allbright v. Aldrich*, 2 Tex. 166. An exception to this rule, however, is allowed where the party against whom the set-off is pleaded is insolvent. In such a case it is held inequitable to permit the party who sues to recover, leaving the defendant, who holds a just demand, for which plaintiff is liable, without any security to enforce its payment. *Castro v. Gentley*, 11 Tex. 28; *Henderson v. Gilliam*, 12 Tex. 71; *Hamilton v. Van Hook*, 26 Tex. 302. We think it clear that, under these authorities, when Schwulst became insolvent the bank had the equitable right to set off his notes held by it against the deposit. Was this right defeated by reason of the notes being unmatured and secured? So far as we are aware, this question has not been passed upon by the court of last resort of this state. It was held by the supreme court of Tennessee in the case of *Nashville Trust Co. v. Fourth Nat. Bank*, reported in 18 S. W. 822, 15 L. R. A. 710, that a bank had the right to set off against a deposit unmatured paper of an insolvent depositor. To the same effect is the case of *Fidelity Trust Co. v. Merchants' Nat. Bank* (decided by the supreme

court of Kentucky), 13 S. W. 910, 9 L. R. A. 106; *Armstrong v. Warner* (Ohio) 31 N. E. 877, 17 L. R. A. 406; and *Hudgin v. Bank* (N. C.) 32 S. E. 887. The supreme court of Iowa held in the case of *Thomas v. Bank*, reported in 68 N. W. 780, 35 L. R. A. 379, that a bank had the right to set off an unmatured note of an insolvent depositor against his deposit, and that this right was superior to those of the holder and drawee of a check drawn on the deposit, but of which check the bank had no notice until after the depositor's insolvency. In the case of *Scammon v. Kimball*, 92 U. S. 362, 23 L. Ed. 483, it was held that a bank having insurance in a company which was rendered insolvent by the Chicago fire of 1871 had a right to set off the amount of its insurance on property consumed against money of the company in his hands on deposit, although the insurance was not a debt due at the time of the insolvency. In the case of *Carr v. Hamilton*, 129 U. S. 252, 9 Sup. Ct. 295, 32 L. Ed. 669, it was held that, when a life insurance company becomes insolvent and goes into liquidation, the amount due on an endowment policy payable at a fixed time may, in settling the company's affairs, be set off against the amount due on the mortgage deed from the holder of the policy to the company, by way of compensation. The case of *Schuler v. Israel*, 120 U. S. 500, 7 Sup. Ct. 648, 30 L. Ed. 707, was a suit brought by Schuler against Israel to recover a debt, in which Schuler caused a writ of garnishment to issue and to be served upon the Laclede Bank. The garnishee bank answered, admitting that it had funds on deposit belonging to Israel, but set up that Israel was indebted to the bank in certain sums of money, some of which had matured, and some had not matured, at the time of the service of garnishment. The bank claimed the right, as Israel was insolvent, to set off the deposit in payment of his obligations held by the bank, whether due or not. It was held that the bank was entitled to the set-off. The court, in discussing the rights of the garnishee in that case, say: "As we understand the law concerning the condition of a garnishee in attachment, he has the same rights in defending himself against that process at the time of its service upon him that he would have had against the debtor in the suit for whose property he is called upon to account. And while it may be true that, in a suit brought by Israel against the bank, it could, in an ordinary action at law, only make plea of set-off of so much of Israel's debt to the bank as was then due, it could, by filing a bill in chancery in such case, alleging Israel's insolvency, and that, if it was compelled to pay its own debt to Israel, the debt which Israel owed it, but which was not due, would be lost, be relieved by a proper decree in equity; and as a garnishee is only compelled to be responsible for that which, both in law and equity, ought to have gone to pay the prin-

cipal defendant in the main suit, he can set up all the defenses in this proceeding which he would have either in a court of law or a court of equity." We think the language of the court in the case above cited is applicable to this case. Schwulst was insolvent prior to the service of the garnishment. The right of the bank to set off the deposit in payment of the notes accrued to the bank prior to the service of the writ of garnishment. It then could have instituted proceedings and compelled the set-off. The fact that the notes were secured by personal indorsement did not affect the bank's right to compel the set-off. It has been held that the surety in a proceeding properly brought could compel a set-off in such a case. *Armstrong v. Warner*, supra. We conclude that there is no error in the judgment, and the same must be affirmed.

CARTER v. NORTON.

(Court of Chancery Appeals of Tennessee.
Sept. 16, 1899.)

ACTION TO QUIET TITLE—OCCUPATION—DEEDS—REGISTRATION—APPEAL—BILL OF EXCEPTIONS—RECORD—QUESTIONS REVIEWABLE—DEPOSITIONS—SUPPRESSION—CORRECTION OF ERRORS—REMAND.

1. Defendant's grantor claimed title to a tract of land through a deed of trust executed in 1861 and a decree of foreclosure in 1886. Defendant received title bonds in 1890 and in 1896, neither of which were registered. The tract overlapped a tract claimed by plaintiff through a deed executed and registered in 1858. The title of both parties rested ultimately on separate grants from the government, defendant's being made in 1830, and plaintiff's in 1841. The defendant had never had possession of the overlap, while plaintiff, the boundaries of whose tract were well defined, had immediately taken possession under his deed, built a house, set out an orchard, cleared a part of the land, and remained in actual possession. *Held*, that plaintiff was entitled to a decree for the land.

2. A paper in the record on appeal headed, "A Wayside Bill of Exceptions," signed by an attorney, but not by the judge, is not a bill of exceptions, and cannot be considered.

3. Where there was no bill of exceptions to an act of the trial court, the fact that the record showed the court's act, and the grounds therefor, did not bring the question before the court on appeal.

4. Where a deposition suppressed on trial would not change the result if admitted, the appellate court will not remand the case for a perfection of the record.

Appeal from chancery court, Unicoi county; John P. Smith, Chancellor.

Bill by James N. Carter against Dube Norton. From a judgment in complainant's favor, defendant appeals. Affirmed.

J. B. Cox, for appellant. Kirkpatrick, Williams & Bowman, for appellee.

WILSON, J. This bill was filed December 23, 1896, to recover possession of a disputed tract of land in the First civil district of Unicoi county, formerly a part of Washington county, to enjoin the defendant from

committing waste thereon, to have an account for rents and waste committed, and, if the defendant claimed under any title, to have the same removed as a cloud upon the title of complainant. No injunction seems to have issued under the prayer of the bill. The bill avers that the defendant wrongfully entered upon the land about three years before the institution of the suit, and that since then, over the protest of complainant, he had been committing waste, and enjoying the rents and profits of the land thus wrongfully entered upon by him. The defendant answered the bill, January 28, 1897. He denied all the material averments of the bill, and sets out in his answer a tract of land which he alleges belongs to him, and says that in cutting timber, etc., he has never got outside the lines of his own land. At the May term, 1897, of the court, by consent of parties, the surveyor of the county was ordered, from the title papers of the parties, to make a complete survey of the lands of the parties, and accompany his survey with a plot, and report to the court. He was directed to subscribe to an oath to make an impartial survey, and to notify the parties of the day that he intended to go upon the premises to commence it. This order to the surveyor was renewed at a subsequent term of the court. He made the survey ordered in November, 1898. His full report of the survey, accompanied by a map, with explanations of its lines and features, is in the record.

The depositions of a number of witnesses were taken. Pending the taking of the proof, the defendant filed a petition in the case averring that the complainant was trespassing upon the land in dispute, and cutting the timber therefrom, and asking that he be enjoined. A fiat was granted for the injunction, upon bond being given, but no bond was given and no injunction issued. At the June term, 1899, of the court, after the parties answered ready for trial, the defendant asked that the case be passed until his solicitor could examine the surveyor upon the survey made and filed by him, and that the case be held open a few days for that purpose, to the end that the cause might be tried at that time. To this request the solicitor of complainant consented. The next day or a few days after this the defendant presented a second petition, asking to be permitted to take the deposition of one George Landers, averring that he could prove by said witness that he (the witness) had cleared a part of the land in dispute, and built on it, more than seven years before this suit was brought; that the evidence was very material to the establishment of his defense; that he had just discovered it; and that he had not been negligent in not discovering it before. The chancellor granted this application, over the objection of the complainant; the defendant being given 10 days in which to take the deposition of said party. The

deposition of the witness was taken and filed during the term of the court. After it was filed, the complainant moved to strike it from the file (1) because it showed on its face that the affidavit of defendant upon which the order was granted allowing the proof for it to be taken was false, in that the fact that the witness had cleared land and erected a cabin on the land in dispute was known to the defendant before the expiration of the time for taking proof in the case, and before announcing ready for trial, as hereinbefore stated; (2) because, if such fact was known to defendant, he did not use due diligence in attempting to discover the evidence, the witness being his vendor, his father-in-law, and living for two years past within a stone's throw of the defendant; (3) because the record discloses that, more than 12 months before the application to take said deposition, the complainant stated in his deposition that said witness had built a house on the land in dispute within three years of the filing of this bill in this case; in other words, the motion to strike the deposition from the file is based upon the proposition that leave to open the proof to take it after the case was opened for trial, and the parties announced ready, was procured by the falsehood and fraud of the defendant. The chancellor, in acting upon the motion, said it presented a novel question, and that he hesitated to grant the motion, but that substantial justice was with the complainant; that a party should not reap benefit from his perjury; and that a prosecution for perjury would not meet the equities of this case. He suppressed the deposition. The chancellor decreed that the complainant was entitled to the land he sued for. He perpetually enjoined the defendant from trespassing on it, or attempting to assert his claim to the disputed land, and adjudged that he was liable for waste committed thereon, and complainant was given leave to take a reference, if he desired, to obtain his damages. The defendant was taxed with the costs. He appealed to the supreme court, and has assigned errors.

There is a paper in the records, headed "A Wayside Bill of Exceptions," showing that defendant excepted to the action of the chancellor excluding the deposition of George Landers. It is signed by the attorney of the defendant, and not by the chancellor. Of course, it is no bill of exceptions, and cannot be considered. The decree of the chancellor, after granting the appeal of the defendant, and giving him time to perfect it by bond, etc., contains the recitation that the defendant leaves his exception to the action of the court "in excluding said deposition."

The errors assigned are: (1) Error in sustaining the bill of complainant, because he does not show in himself a complete chain of title, running back to the state, to the land that he avers defendant was trespassing upon; (2) the proof fails to show that defendant trespassed upon the land of complainant;

(3) the defendant shows title in himself to the land upon which it is alleged that he was trespassing; (4) error in excluding the deposition of George Landers.

This case, after the preceding statements, can be disposed of in a few words. The defendant claims by mesne conveyances from one Josiah Sams. Sams' title ultimately rests upon a grant from the state to Jacob Peck & Co., No. 16,748, for 5,000 acres, issued June 24, 1830. For the purposes of this case, we may concede that Sams owned 300 acres embraced within the grant. He claims thus: Deed from Peck to Thomas Bowen, dated October 22, 1860; deed of trust from Bowen to Sams, dated October 14, 1861; decree of the chancery court of Unicoi county, March 1, 1886, vesting title in Sams. Defendant claims about 60 acres of the 300 acres aforesaid under title bonds from Sams. Sams, September 9, 1889, executed a title bond to George Landers. Landers assigned the title bond to defendant, January 18, 1896. Sams, August 16, 1889, gave a title bond to a piece of his 300 acres to W. R. Shelton. Shelton, January 24, 1890, assigned this title bond to George Landers. Landers, January 18, 1896, assigned it to defendant. Neither of these title bonds were ever registered, and both recite that they are alluded to on a title bond previously made by Sams to one Neely Hensley. The complainant claims title to 400 acres of land. This 400 acres was granted by the state by grant No. 24,465 to Allen Gillespie, November 27, 1841. This 400 acres is embraced in the 5,000 acres aforesaid, issued to Jacob Peck & Co. Complainant gets his immediate title to this 400 acres by a deed from George F. Gillespie and William Tyler, attorney in fact, dated January 23, 1858. His deed aforesaid was registered January 29, 1858. He went into possession immediately after his purchase, cleared a part of his land, built houses on it, set out an orchard, and from his purchase till the present time, either in person or by his tenants, has been in actual possession of the land purchased by him from Gillespie and Tyler. The boundaries of his land are well defined. He also claims by a grant issued by the state, No. 40,735, for 4,000 acres, dated March 19, 1880. This is a consolidated grant, and embraces all the land of complainant in Unicoi county, including the 400 acres bought in 1858 from Gillespie.

It is said or proved in the record that Allen Gillespie, to whom the 400 acres were granted in 1841, died testate, and in his will devised his land to his two sons, George F. Gillespie and — Gillespie. This will, or a copy of it, was not filed in the record. But the evidence is clear, and practically undisputed, that the complainant went into possession of the 400 acres under his deed in 1858, and that he has continued in actual possession ever since. The 300 acres as claimed by Sams and the 400 acres of complainant interlap. This interlap covers about

25 or 30 acres, embraced in the title bond assigned as aforesaid to defendant. There is no evidence in the record, if we disregard that of George Landers, that either Sams, or any one claiming under him, ever had any actual possession of this interlap until defendant entered upon it, some two or three years before this bill was filed. The relation of the 300 and the 400 acre tracts is shown on the map of Surveyor White, filed with the record, and also the interlap.

It was asserted in argument that complainant and Sams had established a conditional line between their respective tracts, and that the conditional line shows that the land in dispute belongs to the defendant. It is true that a line appears on the map of the surveyor which is designated by him as a conditional line. But the proof of Mr. Sams himself shows, explicitly, that this is a line he himself had surveyed, and that the complainant had nothing to do with establishing it, and knew nothing about it.

It is next said that the chancellor erred in suppressing the deposition of George Landers. There is no bill of exceptions to this action of the chancellor, and hence the matter is not before us. It is argued, however, that the second fact is before us, that he did suppress it, and the ground upon which he did it, and that, therefore, it is competent for us to find upon the legal question involved by his act of suppressing it. We do not think the matter is before us. The writer has no hesitancy in saying that, in his opinion, if the chancellor was correct in his conclusion, that the defendant by a false and fraudulent affidavit secured the order permitting the deposition to be taken after the case was called for trial and the parties answered ready for trial, he had the right, during the time, to revoke the order of permission, although the deposition had been taken and filed before the order of revocation was made, and in doing so to suppress the deposition. To say that a chancellor could not check a fraud of this kind involves the recognition of a principle that, in many instances, might have left him and rendered him unable to throttle frauds that he had been made the unsuspecting agent to start in motion.

It is next said that if, by reason of a want of a bill of exceptions, we cannot review the action of the chancellor in suppressing the deposition, we can, in view of the materiality and importance of the evidence of the witness, remand the case, with directions to open it for further proof. In a proper case, we can remand for amended pleadings, and for a perfection of the record to attain the ends of the manifest parties. But this is not such a case. In addition to what has been said, we have read the deposition of the witness, and if it were in the record it would not change the result. The witness obviously fell under a serious lapse of memory in saying that he had cleared and built on the disputed land two years before.

There is no error in the decree of the chancellor, and it is affirmed, with costs. The other judges concur.

Affirmed orally by supreme court, October 5, 1899.

McTEER et al. v. BRISCOE et al.

(Court of Chancery Appeals of Tennessee.
Sept. 16, 1899.)

SUPREME COURT DECREE—BILL TO REVIEW—MOTION TO CORRECT—FRAUD—INJUNCTION—PLEADING—SUFFICIENCY—LIABILITY INDEPENDENT OF BOND—DECREE RENDERED OVER OBJECTIONS—ADMISSION OF PART OF DECREE—DECREE FOR PENALTY FORTHWITH—BOND BEARING LIABILITY.

1. Where it appeared on the face of a bill filed to enjoin a judgment of the supreme court, which characterized itself as "a bill in the nature of a bill of review," that it was in fact a bill attacking a former decree for fraud, it was not demurrable as a bill to review a decree of the supreme court.

2. An injunction suit was decided in favor of the defendants, and their counsel submitted to the complainants' counsel the draft of a decree which the former intended to present to the supreme court for entry. A blank was left for the amount, and it was agreed that defendants' counsel would fill in the amount of the injunction bond. Complainants' counsel trusted them to do so, and were absent when the draft was presented and when handed in for entry. In violation of this agreement, defendants' counsel inserted in the blank "\$2,000," the penalty of a replevin bond, instead of "\$500," the penalty of the injunction bond, without the knowledge or consent of complainants or their counsel, and judgment was entered for the former amount. This was done on the last day of the sitting of the supreme court, and was not discovered, and could not have been, till after adjournment of the court. *Held*, that a complaint alleging such facts made out a case of fraud, and the judgment should be enjoined.

3. It was agreed between counsel on the reversal of a restraining order that the amount of the injunction bond should be inserted by defendants' counsel in the blank left therefor in a draft of a decree for such case submitted by the latter. Complainants' counsel, trusting that the proper amount would be inserted, filed their objections to the rendition of judgment forthwith for the penalty of the bond, and demanded that the cause should be remanded for determination of damages on the bond. *Held*, that the latter were not precluded from complaining of the fraudulent insertion in the decree of four times the amount of such bond by the fact that the judgment was entered over such objection.

4. Where \$2,000, the amount of a replevin bond, was fraudulently inserted in a draft for a decree on an injunction bond, instead of \$500, the amount of the latter, a bill to enjoin the \$2,000 decree as fraudulent, which admitted that defendants were entitled to a decree remanding the cause for distribution of funds in court and determination of damages on the injunction bond, was not demurrable as seeking to overthrow the whole judgment, while admitting that defendants were entitled to part of it.

5. In a suit to enjoin a decree for \$2,000, obtained by the defendants by fraudulently inserting that amount in a draft of the decree, instead of \$500, as agreed by counsel, the contention that no fraud could be imputed to defendants for merely presenting their claims to the court was idle.

6. Under Shannon's Code, § 4837, providing that all bonds taken according to law in the progress of a cause form a part of the record and judgment may be rendered thereon by the

appellate court without scire facias or notice, judgment could not be rendered on a replevin bond on which no writ had been issued, since the provision relates only to bonds carrying liability.

7. Where \$2,000, the amount of a replevin bond, was fraudulently inserted in a draft on a decree on an injunction bond, instead of \$500, the amount of the latter, and a decree was entered for \$2,000 in the supreme court on the last day of the term, the fact that the judgment debtors could move in such court that it correct its decree would not interfere with the jurisdiction of a court of chancery to enjoin the judgment for fraud.

Appeal from chancery court, Carter county; John P. Smith, Chancellor.

Suit by McTeer, Hood & Co. against Daniel Briscoe Bros. & Co. and others to enjoin a supreme court decree for fraud. From a decree dismissing the bill, complainants appeal. Reversed.

H. H. Taylor and Geo. E. Boren, for appellants. Curtin & Haynes and J. M. Simerly, for respondents.

NEIL, J. This bill was filed by Joseph T. McTeer, W. M. Hood, and C. E. McTeer, composing the firm of McTeer, Hood & Co., against Daniel Briscoe Bros. & Co., Etchison, Bates & Starke, and Huntsmen Bros. & Co., and R. A. Smith, clerk and master of the chancery court of Carter county. A demurrer was filed to the bill, and therefore it is necessary to set out the substance of both the bill and demurrer.

The bill charges: That both the complainants and the defendants, except the clerk and master, are wholesale merchants; that they were each creditors of J. A. Jones in the early part of the year 1895, and each obtained judgments before the justice of the peace of Carter county in that year against said Jones, as follows: On July 2, 1895, Huntsmen Bros. obtained a judgment for \$136.69; Etchison, Bates & Starke for \$76.25; Daniel Briscoe Bros. & Co. obtained a judgment on March 11, 1895, for \$632.23, and on which one W. P. Waters became stayor, on which a payment of \$50 was made by said Jones June 5, 1895; and that prior to March 11, 1895, defendants Daniel Briscoe Bros. & Co. obtained two other judgments against said Jones, aggregating \$632.89, which judgments were not stayed. That said Jones, at the time of said various judgments, was, and had been prior thereto, conducting a mercantile business (retail) in Elizabethton, Carter county. It is further alleged that on March 11, 1895, Jones executed to W. P. Waters a mortgage on his stock of goods for the purpose of indemnifying him against loss as stayor on the first-mentioned judgment of Daniel Briscoe Bros. & Co. It is further alleged that Jones was indebted to complainants in the sum of \$676.75, and on April 20, 1895, executed a trust deed on his said stock of goods at Elizabethton to W. P. Waters, as trustee, to secure said debt; that said Jones made provision in this trust deed

to also secure the before-mentioned judgment of \$632.23 to Daniel Briscoe Bros. & Co., on which Waters was stayor; that this last-mentioned trust deed was made with the consent of Waters, and the mortgage of March 11, 1895, was abandoned. It is further charged that the two judgments composing the before-mentioned sum of \$632.89 were as follows: one rendered May 2, 1895, for \$275, and the other June 3, 1895, for \$357.89, in favor of said Daniel Briscoe Bros. & Co.; that execution issued on each of said two judgments, and also on the judgment in favor of Etchison, Bates & Starke and the judgment in favor of Huntsmen Bros. & Co., and that the four executions were levied by the sheriff of Carter county upon said stock of goods, on which complainants' trust deed had been executed as aforesaid; that this levy was made on June 4, 1895, and the sheriff took possession of the stock of goods thereunder on that day, and made invoice thereof, which invoice showed the stock of goods at cost and carriage to be worth \$1,600. It is further alleged that on June 5, 1895, the next day after the levy just mentioned, the said W. P. Waters, stayor on the judgment of Daniel Briscoe Bros. & Co. of date March 11, 1895, for \$632.23, procured by affidavit the issuance of an execution thereon, which was placed in the hands of the sheriff of Carter county, and levied on said stock of goods, subject to the levies of the other four executions. It is further alleged that on July 5, 1895, the defendants to the present bill filed their original bill in the chancery court of Carter county against said Jones, said Waters, and one John G. Emmert, said Emmert having also a chattel mortgage on the same stock of goods, dated January 8, 1895; that the object of this bill was to administer the said stock of goods through the chancery court; that the bill attacked the mortgages of January 8, 1895, March 11, 1895, and the trust deed of April 20, 1895, for fraud in law and in fact; that no mention was made in this bill of the judgment of March 11, 1895, or the issuance of an execution thereon; but that the defendants hereto abandoned their said cause in chancery, and obtained action of the sheriff to advertise the stock of goods for sale under the execution, the sale being advertised to take place on the 25th day of July, 1895. It is further alleged that on July 24, 1895, complainants herein filed their original injunction bill in said chancery court of Carter county against the present defendants, and against J. L. Bradley, sheriff, and said Jones and Waters and J. G. Emmert, and brought forward said trust deed of April 20, 1895, averring its validity as security for the debt of the complainants, amounting to the aforesaid sum of \$676.65; that they prayed for a writ of injunction, and also a writ of replevin,—the injunction being prayed to enjoin the sale of the goods by the sheriff, and a writ of replevin being

asked for that the goods might be placed in the hands of a trustee who would succeed Waters, there being a prayer that there should be a new trustee appointed; that the chancellor entered a fiat upon the bill allowing the issuance of an injunction upon complainants executing bond in the sum of \$500, and also allowing the issuance of a writ of replevin upon the complainants' execution of a bond therefor in the sum of \$2,000; that the clerk and master was appointed receiver to take charge of the goods, when replevied, pending the appointment of a new trustee, which was applied for in said bill. It is further charged that complainants executed bonds for costs, and filed the same on July 21, 1895; also that they executed their injunction bond according to the requirements of the fiat in the sum of \$500, J. N. Edens and George E. Boren being sureties thereon; that a writ of injunction in said cause was issued by the clerk and master July 25, 1895, enjoining the sale of said stock of goods. It is further alleged that complainants abandoned that part of the bill praying for a writ of replevin, and that no writ of replevin was ever issued in said cause, and that none of the goods were ever replevied by them from said Bradley, sheriff, or any one else; that complainants signed a bond for the purpose of replevying said stock of goods, and that this bond was placed in the clerk and master's office at Elizabethton, but, the object thereof, to wit, the having a writ of replevin issue in said cause for the purpose of replevying said goods, being abandoned, they never obtained any sureties to execute said bond with them; that said bond was also abandoned, and never became a bond in intention, in fact or in law, for any purpose in said cause; that said replevin bond so signed by them aforesaid was drawn up on a blank form used by the clerk and master of the chancery court to fill out injunction bonds, and bears upon its back a label, printed in large letters, "Injunction Bond"; that this bond was filled in by the clerk and master, and the words "Injunction" and "Attachment" were stricken out of the face of said printed form, and the word "Replevin" was inserted therein, so as to make said form, when so drawn as was done by the clerk and master, in intention, tenor, and object, a replevin bond; that by some means unknown to complainants the clerk and master marked this bond, "Filed on the 24th day of July, 1895;" that this draft of a bond called for a penalty of \$2,000. It is further alleged that the filing of this bond by the clerk and master was a mistake on his part, because the complainants had abandoned the idea of issuing a writ of replevin, and no writ was ever issued, and the goods were never replevied, and that this fact was recognized in defendants' answer filed on July 26, 1895, wherein the following language was used: "Respondents would further show unto yo-

honor that, while complainants prayed for and obtained your honor's fiat for a writ of injunction and replevin to stop the sale of the goods by the sheriff, and take them out of his hands on the allegation that they were deteriorating and damaging, yet they only filed bond for the injunction, and failed or refused to file a replevin bond, required to take goods out of the possession of the sheriff, seeking to avoid the responsibility of their action by failing to comply with your honor's fiat; and now, by suing out said injunction, and failing or refusing to comply with the fiat by giving the replevin bond, they have stopped the sale of some \$1,500 worth of general merchandise, and allowed the same to remain in a damaging condition, as alleged in their bill, rather than become responsible for their actions by suing out the replevin writ." It is further alleged that this \$2,000 bond was not in tenor or in fact an injunction bond, nor was it ever intended to be, nor was it so treated; that the complainants complied with the fiat of the chancellor in executing the \$500 injunction bond; and that the defendants at no time made a motion therein requiring complainants to execute any other injunction bond. It is further alleged that the complainants, on the 8th day of August, 1895, entered a motion for the removal of W. P. Waters as trustee under the said trust deed of April 20, 1895, and in his stead to have appointed another trustee to execute said trust, whereupon the court appointed R. A. Smith, then clerk and master, receiver of said goods levied on, and ordered him to take charge of them, and to immediately make an accurate invoice of them, showing the cost price of the goods, and, if any goods were damaged or shopworn, to show the same, and to ascertain the then value thereof; that said receiver should sell the goods in bulk on six months' time, and, in case he could not do so, he should retail them for cash, and make his return at the next term of the court, and that the rights of the parties to the proceeds of the sale were reserved for future determination; that the defendants were parties to that proceeding, and made no objection to the order of the court; that said order was made on motion of defendants. It is further alleged that R. A. Smith, under the said order appointing him receiver, took possession of said stock of goods, and sold the same, and held the proceeds subject to the order of the court. It is further alleged that all the defendants to said bill, including the defendants to said cause, answered the original bill, and that pleadings were had by cross bill and answer until all the phases of the cause were at issue; that proof was taken, and the cause was finally heard by the chancellor in March, 1896, when he decreed in favor of the complainants, and upheld the trust deed of April 20, 1895, and gave the complainants a judgment for their indebtedness against said Jones, and decreed

satisfaction thereof out of the proceeds of the sale of the stock of goods. It is further alleged that from this decree the defendants hereto prayed an appeal to the supreme court, and the cause in that court was assigned to the court of chancery appeals, and heard in the last-mentioned court; and in this court the decree of the chancellor was reversed, and it was decreed that the said trust deed of April 20, 1895, was fraudulent in fact and in law, and that the levies of the defendants' executions constituted a prior lien upon the proceeds of the stock of goods, and that by decree of said court the cause was remanded to the chancery court of Carter county for a distribution of funds between said execution creditors. It is further charged that from this decree an appeal was prayed to the supreme court, and the cause was there heard, and the decree of the court of chancery appeals was there affirmed. 49 S. W. 57. The bill continues: "In addition to the affirmance of the decree of the court of chancery appeals, the said supreme court rendered a judgment against the complainants for \$2,000 on what is said in said decree [of the supreme court] to be an injunction bond. This judgment for \$2,000 was obtained by defendants against complainants by fraud, imposition, mistake, and other undue means, and constituted a fraud upon the right of the complainants, which they are advised and believe a court of chancery will relieve them from."

Proceeding to point out the facts constituting the fraud, the bill continues: "Complainants would further show to the court that at the time the honorable supreme court rendered its opinion in said cause their counsel therein, to wit, J. N. Edens and Geo. E. Boren, were not present at the supreme court, but were in attendance at the regular November term, 1898, of the circuit court then being held at Elizabethton for Carter county, Tennessee. Counsel for defendants in said cause were also in attendance upon said circuit court, and while in Elizabethton attending said court defendants' counsel Jno. W. Tipton and Judge Thomas Curtin drew up a decree to be entered in said cause by the supreme court, and submitted the same to the counsel for the complainants, and in said decree they provided for a judgment on the injunction bond executed by complainants and filed in said cause, but in the drafting of said decree defendants' counsel left blank the amount of the judgment proposed to be taken by defendants on the injunction bond. Complainants' counsel drew their written exceptions and objections to said judgment on the injunction bond, on the ground that defendants were not entitled to take judgment on the injunction bond in that cause, but insisted that the cause should be remanded to the chancery court at Elizabethton, where, under the orders of the chancellor, an issue could be made up between the parties, and the damages, if any, arising to the defendants by

reason of the suing out of the injunction, could be ascertained. These written objections by the complainants were forwarded to the clerk of the supreme court at Knoxville, and were filed with said decree. Complainants' counsel also, in said written objection, pointed out the fact that the amount of their proposed judgment on the injunction bond, as they now remember, was left blank. Defendants' counsel said to complainants' counsel they would fill in the correct amount of the injunction bond, and complainants' counsel relied upon them to do so. Complainants' counsel could not attend the sitting of the supreme court that week because of other pressing professional engagements. This was the last week of the sitting of the honorable supreme court of its 1898 term at Knoxville, and complainants are advised that said judgment in said cause was not handed down until in the night of the last day of the sitting of the court, and complainants nor their counsel had an opportunity for a rehearing in said cause. Complainants' counsel did not, nor did they, learn of this iniquitous judgment until some days after the adjournment of said supreme court, when Judge Curtin informed one of the complainants' counsel of the action of the court in rendering judgment for \$2,000, when complainants' counsel was greatly surprised thereat, knowing that he was surety on the injunction bond, and remembering it to have been a much smaller amount, when he was informed by defendants' counsel that he was not surety on this bond at all, but that there was another injunction bond for a larger amount in the cause on which they had taken their judgment. Complainants' counsel was very much surprised at this statement at the time, as he had no recollection of any other injunction bond having been given in the cause. Complainants' counsel, at their earliest opportunity, examined the original record in the cause, and very much to their surprise and astonishment for the first time learned of the filing of said replevin bond hereinbefore mentioned, and found that defendants had not taken judgment on the injunction bond, the only injunction bond filed in the cause, to wit, the \$500 bond, on which Boren and Eden are sureties. Complainants further show to the court that they had no notice in said cause that defendants would attempt to take judgment upon said \$2,000 replevin bond, and, if they had such notice, they would have resisted the same, and shown to the court that the record in said cause failed to disclose the issuance of a writ of replevin therein, or the replevin of said goods; which would have been a valid defense against the judgment on said bond. Moreover, the conditions of said bond are as follows: 'Now, if the said J. T. McTeer, W. M. Hood, and C. E. McTeer shall prosecute said replevin with effect, or, in case he fails therein, shall well and truly return the goods replevied to said Bradley, or either of them, and pay all such costs and

damages as may be awarded and recovered against the said J. T. McTeer, W. M. Hood, and C. E. McTeer in this cause, or in any suit or suits which may be hereafter brought for wrongfully suing out said replevin, and shall, moreover, abide by and perform such orders and decrees as the court may make in this cause, and pay such costs and damages as the court may order, then the above obligation shall be void; otherwise, to remain in full force and effect.' Wherefore complainants insist defendants would not have been entitled to judgment by motion on said replevin bond for the sum of \$2,000, even if replevin proceedings had never been abandoned, but they could only have recovered such damages as they might have sustained by reason of the levy of a writ of replevin, had one issued; all of which, as hereinbefore stated, did not occur. Complainants would further show to the court that defendants obtained their said judgments before the justice of the peace against said Jones individually and alone, and executions issued thereon against the property of said Jones, and said executions were levied upon said stock of goods as the property of said Jones, and the sheriff advertised the same for sale as the property of said Jones. Complainants, in their said original bill, prayed 'that a writ of injunction issue, and said Bradley be enjoined from selling said goods on the 25th inst., as now advertised; that the defendants be enjoined from further proceedings in the bill they have filed in your honor's court, and which they have abandoned, and that they be compelled to come into court and assert their rights, if any they have, in this cause.' Complainants did not enjoin or seek to enjoin in said cause defendants' said judgments at law, or the executions issued thereon, and they are advised, and so charge, that they were not enjoining, and did not enjoin, a judgment at law nor a suit at law before judgment; neither did they enjoin a money demand after judgment; and that they were not liable for defendants for their judgments against Jones to the amount of their bonds. The only thing they could have been lawfully liable for was for damages resulting to said goods between the date of the injunction and the time said receiver, R. A. Smith, took charge of the said goods; and they aver that no damages accrued to said goods within said period of time. They further show that the stock of goods levied on by the defendants according to the invoice price, including cost and carriage, was not over \$1,600, and according to the averment of defendants' own answer in said cause they were worth only some \$1,500. The identical stock of goods levied on by defendants under their executions were turned over to the receiver, R. A. Smith, in said cause, without objection on the part of defendants, who sold the same under the orders of the court, and realized from the sale thereof the sum of \$——, and which, as complainants are advised, said receiver

has had loaned at interest, and which amounts, with interest to this time, to \$——. Complainants are unable to see upon what principle of law or equity defendants are entitled to subject said goods to the payment of their debts and also collect from them the amounts of their judgments or the face of an injunction bond, when complainants have no recourse on said Jones after the satisfaction of his said debts; and this latter is especially true, as, not only in law, but in fact, the said Jones was then and is now insolvent. They are informed, believe, and charge that the goods, if forced to sale under the executions with beclouded titles, would have brought far less than they would when sold under the orders of your honor's receiver or trustee, and they charge that their injunction against said forced sales under said execution by said Bradley was a positive advantage to defendants, instead of a damage."

The bill characterizes itself upon its face as a bill in the nature of a bill of review, and the prayer asks that it be taken as an original bill in the nature of a bill of review, and that the decree in the original cause be reviewed, and perpetually enjoined to the extent of the said \$2,000 judgment, and that R. A. Smith, clerk and master, be perpetually enjoined from issuing execution upon said judgment, and that the said judgment be declared void for fraud and mistake.

A demurrer was filed to the bill, and numerous grounds of objection set forth. These may be summarized as follows: (1) That this is a bill filed in chancery to review a decree of the supreme court, and that such a bill cannot be lawfully filed. (2) That the bill shows a liability in law upon the complainants, regardless of the bond, for the judgment so taken; and, as no judgment was rendered against any sureties, the complainants have no legal ground for complaint. (3) That the decree was entered, over objections filed by the present complainants, after consideration by the court, and hence that the matter has now been finally disposed of. (4) That the bill is too broad, in that it seeks to enjoin the whole judgment, when it is conceded upon the face of the bill that defendants were entitled to some judgment. (5) That no fraud can be imputed to the defendants, because they merely presented their contentions to the supreme court. (6) That complainants' remedy, if any they have, is by application to the supreme court to correct the decree.

As to the first ground of demurrer, if this could be construed as a pure bill of review, of course it would be well taken, as a bill of review cannot be filed in any court to review a decree of the supreme court. *Hurt v. Long*, 90 Tenn. 445, 448, 449, 16 S. W. 968; *Wallen v. Huff*, 1 Tenn. Cas. 4. But the nomenclature adopted in the bill is, "An original bill in the nature of a bill of review," and so a bill to impeach a decree for fraud is styled in *Jones v. Williamson*, 5

Cold. 371, 375, 376, and the authorities there cited. But the name is immaterial. The bill, of course, appears upon its face to be a bill attacking a former decree for fraud, and of this aspect of the matter we will speak more at large when we take up the subsequent grounds of the demurrer.

The second ground of the demurrer is not well taken. The bill does not show any such liability outside of the bond as was decreed under the bond. On the contrary, it shows no liability at all, but merely a contest over a fund in court, and the right of defendants in the present bill to priority in that fund.

The third, fourth, and fifth grounds of demurrer should be considered together. They raise the question as to whether the allegations of the bill are sufficient to sustain it as a bill to set aside a decree for fraud, accident, or mistake. Of course, it is well-settled law that a decree may be set aside when procured by fraud, accident, or mistake without fault on the part of the party aggrieved thereby. *Jones v. Williamson*, 5 Cold. 371, 375, 376; *Maddox v. Apperson*, 14 Lea, 596, 604; *John v. Tate*, 7 Humph. 388; *Smith v. Johnson*, 2 Heisk. 225, 243,—as where an appearance was entered by an unauthorized attorney, and a decree procured on such appearance (*Boro v. Harris*, 13 Lea, 36, 43); so where a decree was procured without the concurring steps necessary to give the chancery court jurisdiction, and such omission was kept from view by false recitals (*Walker v. Day*, 8 Baxt. 77, 82, 83); so where the name of a party was signed to an appeal bond without his authority, and judgment taken thereon in the supreme court (*Coles v. Anderson*, 8 Humph. 490); so where an ex parte judgment on motion was taken in the supreme court against an officer for non-return of an execution for too large an amount, the motioner concealing the fact of certain payments (*Smith v. Van Bebbler*, 1 Swan, 110.—to same effect, *Kinzer v. Helm*, 7 Heisk. 672); so where, in a case carried to the supreme court on a bond for appeal executed after the time for procuring the appeal had expired, the supreme court erroneously took jurisdiction, and rendered judgment (*Wooten v. Daniel*, 16 Lea, 156); so where the satisfaction of a judgment of the supreme court was erroneously set aside by that court upon an ex parte application (*Wilburn v. McCollom*, 7 Heisk. 267); so where the supreme court rendered a decree upon the false statement of an appellee that the appellant had abandoned his appeal (*Pyett v. Hatfield*, 15 Lea, 473). We are referred to numerous cases wherein the doctrine is announced that the supreme court cannot interfere with its decrees passed at previous terms, except for mistake apparent upon the face of the record. *Lamb v. Sneed*, 4 Baxt. 349; *Hill v. Walker*, 7 Baxt. 310; *Russell v. Colyar*, 4 Heisk. 154; *Pettit v. Cooper*, 9 Lea, 21; *State v. Bank of Commerce*, 96 Tenn. 581, 36 S. W. 719. But these are all cases falling under Shan-

non's Code, § 4598 (Old Code, § 2878), which provides that every mistake apparent upon the face of the record may be corrected by the court at any time after final judgment at the discretion of the court. But these cases have no bearing upon a bill filed to set aside a decree for fraud, and in no wise interfere with that well-recognized jurisdiction. The ground of fraud alleged in present bill is, in substance: That the counsel for defendants submitted to the counsel for complainants the draft of a decree, which the former said they intended to present to the supreme court for entry in the case referred to in the bill. That this draft left the amount blank, and it was agreed that this amount should be filled in from the injunction bond which was included in the transcript in that cause, and defendants' counsel agreed with complainants' counsel that they would fill in the amount from the injunction bond. Complainants' counsel trusted them to do so, and were not present when the decree was presented to the court, or when handed in for entry upon the minutes. That there was no controversy or difference between the counsel as to the amount which should be inserted in the blank; that being determined by the face of the injunction bond. That the only controversy between them was as to whether a judgment should be at once entered in the supreme court upon the injunction bond for its penalty, or whether there should be a reference for damages upon that bond. That, in violation of this agreement, defendants' counsel inserted in the blank space not the penalty of the injunction bond, \$500, but the penalty of a replevin bond, \$2,000. That this was done without the knowledge of the complainants or of their counsel, and on the last day of the sitting of the supreme court, and the fact was not discovered and could not be discovered by complainants or their counsel until after the adjournment by the supreme court; and that promptly upon learning the fact of the entry of said judgment the present bill was filed. We think this makes out a case of fraud. Here we have, according to the bill,—which must be taken as true upon demurrer,—the vigilance of complainants' counsel lulled to sleep by an agreement, relied upon, to insert the penalty of an injunction bond for \$500 in a certain blank space in the draft of a decree, and the violation of this agreement and of this trust and confidence by the insertion of \$2,000, an amount four times as large as the penalty of a replevin bond; and there is the further item of surprise that this replevin bond had never been acted upon by the court below, or either party, or treated as creating any liability whatever, and it could not have been supposed by the complainants or their counsel that there was any probability or possibility of the entry of a judgment upon that bond. The foregoing is a fair statement of the allegations of the bill as to the grounds

of fraud. We think there can be no two opinions upon the question as to whether the above allegations state a case of fraud. It is said that this matter cannot now be heard, because objections were offered by the defendants to this decree in the supreme court by a brief, and that the court, after considering these objections, overruled them, and caused the decree to be entered. It is apparent from the allegations of the bill, however, that the objections referred to were upon the point as to whether there should be a judgment outright upon the injunction bond on the ground that a judgment had been enjoined, or whether the cause should be remanded for damages merely upon the injunction bond, which latter course would allow the taking of proof. There never was any controversy, according to the bill, as to whether the amount inserted in the blank space should be taken from the injunction or the replevin bond. The fraud consists, not in the fact that a decree was entered outright, instead of directing a reference for damages, but upon the amount of the decree, \$2,000, instead of \$500. We think it probably true that, if the decree had been entered only for \$500, it would, under the circumstances, be beyond reach, even though erroneous, as we think it would have been erroneous (*Staples v. White*, 88 Tenn. 30, 12 S. W. 330), under the allegations of the bill, inasmuch as no judgment against complainant was enjoined, but only the enforcement of an execution on a particular stock of goods; the execution being issued on a judgment against a party other than complainant. We are to deal with the judgment, however, not as it ought to have been, or as it might have been, but as it was in fact entered. It was entered upon the replevin bond, and without notice, and under the circumstances above detailed, and was, under the allegations of the bill, simply fraudulent.

It is objected that the bill concedes that the defendants were entitled to some judgment in the case referred to, and that, therefore, the bill cannot wholly enjoin the entire judgment for \$2,000. The only decree which the present bill concedes is that the defendants were entitled to a decree remanding the cause for distribution of the funds in court, and for damages upon the injunction bond. There is nothing, therefore, in this objection. The whole amount of the \$2,000 judgment is attacked in the bill.

It is insisted that there could be no fraud in the defendants' presenting their contentions to the supreme court. This is certainly true. In so far as the defendants presented their contention to the supreme court to the effect that they were entitled to a decree for the full amount of the injunction bond penalty, as opposed to the contention of the complainants' brief in that case that there should be a remand for the cause for the damages upon the injunction bond, of course there could be no imputation of fraud.

But, as stated, the charge of fraud rests not here, but upon the insertion of the wrong amount in the blank space, which changed the possible liability of \$500 to an impossible liability of \$2,000, and this at the very heels of the court, when no relief could be had, by petition to rehear or otherwise, in the supreme court. It is due to the counsel for the defendants whose names are mentioned in the bill to call attention to the fact—which we do with great pleasure—that it is inferable from the bill that the insertion of \$2,000 instead of \$500 arose from their mistaking the replevin bond for the injunction bond; this mistake being induced by the words "Injunction Bond" appearing upon the back of the replevin bond, an old blank form of an injunction bond being used, and filled in with the language of a replevin bond. But, although this relieves the defendants' counsel from the imputation of intentional wrongdoing, still the result is the same to the complainants, and it is a fraud in law, for which they are entitled to relief. It results that the third, fourth, and fifth grounds of demurrer are overruled.

We are also of the opinion that the bill is sustainable under its facts on another ground. It is true that the court is free to render judgment upon the bonds taken during the progress of the cause, under Shannon's Code, § 4837, which reads as follows: "All bonds and recognizances taken according to law in the appellate court or in the court below, in the progress of a cause, form a part of the record, and judgment may be rendered thereon by the appellate court to the extent of the respective liability of the parties pending the motion, without scire facias or notice." This refers, however, to bonds which carry an existing liability. Now, in the present case, under the allegations of the bill, the replevin bond on which judgment was rendered carried no liability whatever, because it had never been acted upon, in that no replevin writ had ever been issued thereunder. The bond was not, therefore, in such a condition that any court could render judgment thereon. The judgment of the supreme court as to this matter was, therefore, *coram non jure*, and, like the judgment of every other court under similar circumstances, was simply void as to this matter. A decree of the supreme court is void under such circumstances as would be the decree of any other court. *Pettit v. Cooper*, 9 Lea, 21; *Easley v. Tarkington*, 5 Baxt. 592. Upon the subject of such judgments generally, see *Hume v. Bank*, 1 Lea, 220; *McKeldin v. Gouldy*, 91 Tenn. 677, 20 S. W. 231; *Sanders v. Logue*, 98 Tenn. 365, 12 S. W. 722; *Bank v. Carpenter*, 97 Tenn. 437, 37 S. W. 278; *Gilreath v. Gilliland*, 95 Tenn. 383, 384, 32 S. W. 250.

The sixth ground of demurrer raises the point that the error could be corrected on motion in the supreme court, and therefore that a bill would not lie. Under *Easley v. Tarkington*, *supra*, it is probably true that this re-

lief could be had, though other cases render it somewhat doubtful. Still this would not interfere with the jurisdiction of a court of chancery to enjoin the judgment for fraud, or even on the ground that the supreme court was without jurisdiction to render a particular judgment on the ground that the matter of it was *coram non jure*. If the remedy by motion exists, it is not conclusive. This case illustrates the necessity of resorting to the remedy by injunction, because, if the complainants had been compelled to wait until the next sitting of the supreme court, the money would probably have long since been collected out of them under execution. The supreme court has also stated that, where a remedy exists in that court by motion and also by bill in equity, when any contested question of fact is involved it is preferable that a bill should be resorted to, and the court would probably direct that course under all such circumstances on application being made to it for action by motion. *Dodds v. Duncan*, 12 Lea, 736. It results that the decree of the chancellor sustaining the demurrer and dismissing the bill must be reversed, and the cause must be remanded for further proceedings. The defendants will pay the costs of this court. The costs of the court below will be paid as may be hereinafter decreed by the chancellor. All concur.

Affirmed orally by supreme court, September 23, 1899.

INABNETT v. ST. LOUIS, I. M. & S. RY. CO.

(Supreme Court of Arkansas. March 9, 1901.)

RAILROADS—ACTION FOR PERSONAL INJURIES—ACCIDENT AT CROSSING—INSTRUCTIONS—NEGLIGENCE OF ENGINEER—STATEMENT OF SUBSTANTIVE LAW.

1. Instructions which made the negligence of defendant's engineer in unnecessarily blowing a whistle and allowing steam to escape so as to frighten plaintiff's horse depend solely on whether circumstances in his knowledge admonished him that injury to plaintiff would probably result therefrom, were erroneous.

2. An instruction, in an action for injuries resulting from plaintiff's horse becoming frightened at an engine in the vicinity of a crossing, that defendant's employes "were not bound to take notice of the mere presence of the plaintiff and his horse in close proximity to the railway," was calculated to mislead, as it is their duty to exercise reasonable care to observe travelers in such places.

3. An instruction that mere proof that train employes unnecessarily blew a whistle or let off steam in close proximity to a team of horses, does not necessarily establish negligence, not being predicated on the facts in evidence, should not have been given.

Appeal from circuit court, Nevada county; Joel D. Conway, Judge.

Action by J. A. Inabnett against the St. Louis, Iron Mountain & Southern Railway Company. From a judgment for defendant, plaintiff appeals. Reversed.

L. A. Byrne, for appellant. Dodge & Johnson, for appellee.

WOOD, J. This suit was brought by Inabnett to recover damages for personal in-

juries alleged to have been caused by the negligence of the railway company in blowing the whistle and in allowing steam to escape from the steam cocks of its engine while plaintiff, in his buggy, upon the highway, was approaching the public crossing in the city of Texarkana. It is alleged that the unnecessary blowing of the whistle greatly frightened plaintiff's horse, and that, while he was endeavoring to calm same, plaintiff observed an engineer on the engine nearest to him, and saw that the engineer was apprised of plaintiff's danger, but, without regard to plaintiff's safety, the engineer in a grossly careless manner opened the steam cocks of his engine, and began to move the same, which caused the plaintiff's horse to take greater affright, and caused him to suddenly turn from the highway, and to spring down a deep embankment, whereby plaintiff, in an attempt to extricate himself from the danger of the situation, was thrown from the buggy, and seriously hurt, etc. The answer denies all material allegations, and sets up contributory negligence. Without giving the evidence in detail, it is sufficient for the purpose of this opinion to state that there was proof on the part of the plaintiff which tended to support the allegations of his complaint. The jury might have found from plaintiff's testimony that the agents of the defendant knew, or could have known by the exercise of ordinary care and prudence, that the blowing of the whistle, and especially the escaping of steam from the steam cocks of the engine, under the circumstances detailed by the plaintiff, were well calculated to frighten plaintiff's horse, and to endanger plaintiff, and cause the injury of which he complains. There was evidence also to justify the verdict. Was the jury properly instructed? The court gave, on behalf of the defendant, the following, among other, instructions: "(3) The jury are instructed that negligence is not to be imputed to the railway company merely from the blowing of a whistle, or causing steam to emit from an engine, even though the same may occasion fright to a horse or horses, unless the same was done under circumstances that made the act an imprudent and improper one upon that occasion; and the jury would have no right to impute negligence to an engineer under such circumstances, unless there were circumstances in his knowledge at the time admonishing him that injury would probably result if the act was done; and in this case, unless the jury find from the testimony that at the time of the accident in question there was nothing in the circumstances of the plaintiff's presence upon the track, or in the conduct of the horse, as seen by the engineer, which would have admonished him in time to have prevented it, or that giving of signals or permitting the steam to emit from his engine was likely to cause the horse to frighten, then he would not be guilty of negligence, even if

you find such facts. (4) The court instructs the jury that mere proof that the train employes unnecessarily blew the whistle or let off steam in close proximity to a team of horses does not necessarily establish negligence." "(8) The court instructs the jury, in determining the question of the negligence of defendant's servants, they should take into consideration all of the facts and circumstances, that defendant's servants and engineers were not bound to take notice of the mere presence of plaintiff and his horse in close proximity to the railway, nor that that fact would raise a presumption that the horse would become frightened at the use of steam, but there must have been something at the time in the conduct and actions of the animal which indicated to the engineer that such results would probably follow before he could be charged with negligence." The third and eighth ignored the rule which enjoins upon railroads a high degree of care for the protection and safety of travelers upon the highway at and in proximity to public crossings in cities. It is their positive duty to keep a lookout for such travelers, and to use every reasonable precaution consistent with the proper operation and management of their trains to avoid injuring them. There might not be any circumstances, in the knowledge of the engineer, admonishing him that injury would probably result from the unnecessary blowing of a whistle or escaping of steam. Yet such circumstances might exist, and the engineer's ignorance of them be on account of his willful or negligent failure to do what the law requires; i. e. to keep a lookout for them, and then to do whatever reasonable prudence would dictate to avoid injury to travelers. *Hill v. Railway Co.*, 101 Mo. 36, 13 S. W. 946; *Frick v. Railroad Co.*, 8 Am. & Eng. R. Cas. 280; *Weber v. Railroad Co.*, 58 N. Y. 451-462. Nor does the law gauge the standard of negligence by what the engineer in charge in any particular case did or knew. It is broader and more reasonable than that. Negligence is determined in cases of this kind by what any reasonably prudent and careful engineer would or should have known and done under the circumstances in proof. Both the third and eighth convey the idea that, unless there was something in the circumstances of the plaintiff's presence upon the track, or in the conduct of the horse "as seen by the engineer," which would have admonished him of plaintiff's danger, then he was not negligent in doing the acts complained of. This, too, regardless of whether he had exercised that prudence which any reasonably careful man would have exercised to become acquainted with the circumstances. In this respect the instructions were radically wrong, and wholly inconsistent with the instructions which the court had given at the instance of plaintiff, and which correctly stated the law. *Railway v. Lewis*, 60 Ark. 409, 30 S. W. 765.

1135. Furthermore, the eighth instruction declares that the employes of the railroad "were not bound to take notice of the mere presence of the plaintiff and his horse in close proximity to the railway." This was well calculated to mislead. The duty of railroads is to exercise reasonable and ordinary care to observe travelers about to cross the railroad upon the highway. Here the travelers have a right to be, and they must be expected to be, constantly passing. They are "ever present," so to speak, and the railroad employes must exercise that diligence which the law requires to observe them. "The care and skill, to be reasonable," it is said, "must be proportioned to the danger and multiplied chances of injury." 3 Elliott, R. R. 1156, and authorities cited. It is generally for the jury to determine whether such care has been exercised. The fourth, to say the least of it, was not predicated upon the facts in evidence, and was, therefore, abstract, and should not have been given. Taken in connection with others, however, it may not have been prejudicial. For the error in giving the third and eighth instructions for appellee the judgment is reversed, and the cause is remanded for a new trial.

KLEIN et al. v. GERMAN NAT. BANK.

(Supreme Court of Arkansas. March 9, 1901.)

CHANGE OF VENUE—INDIVIDUAL RIGHT—NOTES—ALTERATIONS—EXPLANATIONS—EVIDENCE—ADMISSION ON PROOF OF SIGNATURES—BURDEN OF PROOF—INDORSERS—ESTOPPEL—ADVANCEMENT TO PAYEE—CONVERSION OF THE MONEY—APPEAL.

1. Under a statute providing that on a change of venue all the papers in a case shall be transmitted to the clerk of the court to which the venue was changed, three of the parties defendant had no right to a change of venue when the fourth refused to join in the application, since one defendant could not take a change without removing the case as to all.

2. A statute authorizing "any party to a civil action to obtain a change of venue" referred to plaintiffs or defendants as a class, and did not authorize each individual defendant to obtain such change, where his co-defendants refused to join in the application.

3. Where the indorsee of a note showing alterations on its face proved the signatures of the defendants, the instrument was admissible in evidence without explanation of the alterations, since the latter raised no presumption for or against the note's validity.

4. The admission of an altered note in evidence without explanation of the alterations, but on mere proof of the maker's signatures, did not place the burden on the defendants to prove that they were not liable thereon, though requiring evidence in rebuttal to overcome plaintiff's case.

5. Where the president of a hotel company executed a note payable to his own order without authority from the company, and three parties, two of whom were officers of the company, signed the note as sureties, and the bank to which the note was negotiated brought suit thereon, the fact that notice of lack of the maker's authority appeared on the face of the note, though releasing the hotel company, did not release the sureties, since they had notice

of such lack of authority, and, having signed the note to give it currency, were estopped to question its validity.

6. Where a note executed and indorsed for accommodation of a hotel company was made payable to its president, a bank advancing money on the note to such president was not responsible for his diversion of such money, and was not thereby precluded from recovering from the sureties on the note.

7. Where a note executed and indorsed for the accommodation of a hotel company was made payable to its president, the fact that the bank advancing money on the note placed the amount to the president's credit was of no moment, as tending to show the bank's responsibility for the president's diversion of the money, since it was the same as payment.

8. Where the evidence as to the alteration of a note was conflicting, the jury's finding that it was altered before the signing would not be disturbed on appeal.

Appeal from circuit court, Pulaski county; Joseph W. Martin, Judge.

Action by the German National Bank against E. F. Klein and others. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

The German Bank brought suit on the following note: "\$15,000.00. Little Rock, Ark., May 28, 1895. Sixty days after date, for value received, we promise to pay to the order of Ed Hogaboom fifteen thousand dollars, at the German National Bank in Little Rock, Ark., with interest at 10 per cent. per annum from maturity until paid. The makers and indorsers of this note hereby severally waive presentment for payment, notice of nonpayment, and protest. The Park Hotel Company, Ed Hogaboom, President. Ed Hogaboom. E. F. Klein. C. O. Greenway. M. A. Eisele. Attest: E. F. Klein, Secretary. [Seal Park Hotel Co.]" This note was made on a printed form for a note used by the Citizens' Bank of Little Rock, but it appeared from the face of the note that the printed words "The Citizens' Bank" were stricken out, and the name of Ed Hogaboom inserted as payee. The printed words "at their office" were also stricken out, and the words "at the German National Bank" substituted, as the place of payment. The complaint alleged that the note had, for a valuable consideration, been transferred and indorsed before maturity by Hogaboom to the bank. Hogaboom filed no answer. The hotel denied that it executed the note. The defendants Klein, Greenway, and Eisele alleged in their answer that they signed the note as sureties for the accommodation of the Park Hotel Company only, and for the sole purpose of enabling that company to negotiate it and use the proceeds thereof; that Hogaboom wrongfully transferred the note to the bank as collateral security for the payment of his individual note to the bank for the sum of \$10,000; and that of this the bank had notice. This answer was filed on the 10th of April, 1897. Afterwards, on the 24th of March, 1898, they filed an amendment to their answer, setting up that the defendants had, for the accommodation of the hotel company, executed the

note to the Citizens' Bank, payable at the office of said bank, and that afterwards, without their knowledge or consent, the note had been altered so as to make it payable to Ed Hogaboom at the office of the German Bank. Three of the defendants filed an application for a change of venue, which the court overruled because the hotel company, another defendant, refused to join in the application. There was a judgment against Hogaboom for want of an answer. The presiding judge directed a verdict in favor of the hotel company on the ground that it did not authorize the execution of the note or receive the proceeds thereof. The jury found in favor of the plaintiffs against the other defendants for the sum of \$8,082.50, and also found specially, in answer to an interrogatory propounded by the court, that the alterations on the note were made before the execution and delivery of the note to Hogaboom. Judgment was rendered accordingly, and the defendants Klein, Elsele, and Greenway appealed.

Greaves & Martin, Wood & Henderson, and Rose, Hemingway & Rose, for appellants. Ratcliffe & Fletcher, for appellee.

RIDDICK, J. (after stating the facts). This is an action on a promissory note by the German Bank of Little Rock against the Park Hotel Company of Hot Springs and certain other parties residing there, who had joined in executing the note, and several questions are presented by the appeal.

On the question as to whether three of the defendants had the right to take a change of venue over the objection of another defendant who refused to join in such application, we are of the opinion that they did not have such right. Our statute directs that upon a change of venue being ordered in a civil action the papers in the case "shall be transmitted to the clerk of the court to which the venue is changed," thus showing that it was not intended that one defendant to a civil action should have the right to sever his case from the others, and take a change of venue, without removing the case as to all the defendants. There is no reason why the wishes of one defendant as to a change of venue should be given preference over others, and where defendants properly joined in an action against them differ as to the expediency of a change of venue, and some of them refuse to join in the application, it is not error for the court to overrule the application. The words in the statute, "any party to a civil action" may obtain a change of venue, do not mean that any individual defendant may obtain such order; but these words refer to the defendants as a class, and include all on that side. To be entitled to the change of venue, they must all join in or favor the application, with the exception, perhaps, of mere nominal or formal defendants having no real interest in

that side. *Wolcott v. Wolcott*, 82 Wis. 63; *Levy v. Martin*, 48 Wis. 198, 4 N. W. 85; *Whitaker v. Reynolds*, 14 Bush, 616; *Peters v. Banta*, 120 Ind. 422, 22 N. E. 95.

The next contention is that the court erred in permitting the note to be read in evidence, without first requiring the alterations apparent on its face to be explained. It is said that this threw the burden of proof upon the defendants. But we do not concur in this contention. The burden of proof is on the plaintiff to make out his case, and to do this he must, of course, show that the defendants executed the note sued on; but, when he shows that the signatures to the instrument are those of the defendants, he has the right to introduce the instrument in evidence, and, if there be no further evidence, he has made out a case sufficient to go to the jury. "The view best supported by reason, and the one to which the authorities seem tending, is that the mere fact of an interlineation or erasure appearing in an instrument does not per se raise any presumption either for or against the validity of the writing; and the question when, by whom, and with what intent an alteration was made is one of fact, to be submitted to the jury upon the whole evidence." 2 Am. & Eng. Enc. Law (2d Ed.) 274; *Gist v. Gans*, 30 Ark. 285; *Simpson v. Davis*, 119 Mass. 269; *Wilson v. Hayes*, 40 Minn. 531, 42 N. W. 467, 12 Am. St. Rep. 754, 4 L. R. A. 196; *Willett v. Shepard*, 34 Mich. 106; *Stayner v. Joyce*, 120 Ind. 99, 22 N. E. 89. This is, in substance, the rule already declared by this court. *Gist v. Gans*, supra. The introduction of the note, and proof of the signatures thereto, did not shift the burden of proof or put it upon the defendant, though, in the absence of rebutting evidence, this might have been sufficient to make out plaintiff's case. But in some of the instructions given at the request of plaintiff it seems to be assumed that the burden was on the defendants to show that the alterations were made after the execution of the note, yet the same thing can be said of those given on the request of the defendants. The presiding judge did not tell the jury, and was not asked to tell them, directly upon whom the burden of proof rested, but stated that it was for them to determine from all the evidence, including the appearance of the note, whether or not the same was altered after its execution by defendants. It is not contended that the judge committed any error in giving instructions on this point, but, if he did, it was error invited by the defendants as well as the plaintiff, and of which they have no right to complain. *Insurance Co. v. Schmaltz*, 66 Ark. 588, 58 S. W. 49; *Elliott. App. Proc.* § 626.

It is next said that Hogaboom had no authority to execute the note for the hotel company, and that, as it was made payable to his own order, this was notice to every one of his want of authority. Quoting the

language of Lord Denman, counsel say the note "bears its death wound on its face." It must be conceded that, as Hogaboom had no authority to execute notes for the hotel company, the bank was not in the position of an innocent purchaser. But the evidence, we think, clearly shows that it acted in good faith, and took the note relying on the statements of Hogaboom that he did have authority, and trusting, also, to the signatures of the other defendants to the note, two of whom were officers in the hotel company; one being secretary, and the other director. The hotel company, it is true, was not bound by the statements of Hogaboom, nor by the fact that the other defendants had signed the note; and the circuit judge therefore properly directed a verdict in its favor, but this did not release the sureties. There was nothing in the character of this contract forbidden by law. The hotel company could have executed such a note, had it chosen to do so, and the mere fact that the party assuming to act for it had no authority does not release the sureties. These sureties had the same notice of the want of authority on the part of Hogaboom that the banks had. Indeed, their opportunities for knowing the extent of Hogaboom's authority were much superior to those of the bank. As before stated, one was secretary and another a director of the hotel company, and all of them lived in the city where the company and its hotel were located. When they executed the note to Hogaboom, and made it payable in Little Rock, the purpose was to enable him to obtain money on it; and they must have known that any party to lending money on it had the right, as against them, to rely upon their signatures, and believe that the note was valid. The very object they had in view in signing the note was to give it currency, and, when that purpose has been carried out and the money obtained, they cannot escape liability by showing that what they in effect represented to be true was not true. Defendants say that they relied upon the statements of Hogaboom that he had authority to execute the note for the hotel company. If so, they can look to Hogaboom. But the bank relied not only on the statements of Hogaboom, but upon the signatures of defendants placed on the note expressly to give it value; and it has the right to hold not only Hogaboom, but defendants, liable for money loaned on their faith and credit. *Maledon v. Leflore*, 62 Ark. 388, 85 S. W. 1102; 2 Daniel, Neg. Inst. § 1306; 2 Rand. Com. Paper, § 915.

Again, it is said that the bank knew that the note was executed for the accommodation of the hotel company, and yet permitted Hogaboom to divert it from its proper purpose. But, though the bank knew that the money was wanted for the hotel company, the money was payable to Hogaboom individually. The note on its face shows that the intention of the makers was that

the money should be paid to him. While the bank refused to loan the full amount of the note, it offered to loan \$10,000 for the benefit of the hotel company. Hogaboom, assuming to act for the company, accepted the offer, gave his own note for the amount, and transferred the note sued on as collateral security to the bank. As this note was made payable to Hogaboom, and delivered to him to negotiate and raise money upon, we are of the opinion it was immaterial whether he obtained the money by a sale of the note, or a deposit of the same as collateral. In either case there was no diversion of the note, for he obtained the money for the benefit of the hotel company, and accomplished the purpose for which the note was executed. The bank had no notice of his intention to divert the funds to a wrongful purpose, and was not responsible for such misappropriation. The defendants, having trusted Hogaboom with a note payable to his own order, upon which to raise money, must, as we said in a recent case, be held to have trusted him to make a proper application of the proceeds. *Evans v. Hardware Co.*, 65 Ark. 213, 45 S. W. 370; *Duncan v. Gilbert*, 29 N. J. Law, 521; *Jackson v. Bank*, 42 N. J. Law, 177; *Maitland v. Bank*, 40 Md. 561; *Proctor v. Whitcomb*, 137 Mass. 308. Nor is it a matter of any moment that, instead of paying Hogaboom money in hand, the bank, at his request, gave him credit for it on the books of the bank. This was, in effect, the same thing as a payment. He at that time owed the bank nothing. It was understood that the money was to be used at once, and it was drawn out, \$9,000 of it on the same day, and the remainder two days' afterwards.

There are other points raised, but we deem it unnecessary to discuss them. The evidence as to the alteration of the note was conflicting, but it was sufficient to sustain the finding of the jury. The conduct of the defendants themselves seems rather inconsistent with their own contention on this point. Although they say that this note was executed to the Citizens' Bank, yet when it was presented for payment by the German Bank they expressed no surprise, and gave no intimation to the bank that it had been altered. It was about a year and a half afterwards, and a year after suit had been brought, and nearly a year after the filing of their original answer, before, by an amendment thereto, the defendants first notified plaintiff of their contention that the note had been altered. For this reason, it is not strange that the jury felt disinclined to credit their statements on that point. While it seems to us that the preponderance of evidence on this question of alteration was in favor of the defendant, still we are clearly of the opinion that, under the circumstances in proof, it was a question for the jury, and their finding must stand.

This case has been well argued by able

counsel, but the sum of it is that these defendants were induced by the president of a hotel company to become sureties on a note which he claimed to have power to execute for the company. The company, when sued on the note, successfully disputed his authority, and he proved to be insolvent, and they are now bound for the payment of the note. It may be a hardship, but, as between them and the bank from whom the money was obtained on their note, it seems to us that the bank has the best of the argument. On the whole case, we think that the judgment was right, and it is therefore affirmed.

AHERN et al. v. BOARD OF IMPROVEMENT DIST. NO. 3 OF TEX-ARKANA.

(Supreme Court of Arkansas. Feb. 9, 1901.)

MUNICIPAL CORPORATIONS—IMPROVEMENTS—PETITION—SIGNERS—ORDINANCE—CONSTITUTIONAL PROVISIONS—ASSESSMENTS—BENEFITS—PROPERTY LIABLE—CHURCH PROPERTY—RAILROAD TRACKS—WATERWORKS—RIGHTS OF WAY—PUBLIC PROPERTY—EXECUTRIX—WIDOW—TENANTS IN COMMON—MORTGAGOR—SELLER—PURCHASER—HOMESTEAD—ASSESSMENT—IRREGULARITIES—OBJECTIONS—DELAY IN MAKING.

1. Under Sand. & H. Dig. §§ 5324, 5329, requiring a majority in number of owners of real property within an improvement district to petition for an improvement, church property, though exempt from general taxation, and therefore not appearing as valued on the county assessor's list, should be included in ascertaining the majority in value of the property in the district, since it is liable for local improvement assessments.

2. Church property not appearing as valuable on the county assessor's list, extraneous proof of its value may be made, in determining the majority in value.

3. In determining whether a majority in value of the owners of assessable real property in an improvement district petitioned for an improvement, as required by Sand. & H. Dig. § 5329, improvements made on the property subsequent to the last county assessment, and before filing the petition, should be included.

4. Where a spur track of a railroad ran on one of the streets in an improvement district, but it did not appear by what title the right of way was held, nor what its value was, except that the state board of assessment valued it at a certain sum per mile, nor that such property would be benefited by the improvements, it was proper to exclude it, in determining whether a majority in value of the owners of assessable real property in the district signed the petition for the improvement, as required by Sand. & H. Dig. § 5324.

5. In determining whether a majority in value of the owners of assessable real property in an improvement district petitioned for an improvement as required by Sand. & H. Dig. § 5324, the underground right of way along the street of the water pipes of the waterworks company, the ground in which the poles of the telegraph and electric light companies stood, and the right of way of overhead wires were properly excluded.

6. Public property, not being assessable, was properly excluded.

7. It was improper to include property belonging to an estate signed for by the executor, since he had no power to bind the heirs by such signing, though clothed with a power of sale.

8. It was improper to include property of an estate signed for by the widow of the deceased

owner, since, being only a life tenant, she was not the owner, within the statute.

9. Only one-half of property belonging to tenants in common, and signed for by only one of them, should be included in the petitioners' list.

10. It was proper to include mortgaged property signed for by the mortgagor, though a decree of foreclosure of the mortgage had been rendered, since, as the mortgagor had the right to redeem, he was the owner, within the statute.

11. It was proper to include property sold before the presentation of the petition, and signed for by the seller, of which the purchaser had knowledge when he purchased.

12. It was proper to include property signed for by the purchaser, who was in possession and had done all that he was required to do to complete the purchase, where delivery of the deed was delayed by the vendor until four days after filing the petition.

13. Where, in determining whether a majority in value of the owners of real property in an assessment district signed a petition for an improvement, as required by Sand. & H. Dig. § 5324, property was included which should not have been, and some which should have been included was omitted, but, on deducting the amount improperly included and adding the amount improperly excluded, it appears that an excess of the majority in value of the owners signed the petition according to the valuation of the county assessor, a decree foreclosing an assessment lien for delinquent assessments for the improvement will be affirmed.

14. Const. art. 9, § 3, provides that a homestead shall not be subject to the lien of a decree of any court, except for purchase money, specific liens, or for taxes. Article 19, § 27, provides that nothing in the constitution shall prohibit the general assembly from authorizing assessments on real property for local improvements. *Held*, that the homestead is not exempt from the lien for assessments for local improvements.

15. Where objections to irregularities in the proceeding of the board of benefit assessments and the city council subsequent to the passage of an ordinance authorizing an improvement on the petition of a majority in value of the property owners in the improvement district were not made within 20 days, defendants are barred from setting them up in a suit to enforce the tax liens for the improvement.

16. Under Const. art. 19, § 27, providing that nothing in the constitution shall prohibit the general assembly from authorizing assessments on real property for local improvements, based on the consent of a majority in value of the property holders adjoining the locality affected,—such assessment to be ad valorem and uniform,—an assessment for local improvements in proportion to the benefits is not prohibited; but it is within the discretion of the legislature to require such assessments to be made according to the whole value of the land in the improvement district, or according to the value of the benefits.

Appeal from circuit court, Miller county; Joel D. Conway, Judge.

Suit by the board of improvement district No. 3 of Texarkana against P. J. Ahern and others. From a decree in favor of plaintiffs, defendants appeal. Affirmed.

Oscar D. Scott, for appellants. Williams & Arnold and J. D. Cook, for appellees.

BUNN, C. J. This is a suit in equity, under the statute, brought to foreclose assessment liens, and enforce the collection of the delinquent assessments against certain owners of real estate in the district. The chan-

cellor decreed for plaintiffs on the complaint, answer, and testimony in the case, and defendants appealed.

In May, 1899, upon the petition of 10 resident owners of real property in the proposed district, the city council of the city of Texarkana, in this state, organized said improvement district No. 3; and within the time required by law the clerk of said city council caused the organization ordinance to be published as required by law, and due proof was made of the same. Within three months from the publication of said ordinance, to wit, on the 8th day of August, 1899, what purported to be a majority in value of the real property owners in the district filed their petition before the council, under section 5324, Sand. & H. Dig., and the city council on the same day passed an ordinance as provided in said section. At the same time the council appointed commissioners to assess the benefits to accrue to the real property in the district by reason of the contemplated improvements under the act approved May 8, 1899, amendatory of sections 5333, 5334, 5335, Sand. & H. Dig., who afterwards reported such assessment. A board of improvement was at the same time appointed, under section 5324, and this board proceeded to form plans for the improvement, and to do other things required by section 5329.

The principal objection—an objection which includes several others numbered in the abstracts and briefs in the case—is that a majority in value of real property owners in the district did not really sign the petition required by section 5324. To specify the irregularities covered by this objection, the defendants say: First, that all the real property in the district was not included in the ordinance passed on the petition; and, secondly, that much of the property going to make up the majority in value was signed for by persons not competent to do so. The petition was on the valuation made by the county assessor, as appeared from his assessment list, made in 1897, for the taxes of 1898 and 1899, which was at the time the last list on file in the clerk's office. The real fact is that the county assessor had made his assessment for the taxes of 1900 and 1901 in July,—the months before; but the same had not been returned and caused to be filed in the county clerk's office at the time the petition was filed, and, of course, not when the same was signed by the petitioners, and was not filed until in September following. This state of things has created some confusion in the record. The defendants contend that, in order to ascertain the majority in value of the property in the district, all the assessable property should have been included, and that all of said property was not included,—for instance, the real property of churches, which they show to have been of the value of \$2,800. Church property is exempt from general taxation, and therefore does not appear as valued on the county as-

essor's list. By a decided weight of authority, however, although exempt from general taxes, church property is liable for local improvement assessments. The contention of the defendants is therefore sustained, and in such case extraneous proof of value is properly made. For a similar reason, the plaintiffs contend that improvements made upon real property in the district since the last county assessment, and before the filing of the petition, ought to be included; and they allege and show that such improvements had been made within said time, upon the property of the signers of said petition, of the value of \$24,650. Under this head the defendants allege that there was a spur track of the St. Louis, Iron Mountain & Southern Railway Company, which ran on one of the streets in the district for a distance of 1,000 feet, and that the track and right of way of the said railroad were valued by the state board of assessors at the rate of \$2,000 per mile. It is not shown by what title or tenure this right of way was held by the railroad company,—whether by lease, easement, or license; and we, therefore, cannot say that it is real property of the company, as owner, in the purview of the law, nor whether or not it is assessable as such. The statement as to the assessment by state railroad board throws no light on the question, as we cannot ascertain from it that this spur track was included in that assessment, or was intended to be included; and, finally, it is not shown that this property would be benefited by the contemplated improvements. The same, and more, may be said as to the contention for exclusion of the underground right of way along the street of the water pipes of the waterworks company, and the ground in which the poles of the postal telegraph and electric light companies are set up, and the right of way of the overhead wires, all of which seem to have been assessed on the county assessment as personal property at the power house outside the district. These were properly excluded, under the showing made. Public property is not assessable, and was properly excluded.

The valuation of the real property in the district, according to the county assessor's books, was as follows:

For 1898, \$570,810. Add to this the church property, and it makes....	\$573,110
Improvements	24,650

Total	2) 597,760
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Majority	\$298,880
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For 1899	\$606,607
Church property	2,800

Total	2) 609,407
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Majority	\$304,703½
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In the matter of the property of J. F. Smith's estate, signed for by the executor, W. A. Williams: In *Rector v. Board*, 50 Ark.

116, 6 S. W. 519, this court held that an administrator is not competent to sign such a petition so as to bind the heirs. A majority of the judges cannot see any distinction between the power of administrator and an executor, although clothed with a power of sale as was the executor in this case. This property was valued at \$6,600 for 1898, and \$6,600 for 1899, and should be deducted from the petitioner's list. The property of the estate of G. W. Tyson was signed for by his widow. The statute does not confer this right upon a tenant for life, and she is not the owner, in contemplation of the statute, except as a life tenant. Mayor, etc., v. Boyd, 64 Md. 10, 20 Atl. 1028. This property was valued at \$4,500 both for 1898 and 1899, and should be deducted from the petitioner's list. In the matter of the property of S. M. & J. O. Hardin valued at \$1,200 in both assessments, and only signed for by one of them, one-half should be deducted from the petitioner's list,—it appearing that they were tenants in common,—leaving \$600. The same may be said as to the property of G. J. & F. M. Hollis, valued at \$650 in both years, leaving \$325 to be deducted. The \$800 against J. P. Kline to be deducted by consent. The case of E. F. Friedell, whose property was valued for 1898 at \$3,650, and \$4,000 for 1899: He was a mortgagor. Foreclosure proceedings had been begun, and had progressed to a decree, but the mortgagor was still allowed to redeem at a future day. He was the owner, in the meaning of the law. F. H. Eubanks had purchased from Turner Bros. before the presentation of the petition, but Turner Bros. had signed the petition before they sold to Eubanks, of which signing the latter had knowledge when he purchased, and is bound by the lien. This property was valued in both assessments at \$4,200. R. R. Gaines sold his property, valued in both assessments at \$4,000, to Offenhauser; the petition having been signed by the latter for the property. The sale had been complete from Gaines to Offenhauser, and the latter put in possession. Everything had been done by the vendee that he was required to do, and he could have compelled specific performance. In fact, the deed, for reasons of Gaines alone, was delayed, but was delivered on 12th August. Offenhauser was a proper signer for this property. On the other hand, J. H. Mullins was a signer, but his property was not counted with the petition. It was valued at \$1,400, and should have been so counted. The other objections under this head do not seem to be insisted upon.

According to the counsel's estimate, the property of the signers was valued at \$294,900. Take from this the Smith and Tyson estates, \$10,600, leaves \$284,300; and add to this the \$24,650 improvements, and the \$1,400, value of Mullins' property, \$26,050, we have the value of the property of the signers, \$310,050—\$925, Hollis & Hardin property,

61 S.W.—37

leaves \$309,025, which is in excess of majority, according to assessment of 1898, of \$10,145, and of the assessment of 1899 of \$4,322.

It is contended by the defendants that the homestead is exempt from this assessment lien by section 3, art. 9, of the constitution of the state, which reads as follows: "The homestead of any resident of this state, who is married or the head of a family, shall not be subject to the lien of any judgment or decree of any court, or to sale under execution or other process thereon, except such as may be rendered for the purchase money, or for specific liens, laborers or mechanics' liens for improving the same, or for taxes," etc. These assessments, though differing in some respects from taxes for general purposes, are yet authorized under the taxing power. If so, so far as the mere exercise of power is concerned, the same rule applies as in cases of taxes. Besides, section 27, art. 19, of the constitution, under which improvement districts are formed and their assessments levied and collected, reads thus: "Nothing in this constitution shall be so construed as to prohibit the general assembly from authorizing assessments on real property for local improvements, in towns and cities under such regulations as may be prescribed by law, to be based upon the consent of a majority in value of the property holders owning property adjoining the locality to be affected. But such assessment shall be ad valorem and uniform." After this much is said as the last section in the body of the constitution, it is not conceivable how we should be able to construe any other clause or section of that instrument so as to render nugatory and of none effect the provision therein contained; for, unless the real property of the district is bound for the expenses of the desired improvement, none could be made. This is the more apparent when it is known that in towns and cities a great portion, if not the most, of the occupied lots are occupied as homesteads. At all events, eliminate the homesteads in any town or city from the list of property bound for these assessments, and no district of important extent could be formed.

There is a suggestion of a possible conflict between the particular provision of our state constitution and the fourteenth amendment of the constitution of the United States, as construed in *Village of Norwood v. Baker*, 172 U. S. 269, 19 Sup. Ct. 187, 43 L. Ed. 443. There was certainly some conflict between our original act authorizing the organization of improvement districts and the said fourteenth amendment as construed. But this was thought to be cured by our amendatory act approved May 8, 1899. To some of us, however, there still remains a conflict, or, rather, I should say, room for a conflict, accordingly as the benefit assessments under said amendatory act may be made according to the one method or the other. But a majority of us see no conflict as the law now '.

In the proceedings at bar the assessments seem to have been both according to the value of the property, and also according to the assessed benefits; for the benefits were assessed by the rate of percentage on the assessed value of the property itself, resulting so as to comply with the provision of both constitutions as we see it. Therefore, for the purposes of determining this case, we need not discuss that point further. But, for the benefit of districts hereafter to be formed, some of us may take occasion to express an opinion on the subject before this decision goes to the publisher.

Some question is raised as to the proceeding of the board of benefit assessments and the city council subsequent to the ordinance passed upon the petition of the majority in value of the property owners, which we will say, by way of parenthesis, was duly published, so far as we can determine from the record. But we have settled the fundamental or jurisdictional questions involved, and as to mere irregularities, not going to the foundation principles upon which the district is organized, the objections were not made within the 20 days, and the defendants are therefore barred by the statute. Let the decree be affirmed.

RIDDICK, J. I concur in the opinion of the Chief Justice, but on one of the constitutional questions involved I can go further, and say that I see nothing in our constitution that necessarily prohibits an assessment in proportion to benefits. The section of the constitution which counsel for appellants contends forbids such an assessment is as follows: "Nothing in this constitution shall be so construed as to prohibit the general assembly from authorizing assessments on real property for local improvements in towns and cities under such regulations as may be prescribed by law, to be based upon the consent of a majority in value of the property holders owning property adjoining the locality affected; but such assessments shall be ad valorem and uniform." Const. 1874, art. 19, § 27. It is said that an assessment levied upon the real property of the improvement district in proportion to the benefit that each lot or tract receives from the improvement is not an ad valorem assessment, and is therefore prohibited by the last clause of the section above quoted, which requires that such assessments shall be "ad valorem and uniform." But it seems to me that an assessment upon real property in proportion to the benefit it receives from an improvement is still an ad valorem assessment. It is, of course, not an assessment according to the full value of the lot or tract improved, but it is an assessment according to the value of the benefit which it receives. Not the value of the whole lot, but the value that is added to it by the improvement, is assessed. The benefit which each lot, tract, or piece of real estate in the improvement district receives is

assessed according to its value, and therefore the assessment is an ad valorem assessment; that is, an assessment according to valuation, as distinguished from an assessment according to frontage or area of lot. Again, it is said that the framers of the constitution by the clause above quoted meant an assessment according to the value of the whole lot or tract, and not an assessment according to the value of the benefit it receives from the improvement. It may be that they did not have in mind an assessment in proportion to benefits. We are not able to tell whether they did or not. But their intention must be found in the language of the constitution itself, and, as this language does not exclude or forbid an assessment in proportion to the value of the benefits, we should presume that there was no intention to forbid such an assessment. It has often been decided that the only sound principle upon which assessments for local improvements can stand is that the property assessed is specially and peculiarly benefited by the improvement. *Village of Norwood v. Baker*, 172 U. S. 269, 19 Sup. Ct. 187, 43 L. Ed. 443; *Dill. Mun. Corp.* (4th Ed.) § 761. If this be the basis upon which such assessments rest, then the most equitable method of apportioning the burden among the property holders of the district is by an assessment in proportion to benefits. Theoretically speaking, there can be no doubt of this; for if a number of property holders are required to pay for a public improvement, on the principle that their property receives a special benefit therefrom, the payment should be made by each in proportion to the benefit he receives. It would be neither right nor just to require one property owner to pay the full value of the benefit he receives from the improvement, while his neighbor is required to pay only a third or one-fourth of the value of the benefit he receives. But this inequality may result unless the assessment is made in proportion to the benefits received. And this furnishes another reason for believing that it was not intended to prohibit an assessment of that kind. For the obvious purpose of the prohibitory clause under consideration was to forbid, not equitable, but arbitrary and unjust, methods of assessment. The intention was to prohibit assessments from being made in proportion to the frontage or size of the lot or tract. For, as the size or frontage of the lot bears no certain relation either to its value or the amount of the benefit it will receive from an improvement, an assessment made in such an arbitrary method must often result in great injustice. Assessments of that kind had, at the time our constitution was adopted, often been condemned as arbitrary and unjust, and for this reason they were forbidden by the requirement that assessments should be "ad valorem and uniform." As the purpose was to prohibit arbitrary and unjust assessments, we should not expect to find a prohibition against so equitable and just a method of as-

assessment as one made in proportion to the benefits received. The language used does not, to my mind, necessarily carry such a meaning; and to put such a construction upon it would, it seems to me, be a perversion of the meaning intended to be conveyed. I am, therefore, of the opinion that under our constitution it is within the discretion of the legislature to require that these assessments be made according to the whole value of the land in the improvement district, or according to the value of the benefit added by the improvement. For practical purposes, one of these methods of assessments may be as good as the other, and it is for the legislature to determine which shall be applied.

HUGHES and WOOD, JJ., concur.

SELLS et al. v. TOOTLE et al.

(Supreme Court of Missouri, Division No. 1.
March 12, 1901.)

RELEASE OF MORTGAGE—CONSIDERATION.

1. As between mortgagor and mortgagee, and likewise as between a person buying the mortgaged property and one buying the note secured, neither having notice or knowledge of any release of the mortgage, there is no release, notwithstanding an instrument given by the mortgagee purporting to be a release and satisfaction of the mortgage in consideration of full payment of the debt secured.

2. As between the first and second mortgagee, a release of the first mortgage, without consideration, is not effective, the second mortgagee having advanced nothing on the faith of the release.

Appeal from circuit court, Buchanan county; A. M. Woodson, Judge.

Suit by Louis Sells and others against Milton Tootle, Jr., and another. Judgment for defendants. Plaintiffs appeal. Affirmed.

This is a suit in equity to enjoin the foreclosure of a deed of trust on the ground that it has been released. The validity of the alleged release is the sole question in the case.

The averments of the petition are to the effect that plaintiff Lester M. Crawford and Mary Crawford, who are husband and wife, on October 2, 1890, were the owners in fee of certain real estate in St. Joseph, and on that day executed their note for \$2,500, payable to the order of one Allen Sells, three years after date, and a deed of trust to defendant Fife to secure it, with the usual powers of sale, etc., which was duly recorded; that afterwards Crawford and wife sold the real estate to the Missouri, K. & N. Opera-House, etc., Company, a corporation, and that company sold it to the plaintiff Louis Sells, who now owns it; that on January 14, 1896, the defendant Tootle became the owner and holder of the note, and as such had caused the property to be advertised for sale by the trustee under the terms of the deed, for foreclosure and satisfaction of the debt; that the note had been paid, except the sum of — dollars, which plain-

tiff tendered to Tootle, January 27, 1896, with expenses, etc., which tender was refused; "that the said deed of trust was for value received, on the — day of December, 1892, duly released by the said Allen Sells, who was the payee in, and at that time the owner and holder of, said note and deed, and that said property from that day and now is not subject to said deed of trust"; that, if the sale is suffered to occur, irreparable injury will be occasioned, etc. The prayer is for injunction and removal of the cloud from plaintiffs' title. The answer joins issue on the material averments. A temporary injunction was granted on filing the bill. Before the cause came to trial the Bank of Topeka was allowed to come in as a plaintiff, and filed its separate petition, in which it averred, in substance, that, after the sale by Crawford and wife to the opera-house company, that concern desired to execute a deed of trust to secure bonds to be issued by it, and applied to the bank to take some of the bonds to secure it for advances made and to be made, and to act as trustee in the deed of trust; that, before the bank would agree to do so, it required of Crawford, who was a director, the president and manager of the corporation, that he should obtain a release of this Sells deed of trust, which Crawford did on December 15, 1892, and upon the faith of that the bank advanced the opera-house company \$25,000, and agreed to act as trustee in the deed which was proposed to be and which was accordingly executed, and the bonds delivered to the bank; that Tootle acquired the Sells note after it was due, and took it subject to equities, but that he was proceeding to have the land sold under the deed of trust, etc., and prayed for an injunction, etc.

Upon the trial the plaintiffs introduced a quitclaim deed to the property from Crawford and wife to the opera-house company, dated September 1, 1891, for \$45,000 cash, subject to an incumbrance of \$12,000, recorded May 16, 1892; then a warranty deed from the opera-house company to Louis Sells, 6th January, 1896, for same property, for \$35,000 cash, "free and clear from any incumbrances, except as is shown by the records of Buchanan county"; then the deed of trust referred to in the bank's petition, from the opera-house company to the Bank of Topeka, to secure bonds to the amount of \$100,000, dated May 1, 1893, and duly recorded; then the plaintiffs introduced the alleged release, which is in these words: "Know all men by these presents that, in consideration of full payment of the debt secured by a mortgage made by Lester M. Crawford and Mary E. Crawford to Allen Sells, dated 2d day of October, A. D. 1890, which is recorded in Book 190 of Mortgages, page 214, of the records of Buchanan county, Missouri, satisfaction of said mortgage is hereby acknowledged, and the same is hereby released. Dated this 15th day of December, A. T

1892. Allen Sells." It was acknowledged before a notary public in Kansas. This document was never recorded. Plaintiffs then called Mr. Imel, who testified that he was legal counselor for the opera-house company during the period covering the events in dispute; that in that capacity the above release was sent to him, and he decided that it was not sufficient for the purpose designed,—that is, clearing the way for the \$100,000 mortgage,—and prepared a quitclaim deed to be executed by Sells and wife to the property, and mailed it to Mr. Crawford in Kansas, but that document he had never seen since, and knew nothing of its fate. Clarence Huff was the general clerk and business man for Mr. Crawford, and was familiar with his correspondence and all his affairs. He was also a notary public, and as such took the acknowledgment to the release. He was a witness for plaintiffs, and testified that Crawford requested him to go to see Sells, and ask him to give a release of the St. Joseph mortgage which he held; that witness went accordingly, and obtained this release; witness knew Sells' signature, and thinks he saw him write his name to this paper; is positive he acknowledged it to be his signature; witness did not recollect that he asked him the formal question as to acknowledgment; "You know frequently when we are well acquainted that we do not go through the formality like you do when it is a stranger;" witness stated that he received the quitclaim deed that Mr. Imel had testified about, and at the request of Mr. Crawford went to see Mr. Sells to get it executed; that he did see both Mr. and Mrs. Sells, and they both signed it in his presence. Plaintiffs, at this stage of the evidence of this witness, stated that, for the purpose of laying the foundation for further questions as to the contents of that quitclaim deed, they would show that it had been lost, and therefore never filed for record. Upon this assurance, the witness was permitted to proceed to state that it was a quitclaim deed releasing the deed of trust in question. On cross-examination, he said that he paid Mr. Sells nothing upon the occasion of the execution of either the release read in evidence or the quitclaim deed, and, so far as he knew, no one paid him anything. Mr. Mulvane, president of the Bank of Topeka, a witness for plaintiffs, testified that, when the subject of the making of the \$100,000 deed of trust by the opera-house company was presented to him by Mr. Crawford, the latter owed the bank about \$20,000, and when that deed was executed the bonds were deposited in the bank, and they held them as security for the debt Crawford owed; that during the negotiations Crawford had shown him some release of a prior incumbrance, just what it was he did not remember. Subsequently (the taking of his deposition lasted more than one day) he was shown the release in question, and he said it was the release Mr.

Crawford had shown him. He first said that Crawford's debt to the bank was incurred before the bonds were delivered, but after a recess in the taking of his deposition he returned, and said that some of the loan was after the bonds had been delivered; that he had not carried the facts in his memory, and had in the recess referred to the books of the bank, and there found that part of the loan had been made to Crawford afterwards; and he then stated that the after loan was on the faith of the bonds and the release he had seen. He was asked, on cross-examination, if he would furnish a copy of Mr. Crawford's account with the bank covering that period, and he said "No," and if he would allow defendants' attorney to see the account on the books of the bank, and he said, "No; that the bank had no right to show Mr. Crawford's account to any one." Further cross-questioned as to the alleged advances to Crawford after the bonds were taken by the bank, witness said \$5,000 or \$6,000 of it was to take up a prior incumbrance on the St. Joseph property, which was originally a note of \$8,000, and the witness had that note then and there. When asked if he would allow defendants' attorney to see it, he first said, "Yes, I have no objection;" but on second thought said, "I believe I won't do it." Plaintiffs next produced the written agreement under which defendant Tootle acquired the \$2,500 note, which was, in substance, a guaranty of the seller, Mrs. Greenspan, that the note and deed of trust described were valid and unsatisfied, except such payments as are indorsed on the note; and that if, at a sale to be made under the deed of trust, Tootle should bid enough to satisfy a former incumbrance for \$8,000 and interest, and as much as \$1,100 in addition, and should become the purchaser, it was further guaranteed that if the deed of trust should in any way turn out to be invalid, and he should lose the \$1,100, which was the sum he was to pay for the note, he was to be indemnified for the loss, together with costs of foreclosure, etc., but that the solvency of Crawford was not guaranteed, nor the title to the lots nor incumbrances, tax sales, etc. The \$2,500 note was then shown in evidence, containing several payments indorsed on it, which reduced it to \$1,500 at June 16, 1895. That was the plaintiffs' case.

Defendants' evidence was to the effect that Tootle bought the note without any notice of the alleged release, and that after he had bought it, and after foreclosure proceedings had begun, Crawford came to him, and offered to pay between \$200 and \$300. After that, Crawford told him that the deed of trust had been released. The note had been kept by Sells in his lifetime in a bank in Kansas, and Crawford and Sells went to the bank together, in February, 1893, and at other times thereafter, and the cashier figured the amount due after the payments were indorsed. During these occasions noth-

ing was said about a release of the mortgage. Sells died in March, 1894. In 1895 the note was in the hands of an attorney in St. Joseph, who urged Mr. Crawford to pay it, and Crawford said he would do so as soon as he could, but was then not able. The attorney called his attention to tax sales of the property, and he said that he would attend to that. The amount spoken of between them as then due on the note was \$1,500. In those discussions Crawford said nothing about a release. After the property had been advertised for sale under the deed of trust, Crawford tendered to the attorney \$363.81, but said nothing about a release. Mrs. Greenspan, who was the widow of Allen Sells, and the executrix of his will, was offered as a witness for defendants. Plaintiffs objected that she was incompetent, but, when counsel for defendants stated that she would be asked only concerning matters that occurred after her appointment as executrix, the court ruled that she was competent to that extent, and plaintiffs excepted. She testified that in 1895, while she held the note, she spoke to Mr. Crawford about it, told him she was building, and needed money, and offered to let him have the note for \$1,000. He said, "I could not do it at the present time; I haven't the money;" but he says, "I will pay you the interest on the mortgage, and pay you off as soon as I can." She learned through Mr. Bonebrake that the taxes on the property had been paid by a brother of Mrs. Crawford's, and witness spoke to Crawford about it, and "he told me he had the taxes fixed so as nobody could get it." Witness testified that Crawford had paid her interest several times, and that once he had tendered her \$250 or \$350. That was after she had sold the note to Tootle and the foreclosure had begun. He never said anything about a release. Witness knew Clarence Huff. Upon two occasions he asked witness, after she was executrix, to allow him to look through Mr. Sells' papers, saying that he had lost a paper (that was in connection with the opera-house company), and that Mr. Crawford wanted to use it, but witness refused to allow him to go through the papers. Defendants procured a paper that Mr. Imel, when recalled for the purpose by defendants, recognized and identified as the quitclaim deed he had prepared and mailed to Mr. Crawford to be executed by Mr. Sells and wife. It was just as it was when Mr. Imel mailed it. There was no signature and no execution of any kind. The court found the issues for defendants, and rendered a decree in their favor dissolving the injunction and dismissing the plaintiffs' bill, from which decree they appeal.

Stauber & Crandall and F. F. Harl, for appellants. A. Bergan and R. A. Brown, for respondents.

VALLIANT, J. (after stating the facts). 1. The intrusion of the Bank of Topeka into

this case was unwarranted. If the original plaintiffs were not entitled in their own right and on the case stated in their petition to maintain the suit, it could not be maintained on the ground that some one else, on a different case stated, could maintain it. The case must stand or fall on the facts stated in the plaintiffs' petition. And, upon reading the petition, it may also be asked, what interest have the Crawfords in the suit? They sold the property by quitclaim to the corporation, and the corporation to Louis Sells, who, according to the petition, is the sole owner of it. The validity of the note, which is the only thing in which they are interested, is not in question, and that there is a balance due on it is not disputed. Yet Mr. Louis Sells takes no interest in the case, and Mr. Crawford is the leading actor in the suit. This fact, perhaps, gives rise to defendants' conjecture that, in spite of the apparent conveyances, Crawford is still the owner of the property. It is not necessary, however, for us to go into that subject. The court allowed Louis Sells, the Crawfords, and the bank to consolidate their several claims, and make a united attack on the defendants' claim, and as the case was tried in that way we will consider it in the same way, but it is not a kind of pleading or practice that we approve.

2. That Tootle, having bought the note after its maturity, took it subject to all defenses and equities to which it was subject in the hands of the original payee, is an unquestioned proposition of law, and is conceded by defendants. It is equally true that the corporation having taken under a quitclaim deed, and Louis Sells having taken under a deed from the corporation, expressly subject to whatever incumbrances the records of Buchanan county showed (among which was the deed of trust in question), Louis Sells stands only in the shoes of Crawford. That view of the attitude of the parties simplifies this controversy very much. It leaves it exactly as if it had arisen in the lifetime of Allen Sells, between him and the Crawfords, before the latter had made any transfer of the property. Could the Crawfords, while still owning the land, have enforced this alleged release against Allen Sells? In the first place, the proof of the alleged execution of the release was far from satisfactory. It depended on the testimony of one witness, and that a zealous one. According to that witness, he called on Mr. Sells, asked him to sign it, and he did so, and that was the whole transaction. Witness was positive he either saw Sells sign it or acknowledge it to be his signature. But the same witness was just as positive that he saw Mr. and Mrs. Sells sign the quitclaim deed that Mr. Imel had prepared, and was even more elaborate in giving the details of the execution of the latter than of the former instrument. Yet that very paper was produced in court at the trial unsigned, and no indication

of any attempt at execution on it. That he was so entirely mistaken as to one justifies the apprehension that he might have been mistaken as to the other also. But, conceding that the paper was signed by Allen Sells, could the Crawfords have enforced it against him? They paid him nothing for it. Their own witness is witness for that. But it is said that the supreme court of Kansas has said that the "holders of a note and mortgage may release the mortgage without receiving anything thereon." That was said in defense of the right of an innocent third party who had bought the mortgaged property on the faith of the release by the mortgagee on the face of the record. *Lewis v. Kirk*, 28 Kan. 497. A mortgage may be released, and the note held, but that is not what this transaction on the face of the paper purports to be. It does not purport to be a release merely, but a satisfaction also, of the mortgage, and, not only that, but it expresses that it is given "in consideration of full payment of the debt secured by" the mortgage. Its purport is to extinguish the note as well as the mortgage, and to extinguish the mortgage by extinguishing the note. But the plaintiffs themselves own that the note was not paid. The acknowledgment of payment in the alleged release was only *prima facie* evidence, and is entirely overcome. *Joerdens v. Schrimpf*, 77 Mo. 383; *Seiberling v. Tipton*, 113 Mo. 373, 21 S. W. 4. As between Crawford and Allen Sells, there was no release, and as between Louis Sells, who stands in Crawford's shoes, and Tootle, who stands in Allen Sells' shoes, there is no release.

3. Is the Bank of Topeka in any better position than Louis Sells? The bank was evidently brought in to rescue this case. According to its own statement, it has agreed to lend its name as trustee to a transaction whereby the bonds of a \$100,000 mortgage put upon this property are to be offered in the market, and now holds those bonds, first as security for its own debt of \$20,000 against Crawford, and afterwards, presumably, for sale as trustee or financial agent. A financial institution of the high character of the Bank of Topeka would not have lent its name and influence to a transaction of that kind if there had not been a larger margin between the \$20,000 of its own debt and the \$100,000 mortgage bonds to be floated than the small balance due on this deed of trust. Therefore, if all that the bank says in its petition is true, there is little ground for apprehension on account of its own debt, and, as to purchasers of the balance of the bonds, there are none yet. The bank has that matter in its own hands. But we do not believe from the evidence that the bank advanced anything on the faith of that release. We do not doubt that Mr. Mulvane, the president, told the truth, but we are not bound to draw the same conclusion that he does from the facts. The transactions between Mr. Craw-

ford and the bank were had with Mr. Mulvane. Therefore, if there was any faith given to any incident in the business, it was given by Mr. Mulvane in person. It was the act of his individual mind, and did not enter into the records of the bank. Yet, when he was testifying from his own consciousness, he said that all the advances to Crawford were before the negotiations about the \$100,000 mortgage came up. Of course, then, as he viewed the case from his own memory, there was no credit given on the faith of any release. But during the recess he examined the books of the bank, and when he resumed the stand he said that he had discovered that part of the debt to Crawford was created after the bonds were delivered to the bank, and then he stated (which was evidently his legal deduction from that fact) that the bank relied on that release in giving the further credit. That testimony is not strong enough to create an estoppel. As president of the bank, he is not to be blamed for guarding his customer's private account from unfriendly examination, but when he comes into court in the capacity of a witness, and discloses so much of the account as he thinks is favorable to his customer, and declines to disclose the balance, he must not expect the court to give his evidence that full weight that it would give if the conditions had been such as that he would have felt justified in putting the court in possession of the whole case. There was no error in admitting the testimony of Mrs. Greenspan and her husband concerning transactions with Mr. Crawford after Mrs. Greenspan had qualified as executrix. The judgment of the circuit court was for the right party, and is affirmed. All concur, MARSHALL, J., absent.

PHELPS v. CITY OF SALISBURY.

(Supreme Court of Missouri, Division No. 2.
March 12, 1901.)

NEGLIGENCE—ISSUES—EVIDENCE OF AGE—INSTRUCTIONS.

1. The giving of an instruction at instance of plaintiff erroneously stating the issue cannot be complained of by defendant; instructions adopting the same theory being given at instance of defendant.

2. There is no conflict as to the quantum of caution and care required of plaintiff to avoid the accident between an instruction that, though he knew of the unsafe and dangerous condition of the sidewalk, verdict should be for him, provided he was at the time of the accident using ordinary prudence and care to avoid it, and one stating that, if he was not using reasonable care,—that is, such care as a person of ordinary prudence would have used under the same circumstances and with the same knowledge,—verdict should be for defendant.

3. An instruction in an action for personal injuries is erroneous in telling the jury in estimating damages to take into consideration plaintiff's age, where there is no evidence thereof, except his personal presence before the jury at the trial.

Appeal from circuit court, Chariton county;
O. F. Smith, Special Judge.

Action by J. W. Phelps against the city of Salisbury. Judgment for plaintiff. Defendant appeals. Reversed.

This is an action against defendant city to recover damages for personal injuries sustained by plaintiff while walking along and upon one of its sidewalks. It is predicated upon defendant's alleged negligence in carelessly and negligently constructing that part of the sidewalk where the same is crossed by the Salisbury and Glasgow branch of the Wabash Railroad, in this: that it failed to erect and maintain guards or railings on and along the sides of same where it passes down an embankment and over a ditch of the depth of four feet on the side of said branch railroad; and that by reason of the negligence and carelessness of defendant to properly construct and keep in safe and good condition the sidewalk and railroad crossing, and suffering them to get out of repair, and to become dangerous and unsafe for public travel, by failing to keep the plank of which said sidewalk and railroad crossing were built securely nailed to its foundation timbers, but allowed the same to become loose and insecure, so that the ends thereof would stand above and below the common level of the walk, and carelessly and negligently allowed the nails with which said plank were fastened to work out and up, so that they stood above the surface of the walk, thus rendering same unsafe for public use and travel, for a long time before the accident; and that by reason thereof plaintiff, on or about the 14th day of October, 1894, while passing over that part of said sidewalk, and while using care and caution, caught his foot against the end of one of the loose planks of said walk, and against one of the spikes or nails, which had partly drawn out of same, and was, by reason thereof, thrown down, causing a dislocation of his left knee, resulting in the necessary amputation of that leg, etc. The answer is, first, a general denial. It then alleges that the sidewalk where the accident occurred was at that time, and for a long time previous thereto, in a reasonably good and safe condition; that plaintiff was familiar with it, was accustomed to pass over and upon it daily, and knew its condition; and that he so carelessly and negligently passed over and upon said sidewalk that he slipped thereon and fell, which was the result of his own carelessness and negligence; and that the extent of plaintiff's injury and the amputation of his limb were occasioned by his physical condition prior to receiving the injury, and to his own subsequent carelessness and negligent conduct.

The salient facts are about as follows: At the time of the accident, and for about four years prior thereto, the plaintiff was and had been a citizen of defendant city, and while returning home from church about 8 o'clock on the evening of the 14th of October, 1894, and without fault or negligence upon his part, he struck his right foot against the

end of a board of the sidewalk of said crossing, of which it was composed, where the sidewalk and crossing connected, and slipped, and he was precipitated into a ditch under the crossing, and his left leg so badly injured that amputation was a necessary result. At the point where the injury occurred the ends of the sidewalk plank where they had been nailed had become loose, and the walk, in consequence thereof, had settled down, and was at the time an inch and one-half lower than the ends of the plank in the crossing. The sidewalk had been in this condition some two or three months, and plaintiff testified that he had about that time called the mayor of the city's attention to it, as well also as one of the councilmen. The evening upon which the accident occurred was dark, but there was an electric light near by the point of the accident, but an arm of the lamp shaded the place. Plaintiff's injuries were serious, and are permanent.

At the instance of plaintiff, and over the objection and exception of defendant, the court instructed the jury as follows: "(1) For plaintiff the court instructs the jury: That in this case the plaintiff seeks to recover damages for an injury to him resulting in the loss of a leg, alleged to have been received by him on account of the defective and dangerous condition of a sidewalk and its crossings over the Salisbury and Glasgow branch of the Wabash Railroad Co., on the north side of Third street, in said city, and in consequence of its failure to maintain railings along the sides of said crossing where the same passes down the embankment of said railroad, which it was the duty of said defendant city to construct and maintain in a reasonably safe condition for the travel of the public by day or by night. His claim is based on the alleged negligence of defendant in failing to keep said sidewalk in a reasonably safe condition for the use of the public, and on its carelessness and negligence in failing to construct and maintain railings on the sides of said walk where it passes down the railroad embankment over the ditch alongside of the track, and the injury received by plaintiff in consequence of such failures. The defendant city, by its answer, denies the carelessness and negligence charged against it, and the injury, and asserts that the injury, if any, to plaintiff, was received by him as a result of his own carelessness and negligence. (2) You are instructed that it was the duty of defendant city to maintain said sidewalk and crossing over the railway track in a reasonably safe condition for travel by day or by night. If, therefore, you believe from the evidence that the plaintiff received the injury complained of by reason of the carelessness and negligence of the defendant in failing to maintain and keep said sidewalk and railroad crossing in a reasonably safe and proper condition for the public use by day or by night, and without fault or negligence on his part.

then your verdict must be for the plaintiff. (3) The jury are instructed that if they shall find and believe from the evidence in this case that the sidewalk and crossing down the railroad embankment described in plaintiff's petition were in an unsafe and dangerous condition, and that the defendant or its officers knew, or, by the exercise of reasonable attention, care, and diligence, might have known, the fact, and that they carelessly and negligently failed within a reasonable time to repair and put same in a reasonably safe condition for the use of the public, and that plaintiff was injured in consequence thereof, then their verdict should be for plaintiff, though they further believe that plaintiff knew of the unsafe and dangerous condition of said walk and railroad crossing; provided they shall also believe from the evidence that he was at the time of receiving said injury using ordinary prudence and care on his part to avoid the same. (4) The court instructs the jury that in this case it does not devolve on the plaintiff to prove that he was exercising ordinary care in walking over and upon the walk where he received the injury. The law presumes that he was, and it is a matter of defense for the defendant. The burden is upon the defendant to prove to the reasonable satisfaction of the jury, by the preponderance of the evidence, the defense of contributory negligence set up and pleaded in its answer; and, if it has failed to so prove and satisfy the jury, the finding must be for the plaintiff on this issue; and, although the plaintiff may have known of the condition of said walk, the law did not require of him the exercise of extraordinary care in passing and traveling over said walk, but only that he exercise such care and prudence in passing over and upon said walk as ordinarily prudent persons would under like circumstances, and having like knowledge. (5) The jury are instructed that, notwithstanding they may believe from the evidence that the plaintiff may have had tuberculosis or blood tainted at the time of the happening of the injury complained of, which may have aggravated his injuries or retarded his recovery, yet if he received the injuries complained of directly by reason of the negligence of the defendant, if the jury find it was negligent in failing to have and keep the sidewalk and crossing at the point where plaintiff fell and was injured in a reasonably safe condition for foot passengers to pass over either in the daytime or at night, then the fact that the plaintiff had tuberculosis, if the jury so find, renders the defendant responsible for all the ill effects which naturally followed said injuries in the condition of health in which the plaintiff was at the time, and it is no defense that the injuries may have been aggravated and rendered more difficult to cure by reason of plaintiff's state of health, or that by reason of the latent disease the injuries were rendered more serious to him than they would have been to a

person in robust health and entirely free from disease. (6) The court instructs the jury that it is not necessary, to recover in a suit for damages for personal injuries against a municipality, that the neglect to keep its sidewalks and street crossings in repair shall be the sole cause of the injury, but the injured party may recover where he is in the exercise of ordinary care and prudence, and the injury results partly from the defective sidewalks and crossings and partly from an accident that neither the city nor the plaintiff may be responsible for. Therefore, if the jury shall find and believe from the evidence in this case that at the point on Third street, in said city of Salisbury, where the sidewalk on the south side of block 33 in said city connects with the railroad crossing, was defective and unsafe for the use of the public, and that plaintiff was using ordinary care and prudence at the time of receiving the injury, and that in consequence of their defective condition plaintiff struck one of his feet against the end of the plank composing said crossing, and was thrown forward, and that the other foot slipped in consequence of said crossing being wet from a recent rain, if you so find, thus causing him to fall, and resulting in the injuries complained of, then in this case the city is liable, and your verdict should be for plaintiff. (7) If the jury find for the plaintiff, in estimating his damages they will take into consideration not only his age and condition in life, the physical injuries inflicted, and the bodily pain and mental anguish endured, together with the loss of time occasioned, and all the expenses incurred in and about the treatment of his case, but also any and all such damages which it appears from the evidence will reasonably result to him from said injuries in the future; in all, however, not exceeding the sum of twenty thousand dollars."

On behalf of defendant city the court instructed the jury as follows: "(1) The court instructs the jury on the part of the defendant the city of Salisbury as follows: The defendant, the city of Salisbury, is a municipal corporation, and as such is not an insurer against accidents upon its sidewalks; nor is every defect therein, though it may cause injury, actionable. It is sufficient if the sidewalks are kept in a reasonably safe condition for travel therein in ordinary modes. (2) The jury are instructed that municipal corporations, such as the defendant, are only liable for such defects in their sidewalks as are in themselves dangerous, or such that a person exercising reasonable care and caution would not avoid danger in passing over; and if the jury believe from the evidence that the defect, if any, in the sidewalk in question, was not in itself dangerous to the safety of persons passing over it with reasonable care and caution, and that the alleged injury to plaintiff was the result either of mere accident, without negligence

of the defendant, or that it resulted from a want of reasonable care and caution on the part of the plaintiff, then they should find for the defendant. (3) In determining the question of negligence or carelessness on the part of the plaintiff, the jury will take into consideration all the facts and circumstances in proof, including the condition of the said sidewalk at the place where the injury is alleged to have occurred, and the knowledge of the plaintiff of the same, if he had such knowledge; and if, from all the facts and circumstances of the case, they believe that negligence or the want of ordinary care or prudence on the part of plaintiff directly contributed to the accident which caused the injury sued for, they will find for the defendant. (4) In order for the plaintiff to recover any sum whatever in this action, he must establish defendant's liability by the preponderance of evidence,—that is to say, by the greater weight of all the creditable evidence in the case; and, unless he has done so, your verdict must be for defendant. (5) Although the jury may believe from the evidence that one or more planks in the sidewalk at the place where the alleged injury occurred were loose from the stringers, and that one or more nails projected above the level of the sidewalk, and that there was a descent in said walk, and that there was no railing on the sides of said walk, yet if the jury further believes from the testimony that the sidewalk in question was at the time of the alleged injury in a reasonably safe condition for travel in the ordinary modes upon a sidewalk, the jury should find for the defendant. (6) Although the jury may believe from the evidence that the defendant city suffered one or more of the boards in the sidewalk in question to be and remain loose or detached from the stringers, and that one or more nails were permitted to project above the walk, and that plaintiff caught his foot against one of said nails, and was thereby thrown from said walk; and although you may further believe that there was no railing on the sides of said walk, and that there was a descent in said walk; yet if the jury further believe from the evidence that plaintiff knew of such conditions of said sidewalk before he fell, and that, so knowing the condition of said sidewalk, the plaintiff, while walking over and upon said sidewalk, was not using reasonable care (that is to say, such care as a person of ordinary prudence would have used under the same circumstances and with the same knowledge), and that he caught his foot while so walking, and was thrown down and injured,—he cannot recover in this action, and your verdict must be for the defendant. (7) If, from the evidence, you believe that at the time and place in question the sidewalk had been rendered slippery and dangerous from recent rain, then the plaintiff was bound to observe a greater degree of care in traveling upon said walk than would have otherwise

been necessary,—that is to say, a degree of care reasonably commensurate with the danger of falling therefrom; and, if he failed to use such care, and such want of care caused or directly contributed to his fall, the city is not liable, and the plaintiff cannot recover. (8) The plaintiff, in his petition, alleges that his fall was caused by catching his foot against the end of a loose plank in the sidewalk and against a spike or nail therein. The court therefore instructs you that if, from the evidence, you believe that his fall was not so caused, but that he slipped and fell from said sidewalk, the plaintiff cannot recover. (9) If, from the evidence, you believe that the plaintiff was predisposed to tuberculosis or other disease, and that he failed and neglected to use reasonable care in the treatment of the injury to his leg caused by his fall, and that by reason of said want of care on his part said disease broke out in his injured leg, and rendered it necessary to amputate said leg, the city is not responsible for such amputation, nor for the consequent pain, suffering, or loss. (10) If, from the evidence, you believe that by the exercise of ordinary care and prudence on the part of the plaintiff, and by submitting to the reasonable directions, advice, and regulations prescribed by his physicians, the plaintiff could have rendered unnecessary the amputation of his leg, and that he failed and neglected to use such care and prudence, or failed to submit to the reasonable regulations, directions, and advice of his physicians, and because of such conduct on his part the injury caused by his fall from the sidewalk was so aggravated by disease that his leg had to be amputated, then the court declares the law to be that the city cannot be held responsible for the amputation of plaintiff's leg, nor liable for any pain, suffering, or permanent injury resulting from such amputation. (11) The court instructs the jury that you are the sole judges of the weight of the evidence and of the credibility of the witnesses, and, if you believe from the evidence that any witness has willfully sworn falsely to any material fact, then you are at liberty to disregard the entire evidence of such witness; and in determining what weight and credit shall be attached to the testimony of any witness sworn in the cause you may take into consideration his relation to the suit, and his interest, if any, in the result of the case, and all other facts and circumstances in evidence."

The trial resulted in a verdict and judgment in favor of plaintiff for \$5,000, from which defendant appeals.

C. C. Hammond and Stockwell & Lamb, for appellant. Wm. H. Bradley, for respondent.

BURGESS, J. (after stating the facts). The first instruction given in behalf of plaintiff is criticised upon the grounds that it does not correctly declare the issues, and is mis-

leading. While the petition alleges that defendant failed to erect and maintain guards or railings on and along the sides of the sidewalk where the street passes down an embankment and over a deep ditch, to wit, of the depth of four feet, on the side of said branch railroad track, it nowhere alleges that this was the cause of, or had anything to do or connection with, the accident; but the petition does allege that the injury was caused by the negligence of defendant city in permitting its sidewalk where the accident occurred to become dangerous and unsafe for public travel by reason of the nails with which the plank forming the sidewalk were nailed down coming loose, so that where they connected with the plank over the railroad crossing they were from one to one and one-half inches above the level of the walk, and against the end of which he struck his foot and fell, and was injured. Nor did the evidence show that the absence of railings upon the sides of the walk when the accident occurred have anything to do with the accident. This instruction was, therefore, unwarranted by both the pleadings and the evidence; and, but for the fact that defendant, by its fifth and sixth instructions, in substance adopted the same theory, the judgment would have to be reversed, but a party will not be heard to complain of an error which he invites or adopts. *Whitmore v. Supreme Lodge*, 100 Mo. 36, 13 S. W. 495, and authorities cited; *Johnson-Brinkman Commission Co. v. Central Bank of Kansas City*, 116 Mo. 558, 22 S. W. 813, and authorities cited.

It is claimed that plaintiff's third instruction is erroneous upon the ground that it is in conflict with defendant's sixth and seventh, which it is asserted correctly declare the law. In the first place, defendant's sixth instruction is vicious, in that it is not in accordance with the evidence, which shows that the injury was occasioned by plaintiff striking his foot against the end of a plank in the sidewalk, which stood above the level of the walk, while the instruction says against a protruding nail in the sidewalk. There is, however, no conflict in the instructions with respect to the quantum of caution and care required by law of plaintiff to prevent the accident. They must be considered with reference to the condition of the sidewalk, where and when the accident occurred; and, although plaintiff knew of its unsafe condition, the care exacted of him was such as an ordinarily prudent person similarly situated would, under the circumstances, including the condition of the sidewalk, have exercised; and this was the theory presented by plaintiff's instruction. Defendant's instructions under comment simply presented the converse of plaintiff's, that is, if the jury believed from the evidence that plaintiff was not using such reasonable care as a person of ordinary prudence would have used under the same circumstances and with the

same knowledge, he could not recover. It is clear, we think, that there is no conflict in the instructions.

There was no verbal testimony as to plaintiff's age at the time of the accident or trial, and the point is made that plaintiff's seventh instruction, which told the jury that in estimating the damages that plaintiff had sustained they would take into consideration "his age and condition in life" was erroneous for the want of evidence upon which to base it. It is well settled that an instruction should not be given when there is no evidence upon which to base it (*Wilkerson v. Ellers*, 114 Mo. 245, 21 S. W. 514), and the only question is whether or not plaintiff's personal presence before the jury at the trial authorized the instruction. Plaintiff's contention is that it was, and in support of this position relies upon *Bertram v. Railway Co.*, 154 Mo. 639, 55 S. W. 1040, and *State v. Thomson*, 155 Mo. 300, 55 S. W. 1013. *Bertram's Case* was an action for damages against a grip-car line for personal injuries, upon the trial of which he testified that he was 68 years old. There was no other testimony with respect to his age, and it was held not to be reversible error for an instruction to assume that he was an old man. In the case of *State v. Thomson*, supra, defendant was prosecuted for the crime of embezzlement. Upon his trial he was a witness in his own behalf, and the jury were required to find as a fact that he was over 16 years old. Held, that they could use their eyes in determining that fact, but that there was ample evidence from which such fact could be found. But there is a very material difference in determining from a man's personal appearance whether he is an old man or not, or whether he is over 16 years old, and in passing upon his age from his personal appearance at any particular time in an action for damages for personal injuries, when the age of the injured party is to be taken into consideration in passing upon the measure of damages sustained by him. In this case the age of plaintiff was, under the facts, mere conjecture, while it should have been established, as it could have been, to a certainty, or proximately so. *Hinds v. City of Marshall*, 22 Mo. App. 215, was an action for damages for personal injuries sustained by reason of an alleged defect in a sidewalk. There was no verbal testimony as to plaintiff's age, but she was present before the jury, and an instruction which told them that, in estimating the damages, to take into consideration "the age and condition in life" of the plaintiff, was held to be erroneous because of the want of evidence upon which to base it. It was also held in that case that the phrase "condition in life" was misleading and vicious, as applicable to the facts in that case. A similar instruction was condemned for the same reasons by that court in the subsequent case of *Gessley v. Railway Co.*, 26 Mo. App. 156. But in this case the words

"condition in life" had reference alone to plaintiff's ability to work, or earn a livelihood, and is clearly distinguishable from a case in which a married woman is plaintiff; for in such case the husband alone can sue for the loss of the services of the wife, or for damages for her inability to work. There was ample evidence to take the case to the jury. For the reasons indicated, the judgment is reversed, and the cause remanded.

SHERWOOD, P. J., and GANTT, J., concur.

NATIONAL BANK OF COMMERCE v. ESTATE OF RIPLEY et al.

(Supreme Court of Missouri, Division No. 1.
March 12, 1901.)

ASSIGNMENT FOR CREDITORS—TIME FOR PRESENTING CLAIMS—STATUTES.

1. Under Rev. St. 1899, § 342, limiting the time for presenting claims against an assigned estate, with a proviso in favor of a creditor who shall fail to present his claim in such time "on account of sickness, absence from the state, or any other good cause," the excuse does not have to be in the nature of sickness or absence from the state.

2. Failure of a bank to present its claim against an assignee within the time limited is for "good cause," within Rev. St. 1899, § 342, in such case extending the time for presentation, where the bank's claim was on notes not yet due, and it was erroneously advised and believed that it had the right to apply to their payment money of the assignor deposited with it.

Appeal from St. Louis circuit court; D. D. Fisher, Judge.

Claim of the National Bank of Commerce against the assigned estate of Ripley & Bronson was disallowed by W. B. Homer, assignee, and from the judgment of the circuit court the bank appeals. Reversed.

Albert Arnstein, for appellant. Clinton Rowell and Jos. H. Zumbalen, for respondent.

VALLIANT, J. Appeal from the judgment of the circuit court of the city of St. Louis affirming a decision of the assignee refusing to allow a claim of the plaintiff against the assigned estate. The facts are: Ripley & Bronson made a general assignment to W. B. Homer, Esq., for the benefit of their creditors, July 24, 1893. Mr. Homer gave notice as the statute requires to creditors to present their claims against the estate on the 12th, 13th, and 14th of September, 1893, of which fact the plaintiff had knowledge. At the date of the assignment Ripley & Bronson had on deposit in plaintiff's bank about \$5,000, and the bank held their notes, not then due, aggregating \$4,800. The assignee demanded the \$5,000, but the bank declined to pay it, on the ground that it was entitled to set off its notes against the deposit. The assignee sued the bank, and the case reached this court, when

it was decided that the bank could not set off the unmatured notes of the assignors against the deposit, which at the date of the assignment was a material obligation of the bank to the assignors. *Homer v. Bank*, 140 Mo. 226, 41 S. W. 790. Thereupon the bank paid the deposit and interest to the assignee, and then presented the notes it held to the assignee, for allowance against the estate. This was long after the time appointed by the assignee for presenting claims had elapsed, but the estate had not been wound up, and the assignee had in his hands assets belonging to it applicable to the payment of its debts. In the petition of the plaintiff the facts as above given are stated, and that the reason it had not presented the claims for allowance within the time appointed by the assignee was that it believed it was entitled to the set-off; that the assignee knew all the time of the existence of the notes; that they were given by the assignors for cash loaned them by the bank, and constituted an honest debt. The assignee refused to allow the claim, on the ground only that it was not presented for allowance within the time appointed. The plaintiff appealed to the circuit court, which rendered judgment affirming the decision of the assignee, and the plaintiff took this appeal.

The only question presented for our consideration is, was the plaintiff entitled to have its claim audited and allowed, notwithstanding its failure to present the same for allowance within the period appointed by the assignee? The answer to this question must be found in the interpretation to be given to section 342, Rev. St. 1899, which directs that the assignee give notice in the manner therein indicated of a time and place when and where claims are to be presented for allowance, and that he attend then and there to audit the same, and that all creditors who, after notice, fail to present their claims within that time, be precluded from any benefit in the estate. The section concludes with this proviso: "That any creditor who shall fail to lay his claim before said assignee during said term, on account of sickness, absence from the state, or any other good cause, may, at any time before the declaration of a final dividend, file and prove up his claim, and same may be allowed, and the remaining dividends paid thereon as in case of other allowed claims." It is contended on the part of the respondent that the proviso means that the estate will open to let in a creditor whose failure to present his claim within the prescribed time was occasioned by sickness or absence from the state, or something of that kind, but not otherwise. It is a rule of construction that a statute should be construed so as to give effect to all its words, if it can be done. Out of that rule grew the further rule on which respondent relies; that is, that when particular words of description are used, followed by general words, the latter are

to be limited in their meaning so as to embrace only a class of things indicated by the particular words. The learned counsel for respondent, after stating the rule in their brief, and citing authorities in support of it, say: "The reason of the rule of construction announced in the foregoing cases is that, if the general words were meant to embrace persons or things different in character and kind from those specifically enumerated, there would be no occasion at all for a specific enumeration." The rule, therefore, accomplishes the purpose of giving effect to both the particular and the general words, by treating the particular words as indicating the class, and the general words as extending the provisions of the statute to everything embraced in that class, though not specifically named by the particular words. This subject has several times received the attention of this court. *State v. Pemberton*, 30 Mo. 376; *City of St. Louis v. Laughlin*, 49 Mo. 559; *State v. Bryant*, 90 Mo. 534, 2 S. W. 836; *State v. May*, 106 Mo. 488, 17 S. W. 680; *State v. Dinness*, 109 Mo. 434, 19 S. W. 92; *City of St. Louis v. Lane*, 110 Mo. 254, 19 S. W. 533; *State v. Schuchmann*, 133 Mo. 111, 33 S. W. 35, 34 S. W. 842. But this is only a rule of construction, to aid us in arriving at the real legislative intent. It is not a cast-iron rule. It does not override all other rules of construction, and it is never applied to defeat the real purpose of the statute, as that purpose may be gathered from the whole instrument. It is a corollary to the first proposition above stated,—that the statute must be construed to give effect to all its words. The rule itself must not be so construed as to defeat that purpose. While it is aimed to preserve a meaning for the particular words, it is not intended to render meaningless the general words. Therefore, where the particular words exhaust the class, the general words must be construed as embracing something outside of that class. If the particular words exhaust the genus, there is nothing *ejusdem generis* left; and in such case we must give the general words a meaning outside of the class indicated by the particular words, or we must say that they are meaningless, and thereby sacrifice the general to preserve the particular words. In that case the rule would defeat its own purpose. *Fenwick v. Schmalz*, L. R. 3 C. P. 313; *Ellis v. Murray*, 28 Miss. 129, loc. cit. 142. If we were required to give a common name to a class of excuses that would cover sickness and absence from the state (that is, a name under which both could be classified to the exclusion of all other good excuses), we might find it difficult to do so to our own satisfaction. And, if we undertake to treat them as two classes, then, when we have said that sickness shall be an excuse, and absence from the state should also be an excuse, have we not exhausted the entire subject of excuses that

can be grouped either under the head of sickness or that of absence from the state? In the *Laughlin Case*, referred to by respondent, this court quoted from the opinion of Lord Tenderden in *Sandiman v. Breach*, 7 Barn. & C. 96, in which it was held that the act of parliament declaring that "no tradesman, artificer, workman, laborer, or other person or persons" should perform worldly labor on the Lord's day did not include drivers of stage coaches. And in the *Laughlin Case* itself it was held that the power of the city to license and tax "auctioneers, grocers, merchants," etc.,—enumerating a large number of trade avocations, and concluding with "and all other businesses, trades, avocations or professions whatsoever,"—did not extend to lawyers. Those two cases sufficiently illustrate the rule, and it was justly and wisely applied in both of them. But can we apply it to this case? In the first place, in order to do so, we must say that the legislature did not intend that every creditor who had good cause for not presenting his claim within the time could do so afterwards, but only some of them might have that privilege. Though one creditor's excuse might be in fact every bit as cogent as another's, yet, if it was not of the same kind as the favored class, he could not be heard. That would create an invidious distinction. To apply the *ejusdem generis* rule to this statute, and write it out as so construed, it would read that the belated creditor might be heard if his delay was "on account of sickness or something in the nature of sickness or absence from the state or something in the nature of absence from the state." It is safe to say the statute would never have gotten on our books in that form. But why should the particular words have been used in this instance, if the legislature intended to allow all creditors who could show good cause to come in after the assignee had closed the door? Doubtless because the legislature did not want to leave it a debatable question that sickness and absence from the state were good excuses. This case has no correspondence with *Valentine v. Decker*, 43 Mo. 583, or *Dry-Goods Co. v. Warden*, 151 Mo. 578, 52 S. W. 508, to which we are referred. In the one of those cases it was held that a creditor could not claim a distributive share in an assigned estate, and at the same time attack the assignment as fraudulent; in the other, that the plaintiff could not recover his goods by replevin, and at the same time prove up a claim for the price of the goods against the assigned estate. In the case at bar the validity of the plaintiff's claim is conceded. It was not presented, because the bank was advised and believed that it had a right to apply the money in its hands to the payment of the notes. If that view of the law had proven correct, the plaintiff had no claim to be allowed. It was extinguished by payment. There was noth-

ing wrong in the plaintiff appealing to the courts to determine its rights in the matter. That is what courts are established for. The point in dispute at the time had never been decided in this state, and, as we said in that case, "upon this question, however, the authorities generally are in much conflict." The spirit of our statute is that the assets of the insolvent debtor be distributed pro rata among all his bona fide creditors. Reasonable regulations are made to facilitate the speedy and economical administration of the estate, and, if creditors neglect to conform to those requirements, they may suffer for their own fault; but if they have failed to appear in time, for any good cause, they may still come, before the final dividend, and, if they show that their excuse is good and the claim is meritorious, the door will be opened to them. The judgment is reversed, and the cause remanded to the circuit court, with directions to enter judgment establishing the plaintiff's claim against the assigned estate, as shown by the three notes mentioned in its petition, and to certify the same to the assignee as required by section 348, Rev. St. 1899. All concur, except MARSHALL, J., absent.

PLASTER v. GRABEEL et al.

(Supreme Court of Missouri, Division No. 1.
March 12, 1901.)

ADVERSE POSSESSION—COLOR OF TITLE.

1. A deed to M. need not be recorded, to be color of title, where the land is openly known as M.'s land, and the true owner lives in the neighborhood, and sees and knows of the condition of affairs.

2. One who goes into possession of land under a recorded deed giving him color of title, and cultivates part of it for 10 years,—his possession being uninterrupted,—acquires title by adverse possession, though he lives on adjoining property.

Appeal from circuit court, Ozark county; W. N. Evans, Judge.

Action by Thomas E. Plaster against Isaac Grabeel and others. Judgment for defendants. Plaintiff appeals. Affirmed.

Ejectment for 40 acres in Ozark county. Answer, general denial, and statutes of limitation of 10 years and 30 years. Trial by the court,—jury waived. Plaintiff called a witness, and asked him to refer to a plat and read an entry. What the plat was, or what the entry would have referred to, is not shown in the record. At that stage the investigation in that direction was interrupted by an admission "that A. Plaster entered the land in question December 27, 1869." Then the plaintiff, Thomas E. Plaster, was called and asked "if you are the identical person that that land was entered for by your guardian. A. Yes, sir." Cross-examined, he said that his guardian's name was T. J. Matlock, that his father's name was Thomas Plaster, and that his own name was

Thomas Alexander Plaster, but that it had always been signed, "Thomas E. Plaster." He had never sold the land himself, and knew nothing about the sale in 1869. He was born June 23, 1862. "Q. Were you ever in possession. A. I never lived on it at all. I worked on it when I was a small chap. Q. How long has Grabeel been in possession? A. I can't tell you. Q. How long since you have been in possession of the land? A. I hain't been in possession at all." Re-examined: "Q. You were living with your guardian when you worked on it? A. Yes, sir. Q. That was about 1869 or 1870? A. I don't know just when it was. Q. When did your father die? A. He died three or four days before I was born. * * * Did your father live on that tract of land when he died? A. No, sir; this land was entered, if I understand it right, with his money, for me. Q. After he was dead? A. Yes, sir; after he was dead." With that evidence, the plaintiff rested. Defendants introduced deeds as follows: Thomas J. Matlock to James G. McGee, 5th September, 1870, recorded April 1, 1887; James McGee and wife to Jesse J. McGee, April 27, 1886, recorded April 1, 1887; Jesse J. McGee and wife to Nancy H. Grabeel, November 23, 1887, recorded March 1, 1888; Nancy H. Grabeel to Andrew J. Grabeel, February 13, 1895, recorded — (date of record not given in abstract). The deed from Matlock to McGee described the grantor as "Thomas J. Matlock, guardian of Thomas Plaster." In other respects it was simply a warranty deed from Matlock to McGee, not purporting to have been made in pursuance of an order of the county court, nor to convey the title of a ward. The evidence shows that up to that time no one had lived on the land, but that Matlock lived near it, and had cleared and cultivated a small patch,—two, three, or four acres. McGee went into possession under his deed, and continued to cultivate the cleared part, but did not reside on the land. He, or his son Jesse, to whom he sold it, extended the clearing, until when the latter sold to Grabeel there were some 10 or 12 acres cleared, fenced, and in cultivation. Grabeel had homesteaded an adjoining 40, and, when he bought from Jesse McGee, moved on his 40 in a house within 25 or 30 feet of the line of the land in suit, and immediately began to cultivate and enlarge the clearing on this land. That was October 15, 1887, and the Grabeels have been in possession ever since, and have made improvements on it. At the close of the evidence plaintiff offered to prove that defendants lived on a tract adjoining the land in suit, and only had a narrow strip in cultivation, and never had any deed recorded until about 1889 (probably misprint for 1887), and the plaintiff knew nothing of any adverse claim or possession, which evidence the court declined to hear, and plaintiff excepted. The finding and judgment were for defendants, and the plaintiff appeals.

Harrison, Boone & McClendon, for appellant. W. A. Love, for respondents.

VALLIANT, J. (after stating the facts). The plaintiff's evidence can scarcely be said to have made a *prima facie* case for him, and if it had been held by the trial court that he failed on his own proof the judgment would not have been disturbed. It was admitted that the land was entered by A. Plaster. That was not the name of the plaintiff, nor of his father. Plaintiff testified: "This land was entered, if I understand it right, with his [his father's] money for me." But he was speaking of a matter of which he had no personal knowledge, and which occurred when he was seven years old. It was only hearsay, and of remote and indefinite origin. But its sufficiency was not challenged in that court, and we will, therefore, not further criticise it. If plaintiff owned the land, his title did not pass by the deed from Matlock to McGee. The statute in force at that date prescribed the only method for sale by the guardian or curator of his ward's land. It is incumbent on one claiming to have purchased such title to show that the statute was followed. Gen. St. 1865, p. 469, §§ 28-33. For interpretation of that statute, see *Bone v. Tyrrell*, 113 Mo. 175, 20 S. W. 796, and cases cited. But the evidence showed that under that deed James McGee took possession of the land, and continued to exercise ownership up to April, 1886, when he sold to Jesse McGee, who took possession and held until he sold to Grabeel.

Appellant contends that the Matlock deed, being insufficient to convey his ward's title, was not color of title until it was recorded, which was not until April 1, 1887, and that, James McGee having actually cultivated only a few acres, his possession was not constructively extended by color of title over the entire tract. In *Crispen v. Hannavan*, 50 Mo. 536, loc. cit. 544, it is said per Bliss, J.: "Not only must the entry and occupation be open, notorious, etc., but the true owner must have actual or constructive notice of the paper under which he enters, and thus be advised not only of the actual possession, which is so open as to be known to all men, but also of its constructive extent and boundary, which can be known only by the paper." And in *Nye v. Alfter*, 127 Mo. 527, 30 S. W. 186, it was held, under the circumstances of that case, that an unrecorded, void tax deed did not give color of title to the defendant. Those cases are authority on this subject only for saying that, when one claims under color of title, the nature and extent of his claim, as well as his possession, must be made known. In *Land Co. v. Hays*, 105 Mo. 143, loc. cit. 150, 18 S. W. 959, per Barclay, J., the court said: "Color of title need not necessarily consist of recorded instruments. Facts and circumstances showing sufficient notoriety of claim, and of its relation and extent, may sometimes impart to an unrecorded in-

strument the effect of color." It was not, therefore, essential that the Matlock deed should have been recorded, if, as the evidence tended to show, it was openly known as McGee's land, and the plaintiff lived in the neighborhood and saw and knew the condition. But the defendants may discard the Matlock deed entirely, and still have actual possession of part under color of title for the whole for the period limited by the statute. The plaintiff was 21 years old June 23, 1883. James McGee and wife executed their deed to Jesse McGee April 27, 1886, under which he went into possession, and his deed was recorded April 1, 1887. This suit was commenced November 4, 1897. So that the plaintiff not only saw that the land was in the possession of and being cultivated and improved by Jesse McGee in 1886, but he also had notice by the record in April, 1887, of the nature and extent of his claim, and this was more than 10 years next before the commencement of this suit. That possession has been unbroken from that date to this. The defendants have shown a perfect title by adverse possession. The facts which plaintiff offered to prove at the close of defendants' case were not contradictory of what the defendants' evidence itself disclosed. The judgment of the circuit court was for the right party, and is affirmed. All concur.

MARSHALL, J., absent.

STATE v. EVANS.

(Supreme Court of Missouri, Division No. 2
March 12, 1901.)

JURY—CHALLENGES—POLICEMEN—AUTHORITY TO MAKE ARREST—RESISTANCE—MURDER.

1. Challenging a juror for cause is insufficient, unless the ground of the challenge is distinctly specified.

2. Rev. St. 1899, §§ 5784, 5788, authorizing policemen in cities to make arrests without process for offenses against the city committed in their presence, do not limit their authority at common law to make arrests without process for crimes against the state; and if a police officer has reasonable cause to suspect that a person apprehended for a felony is guilty, and the prisoner kills the officer in his attempt to escape, such killing is murder.

3. A person arrested without process by policemen, who are known to him and clothed in their official uniform, cannot justify resistance and the killing of one of them on the ground that he had no notice of their official character.

4. A person apprehended for a past felony on a fresh pursuit is presumed to know the cause of his arrest, and cannot justify resistance and the killing of the officer making the arrest on the ground that he had no notice of the charge against him.

5. Where an officer, having knowledge of a past felony and of the one who committed it, arrests the offender without process, the killing of the officer by the prisoner while resisting arrest is murder in the first degree.

6. Where an officer arrests a person for a felony without process on a reasonable suspicion, the killing of the officer by the prisoner while attempting to escape is murder in the first degree, though no felony has been committed.

Appeal from circuit court, Cooper county; George F. Longan, Special Judge.

Ellsworth Evans was convicted of murder in the first degree, and he appeals. Affirmed.

C. D. Corum and W. G. Pendleton, for appellant. Edward C. Crow, Atty. Gen., and Sam B. Jeffries, Asst. Atty. Gen., for the State.

SHERWOOD, P. J. For the murder of William L. Hennicke, a policeman of Boonville, by shooting him with a pistol, defendant, a negro, was put upon his trial, which resulted in a verdict of guilty of murder in the first degree, and judgment and sentence accordingly.

The homicide happened on this wise: A number of business houses in Boonville had been burglarized during the month of March of last year, which closed the nineteenth century. Nor did the burglars neglect the cigar store of Louis Bernard. It had been burglarized three or four times in succession, the last time the night before, and the cash drawer each time depleted of its funds. On the night of 26th of the month mentioned, John Bernard, the brother of Louis, remained at the cigar store of the latter, and with Henry Winklemeyer kept watch for the burglarious thief. He came about 10 o'clock, and stopped at the front door two or three times for a moment, but seemed frightened away by passers-by; but finally, after the lapse of a few minutes, he went up the steps, unlocked the door with a false key, walked away, came back, opened the door, and walked in, leaving the door open about two inches. He stood at the door, holding the latch, when he seemed to take alarm from persons passing by, and was about to go out again, when Winklemeyer hallooed to him to throw up his hands, whereupon defendant ran out through the door, closing it behind him. Winklemeyer and Bernard followed in close pursuit, and, seeing defendant in front of Dan's drug store, Winklemeyer shot at him once, when he disappeared. Thereupon Bernard returned to the cigar store, closed it, and started home, when Officers Hennicke and Jones called to him across the street, asking him if he could recognize the burglar, when he replied he could,—that it was "Jocko." On being asked which one, he answered, "The one that used to be on the 'bus a good deal." Bernard knew the negro well, and had known him for three or four years; and the light was such in the cigar store, from neighboring establishments, as to render recognition by Bernard of defendant, when in the cigar store, easy. Winklemeyer, who was twelve feet from defendant when in the cigar store, though he had never known him before, had no difficulty in subsequently identifying him as the same man he had seen enter the cigar store. When Bernard was accosted by the

police officers as aforesaid, it was about 10:15 to 10:20 p. m. Hennicke then said to Bernard: "Well, I have some other stores to watch to-night; but we ought to catch him, and so I will go down to-night. I know where he stays." He says, 'We will go down.' So Officers Jones and Hennicke and Knack and myself went down. Q. Adolph Knack? A. Yes, sir. * * * Q. Where did you go? A. We went down to the house this side of the track; the old 'Sandrock House,' they call it. Q. You speak of the Missouri Pacific track? A. Yes, sir. Q. Where is that house situate with reference to the Missouri Pacific track,—with reference to the depot? A. It is south of the track. Q. Just across the street, is it? A. Yes, sir; just across the street. Q. Now, what occurred there? A. Why, we went down there, and the officers knocked on the door. The woman didn't want to let them in at first. She said she was in bed. So they told her they were looking for some one; to get up. She finally got up and opened the door, and the officers went in. Q. Where were you at that time? A. I was standing out in front of the house, or steps; and as they were coming out, why, Evans came around between that hallway,—there is a hallway between the two houses,—him and some more young fellows and some women. And he stepped upon the step, and the officers came out. They put their hand on him, and I says, "That is the man." And he said to the officers, he said, 'I didn't do anything.' Hennicke says, 'You will find out about it in the morning.' Q. Well, they arrested him there, did they? A. Yes, sir; he went along with them. They walked down as far as the track, and went over to the Missouri Pacific depot, and come up on the other side. Q. Now, which side of that street would that be? A. That would be on the north side of the street. Q. As they went up the street, how were they walking with reference to each other? A. Evans was in the middle, between the two officers. Hennicke was on the north side of him, and Jones on the south side. Q. Well? A. Well, as they got in front of Deck's property, down there, why, Evans had a deck of cards in his hands. And he said to Jones, 'Take these cards,' and handed them to Jones. Jones put them in his pocket. As he did Evans jerked down his arm, as if to get into his pocket or something. Jones says, 'No, you don't.' And then they began tussling. Q. Where is that Deck property with reference to the Missouri Pacific depot? A. It is east. Q. Well, how many doors? A. Why, it is, I guess, 150 feet from the depot. Q. This occurred about that far, then, from the depot? A. Yes, sir. Q. Which hand, if you remember, was the deck of cards in? A. Why, it was in this hand,—the right hand. Q. Well? A. And they began tussling, and Evans pulled them into the alley. Q. How does the alley run there, Mr. Bernard? A. Runs north and south. Q.

Crosses Morgan street right there? A. Yes, sir; and they tussled up into the alley about 15 feet, and began tussling there against the fence, and swayed back, and finally a flash and a shot fired towards Jones, and a flash and the report was to Hennicke; but the first report was louder than the second report. Q. At this time where were you? A. I was standing at the mouth of the alley, facing them. Q. They were, I understand, about 15 feet in the alley, perhaps? A. Yes, sir. * * * Q. From where you stood, could you see the direction of these flashes? A. Yes, sir. Q. The first one went which way? A. Towards Officer Jones, and the other went towards Officer Hennicke. Q. The first, then, was towards the south, was it? A. Yes, sir. Q. And the second towards the north? A. Towards the north; yes, sir. Q. Well, did you hear any other shots fired there, Mr. Bernard? A. No, sir; just these two. Q. After you heard these shots, then what occurred? A. Why, in a second or two Hennicke fell forward right onto Evans' chest; looked like he was trying to throw him; and then they all three kind of tussled over and fell with their heads this way." Bernard then tells of defendant releasing himself from the officers and making his escape, and of Officer Hennicke dying in a few moments in consequence of the shot he had received from defendant. Officer Jones, also, had his cheek grazed by the first shot fired by defendant. Defendant fled the city. He was captured the next morning by special officers, at a station 20 miles west of Boonville on the Missouri Pacific Railroad.

Policeman Jones' account of the arrest is the following: "Then we walked out the door, and on the top step, just as we walked out the door, this man Jocko was standing at the door; and I put my hand on him about the same time that Mr. Hennicke did, and I said to him: 'You are just the fellow I am looking for. We want you.' Q. Did Mr. Bernard say anything at that time,—about that time? A. And Bernard says: 'That is the fellow; that is the fellow.' And Jocko says: 'What do you want to arrest me for? I haven't done anything.' Mr. Hennicke says: 'Never mind about that. We will tell you all about that in the morning.' By this time we were at the railroad. Then we went north along the railroad— Q. Well, did you arrest the defendant there? A. We arrested him there; yes, sir. Q. And as you went to the railroad he was under arrest and in your custody, was he? A. He was under arrest at the top steps. Q. Well, go ahead, Mr. Jones. A. Then we got across to the north side of the street, and we went along there, possibly until we got in front of that gate, or in front of Mr. Preston's grocery store. He had a deck of cards in his hands, and he says to me: 'What will I do with these?' And I just took them. I had hold of his right arm, and I just took hold of the deck of cards and shoved it in

my overcoat pocket. By this time we were at that gate that Jake Deck used to own the property. A man by the name of Bowers lives there now, I think. Just as we got along that gate, he commenced ramming his hand, or trying to get his hand, in his hip pocket. Q. Which hand? A. His right hand; the one I had hold of. Well, I says to him: 'No, no; you can't do that.' And right there he began to fight, and pull, and drag, you know, to the corner of the alley. Q. And about how far was that from where he first made his motion to his pocket? A. Well, it must be—I will say it is—16 feet, anyway; maybe a little over that. Well, when we got to the alley he kept fighting and pulling, and me holding onto his wrist to keep his hand out of his pocket, until we went up the alley about maybe the same distance,—until we struck a picket fence on the west side of the alley. The picket fence I judge to be about that high; struck me about here (indicating). Well, I and him, when we struck the fence, fell over the fence,—that is, didn't fall over completely, but bent way over the fence,—and that is where my hold broke on his right hand. Q. Up until that time you had been holding his right hand? A. Up until that time I had hold of his right hand, and both our hats fell off over the fence, and we both raised up about together, and as we did we were facing one another, and I thought he attempted to strike me with his fist that way (indicating), only with his right hand, and I throwed up my hand that way (illustrating), and his gun went off and just left a little black streak up the side of my face here (indicating), and I could feel the heat of the powder or the flash of the gun against my face. Well, then I grabbed him,—grabbed under holds on him,—and he twisted in my arms. That is when he shot the second time. Q. Now, in which direction did he shoot that time? A. Well, he shot— Mr. Hennicke was to my left, and then when we were turned, and to Jocko's right, and then I throwed him— Q. Where was Mr. Hennicke, you say, at that time? A. Mr. Hennicke was the other side of Jocko. Jocko was in between him and I, and he was on the north side and I was on the south side. Q. Well, tell the gentlemen of the jury whether or not the second shot went in the direction of Mr. Hennicke. A. The second shot I didn't see no flash; yes, I saw the flash, but it didn't sound loud. It was kind of underneath; was low; between us like. It was a kind of a shot,—low; didn't sound loud and clear like the other one did. Q. Well, did it go in the direction of Mr. Hennicke? A. Yes, sir; it went in the direction of Mr. Hennicke. Well, then I throwed this fellow very near across the alley. Q. You mean the defendant, do you?" etc.

Defendant on his part denied he was ever in Bernard's cigar store the night of the homicide. He also testified that after his

captors had taken him about 100 feet, he stopped and said to them: "I asked them what they was arresting me for. Q. Who did you ask that? A. I didn't particularly ask either one of them. I just spoke; says, 'What are you arresting me for?' Q. Did they tell you? A. No, sir. Q. What did they do? A. After I asked them what they were arresting me for, Mr. Jones says, 'Come on here.' And I stopped and says, 'What are you arresting me for?' Mr. Jones says, 'Come on here.' I didn't come here. I stopped. As I stopped, Mr. Jones hit me up side the head. Q. What did Mr. Hennicke do? A. When he hit me up side the head, I fell up against the side of him, and Mr. Hennicke pulled out his billy and commenced beating me. Q. Now, go ahead and state what occurred. A. Then they commenced beating me; then they got me down, and they were beating me, and when I got a show I got up and fired a shot." That he shot because he was mad, and that he was mad because Hennicke and Jones were beating him. He also contradicts Jones and Bernard in other respects. It is also in evidence that about a month prior to the homicide Hennicke had arrested defendant for some offense, and while in jail defendant told the matron that Hennicke could never arrest him again alive.

1. In regard to the jurors, it is sufficient to say that under the settled rule of this court it is the established law of this state, and has been ever since *State v. Taylor*, 134 Mo. 109, 35 S. W. 92, that the mere challenging of a juror "for cause" will not do; that the cause of challenge must be as distinctly specified as the objection to the introduction of evidence.

2. Relative to the arrest of defendant, the power of a policeman to make the arrest in question is denied; reliance therefor being based on sections 5784, 5788, Rev. St. 1899. These sections relate to the powers and duties of policemen in cities of the third class, and authorize policemen to arrest without process for offenses committed in their presence against the laws of such city. But these sections do not in terms impinge upon the authority of policemen at common law to make arrests for crimes committed against the state. Bishop says: "If a person is walking the streets at night, and the indications are that he has committed a felony, watchmen and beadies have authority at the common law to arrest and detain him in prison for examination, though the proof of an actual felony committed may be wanting." 1 Bish. Cr. Proc. § 182. And he cites, among others, the case of *Lawrence v. Hedger*, 8 Taunt. 14, where a watchman arrested a man in the streets of London about 10 o'clock at night with a bundle in his hand, as to the contents of which he would not or could not tell, and he was held properly arrested, and that no action could be maintained against the watchman. Heath, J., observed: "At every Old Bailey sessions numbers of per-

sons are convicted in consequence of their being stopped by watchmen while they are carrying bundles in this way." *Chambre, J.*, said: "In this case, what do you talk of groundless suspicion? There was abundant ground of suspicion here. We should be very sorry if the law were otherwise." See, also, *Whart. Cr. Law* (10th Ed.) § 415; 1 *Russ. Crimes* (9th Am. Ed.) 733; *State v. Grant*, 79 Mo., loc. cit. 134. Hale says: "There are certain officers and ministers of public justice that virtute officii are empowered by law to arrest felons, or those that are suspected of felony, and that before conviction, and also before indictment. And these are under a greater protection of the law in execution of this part of their office upon these two accounts: (1) Because they are persons more eminently trusted by the law, as in many other acts incident to their office, so in this; (2) because they are by law punishable, if they neglect their duty in it. And therefore it is all the reason that can be that they should have the greatest protection and encouragement in the due execution of their office, since their actings herein are not arbitrary, but necessary duties, not permissions, and under severe punishments in their neglect thereof. And hence it is that these officers that are thus intrusted may without any other warrant, but from themselves, arrest felons and those that are probably suspected of felonies; and if they be assaulted and killed in the execution of their office it is murder. And, on the other side, if persons that are pursued by these officers for felony or the just suspicion thereof, nay for breach of the peace or just suspicion thereof, as night walkers or persons unduly armed, shall not yield themselves to these officers, but shall either resist or fly before they are apprehended, or, being apprehended, shall rescue themselves and resist or fly, so that they cannot be otherwise apprehended, and are upon necessity slain therein, because they cannot be otherwise taken, it is no felony in these officers or their assistants that upon inevitable necessity kill them, though possibly the parties killed are innocent, for by their resistance against the authority of the king in his officers they draw their own blood upon themselves. The officers that I herein principally intend are: (1) Justices of the peace; (2) sheriffs; (3) coroners; (4) constables; (5) watchmen. And when I mention these I also include all that come to their aid and assistance; for every man in such cases is bound to be aiding and assisting these officers, upon their charge and summons, in preserving the peace and apprehending of malefactors, especially felons." 2 Hale, P. C. 85, 86. Besides, our statutes have given recognition in at least two instances that the term "policeman," which is the legal equivalent of "watchman" at common law, names proper persons to make arrest in state crimes. Rev. St. 1899, §§ 2468, 8848. Such recognition in legislative enactments is tanta-

mount to legislative authorization in express terms, and this principle is attested by many authorities. *Bonds v. State*, 17 Am. Dec. 795; *Small v. Field*, 102 Mo., loc. cit. 119, 120, 14 S. W. 815; *Bow v. Allenstown*, 34 N. H. 351; *People v. Perrin*, 56 Cal. 345; *State v. Cummins* (Tenn. Sup.) 42 S. W., loc. cit. 881; *McCartney v. Railroad Co.*, 112 Ill. 611; *People v. President & Directors of Manhattan Co.*, 9 Wend. 351; *Society for the Propagation of the Gospel v. Town of Pawlet*, 4 Pet. 480, 7 L. Ed. 927; *Railroad Co. v. Reaney*, 42 Md., loc. cit. 131; *Inhabitants of Springfield v. Connecticut River R. Co.*, 4 Oush. 63; 1 Bish. New Cr. Proc. § 181. A policeman, then, has the same power of making arrests for crimes or offenses against the state as has a sheriff, constable, etc., and in thus making arrests is covered by the same peculiar protection which the law throws around a sheriff or other like officer. If a sheriff or other peace officer arrest a person without warrant, he will be justified in doing so, although no felony be actually committed. It is sufficient if he have reasonable cause, either on his own knowledge of facts or on facts communicated to him by others, to suspect the one apprehended. And in thus arresting such suspected felon, or in conveying him to the place of confinement, if the person arrested, or attempted to be arrested, in his endeavor to escape, kill the officer, the crime will be murder; but, if the officer necessarily kill him when he resists arrest or endeavors to escape, the homicide will be altogether justifiable. *State v. Underwood*, 75 Mo. 230; 1 Bish. New Cr. Proc. § 181, and cases cited, and authorities supra. See, also, 2 Am. & Eng. Enc. Law (2d Ed.) 870. Here Bernard had given the police officers direct and positive information as to the felon, and afterwards at the time of the arrest identified the felon. More than this certainly could not be required.

3. But it is objected that defendant had no notice of the official character of the officers. This is answered as to Hennicke by the testimony aforesaid of the matron of the jail as to defendant's covert threats against Hennicke, and by the official uniforms worn by both officers at the time of the arrest.

4. But further objection is made that defendant was not notified by the officers for what he was arrested. This, however, was not necessary, inasmuch as defendant was apprehended on fresh pursuit; for in such cases notice is not requisite; because the accused is presumed to know for what he is arrested. 1 Whart. Cr. Law (10th Ed.) § 418, and cases cited; *Lewis v. State*, 3 Head, 147; *Rex v. Howarth*, 1 Moody, Cr. Cas. 207; *Rex v. Hunt*, Id. 93. And it is the rule that notice of the charge and of intention to make the arrest may be made to appear by some incidental matter. *Gordon's Case*, 1 East, P. C. 315. And it is agreed on all hands that a private person making an arrest for a past felony need not give notice of the ground

for the arrest, if the accused have notice allunde. *State v. Albright*, *infra*. Here the pursuit was fresh, since not more than 20 or 25 minutes elapsed between pursuit begun and apprehension had.

5. But, even could the arrest be regarded as one made by mere private citizens, still Bernard had knowledge of the crime committed and of the one who committed it, and therefore the killing of him in making the arrest, or of one of his assistants, would also be murder. *State v. Albright*, 144 Mo. 638, 46 S. W. 620, and cases cited.

6. Under the authorities cited, even if there had been no felony committed, still, arresting defendant in the circumstances already related, the officers would have been justified in killing defendant if necessary to overcome his resistance,—that is, if he could not otherwise be taken or such resistance overcome; and the killing of Hennicke was nothing less than murder in the first degree, for in such circumstances "passion becomes wickedness and resistance crime." Under these views there was in this cause neither murder in the second degree nor manslaughter.

7. Holding as above, it is only necessary to say that the instructions given (except as to murder in the second degree) were substantially correct, and that those refused defendant were consequently correctly refused. Therefore, judgment affirmed, and the sentence pronounced ordered to be executed. All concur.

STERN v. BENSIECK et al.

(Supreme Court of Missouri, Division No. 2.
March 12, 1901.)

MUNICIPAL CORPORATIONS—SIDEWALKS—OBSTRUCTIONS—PERSONAL INJURIES—INFANTS—NEGLIGENCE—DUE CARE—PLEADING—BURDEN OF PROOF.

1. In an action for injuries to plaintiff's minor son, sustained by reason of a defective sidewalk, it was error to instruct that the son was bound to exercise such reasonable care as a boy of his age, experience, and intelligence was "individually capable of," since the boy was bound to exercise only that degree of care which, under like circumstances, was reasonably to be expected of one of his years and capacity.

2. Where, in an action for injuries to plaintiff's minor son by reason of a defective sidewalk, plaintiff alleged that the planks and supports of the sidewalk were rotten, worn out, out of place, and warped so as to form a dangerous obstruction, the substance of the issue being merely that the sidewalk was defective, and formed an obstruction, plaintiff was not bound to prove all the facts as alleged.

Appeal from St. Louis circuit court; James E. Withrow, Judge.

Action by Abraham Stern against John O. Bensieck and the city of St. Louis. Judgment for defendants, and from an order granting plaintiff a new trial defendants appeal. Affirmed.

This is an appeal by defendants from an order of the circuit court of St. Louis award-

ing plaintiff a new trial. The action is by the father of a minor for the loss of services and expenses incurred by him by reason of an injury to his son, caused by a fall on an alleged defective sidewalk upon which defendant Bensieck's property abutted. The petition alleged, in substance, that defendants maintained in front of premises known as "No. 1113 North Broadway, St. Louis," a wooden sidewalk; that on the 28th day of September, 1895, and for a long period prior thereto, the said sidewalk was in a dangerous and defective condition, unfit and unsuited for the passage of pedestrians thereon; that the planks and supports of said sidewalk were rotten, worn out, out of place, and warped so as to form a dangerous obstruction to persons on foot passing over the same, especially at night; that the city of St. Louis, by its proper officers having charge of keeping its sidewalks in repair, knew of said defective condition of said sidewalk in time to have repaired the same before the injury to plaintiff's son, yet neglected to do so; that on the night of September 28th plaintiff's son was passing over said sidewalk, and, while doing so, by reason of said defective condition of the sidewalk his foot was caught against and under a plank of said sidewalk, whereby he was thrown down, breaking his right arm near the elbow; that plaintiff was entitled to the earnings of his son during his minority; that by the injury to his son plaintiff has lost the earnings of his son during his minority, and incurred expenses for medicines, medical attention, and nursing to the damage of the plaintiff in the sum of \$5,000, etc. The answer of defendant Bensieck was a general denial, with a plea of contributory negligence. The answer of the city of St. Louis was a similar plea. There was a general denial for reply. For the purpose of this discussion it is sufficient to say that there was evidence tending to support the petition and answers and reply. There is no dispute upon this question, so that we shall proceed to discuss the grounds urged for a reversal. Upon the trial of the case the jury rendered a verdict for both defendants, and upon motion for a new trial the court sustained the motion, set aside the verdict, and ordered a new trial because of its errors in giving instruction No. 4 at the instance of defendant Bensieck, and instruction 5 given at the request of the city. These were the errors assigned upon the record by the court as its grounds for granting a new trial, though others were assigned in the motion. Since the appeal to this court, defendant Bensieck has died, and the cause has been abated as to him by the judgment of this court. The two instructions, No. 4 given at the instance of Bensieck, and No. 5 given at the instance of the city, are as follows: "(4) The son of the plaintiff was bound to exercise such reasonable care and caution for his personal safety while using the sidewalk as a boy of his age, experience,

and intelligence was individually capable of, and as shown by the evidence. And if, from the evidence, the jury believe that plaintiff's said son knew, or, by the exercise of the degree of care aforesaid, would have known, of the condition of said sidewalk, but did not, at and just before the time he was injured, exercise said degree of care, and directly contributed to his being hurt, then the jury will find for the defendants." "(5) The jury are instructed that it devolves upon the plaintiff to prove to the satisfaction of the jury: First, that the planks and supports of the sidewalk on the west side of Broadway in front of No. 1113 N. Broadway were rotten, worn out, out of place, and warped so as to form a dangerous obstruction to persons on foot passing over the same when exercising ordinary care as defined in these instructions; and, second, that the plaintiff's son was injured, while passing along said sidewalk, by reason of having his foot caught under a plank of said sidewalk. And, unless the plaintiff has shown these facts to the satisfaction of the jury, the verdict must be for the defendant the city of St. Louis."

B. Schnurmacher and Chas. C. Allen, for appellants. Morris Tucker and A. R. Taylor, for respondent.

GANTT, J. (after stating the facts). 1. It is insisted by plaintiff that the court properly set aside the verdict for the giving of said instruction No. 4, because it exacted the highest degree of care of which the boy was capable, whereas he was only required by the law of this state to exercise that ordinary care and prudence which, under like circumstances, could reasonably be expected of a boy of his years, capacity, and experience. We think the circuit court erred in said instruction. The instruction exacted the highest degree of care of which the boy was capable. He was capable of exercising the highest degree of care that a boy of his age and intelligence could exercise. An adult is only required to exercise that ordinary care in travelling along the streets of a city that a reasonably prudent person would observe under similar circumstances, not the highest care of which he is capable, and yet this instruction exacts more of a boy of tender years than is required of an adult. The rule is too well settled to admit of discussion. Municipal corporations are bound to keep their streets and highways free from obstructions, and reasonably safe for travel in the usual modes, and are liable for injuries caused by neglect to do so. *Russell v. Inhabitants of Columbia*, 74 Mo. 480; *Loewer v. City of Sedalia*, 77 Mo. 431; *Franke v. City of St. Louis*, 110 Mo. 516, 19 S. W. 938; *Roe v. City of Kansas City*, 100 Mo. 190, 13 S. W. 404. A child is not deemed negligent if he exercises that degree of care which, under like circumstances, would reasonably be expected of one of his years and capacity.

Beach, Contrib. Neg. § 117; *Burger v. Railroad Co.*, 112 Mo. 238, 20 S. W. 439; *Williams v. Railroad Co.*, 96 Mo., loc. cit. 283, 9 S. W. 573.

2. The fifth instruction obtained by the city was erroneous. Plaintiff was not bound to prove all the defects he alleged. Counsel for the city concedes that, if the sidewalk was defective, either by being rotten or worn out, or because a plank was out of place in it, or a plank was so warped as to create an obstruction, with notice to the city, and plaintiff was injured by either, while exercising ordinary care on his part, he would be entitled to recover; but insists that, because plaintiff alleged the walk was defective in all these respects, he must prove all, or he cannot recover. This is not tenable. It was only essential that he should prove the sidewalk was defective from either of these causes, with notice to the city thereof, and his resulting injury, to make out his case. *Morrow v. Surber*, 97 Mo., loc. cit. 161, 11 S. W. 48; *Robertson v. Railroad*, 152 Mo., loc. cit. 392, 53 S. W. 1082; *Knox Co. v. Goggin*, 105 Mo. 191, 16 S. W. 684. The substance of the issue was a defective sidewalk, and if plaintiff proved that fact either by showing it was rotten or was warped, of which the city had notice, and his son was injured thereby, he made out a case, and he was not required to prove all, or be defeated. As said by *Sherwood, J.*, in *Frederick v. Allgaler*, 88 Mo. 604: "Although it is a fundamental rule of evidence that the evidence must correspond with the allegation, yet it is equally fundamental that it is sufficient if the substance of the issue be proved." "The fact that the answer was drawn too broadly did not require that defendant should be required to offer proof or submit to instructions as broad as the allegations of the answer." The circuit court, then, was not in error in holding it had committed error in giving the instruction. As to the point that the verdict was for the right party, we need only say that there was a sharp conflict of testimony, and in such case it is not our province to pass on the weight of evidence. The circuit judge awarded a new trial, and committed no error in so doing, and his judgment in so doing is affirmed. All concur.

OGLE v. HIGNET et al.

(Supreme Court of Missouri, Division No. 2.
March 12, 1901.)

INFANTS—CONTRACTS—CONVEYANCE—VENDOR AND VENDEES—ADVERSE POSSESSION—LIMITATIONS.

1. Where a minor made a parol sale of land, and the vendee took possession, and paid the purchase price, his possession was adverse, and was not that of a vendee in possession under an unexecuted contract of sale merely because the minor had promised to execute a deed when he attained majority.

2. Gen. St. 1865, c. 191, § 4, provides that, if a minor is entitled to sue to recover realty, the

time during which minority continues shall not be deemed any portion of the ten years limited for the commencement of such action, but he may bring the action after the time limited if within three years after attaining majority. A minor sold property in 1886, and became of full age in 1891, and six years afterwards he deeded the land to another. Held, that the minor's rights were barred, and the deed conveyed no interest.

Appeal from circuit court, Pike county; Reuben F. Roy, Judge.

Action of ejectment by Hugh Ogle against Sarah J. Hignet and others. From a judgment in defendants' favor, plaintiff appeals. Affirmed.

J. D. Hostetter, for appellant. Jas. D. Kincaid, for respondents.

GANTT, J. This is an action of ejectment for an undivided one-fourth of the N. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of section 25, township 54, range 5 E., in Pike county, Mo. The answer is a general denial. Joseph Keithly is the common source of title. By his will said Keithly devised the said 40 acres to his wife for life, remainder to his four sons. His wife died in 1884. Three of the sons were adults, and one a minor about 13 years old. In 1886 the three adult heirs conveyed their three-fourths interest to Dr. C. A. Wicks, and the minor, Osa Keithly, by parol sold his undivided fourth to Dr. Wicks, who paid him the purchase price in full, and Dr. Wicks took possession of the whole tract, and fenced it, and used it as a pasture until the time of his death. His administrator took charge of it until it was partitioned among the heirs of Dr. Wicks. In the partition it was assigned to Mrs. Hignet, and she has had possession ever since, and was in possession when this action was commenced in April, 1897. Osa Keithly testified that some time—he was uncertain when, whether at the time he received the payment for his interest, and put Dr. Wicks in possession, or after that time—Dr. Wicks had him sign a bond to make a deed when he arrived at his majority. Dr. Wicks died before Osa reached his majority. Osa testified that if Dr. Wicks had lived he would have made the deed to him; that Osa took the purchase money, and spent it for his support. In March, 1897, Osa Keithly, after telling Ogle, the plaintiff, that he had also sold the land to Dr. Wicks, and spent the money, again sold the undivided one-fourth to Ogle for \$15, the same amount Wicks had given him. The circuit court held the statute of limitations under the evidence was a bar. There was sufficient evidence upon which the court could have found there had been an adverse possession by Wicks and his heirs. Osa Keithly arrived at his majority in 1891, and did not bring his action or disavow his sale to Wicks until March 1, 1897.

The first proposition of appellant is that Dr. Wicks' possession was not adverse, because he was a vendee under an unexecuted contract of sale. This is untenable under

the facts. Wicks paid the full purchase price, and took possession in 1886, and had a continuous adverse possession from that date. The collateral agreement of Osa to make him a deed when he reached his majority did not make the contract an unexecuted one on the part of his vendee, Dr. Wicks; and it is settled law in this state that a vendee under an executed contract holds adversely to his vendor. Did the statute run against Osa Keithly before he made his deed to plaintiff? We think it did. In *Gray v. Yates*, 67 Mo. 608, this court unanimously construed section 4, c. 191, Gen. St. 1865,—the same in this respect as it is to-day,—to mean that, when a right of action accrues to a minor under the disability of infancy, “the period during which such disability continues, though more than ten years, shall not constitute a bar to his or her action or entry, but he or she may, within three years after the removal of such disability, and within twenty-four years after such right of action or entry accrued, institute such action or make such entry. If the disability has existed for a period of time less than ten years, the person laboring under such disability must institute his suit within three years after the removal of the disability, unless said three years, together with the period of disability, are less than ten years, in which event such person is entitled to the unexpired portion of the ten years, for all persons are entitled to ten years in any event. When a party has the three years given by the statute (section 4, Gen. St. 1865) and the whole period given by the first section, the right of action or of entry is barred. In other words, when ten years have elapsed since the right of action accrued, and three of those years have been free from disability, the right of action or of entry is barred.” The same construction has been given a similar statute in New York. *Smith v. Burtis*, 9 Johns. 180; *Jackson v. Johnson*, 5 Cow. 98; *Willson v. Betts*, 4 Denio, 208. The right of action of Osa accrued when Dr. Wicks took possession in 1886. Osa became of age in 1891. Six years afterwards, and after the ten years had elapsed, he chose to make a deed to plaintiff, who had full knowledge of all the facts. At that time Osa Keithly was barred, and had nothing to convey to plaintiff; and the judgment of the circuit court was right, and is affirmed. All concur.

SMITH v. WILSON.

(Supreme Court of Missouri, Division No. 2.
March 12, 1901.)

SPECIFIC PERFORMANCE—UNILATERAL CONTRACT—MEMORANDUM—SUFFICIENT DESCRIPTION—HUSBAND AND WIFE—AGENCY—WITNESS—COMPETENCY.

1. Under Rev. St. 1899, § 8418, requiring contracts for the sale of real estate to be in writing, and signed by the party to be charged, such a contract may be enforced by suit for

specific performance, though it is unilateral, or signed only by the party to be charged.

2. A memorandum of a contract for the sale of real estate describing the land as “five acres in the southwest corner of the northeast quarter of section five, township fifty-seven, of range twenty, in L. county, inside the fence,” contains a sufficiently definite description of the land to make the contract enforceable by specific performance, since it affords means whereby the identification may be made certain by parol evidence.

3. Under Rev. St. 1899, § 8922, providing that “no married man shall be disqualified as a witness in any such civil suit or proceeding prosecuted in the name of his wife, whether he be joined with her or not, as a party, when such suit or proceeding is based on, grown out of, or is connected with any matter of business or business transaction where the transaction or business was had with, or conducted by, such married man as the agent of his wife,” a married man who has negotiated a contract for the purchase of land on behalf of his wife is a competent witness to prove his own agency for his wife.

Appeal from circuit court, Linn county; W. W. Rucker, Judge.

Suit for specific performance of a land contract by Anna Smith against D. C. Wilson. From a decree for the plaintiff, defendant appeals. Affirmed.

O. F. Lobbey and A. W. Mullins, for appellant. O. C. Bigger, for respondent.

BURGESS, J. On the 30th day of December, 1897, plaintiff, through an agent, bought from defendant a tract of land containing five acres, of which he was the owner, at the price of \$500, and as part of the purchase money paid him \$20, at the same time defendant executing to her an instrument of writing in words and figures as follows: “Laclede, Mo., Dec. 30th, 1897. \$20.00. Received of Mrs. Anna Smith twenty dollars in part payment of the purchase money for 5 acres of land in the S. W. corner of the N. E. ¼, Sec. 5—57—20, Linn Co., Mo., which I have today sold to her for \$500; deed to be delivered when balance of purchase money is paid, I to furnish abstract showing perfect title. Said 5 acres is inside the fence. [Signed] D. C. Wilson.” Defendant refused to execute to plaintiff a deed as provided for in the foregoing instrument of writing, whereupon she tendered to him, on the 4th day of January, 1898, the balance of the purchase money, and demanded a deed to the land, and upon his refusal to comply with her request she instituted this suit for the specific performance of the contract, alleging defendant’s failure and refusal to comply with the terms thereof, and a readiness and willingness upon her part to do so. Defendant answered the petition, admitting that he was at the date of the contract the owner of all of section 5, township 57, range 20, in Linn county, which lies north of the right of way of the Hannibal & St. Joseph Railroad Company, but denied every other allegation and averment in the petition. The answer then proceeds as follows: “Defendant, further answering, says that heretofore, to wit, in the

month of December, 1897, one May Jones, a real-estate dealer in the city of Laclede, Missouri, came to defendant, and desired to know whether he would sell five-acre tract of land in the southwestern portion of above-mentioned tract of land; that, after much talk and consideration, defendant told Jones that he would sell off of said tract of land as many as three five-acre tracts, commencing at the hedge fence on the south, at the west line of said quarter section aforesaid; each of said five-acre tracts to be measured off, commencing at the southwest corner of the hedge fence for the place of beginning, the first tract running thence east along the line of the south hedge fence forty (40) rods, thence north twenty (20) rods, thence west forty (40) rods to the west line (or hedge fence) of said above tract of land, thence south down the line of the west hedge fence twenty (20) rods, to the place of beginning; the other two tracts to be in the same shape, and of the same length and width, but lying to the north of the tract first described,—all being in the northeast quarter of section No. five (5), in township No. fifty-seven (57) north, of range No. twenty (20) west, Linn county, Missouri. Defendant, further answering, said that he informed the said Jones aforesaid that he would sell five acres in the southwest corner, measured off and described as aforesaid, for the sum of five hundred dollars, provided always, and upon the express condition and with the understanding that, if defendant could not procure a release of the trust deed on said tract of land from the holder of the same, then the land was not for sale. Defendant, further answering, says that afterwards, to wit, on or about the 30th day of December, 1897, the said May Jones, aforesaid, came to his house, representing himself to be acting for and on behalf of the plaintiff herein, Anna Smith, and told defendant that he (Jones) was in a great hurry, and wanted to close a sale of the five-acre tract of land in the southwest corner of defendant's farm in form and shape as they had heretofore agreed upon, to wit, a strip of land twenty (20) rods wide north and south, and forty (40) rods long east and west, inside of the hedge fence, and not otherwise; that he had twenty dollars to pay down, the balance to be paid in a short time, or as soon as deeds could be made, provided that defendant could obtain a release of the mortgage or trust deed, and furnish to plaintiff an abstract, and, should defendant fail to obtain a release of the mortgage lien on said land, then the trade and sale shall be canceled without prejudice to either party; that, acting in good faith, believing the land to be sold was the five acres above described, and in the manner and of the dimensions above as herein set forth, defendant took and received of said Jones, acting for and on behalf of plaintiff, the sum of twenty dollars, to be applied as part payment on the purchase of said five acres of land; that at the same

time defendant received the twenty dollars from Jones he was requested by the said Jones to sign a receipt for said money, so that, as he (Jones) said to defendant, he could show to plaintiff what he had done with the money. Defendant further says that he did not read the paper so presented to him by Jones, claiming the same to be a receipt only for the \$20 so paid out, but that Jones read the same in a hurried manner, and assured defendant that it was simply a receipt for \$20, and nothing more; that they would have the land measured, and deeds made describing the land as heretofore described; that defendant never offered to sell the land, and no talk was had between plaintiff or her agent, Jones, about selling a tract of land, as described in plaintiff's petition. Defendant further says that he did not himself read the receipt he signed for the \$20, but relied upon the representation so made by Jones, the plaintiff's agent in said transaction, that the land was not described therein; that such writing copied in plaintiff's petition does not contain a true and correct description of the tract of land sold to the plaintiff, and that said pretended receipt containing the description set forth in plaintiff's petition was obtained by the false and fraudulent representations of plaintiff's agent in making such purchase, and for the purpose of gaining an advantage over defendant. Defendant further says that he is now ready and willing to comply with the terms of said contract of sale for the tract of land twenty rods wide and forty rods long in the southwest corner of his farm aforesaid, inside of the fence, and has been ready and willing on his part at all times since December 30, 1897; that he now tenders into court a deed conveying the title to the land in manner and form aforesaid upon plaintiff's paying the balance of the purchase money, four hundred and eighty dollars. Defendant therefore prays the court to order and decree that the memorandum or receipt signed by defendant be reformed so as to conform to the agreement and sale made by defendant to plaintiff, and that plaintiff be required to pay into court at a day named the balance of the purchase money, to wit, four hundred and eighty dollars, for defendant, and that plaintiff accept the deed of conveyance tendered in open court, and that defendant have all other and proper relief in equity, as well as costs laid out and expenses in their case." Plaintiff replied to the answer, denying all new matter contained therein.

At the time of the execution of the contract and for some time prior thereto defendant was the owner of and in the possession of the N. E. quarter of section 5, in township 57, of range 20, in Linn county, except a strip off the south side occupied by the right of way of the Hannibal & St. Joseph Railroad and a public road. A hedge fence runs from east to west along the north line of said road, being the south boundary

line of that part of said land owned and in the possession of defendant. Said land also adjoins the city of Laclede on the east; and Pleasant street, one of the streets of said city, runs from north to south along the west side of said land, a hedge fence being on the line between said street and defendant's land. Some time in the fall of 1897, defendant, Wilson, employed May Jones, a real-estate agent of Laclede, to sell for him a five or ten acre tract out of the west side of his said land. On December 30, 1897, Jones negotiated a sale of five acres in the southwest corner of the said land of defendant inside the fence to the plaintiff, Mrs. Anna Smith, for the sum of \$500; her husband, E. T. Smith, acting for her in making the trade. Smith paid to Jones \$20 as part of the purchase money, and then the memorandum of the agreement which forms the basis of this action was prepared, and Jones took it to Wilson for his signature. The memorandum was twice read over to Wilson by Jones, and the trade was fully discussed, Wilson expressing himself entirely satisfied with the terms, except that he wanted the land measured from the southwest corner, which would include a part of the right of way of the Hannibal & St. Joseph Railroad and also the public road, instead of inside the fences. Jones informed Wilson that Mrs. Smith would not pay \$100 per acre for land which she would not get, and that, if he insisted on the land being measured from the corner, instead of inside the fences, the trade would fall through. Wilson finally agreed to the terms of the sale as made, took the memorandum of the agreement, read it over, and signed it. The \$20 was then paid over to Wilson, and Jones took the memorandum back, and delivered it to Mrs. Smith. On the following day, Wilson, Jones, and E. T. Smith went to the land, as they all agree, to "step" it off; that is, to approximate how far north from the corner of the hedge fences at the southwest of the field they would have to go in order to get the five acres. Jones "stepped" the land off, and when Wilson saw that the line would go further north than he expected it would he refused to carry out his part of the contract, and for the first time claimed that he had not agreed to sell in a square, but in a plot 20 rods east and west by 40 rods north and south. Thereafter, within a few days, Mrs. Smith, through her husband, E. T. Smith, tendered to Wilson the balance of the purchase money, \$480, and demanded a deed. Wilson refused to accept the money or make the deed, but offered to return the \$20 that had been paid, and to cancel all attempted sales; but this proposal was declined by plaintiff. Thereafter this suit was instituted by her against defendant to compel specific performance of the contract. The balance of the purchase money, \$480, was tendered in court by the plaintiff, and, the defendant having refused

to accept the same, it was paid to the clerk. The court, after having heard the evidence, found for the plaintiff, and rendered judgment as prayed in the petition. In due time defendant filed his motions for new trial and in arrest, which, being of no avail, he appeals.

As a general rule, courts will not enforce the specific performance of a contract when the obligations are not mutual, and capable of being enforced against either one of the parties (*Glass v. Rowe*, 103 Mo. 513, 15 S. W. 334; *Wat. Spec. Perf. Cont. § 190*), but an agreement with respect to the sale of land is an exception to that rule, and, although unilateral, or signed by one of the parties, thereto, will be specifically enforced in equity, the statute only requiring that all such agreements upon which the action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person by him lawfully authorized. Section 3418, Rev. St. 1890. *Mastin v. Grimes*, 88 Mo. 478, was a suit in equity for the specific performance of an agreement for the sale of land in all material respects like the one involved in the case at bar, and *Sherwood, J.*, in speaking for the court, said: "The ruling of courts of equity in this respect constitutes an exception to the principle which requires mutuality in agreements which are to form bases for specific performance. At one time the correctness of this view of the subject was denied. *Lawrenson v. Butler*, 1 Schoales & L. 13; *Armiger v. Clarke*, Rumb. 111. Chancellor Kent seems by his intimations in the cases of *Parkhurst v. Van Cortlandt*, 1 Johns. Ch. 282, and *Benedict v. Lynch*, Id. 370, to have favored the ruling made by Lord Redesdale in the case first cited,—that both parties to the agreement must be bound, or else neither would be; but in a later case (*Clason v. Bailey*, 14 Johns. 484), having occasion to review his former opinion, Chancellor Kent found it to be erroneous, and admitted that the point was too well settled the other way to be questioned. To the like effect are *Fry, Spec. Perf. §§ 295-346*, and cases cited; *Wat. Spec. Perf. Cont. § 201*, and cases cited; *McCrea v. Purmort*, 10 Wend. 460; *Hunter's Case*, 1 Edw. Ch. 1; *Davis v. Shields*, 26 Wend. 341; *Green v. Richards*, 23 N. J. Eq. 32. There are some modern authorities to be found to the contrary of the position here announced, but the great current of authority flows in the direction above indicated. The memorandum, being signed by the party to be charged, and being sufficiently clear and certain, affords a competent basis for specific performance." That case was followed and approved in the more recent case of *Warren v. Costello*, 109 Mo. 338, 19 S. W. 29, and must now be considered as the law of this state.

But it is said that the description of the land in the agreement is so vague and un-

certain that the agreement is not enforceable upon that ground also. While there is much conflict among the authorities as to what is a sufficient description of property in a memorandum or contract of sale in order that it may be specifically enforced by the purchaser, the rule to be deduced therefrom is that "the land need not be fully and actually described in the paper so as to be identified from a mere reading of the paper; but the writing must afford the means whereby the identification may be made perfect and certain by parol evidence." *Black v. Crowther*, 74 Mo. App. 480. In the case at bar the land described in the agreement is "five acres of land in the S. W. corner of the N. E. $\frac{1}{4}$, Sec. 5-57-20, Linn Co., Mo., which I have to-day sold to her for \$500; deed to be delivered when balance of purchase money is paid, I to furnish abstract showing perfect title. Said 5 acres is inside the fence." This description is, we think, of itself sufficiently specific and definite to identify the land from a mere reading of the paper, without more, for it clearly describes the land as five acres in the southeast corner of the N. E. $\frac{1}{4}$ of section 5, township 57, of range 20, in Linn county, inside the fence. No more specific description was necessary in order that any person familiar with the description and admeasurement of land might locate it. But, even if the description given is not specific enough, without more, to justify a decree of specific performance, there can be no question but that it affords the means whereby its identification could be made perfect and certain by parol evidence. Moreover, if any further description was necessary in the way of identifying the land, it was furnished by defendant's answer, in which he, in effect, alleged that, through mistake and by deception and fraud, he was induced to sign the contract by which he was bound to sell 5 acres of land in the southwest corner of his farm, inside the fence, to the plaintiff, for \$500, when he really intended it to be 5 acres, 20 by 40 rods, in said corner.

It is claimed that E. T. Smith was incompetent as a witness for any purpose, and especially for the purpose of showing that he was the agent of his wife, the plaintiff, and as such agent acted for her in the purchase of the land. *Williams v. Williams*, 67 Mo. 661, and *Manufacturing Co. v. Tinsly*, 75 Mo. 458, are relied upon as supporting this contention; but those cases were disapproved in the more recent case of *Leete v. Bank*, 115 Mo. 185, 21 S. W. 788, in which it is held that a husband, under Rev. St. 1889, § 8922, is a competent witness to prove his own agency for his wife. The finding and decree of the trial court were well authorized by the evidence. The judgment should be affirmed, and it is so ordered.

SHERWOOD, P. J., and GANTT, J., concur.

STATE v. HOLLOWAY.

(Supreme Court of Missouri, Division No. 2.
March 12, 1901.)

HOMICIDE—SELF-DEFENSE—ERRONEOUS INSTRUCTIONS—SUFFICIENCY OF EVIDENCE.

1. A number of witnesses for the state testified that defendant, who was in his own house, invited deceased to fight, and while the latter was attempting to take off his coat the defendant drew a revolver, and shot him. None of the witnesses saw any weapon in the possession of deceased. Defendant testified that deceased had a razor, and was pursuing him during the entire shooting, and cut him on the hand, but other witnesses testified that deceased was never near enough to cut defendant. Deceased was shot in the back, and an examination of his person failed to show a razor, and he denied having one. The mother and sister of defendant testified that deceased admitted that he was to blame, and they also testified that defendant's hand was cut, but officers who examined his hand on the succeeding day found no wound. Defendant was shown to have a bad reputation. *Held* to sustain a conviction for murder in the second degree.

2. Where deceased is shot in the back, and all the witnesses present at the time except defendant testify that deceased was not attacking defendant when the fatal shot was fired, and no wounds are found on defendant's person, an erroneous instruction on self-defense is not reversible error, though defendant, whose reputation was impeached, testified that the shot was fired in self-defense.

3. An erroneous instruction on murder in the first degree will not be considered on an appeal from a conviction for murder in the second degree.

Appeal from circuit court, St. Louis county; Rudolph Hirzel, Judge.

Floyd Holloway was convicted of murder in the second degree, and he appeals. Affirmed.

Matthews & Shackelford, for appellant. Edward C. Crow, Atty. Gen., and Sam B. Jeffries, Asst. Atty. Gen., for the State.

SHERWOOD, J. Some negroes had a dance in St. Louis county, about a mile and a half from Ellisville, on the Clarkson road, on the night of the 30th day of December, 1899, at the house of Matilda Stafford, mother of defendant. The dance ceased about 6 o'clock next morning, and on its discontinuance trouble began between defendant and Austin Watts, in the kitchen, about another glass of wine, which defendant, the master of ceremonies, refused to let him have. Thereupon quarrelling began between them, which resulted in Watts, who was evidently at the time trying to get away from defendant, being shot in the back by the fourth shot fired, whereupon he sank to the floor, and died in a few days thereafter, his spinal marrow being nearly severed by the bullet. Watts, at the time he was shot, was going out of the kitchen. He was going towards the east kitchen door. He was "moving pretty swift." He had left the middle of the kitchen, and was trying to get away. He almost fell in the door. Being raised up, at his request, by two of those present, he was seated in a chair, when he said to those who

assisted him: "I want you boys to search me, and say if I have got a razor. Holloway claimed I was after him with a razor." He then said to Massey and Herman, "There is an iron handled knife in my right-hand pocket." Thereupon they searched Watts, and found no razor on him, and only a little pocketknife, which was closed, and which Watts gave to Herman to keep till he called for it. Dr. Neitert testified that the bullet "entered the back [of Watts] about on a level with the eleventh dorsal vertebra, a little to the left of the median line"; and he stated further that the bullet penetrated the spinal vertebra, and almost severed the spinal cord, resulting in paralysis and death.

As a sample of the testimony given on behalf of the state, Lawrence testified, in substance, the following: "I know the defendant, Floyd Holloway. I knew Austin Watts in his lifetime. Have known Holloway six years. I have lived in that neighborhood for the last six years. Floyd was living at the Stafford House on the 31st of December last. I was there on that day, and in the kitchen at the time the trouble started. It was between seven and eight o'clock in the morning, as near as I can get at it. We were having a little dance there. Floyd had left word at my house that he was going to have a watch raffled, and asked me and my wife to come over, and we went over there; and there was not enough come, and he didn't have it, and so we had a dance instead. Austin Watts and Will Booth furnished the music. The dance broke up about half past five o'clock. Just before this difficulty occurred, Floyd was in the other room somewhere. He was not in the room where I was. Joe Massey, John Stafford, Jim Herman, and myself was in the kitchen, talking about school days. There had been no trouble between any of us that I knew of. Directly Floyd, the defendant, came into the kitchen. Austin says, 'I don't want to fight.' I thought they was playing. But Austin says, 'I don't want to fight. I would not raise my hand to hit you in here at all.' Floyd says, 'I guess you must be looking for something.' And he says, 'Yes, I want a drink of wine.' And Floyd says, 'I just awhile ago gave you a drink. Do you want it all?' Austin says, 'No, I don't want it all. All I want is a drink of wine.' And Floyd says, 'I won't give you the wine.' Austin says, 'That's all right. I don't want to have any fuss. If you come down here for a fuss, you can go back upstairs.' Floyd says, 'You make me go back upstairs.' Austin says, 'No, you can stay in your own house. If you want to fight, I will meet you somewhere, and fight it out.' Then Floyd says, 'You black son of a bitch, if you can fight it out somewhere else, fight it out here;' and Austin went to pull his coat off, and Floyd put his hand in his pocket, and I went for the door. Floyd says, 'You black son of a bitch, if you can fight it out some

place else, you can fight it out here.' Austin didn't say anything, but pulled his coat off. Joe Stafford run and grabbed Floyd, and I saw the pistol coming out of Floyd's pocket, and I fell on my hands and opened the door, and as the door opened the gun said 't-o-o,' and a bullet struck over me. I heard five reports. I didn't see anything in Austin's hand when he took his coat off. I didn't see him get out of his coat though, for when I looked back last he had his coat this way (illustrating), just as I was going for the door. Stafford had hold of Floyd. I saw no cuts or bruises on Floyd's hand or face." Stafford, defendant's stepfather, who was present in the kitchen when the shots were fired, and who, with another, tried to separate the combatants, testified he saw no blood on defendant after the shooting was over. Massey, who was present in the kitchen when the shooting occurred, testified he did not see any marks of cutting on defendant at the time, but saw he had his hand tied up, but didn't see any marks. Herman testified that when defendant fired the first shot Watts was about 15 feet away from him, and that during the tussle Watts did not get close enough to defendant to cut him with a razor or knife, and that witness did not see Watts have any kind of weapon during the scuffle; and no witness testifies that he saw Watts with any weapon during that time except defendant. Booth testified that defendant was getting ready to shoot as Watts was pulling off his coat; that Watts, during the struggle, was not nearer defendant than six feet; and that he saw no cuts on defendant. Hamm testified that defendant said to Watts, "You can fight as good here as outside," and that as Watts was pulling off his coat, and started towards defendant, the latter pulled his pistol, and began to fire; and that witness did not notice any blood on defendant's hands or head. Defendant went to the county jail and surrendered himself on the 1st of January, 1900, and Kerth, the sheriff and keeper of the jail, testified that there was nothing the matter with defendant's finger at that time, nor did he have it tied up. Albert Autenrieth testified that "defendant, Floyd Holloway, came to Clayton on the day after the shooting, and gave himself up. His forefinger was not bandaged. He said that he had gotten into some difficulty, and a man had struck him with a razor, and had cut him on the hand, and I said, 'Floyd, I don't see any cut,' and he said, 'He hit me with a razor, and that is the reason I shot him.'" Heiss, Hock, and Schumacher all testified as to defendant's bad reputation.

On his own behalf, defendant testified substantially as follows: "I live at Ellisville, St. Louis county, Missouri, with my mother, Matilda Stafford. I was at home on the night of the 31st day of December, 1899. After I gave the raffle out, and enough did not come, we postponed it, and thought we

would enjoy ourselves anyway, and I engaged Watts to play; and I told him if I found we didn't have enough to have a raffie I didn't want him, because I couldn't pay him, but I told him if he wanted to stay there with the rest of the people he could do it. We had for refreshments wine, candy, and cake. I had some difficulty with Watts the next morning. That commenced about six o'clock. Immediately before that I was upstairs, but I can't say where Watts was. When I left him, he had his overcoat on, and had bid me the time to go home. I left him at the kitchen door. After I had been upstairs for awhile, Willie Booth called me, and I asked him what he wanted, and he said, 'Austin Watts wants to see you.' Well, I never said anything, and I set there a while, and Willie called me again, and I said, 'What do you want?' And he says, 'Austin wants to see you;' but I set there with the door shut, and in a few minutes after that Austin called me, and he says, 'Come down; I want to see you;' and when I got down to the foot of the steps he says, 'Well, there is something more due me, isn't there?' And I said, 'What is it?' And he says, 'I want more wine.' And I says, 'I told John Stafford to give you some. Did you get it?' 'Yes,' he says, 'but, by God, there is something more than that due me.' He says, 'Do you suppose I would play here all night for nothing?' And I says, 'Austin, you never played but a few sets, and you and me made an agreement that before you played a single set, that, as there was but a little crowd, you would stay and enjoy yourself with us, didn't you?' And I says, 'I will go into the kitchen, and, if there is any money in there that I took up during the time of the dance, I will give it to you;' and he came in behind me, and shut the door, and he says, 'By God, I want a glass of wine.' And I says, 'Well, do you want the jug?' And he says, 'No, I don't want the jug.' And I says, 'Austin, you got the glass of wine that you asked for before you were going home, and I ain't going to give you any now.' And he says, 'Well, I want that wine or the money.' And I says, 'I don't owe you any.' He says, 'That's all right; I will see you after this.' I says, 'What?' And he says, 'That's all right; I will meet you in a country road.' I says, 'What are you talking about,—fighting?' And he says, 'You can call it anything you want to.' And I says, 'If you are talking about fighting, we can settle that right here.' He says, 'I am a man amongst men.' And I says, 'So far as your fighting here is concerned, you can't do it. I don't keep this for a fighting hall.' And he says, 'By God, I am going to have my money or have you;' and he started to take off his overcoat, and he ran his hand down like this (indicating), and threw his overcoat back on his shoulder, and started down with his hand, and that's all I could see. John Staf-

ford grabbed me and Joe Massey him, and when Stafford grabbed me I tried to get loose, and this boy struck over Stafford's shoulder at me. I threw up my hand like that, and he struck me on the hand right here. There is the mark. I had a revolver in my pocket. I had my hand on my pocket when Stafford grabbed me, and he advanced; and I hollered and said, 'Look out, Stafford! that fellow is going to cut me;' and with that he struck me. Massey was trying to keep the fellow away from me. I shot four times. The first shot occurred when Stafford grabbed me by the arm and this fellow advanced. The next shot was fired in the tussle. He was advancing on me all the time. When I shot the fourth shot, he turned, and made a couple of steps, and fell; and I had another bullet yet, but I didn't shoot any more. He just turned as I shot. He was close enough to strike me if I hadn't dodged and got out of his way. The folks tied up my hand, which was bleeding. I never went to the kitchen any more."

Defendant is supported in his testimony as to having had his hand cut by Watts by the testimony of his mother and sister as to the fact of his hand being cut, and that they bound it up, and poured turpentine into the wound; and they also testified that immediately after the shooting they went into the kitchen, saw Watts seated in a chair, and he then admitted that he was in the wrong, and he only was responsible for what had occurred. But on this point their testimony is in direct opposition to the testimony of every other witness present. Nor is that part of defendant's testimony supported where he says: "So far as your fighting here is concerned, you can't do it. I don't keep this for a fighting hall." No other witness corroborates this statement, but all their testimony is at variance with it; indeed, it is directly repugnant to what defendant had testified to but a moment before. Nor is there testimony countervailing that in relation to defendant's bad character, and defendant is the only one of the witnesses present who testified to seeing Watts with a weapon in his hand. Hamm testified that, so soon as defendant began to shoot, Watts began jumping around; and he also testified that Watts was never closer than three or four feet of defendant while they were in the kitchen; and that when the third shot was made Watts was just turning to run, when witness sprang through the door, and on the outside heard the fourth shot. The jury found defendant guilty of murder in the second degree, and assessed his punishment at imprisonment in the penitentiary for the term of his natural life, and on this verdict judgment and sentence went in regular course, and defendant appeals.

Complaint is made on behalf of defendant that the verdict is "the result of prejudice, passion, and partiality." There is no such

ground in the motion for a new trial, and, if there were, the testimony abundantly warrants a verdict for murder in the first degree. Defendant offered to fight Watts in the house where they were. Nothing was said in that offer about a fight with weapons, and, this being the case, if defendant, as the testimony clearly shows, agreed to fight Watts in the room where they were, in the ordinary fashion, in order to take undue advantage of him, and under color of fighting on equal terms, uses from the inception of the contest a deadly weapon on his adversary, as defendant did do, and as the testimony shows he did do, then, according to all the authorities, defendant is guilty of the highest grade of murder. *State v. Christian*, 66 Mo. 138. But it is insisted that the fourth instruction given at the state's instance is incorrect as regards the doctrine of self-defense. This may be true, and yet that furnishes defendant no legitimate ground of censure upon that instruction for the palpable reason that there was no self-defense in this case; and the physical facts in the case as well as the evidence show deceased was shot in the back, as he was attempting to escape from the murderous aim of his adversary; and they show also that defendant was not cut on the hand or on the face, as he pretends he was. The shot in the back of a fleeing adversary shows the true animus of defendant in doing the fatal act; shows it was not prompted by self-defense. Neither courts nor juries should stultify themselves by believing physical impossibilities. No amount of perjured testimony can break down the fact that defendant was shot almost squarely in the back. This could not have occurred if Watts was advancing on defendant all the time, as defendant swears he was. *State v. Anderson*, 89 Mo. 312, 1 S. W. 185; *State v. Gilmore*, 95 Mo., loc. cit. 564, 565, 8 S. W. 359, 912; *State v. Bryant*, 102 Mo. 24, 14 S. W. 822; *State v. Tabor*, 95 Mo. 585, 8 S. W. 744; *State v. Turlington*, 102 Mo. 642, 15 S. W. 141. Nor, in this connection, should it be forgotten that defendant's reputation was thoroughly impeached. The instructions as to self-defense, taken as a whole, seem to be substantially correct.

Instructions were given on murder in the first and second degrees and on manslaughter in the fourth degree, as to which it is needless to say more than that they were very favorable to defendant, and covered all the ground legitimately covered by those asked by defendant.

Complaint is further made that error occurred in giving an instruction on murder in the first degree. But this point is not open to contention in this court, owing to the fact that defendant was not found guilty of that grade of homicide. See cases cited in state's brief. In defining murder in the first degree, a definition is given of "de-

liberately" in connection with the term "violent passion," which is not defined. Inasmuch, however, as defendant was not convicted of the grade of crime referred to, the failure to define "violent passion" can have worked him no hurt. See *State v. Snell*, 78 Mo. 240.

For these reasons, judgment affirmed. All concur.

STATE ex rel. GOTTLIEB, Collector, v.
METROPOLITAN ST. RY. CO.

(Supreme Court of Missouri. Feb. 19, 1901.)

STREET RAILROADS—TAXATION—STATUTORY PROVISIONS—ASSESSMENT—LEVY CONSTITUTIONAL LAW—CLASS LEGISLATION.

1. Act Gen. Assem. 1897, to provide a more uniform assessment and taxation of street railroads in cities, by sections 1 and 2 provides that the chief officer of every street-railway company in every city shall furnish to the state auditor a statement setting out the full length of the line, and the length in each county, municipal township, and city through or in which it is located, which shall be taxed as property of private persons, and assessed, apportioned, certified, levied, and collected in the same manner as other railroad property. Section 3 repeals all acts inconsistent with the act. *Held*, that a street railroad, a part of whose line is within two cities and a part not within any city, is subject to taxation under such act.

2. The act being applicable to all street railroads in the state is not unconstitutional as class legislation.

3. Act Gen. Assem. 1897, §§ 1-3, provide that a statement of the property of a street-railway company shall be made to the state auditor, the property so returned to be assessed, and taxes thereon levied and collected, as other railroad property. 2 Rev. St. 1889, c. 138, art. 8, divides the property of railroads for the purposes of taxation into two classes, the local and the distributable; the distributable consisting of roadbed, rolling stock, and other movable property, which is returned by the company to the auditor, assessed as an entirety by the state board of equalization, the value apportioned among the several counties, cities, towns, villages, and municipal townships in which the road is located, and the assessment certified to the county court. *Held*, that it was proper to assess the whole property of a street railroad, and apportion and certify its assessed value in the manner prescribed for the assessment of the distributable property of other railroads.

4. Under Act Gen. Assem. 1897, §§ 1-3, providing that the whole property of a street railroad shall be subject to taxation to the same extent as the property of private persons, the taxes to be levied and collected in the same manner as on other railroads, it was proper to levy the school taxes at the rate levied on other property in each school district, instead of at the average rate of several school districts throughout the county, as prescribed for levying school taxes on other railroads by 2 Rev. St. 1889, § 7732.

In banc. Appeal from circuit court, Jackson county; Edward P. Gates, Judge.

Action by the state, on the relation of Chris Gottlieb, collector of revenue of Jackson county, against the Metropolitan Street-Railway Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Frank Hagerman, Daniel B. Holmes, and Willard P. Hall, for appellant. H. M. Meriwether, for respondent.

BRACE, J. This is an action in the name of the state by the collector of the revenue of Jackson county to recover delinquent taxes for the year 1898, assessed and levied on the property of the defendant in that county, as follows: For school taxes of the school district of Kansas City, \$9,233.56; for school taxes for the school district of Independence, \$117.19; for school taxes for the school district of Westport, \$384.23; for school taxes of district No. 4—49—33, \$24.97; for school taxes for district No. 3—49—33, \$117.78; for school taxes for district No. 9—49—32, \$94.02; for school taxes for district No. 2—50—32, \$181.57,—amounting in the aggregate to the sum of \$10,153.32, for which amount, with interest, penalties, and costs, the plaintiff obtained judgment in the circuit court, and the defendant appeals.

These taxes were assessed and levied in pursuance of the provisions of an act of the general assembly approved March 11, 1897, entitled "An act to provide a more uniform assessment and taxation of street railroads in cities of this state," which is as follows:

"Section 1. On or before the first day of January in each year, the president or other chief officer of every street railroad company in every city of this state whose line is now or shall hereafter become so far completed and in operation as to run horse cars, electric cars, cable cars or cars propelled by any other device for the transportation of passengers, shall furnish to the state auditor a statement, duly subscribed and sworn to by said president or other chief officer, before some officer authorized to administer oaths, setting out in detail the full length of the line, so far as completed, including branch or leased lines, the entire length in this state, the length of double or side tracks, the length of such line located upon real estate to which such company may have title as right of way, the length of such line located upon the public streets or thoroughfares of any city, together with all cars, motors, grip cars, live-stock, electric trolley wires, cables, cable conduits, power houses, stables and all other property, real, personal or mixed, owned, used or leased on the first day of June, which may be used in or incident to the operation of such street railroad, the length, of such line in each county, municipal township and city through or in which it is located, and the cash value of the several items embraced in the statement.

"Sec. 2. The said property returned to the state auditor, as by the first section of this act required, shall be subject to taxation for state, county, municipal and other purposes to the same extent as the real and personal property of private persons, and the same shall be assessed, apportioned, certified and the taxes thereon levied and collected at the

time and in the manner which is now or may hereafter be provided by law for the assessment and taxation of other railroad property.

"Sec. 3. It being the purposes of this act to make the property of street railroads in cities assessable and taxable in the same manner which is now or may hereafter be provided by law for the assessment and taxation of other railroad property, all acts and parts of acts inconsistent or in conflict herewith, are hereby repealed."

Laws 1897, pp. 215, 216.

The city of Kansas is the domicile of the defendant, and the seat of its plant. The city of Westport is contiguous thereto, and the city of Independence is in the vicinage thereof. The line of defendant's railroad is located on the streets and thoroughfares of those cities, and between Kansas City and Independence passes over territory not within the corporate limits of either of those cities.

1. The first contention of the defendant is that by reason of the fact that the whole of the defendant's line of railroad is not in a single city, and part of it not within the limits of any city, the law does not apply to the defendant or its property. This contention seems to be based upon the use of the words "in cities" in the title and text of the act. The purpose of the act, evident upon its face, is to provide a uniform system for the assessment and taxation of that class of property known as "street railroads," and to this end the act requires that the chief officer "of every street-railroad company in every city of this state" furnish the state auditor with a sworn statement of the length of its line of railroad "in this state," its length "in each county, municipal township, and city through or in which it is located," its length upon real estate to which the company has "title as right of way," and the length of such line located upon "the public streets or thoroughfares of any city," together with all other property, real, personal, or mixed, "used in or incident to the operation of such street railroad." The property thus returned is the property for the assessment and taxation of which this act makes provision. That the defendant is "a street-railway company in a city of this state" is beyond question. That the property of such a company comes within the provisions of this act, not only when its line is located on "the public streets and thoroughfares" of a single city, but also when located on the public streets and thoroughfares of any city, one or more, "through or in which it is located," and also when its line may be extended on its "right of way" through or into "a municipal township not within the limits of such cities," is a fair and reasonable construction of this act. The words "in cities," in the title, and in section 3 of the act, were evidently used as words of description, and ought not to have the effect

of limiting the terms of the text as a whole. This act is applicable to the defendant's street railroad, and, being applicable as well to all other street railroads existent in this state, is not obnoxious to the constitutional inhibitions of class legislation; and this also disposes of defendant's second contention.

2. The defendant's main contention, however, is that these school taxes are void, for the reason that they were not assessed and levied in accordance with the provisions of this act, the second section of which requires that the property so returned to the auditor "shall be assessed, apportioned, certified, and taxes thereon levied and collected, at the time and in the manner which is now or may hereafter be provided by law for the assessment and taxation of other railroad property," and the third section of which declares the purpose of the act to be to make the property of street railroads "assessable and taxable in the same manner which is now or may hereafter be provided by law for the assessment and taxation of other railroad property"; and it is on these provisions of the act that this contention seems to be based. By the law for the assessment and taxation of other railroads (article 8, c. 138, 2 Rev. St. 1889) the property of such railroads, for the purposes of taxation, is divided into two classes; one consisting of the roadbed, rolling stock, and other movable property, which, for convenience, may be designated as "distributable property." This class is returned by the company to the auditor, assessed as an entirety by the state board of equalization, and the value thereof apportioned to the several counties, cities, towns, villages, and municipal townships in which such railroad is located, and the assessment certified to the county courts. Sections 7718, 7727. The other class, which may be designated as "local property," embracing all other property of such railroads, and which is not returned to the auditor, is assessed by the local authorities as other local property is assessed. Section 7728. Upon these assessments the county courts levy the taxes authorized by law. Sections 7728, 7731. Now, by the first section of the act of March 11, 1897, all the property of a street railroad is required to be returned to the auditor, and this is the property which, by this act, the state board of equalization is required to assess, apportion, and certify to the county courts in the manner provided by law for the assessment of other railroad property. The only manner provided by law for that board to assess the property of other railroads was that prescribed for the assessment of the distributable property of such railroads, and that is necessarily the manner required by this act for the assessment of the whole property of a street railroad. The defendant's railroad was assessed, the assessed value apportioned and certified to the county court in that manner, and hence assessed in accordance with the requirements of the act. Prior

to this enactment, the whole property of a street railroad was subject to assessment for taxes by the local authorities. The effect of this act in that respect was simply to change the assessing authority from them to the state board of equalization, and we know of no reason why this might not have been done. This brings us to the levy. The manner provided by law for the levy of school taxes upon the property of other railroads is as follows: "For the purpose of levying school taxes, * * * in the several counties of this state, on the roadbed, rolling stock, and movable property of railroads in this state, the several county courts shall ascertain from the returns in the office of the county clerk the average rate of taxation levied for school purposes * * * by the several local school boards or authorities of the several school districts throughout the county. Such average rate for school purposes shall be ascertained by adding together the local rates of the several school districts in the county, and by dividing the sum thus obtained by the whole number of districts levying a tax for school purposes, and shall cause to be charged to said railroad companies taxes for school purposes at said average rate on the proportionate value of said railroad property so certified to the county court by the state auditor, * * * and the said clerk shall apportion the said taxes for school purposes, so levied and collected, among all the school districts in his county, in proportion to the enumeration returns of said districts;" provided "that all lands, workshops, and warehouses, and other buildings and personal property belonging to such railroad company lying in any school district, shall be taxed at the same rate as other property in such district, and the school taxes * * * thereon shall go to the district in which such lands, depots, workshops, or buildings are situate." Section 7732. The defendant's contention is that, as the whole of its property was assessed under this act in the manner that the distributable property of steam railroads is required to be assessed, the school taxes ought to have been levied thereon at the rate prescribed by the statute for that class of the property of such railroads,—that is, at the average rate of the several school districts throughout the county,—instead of, as they were, at the rate levied upon other property in each district; and that, if the school taxes had been so levied, they would have been several thousand dollars less than they are. There would be much force in this contention if the law went no further than the clauses we have been hitherto specifically considering, but this contention, and the argument in support of it, leaves out of view the first clause of section 2, containing the dominant idea of that section; i. e. "the said property returned to the state auditor as by the first section of this act required, shall be subject to taxation for state, county, municipal and other purposes to the same ex-

tent as the real and personal property of private persons." This clause of the act furnishes a complete and satisfactory answer to the argument in support of this contention. The only way that defendant's property could be subjected to taxation for school purposes to the same extent as the property of private persons was by levying the same rate therefor on its property in each district as was levied upon the property of private persons. At these rates the taxes sued for were levied, and having been, as we have seen, assessed and levied in accordance with the requirements of this act, the judgment of the circuit court ought to be affirmed, and it is accordingly so ordered. All concur.

WINTER v. KANSAS CITY CABLE RY. CO.
(Supreme Court of Missouri, Division No. 2.
June 30, 1900.)

EQUITY—JUDGMENT—SETTLEMENT AND COMPROMISE—FRAUD—RELEASE UNDER SEAL—CONSIDERATION—RESCISSION—AMOUNT RECOVERED—AMOUNT PAID—TENDER—NECESSITY.

1. An infant obtained a judgment for \$5,000 against a solvent railroad company, which was affirmed by the supreme court. On execution sued out against it, defendant interpleaded against the next friend of the infant and curators appointed for him by different courts, but without paying the money into court. The rightful curator, on representations by a friend of defendant that the litigation would be protracted if settlement were not made, obtained an order from the probate court to accept \$1,500 in full settlement of the judgment, which, with interest accrued, then amounted to \$6,900. Satisfaction of the judgment was then entered on the records. The order was subsequently rescinded on the ground of mistake as to the facts. *Held*, that there was no consideration for the release of the balance due on the judgment, the infant's right thereto being no longer in dispute.

2. The discontinuance of vexatious lawsuits brought to harass the attorneys of an infant who had obtained a final judgment against a railroad company, and to delay the collection thereof, furnishes no consideration for a release of the judgment by the infant's curator for less than the amount due thereon.

3. Where a curator, under authority of the probate court, released on the record an infant's judgment against a railroad company for less than the amount due thereon, and unnecessarily attached his seal thereto, the seal did not conclusively import a consideration for the discharge of the entire debt.

4. Rev. St. 1889, § 2000, provides that whenever a specialty or other written contract for the payment of money or delivery of property shall be the foundation of an action or defense in whole or in part, or shall be given in evidence in any court without being pleaded, the proper party may prove want or failure of consideration thereof, in whole or in part. *Held*, that equity would inquire into the consideration of a curator's release under seal of an infant's judgment for less than the amount thereof.

5. Where an infant sought to rescind his curator's settlement for less than the amount due on his judgment against a railroad company, on the ground of fraud and want of consideration, he was not obliged to tender the amount paid, to recover the balance due, since he was entitled to this in any event.

Appeal from circuit court, Jackson county; Charles L. Dobson, Judge.

Suit by Willie Winter, by Thomas R. Smith, curator, against the Kansas City Cable Railway Company, to set aside a compromise. A judgment for plaintiff was affirmed by the Kansas City court of appeals, and certified on dissent. Affirmed.

The following opinions were filed in the Kansas City court of appeals:

"SMITH, J. This is a suit in equity. For a proper understanding of the questions presented for decision, no better general statement of the case can be made than is to be found in the allegations of the petition, which are as follows:

"Plaintiff says: That Thomas R. Smith is the duly appointed and legally qualified curator of the estate of said Willie Winter, a minor under the age of fourteen years. Said Smith was appointed curator of said estate January 29, 1890, by the probate court of Buchanan county, in which county said minor then resided. Defendant is a corporation duly incorporated. That the estate of said minor then consisted of a judgment of the circuit court in and for Jackson county, Missouri, sitting at Kansas City, for the sum of \$5,000, against said defendant, rendered on due service, and dated April 22, 1886, in favor of said Willie Winter, by his next friend, D. R. Stevens. That on the 2d day of January, A. D. 1890, said judgment was affirmed by the supreme court of the state of Missouri [12 S. W. 652], and no other proceedings to reverse or modify or in any way affect the validity of said judgment have been commenced or prosecuted. The said Smith had no connection with, nor personal knowledge of, the litigation to procure said judgment, or of the appeal to the supreme court to reverse the same, as said proceedings on behalf of said minor were conducted wholly by said next friend. On or about the 17th day of March, A. D. 1892, at St. Joseph, Missouri, said Thomas R. Smith was approached by defendant's agent, whom said Smith at the time supposed and believed to be the attorney for said Willie Winter. That he was informed by said agent that said judgment was in litigation of a tedious and complicated nature, and that defendant was willing to pay the sum of \$4,500 in settlement of said judgment. Relying upon the representations so made as aforesaid, said Smith the same day made application at the February term, A. D. 1892, to the probate court of Buchanan county, for, and procured, an order authorizing said curator to accept said sum in satisfaction of said judgment. And on the next day, March 18, 1892, at Kansas City, Missouri, said Smith accepted from defendant said sum, and entered on the margin of the record of said judgment satisfaction in full thereof, as curator of said estate. Said judgment, when so satisfied, principal and interest, amounted to the sum of six

thousand seven hundred and seventy (\$6,770) dollars, exclusive of costs. Thereafter, at the same term of said court, on due notice to defendant, plaintiff made application to have said order of said probate court authorizing said settlement set aside, which order said court made during said term in the following words and figures, to wit:

"In the Probate Court within and for Said County. At the February term, 1892, on this 7th day of May, 1892, during the session of said court, among other things had and done was the following, to wit:

"In the Matter of the Estate of Willie Winter, Minor. Now, on this day the motion of Thomas R. Smith, public administrator of Buchanan county, Missouri, in charge of the estate of said minor, to set aside an order of this court heretofore made, ordering and directing a compromise of a judgment against the Kansas City Railway Company, coming on to be heard, and it being shown to the court that due notice of the hearing of said notice has been served on said company, the same is submitted to the court on the evidence offered; and it appearing to the court that the order of this court heretofore made at this term on the 17th day of March, 1892, directing the public administrator in charge of said estate to accept \$4,500 in full settlement of a judgment against the Kansas City Cable Railway Company, was made on a mistake of facts as to the amount due on said judgment, and as to litigation in relation thereto then pending, and in reliance by said administrator upon the representations of said railway company, which representations were not true, and it now appearing that said judgment was final; that the same, with interest, amounted to about \$6,800, instead of \$5,000, as represented; and that said railway company and its securities, who were and are liable therefor, are solvent; and it further appearing that pursuant to said order of this court, that said administrator accepted said sum of \$4,500 of said company, and entered satisfaction thereof in good faith, by mistake, as aforesaid,—it is now ordered that said order directing a compromise of said judgment be, and the same is now hereby, set aside, to the end that the same shall not prevent other and further proceedings for the collection of the balance remaining due and unpaid on said judgment, and that said administrator be, and he is now here, ordered to enter a credit on said judgment for said sum of \$4,500 as of the date of receipt thereof, instead of a satisfaction in full of said judgment."

"Plaintiff says that said settlement of said judgment was made on a mistake as to the facts, relying on the representations of defendant as aforesaid, and without any consideration whatever. Said judgment is unpaid, and, except as herein stated, in full force and effect. Wherefore plaintiff prays that said settlement of said judgment, and the aforesaid satisfaction of the same of

record, may be canceled, declared null and of no effect; that said \$4,500 may be applied on said judgment as part payment; and that judgment be rendered against defendant and in favor of plaintiff for the balance due on said judgment, to wit, the sum of twenty-five hundred eighty-three and ⁹⁰/₁₀₀ dollars, and interest from the date of the filing of this petition."

"The answer was a general denial. The decree in the court below was for the plaintiff, and defendant has appealed.

"1. The plaintiff, to maintain the issue in his behalf, was permitted, against the objections of defendant, to prove certain declarations of Vinton Pike, on the assurance given by the defendant that he would later on connect Pike with defendant in the capacity of attorney or agent. The objectionable declarations of Pike, just referred to, were those made by him to the curator and Mr. Carolus, and which the testimony of the two latter tended to prove. The curator testified that Pike told him that he believed the best thing to do was to accept the \$4,500 offer of settlement made by the defendant, and to procure an order of the probate court authorizing the same; that there might be trouble in getting the \$5,000; that defendant would not settle it, perhaps, without being forced; and that litigation would eat up the amount. These and other similar declarations made by Pike to the curator respecting the signing of the paper requesting that the probate court, by an order, authorize a settlement of the judgment, and the subsequent occurrences connected with the curatorship, were testified to by the curator. Carolus testified: That Pike told him that plaintiff resided in Buchanan county, and had a judgment against defendant for \$5,000. He said defendant had no objection to paying the money, but wanted to pay it to a proper guardian; that there were proceedings to have a guardian appointed in Kansas City, etc. That, when Pike received notice of the motion to set aside the appointment as curator, that he (Pike) told him (witness) to resist the motion when it came up. That he (witness) asked Pike to assist him, but the latter refused, saying the defendant did not want to be known in the matter; that defendant was tired of certain lawyers bringing suits against them, and wanted to give them as much trouble as they could, and to wear them out. That Pike sent for witness, and told him that there was a proposition made by defendant to compromise the judgment, which had been affirmed by the supreme court, but that the defendant would litigate it considerably; that there had been an execution, and there would be a great deal of litigation; that he thought it would be advantageous to plaintiff to compromise the matter, and for him to see the curator and talk over the matter with the probate judge. He further told him (witness) that the litigation would amount to a great deal

more than the difference between the amount of the offer and that of the judgment; that he informed the witness, in confidence, that defendant was not as solvent as Thompson, the lawyer who obtained the judgment, thought it was; that the possibilities were that the judgment would not be made at all; that, in view of all this, he thought it advisable to compromise the judgment. He further testified that, at the time Pike requested him to hunt up the plaintiff, that he (Pike) told him that plaintiff's stepfather was a drunkard living in Kansas City, and that proceedings had been set on foot down there to have a guardian appointed, and that plaintiff's estate would be so manipulated that the stepfather would get hold of it, and also that the attorneys who had obtained the judgment were trying to rob the plaintiff's estate by getting one-half of such judgment; that the plaintiff's interest required the appointment of a guardian, so as to compel the attorneys to come and sue for their fees, where they could only obtain a reasonable allowance for their fees; and that Pike told witness that he represented the defendant from the beginning. These, with other declarations of Pike, were testified to by the witness. It is proper here to state that Pike, in his testimony, specifically denied that he made either or any of the declarations to which the curator and Carolus testified. In vain have I searched the record for the assured evidence that was to establish the existence of the relation of attorney or agent between Pike and defendant. The contradicted testimony of Pike and Lucas (the latter the general attorney for the defendant) was to the effect that the former was not employed by defendant to act for it to procure the appointment of the Buchanan county curator, nor to effect a settlement of the judgment. Whatever inferences there might have been drawn from the circumstances proved by the testimony of the curator and Carolus are rebutted by the negative testimony of Pike and Lucas. It therefore follows that the testimony of the curator and Carolus as to the declarations of Pike should not have been admitted, or, if admitted on the plaintiff's assurance, the same should have been subsequently stricken out, when it appeared that the plaintiff was unable to make good his assurance.

"2. The plaintiff assails the validity of the satisfaction of the judgment on three distinct grounds, namely: First, that it was procured by fraud; second, that it was the result of mistake; and, third, that it was wholly without a supporting consideration. If either of these grounds finds substantial support in the testimony contained in the record, then the decree must stand; otherwise, not. If we exclude from consideration, as we must, the declarations of Pike already mentioned, it then remains only to consider whether the representations contained in the application for leave to settle the judgment

which was prepared by the defendant and signed by the curator, and presented by him to the probate court, were false and fraudulent, and, if so, whether the satisfaction of the judgment was induced thereby. It appears from the testimony that in the latter part of 1889, or early part of 1890, defendant's said attorney, Lucas, mentioned to Pike the fact that plaintiff had judgment against defendant, and that as he resided, as he was informed, in Buchanan county, he ought to have a curator appointed there, to take charge of his estate, and that, acting upon this suggestion, Pike requested Carolus to look into the matter, which the latter accordingly did, and the result of which was that Smith was appointed curator of plaintiff's estate by the probate court of Buchanan county. It must be inferred from the circumstances disclosed by the testimony that Pike was influenced in his action by no feelings other than those of kindness for the plaintiff, and a desire to open the way for the ultimate professional employment of his young lawyer friend in the management of the plaintiff's estate by the curator to be appointed. The curator, after his appointment, having been apprised of Pike's connection with his appointment, constantly sought his advice in relation to the management of the estate of his ward, so that, without any special employment to that effect, he (Pike) became the recognized attorney for the curator in every matter which concerned the plaintiff's estate. The curator understood that Pike was in the employ of the estate, for he had testified that he expected to pay him for his services. It appears that the plaintiff, by his next friend, Stevens, brought his suit and recovered judgment against defendant; that after the affirmance of the judgment an execution was issued thereon, and that defendant filed a motion in said court to quash the same, on the ground that the plaintiff had a lawfully appointed curator, who alone was entitled to sue out the execution on the judgment. This motion was overruled, and, from the order overruling the same, defendant appealed to the supreme court. It appears further that, on or about the day of the appointment of the said Smith as curator for plaintiff, another curator for plaintiff was appointed by the probate court of Jackson county. It also appears that still another curator was appointed for plaintiff by a Kansas court. These various representatives of the plaintiff claimed the right to collect the judgment. About this time the defendant brought a suit in equity, in which the next friend, the two Missouri curators, the attorneys of the next friend, the plaintiff herein, and the sheriff were made parties defendant. The object of the suit was to require the defendants therein to appear and litigate their respective rights to the judgment, so that upon the determination thereof the defendant herein could discharge the same, and for an injunction,

etc. The plaintiff's Buchanan county curator turned over the matter, so far as affected him in his fiduciary capacity, to Pike, who caused an answer to be filed wherein was set up his (the curator's) claim to the judgment. It further appears that Thompson, the attorney for plaintiff's next friend, already referred to, filed a motion in the probate court of Buchanan county for the removal of the curator appointed by that court, which was successfully resisted by Pike for the curator. Later on Thompson presented a claim for allowance to the Buchanan probate court against the plaintiff's estate, which was resisted by Pike for the curator. This claim was subsequently withdrawn by Thompson. Two years or more after the appointment of the Buchanan curator, and while the interpleader suit was yet undisposed of, and the appeal on the motion to quash the execution was pending in the supreme court, Lucas, the attorney of defendant, made an offer of \$4,000 to Pike in settlement of the judgment. This offer, it appears, Pike rejected, but stated that, if he would make a proposition in writing offering \$4,500, he (Pike) would submit it to the curator. Thereupon Lucas drew the application for leave to settle on payment of the last-named sum, which was mailed to Pike, who caused the same to be submitted to the curator. The application was favorably considered by the curator, who signed and presented it to the probate court. It appears that Pike appeared before the probate court, and, in connection with the curator, favored the making of the order authorizing the acceptance of the defendant's offer. It appears further from the testimony of the curator that he was governed in his action wholly by the counsel and advice of Pike, and that Pike did his thinking for him, and that in the management of the estate of his ward he conformed in every particular to the views of Pike. During the two years in which Pike had been connected with the curator as his attorney and adviser, he had become fully acquainted with every phase of the controversy between plaintiff and defendant. It is insisted that that part of the curator's application to the probate court which represented 'that the sole estate of said minor consists of a judgment for \$5,000 rendered in favor of said minor in the circuit court of Jackson county, Missouri, on the 22d of April, 1886, against the Kansas City Cable Railway Company; that the said judgment is and has been in litigation, and litigation concerning the same is now pending both in the said circuit court and the supreme court of said state, and it is entirely uncertain when the said litigation will terminate. It having been begun in the year 1885, and there being two suits pending now, instead of one, as then, and three claimants for the judgment now,'—was false and misleading as to the amount then due on the judgment. Since the date and amount of the judgment

were truly represented, it may be fairly presumed that both Pike, the curator's alter ego, and the probate judge, knew the judgment, under the statute, bore interest at the rate of six per cent. per annum from the date when it was given, so that it will not do to say that the representation in this regard was false, or that the application suppressed any material fact in respect to the judgment, or that the curator or the probate judge was unadvised thereby as to the amount of the judgment. Nor do we think that the representation as to the existing litigation was false. It is not disputed that the interpleader proceeding and the motion to quash the execution previously referred to were then pending and undisposed of. Certainly, if these actions were to be prosecuted, it was quite uncertain when or how they would terminate. It may be conceded that, whatever way they terminated, the amount of the judgment would not be reduced, but this concession in no way impugns the correctness of the representation last alluded to. While the amount of the judgment was an important factor to be considered in determining whether or not the defendant's offer of settlement should be accepted, it was not the only one. The plaintiff was a fatherless infant, under fourteen years of age, who had no estate other than the judgment out of which he could be supported and educated. Seven years had come and gone since plaintiff, by his next friend, had invoked the assistance of the court in enforcing payment of his claim. The assertion of conflicting titles to the judgment had given rise to the two collateral actions to which the application referred, and made it quite likely that payment would be still further deferred. The representation, then, as to the litigation was not only true, but was a proper matter to be considered in connection with the defendant's offer. I am unable to discover that the application of the curator falsely represented any fact, or that the curator and the probate court were not fully advised of every fact material to a full and fair consideration of the defendant's offer of settlement. There is much irreconcilable conflict in the testimony of the witnesses, which it is unnecessary for us to specially notice. It is sufficient to say that a very thorough examination of all the testimony has not led us to the conclusion that the settlement was induced by the misrepresentation of any material fact by defendant, or that, under the circumstances, it was imprudent or ill advised.

"3. It is true that it is a well-settled rule of equity that, where a contract has been materially induced by an innocent but substantial misrepresentation of one of the parties, the other contracting party may avoid or rescind it. *Sachleben v. Heintze*, 117 Mo. 520, 24 S. W. 54. The testimony presented by the record does not disclose that the settlement was induced by any misrepresentation

whatever, and therefore the rule just quoted is without application to the present case. I do not think the testimony adduced sufficient to authorize a court of equity to disturb the settlement in question on the ground of mistake.

"4. The settlement made by the curator with the defendant in pursuance of the authority conferred by the order of the probate court was evidenced by an entry on the margin of the judgment as follows: 'I, Thomas R. Smith, public administrator and ex officio public curator of Buchanan county, Missouri, and as such in charge of the estate of William Winter, the plaintiff in this judgment, in pursuance of the authority vested in me by law, and by virtue of an order of the probate court of said county, do hereby acknowledge full satisfaction of this judgment and costs. Witness my hand and seal this 18th day of March, A. D. 1892. Thos. R. Smith, Curator. [Seal.] Attest: H. H. Noland, Clerk, by W. B. Winn, D. C.' The defendant contends that the said marginal entry is a release of the judgment, but this the plaintiff denies, and insists that it is no more than a receipt, but, if the former, it is wholly without consideration. A release has been defined to be the act or writing by which some claim or interest is surrendered to another; the giving up or abandoning of a claim or right to the person against whom the claim exists, or the right is to be exercised or enforced. 20 Am. & Eng. Enc. Law, 740; Shep. Touch. 320; And. Law Dict. 871; Rap. & L. Law Dict. 1000; Tayl. Law Dict. 585. No set form of words is necessary to constitute a release. Such words should be used as will express the intention, and such intention will be recognized in law and equity. 20 Am. & Eng. Enc. Law, supra, and cases cited in note 5. It has been expressly declared by one statute that a marginal acknowledgment of satisfaction shall have the effect of a release. Rev. St. 1889, §§ 6028, 6030, 6032. I think there can be no doubt that the said marginal acknowledgment is a 'release,' in every sense that term implies. A release may be under seal, or it may not. If of the former kind, it is good, without further proof of consideration than the seal imports. 20 Am. & Eng. Enc. Law, 741. In Leake, Cont. (3d Ed.) 704, it is said: 'A release under seal, being subject to the rules and incidents of a contract under seal, does not require a consideration to support it, either at law or in equity.' The learned author, on page 124 of the same work, further says that: 'Contracts made by deed under seal do not require a consideration to give validity to the promise, in the same sense as simple contracts by agreement. * * * With contracts under seal, a deliberate intention to make a binding promise is presumed, from the formalities required in the execution of the deed. Hence a voluntary promise (that is, one that is gratuitous or without consideration) may be binding in the form of a

covenant by a deed under seal, though such promise cannot be made binding in the form of a simple contract. Equity follows the law in this respect, and allows a voluntary covenant full effect. But the courts, in administering equity, though they cannot set aside or restrict the legal operation of a contract merely on the ground that it is voluntary, yet refuse to apply the auxiliary remedies of specific performance, injunction, or other purely equitable remedies.' In Storm v. U. S., 94 U. S., loc. cit. 84, 24 L. Ed. 45, it was said that: 'The seal imports a consideration, or renders proof of consideration unnecessary, because the instrument binds the parties, by force of the natural presumption that an instrument executed with so much deliberation is founded upon some sufficient cause.' Parker v. Parmele, 20 Johns. 134; 1 Smith, Lead. Cas. (7th Am. Ed.) 698; 1 Chit. Cont. (11th Am. Ed.) 20; Paige v. Parker, 8 Gray, 213; Wing v. Chase, 35 Me. 265; 2 Bl. Comm. 446; Fallows v. Taylor, 7 Term R. 475. And it has been declared by us that the rule which permits the consideration clause of a sealed instrument to be explained by parol does not permit the operative effect of a deed to be destroyed by showing there was no consideration whatever. Hickman v. Hickman, 55 Mo. App. 311; Jackson v. Railroad Co., 54 Mo. App. 636. And it was declared in Bobb v. Bobb, 89 Mo. 411, 4 S. W. 511, that the want of consideration cannot be shown, against the recitation in the deed, for the purpose of defeating the operative words of the instrument. The plaintiff, as opposing the trend of the authorities just referred to, calls our attention to section 383, Pom. Eq. Jur., where it is said by that author: 'Equity has applied its principle of looking at the intent, rather than at the form, in some instances, by treating the presence of a seal as a matter of no consequence,—as producing no effect upon rights and duties of parties; in other instances, by disregarding its absence where absence would be fatal at law. Although the common law, in theory, requires a valuable consideration in order to render any agreement valid and binding, yet it declares that a seal is conclusive evidence of such a consideration; and under no circumstances would it permit this arbitrary effect to be removed by evidence showing, no matter how clearly, the absence of any consideration. Equity, disregarding such form, and looking at the reality, always requires an actual consideration, and permits the want of it to be shown, notwithstanding the seal, and applies this doctrine to covenants, settlements, and executory agreements of every description.' By reference to the cases cited in the footnotes of the section, the meaning intended to be conveyed by the language of the section will become clear. It will be seen that the doctrine of the text is limited in its application to those cases where a party seeks specific performance of a voluntary agree-

ment or voluntary covenant under seal. A court of equity will not execute a voluntary contract, and the principle of these courts to withhold their assistance from a volunteer applies equally whether he seeks to have the benefit of a contract, a covenant, or a settlement. Want of consideration is a sufficient reason for refusing the assistance of a court of equity. If, in a suit for specific performance of a contract, it is developed that such contract is voluntary, or, which is the same thing, is supported by no consideration other than that imparted by the seal thereto, the court will refuse to lend the assistance invoked. In no case to which we have had access has this doctrine been extended to the class of cases to which this belongs. If the plaintiff were seeking to enforce specific performance, rather than to overthrow the contract, and the defendant were defending on the ground that the contract was without consideration other than that imported by the seal, the doctrine announced in the excerpt already quoted from Pomeroy's Equity Jurisprudence would apply. But in a case like this the contract will be given full effect in both law and equity. Leake, Cont. 124, *supra*. In *Riley v. Kershan*, 52 Mo. 224, cited by plaintiff, it was said 'that the established rule to be found in all the earlier cases is that the payment of part of a debt or liquidated damages is no satisfaction of the whole debt, even where the creditor agrees to receive a part for the whole, and gives a receipt for the whole demand. But this rule must be so far qualified as not to include the common case of the payment of a debt by a fair and well-understood compromise, carried faithfully into effect, even if there were no release under seal.' The effect of the seal is, by implication, here fully recognized. The authorities fully establish the rule that where there is an overdue money demand, liquidated and not disputed, and a part only of it is paid, though this is accepted as full satisfaction, there is only part performance of the obligation in kind, and the agreement to discharge the residue of the debt not paid is void for want of consideration. *Suth. Dam.* 426. This rule rests mainly upon a want of consideration for the new agreement or promise. But it is without application here, for the reason that the agreement to discharge is evidenced by a release under seal, which conclusively imports a consideration. In *Ryan v. Ward*, 48 N. Y. 204, it was said: 'A man cannot by the payment of \$1,500 pay an admitted debt of \$2,000. This has never been the law. In such case nothing less than a technical release under seal can bar a recovery.' I am referred to *Saunders v. Blythe*, 112 Mo. 1, 20 S. W. 319, where it was said: 'The release recited only the nominal consideration of one dollar, but it was under seal, and became an executed contract upon delivery and acceptance. As such, no other consideration was necessary to support it, so far as concerns

the legal rights of the parties thereto; and no equities are involved or have been invoked in the case.' This statement of the law is not at variance with what I have already stated it to be. Though the release was under seal, it was not impregnable to assault in equity on the ground of fraud or mistake; and this was, no doubt, what was meant by the remark of the court in the latter part of the above paragraph. The case recognizes fully the force and effect of the rule that an instrument under seal requires no other consideration for its support, and that such instrument is valid until set aside for fraud or mistake. I am, therefore, of the opinion that the release of the judgment ought not to be overthrown for want of consideration.

"It is further insisted by the defendant that the release is supported by a valuable consideration as well as that imported by the seal. Chancellor Kent has defined a valuable consideration to be one that is either a benefit to the party promising, or some trouble or prejudice to the party to whom the promise is made. 2 Kent, Comm. (2d Ed.) 465. If the least benefit or damage be received by the promisor from the promisee or a third person, or if the promisee sustain any or the least injury or detriment, it will constitute a sufficient consideration to render the agreement valid. A court will shut its eyes to the inequality between the consideration and the promise. *Wirt v. Schuman*, 67 Mo. App., loc. cit. 172, and cases cited; *Brownlow v. Wollard*, 66 Mo. App. 636. In *Hooker v. Insurance Co.*, 69 Mo. App. 136, this court, in speaking through Judge Ellison, said: 'The law is that a contract whereby the creditor agrees to accept or does accept a sum of his debtor less than the debt will not prevent the creditor recovering the whole of the original debt, for the reason the contract is without consideration. But if there be any benefit, or even any legal possibility of benefit, to the creditor, thrown in, that additional weight will turn the scale, and render the consideration sufficient to support the agreement.' *Jaffray v. Davis*, 124 N. Y. 164, 26 N. E. 351, 11 L. R. A. 710. In the case just cited will be found many illustrations in support of the proposition quoted. Thus, if the payment of the lesser sum is provided to be made at a different place from that where the original was to be paid, it is a sufficient consideration. *Foakes v. Beer*, 9 App. Cas. 605. So the receipt of a negotiable note for a less sum will discharge the whole of an open debt, for the reason that it is more advantageous to the creditor to have the negotiable paper. *Jaffray v. Davis*, *supra*. So, if the lesser sum be paid in discharge of the greater before the latter is due, it is a valid consideration. *Brooks v. White*, 2 Metc. (Mass.) 283. And so, if a third party pay a lesser sum to the creditor in agreement to discharge the whole debt of the debtor, it is valid. *Wilkes v. Slaughter*,

49 Ark. 237, 4 S. W. 766; *Gordon v. Moore*, 44 Ark. 349.

"The plaintiff, it is true, had judgment; but he could not enforce it by final process, on account of the suits which the defendant had deemed necessary to bring to protect itself against the various conflicting claims set up to the judgment. Pending these suits the defendant, under the agreement, paid the \$4,500 in full discharge, in advance of the time when it could have been compelled to do so. Besides this, it took the risk incident to its election to make the payment to the Buchanan county curator before the rights of all the parties claiming the judgment had been judicially determined by the suits. In view of these and other facts relating to the transaction, we are inclined to think the release was supported by a sufficient consideration, deemed valuable in law, to support it. *Leake, Cont.* (Eng. Ed.) 888; *Savage v. Everman*, 70 Pa. 315. It seems to me that whether the release be regarded as a technical release under seal, or a release not under seal, it is supported by a sufficient consideration, and ought to be upheld. It is true that where the rights of an infant are involved, as in this case, courts will not search for technical rules to sustain transactions which are not characterized by the strictest fairness, yet we discover nothing in this case to render inapplicable the principles to which we have hereinbefore adverted. I think that the decree of the circuit court should be reversed."

"GILL, J. In my opinion, the judgment of the circuit court is right, and ought to be affirmed. The learned judge who tried the case below has found that the so-called compromise or settlement of the infant's judgment against the cable company was procured by misrepresentation, and that the taking and acceptance of \$4,500 in satisfaction of said judgment was without consideration, and should not, therefore, bar the infant from recovering the balance justly due him. From a patient consideration of the entire record in the light of the authorities, I am of the same opinion. It seems to me that the facts are about as stated in plaintiff's petition, which will be found quoted at length in Judge SMITH'S opinion. In April, 1886, the infant plaintiff obtained in the Jackson circuit court a judgment against the defendant for \$5,000. The defendant appealed to the supreme court, giving a good and sufficient appeal bond, and the judgment was affirmed by that court in December, 1889. Here, then, was an indisputable and unquestioned claim or demand for \$5,000, bearing six per cent. interest from April 22, 1886, which the infant plaintiff had against the defendant. And it is admitted that the same was, after the affirmance, valid and binding, and that the defendant and its securities on the appeal bond were all entirely solvent. This judgment, with accrued interest to the date of the pretended settlement in March,

1892, amounted to about \$6,800. In satisfaction of this sum the defendant paid to the infant's curator the sum of \$4,500, and the curator entered on the margin of the judgment record at Kansas City an acknowledgment of full satisfaction thereof. The effort of this suit is to get back of this record satisfaction, and establish the infant plaintiff's right to recover the balance due on the judgment. The rule of law is conceded that payment of part of an undisputed debt will not discharge the whole, even if expressly accepted for that purpose. The rule is thus comprehensively stated: 'All claims for damages are payable in money. When a demand therefor is certain, or rendered certain by agreement or adjudication, and is no longer disputed, it cannot be satisfied with any less amount than the precise amount owing. If a part is paid, there is a partial performance of the obligation of the party liable, and no more. His payment is only a discharge pro tanto. This part payment may have been induced solely by the assurance that it would be accepted as full satisfaction, and it may have been possible to compel payment; still the party paying has done in kind only what he was under a legal obligation to do in respect to the amount paid, and the corresponding amount of the obligation is thereby satisfied, but no more. Therefore the agreement of the creditor to discharge the residue is, in a legal sense, gratuitous, and not binding.' 1 *Suth. Dam.* (2d Ed.) § 245. If, now, the rule just stated is to be applied in this case, then, clearly, the infant plaintiff is entitled to have the balance of his liquidated claim against the defendant. At the date of the so-called settlement (March, 1892) he had a final and conclusive judgment against the defendant, which at that time called for \$6,800. The defendant paid \$4,500, and asked to be acquitted not only of that portion of the debt, but also of the remainder, amounting then to \$2,300. This cannot be allowed unless there be some consideration moving to the creditor for the discharge of the balance. In this connection the claim is advanced that, as the receipt or acknowledgment of satisfaction by the curator was made over his seal, the plaintiff is precluded from disputing the existence of a consideration,—in other words, that such seal 'conclusively imports a consideration' for the discharge of the entire debt. This contention is based on the theory that the marginal satisfaction of the judgment is to be treated as a technical common-law release under seal. It seems to me that this attaches more importance to the writing in question than it deserves. It is not a 'contract,' in the proper use of that term; is nothing more than an acknowledgment of the payment of the debt,—an admission or declaration by the curator that the judgment in favor of his ward has been paid. While competent evidence tending to prove payment, it is in no sense conclusive, was

entitled to no further binding force than any other written receipt, and is subject, therefore, to explanation or even contradiction. *Ryan v. Ward*, 48 N. Y. 204. A receipt or ordinary acknowledgment of satisfaction is all the order of the probate court authorized or intended the curator to give. It will be presumed that the probate court intended the satisfaction of judgment provided by the statute, and to be entered as there required. Rev. St. 1889, §§ 6028-6032. In so compounding the judgment the curator could only act in pursuance of and subject to the orders of the probate court. Id. §§ 5297, 5298. These sections (6028, etc.) clearly do not contemplate such acknowledgments to be under seal nor to be evidenced by technical common-law releases under seal. I am unwilling, then, to say, because the plaintiff unnecessarily and without authority attached a scrawl to his signature in acknowledging satisfaction of the judgment, that said curator thereby estopped his ward from ever after inquiring into or impeaching the consideration of the alleged discharge. Moreover, if this written satisfaction of the record should even be considered in the category of sealed contracts, it would yet be within the province of a court of equity to go behind the seal and inquire into the matter of consideration. 'Equity, disregarding such form, and looking at the reality, always requires an actual consideration, and permits the want of it to be shown, notwithstanding the seal.' 1 Pom. Eq. Jur. (2d Ed.) § 383; also, Id. §§ 370-379. This has been the doctrine of the chancery courts from the beginning, and, as years have gone by, modern courts have gotten further from the influences of such rigid and barbarous dogmas of the ancient courts of law. In this state the law courts, even, have in a large measure been released from this subserviency to mere form. By section 2090 of the present statutory revision it is provided: 'Whenever a specialty or other written contract for the payment of money, or the delivery of property, or for the performance of a duty, shall be the foundation of an action or defense in whole or in part, or shall be given in evidence in any court without being pleaded, the proper party may prove the want or failure of the consideration, in whole or in part, of such specialty or other written contract.' When now we get behind this so-called seal, which, as I think, was useless and ineffectively attached to the marginal satisfaction, it seems clear to me that there was no consideration moving between the contracting parties for the satisfaction of the judgment, save and except only the payment of said \$4,500. And, if this be so, then the debt, which it was then conceded amounted to \$6,800, was, according to the rule before announced, satisfied only to the extent of \$4,500, and no further.

"In order to understand the status of the parties at the date of the so-called settle-

ment, it seems necessary to recall the main facts attending the controversy. In the early part of January, 1890, the mandate came back from the supreme court announcing the affirmance of the judgment of Willie Winter, by next friend, against the defendant. On the 20th day of the same month the public administrator of Buchanan county, and ex officio public curator, under the order of the probate court of said county took charge of the estate of the minor plaintiff; and on the same day the attorney for the plaintiff in the main suit had the probate court of Jackson county appoint another curator. Each appointment had been made without knowledge of the other. Since the boy's residence was at the time in Buchanan county, it is clear that the first appointment was proper, and the last improper, and so the parties seem to have subsequently agreed. Twelve days after the appointment of these curators (February 10, 1890), the next friend who had prosecuted the suit for the minor sued out execution against the defendant. Thereupon, on the same day, February 10, 1890, defendant filed in the Jackson circuit court a petition in the nature of a bill of interpleader, making the rightful curator of Buchanan county, and the party as well who was appointed curator in Jackson county, as also the next friend and attorney who had sued out the execution, all parties defendant, and in its petition set up that conflicting claims were made by these curators and next friend as to the rightful custody of the proceeds of the judgment, and prayed the execution be enjoined, and the parties be required to litigate their respective claims. The defendant did not bring in the money due on the judgment, as it might have done, and thereby relieve itself of any future liability in the premises. At the filing of the bill the court granted an order restraining the execution until a hearing could be had on the application for temporary injunction. This was subsequently heard, and on March 8, 1890, the court denied the application and dissolved the restraining order. At once, on said March 8th, and after dissolution of the injunction order, defendant filed in the circuit court a motion to quash the execution on the alleged ground that the next friend had no authority to order out such execution. This motion was heard and overruled May 9, 1890, and defendant appealed to the supreme court. At the date of the settlement (in March, 1892) the interpleader suit above mentioned, though still appearing on the docket of the Jackson county circuit court, had in fact been abandoned by the defendant, and was ultimately dismissed by the court because not listed for trial for more than three terms, as required by a rule of that court. And at the time of said so-called compromise or settlement the motion to quash the execution, which had been denied by the circuit court and appealed, was set for trial in the supreme court, and, as the

witnesses put it, was about to be reached. This appeal was dismissed ten days after the settlement. It was now, at the date of this settlement, when the injunction or interpleader suit begun in March, 1890, had failed of its purpose, and was practically abandoned, and when the defendant's appeal on motion to quash the execution was about to be reached on the supreme court docket, the defendant, by its general counsel, prepared a written petition for the compromise, and which said petition was, through a friendly attorney at St. Joseph, presented to the infant's curator, who signed the same, and on which said petition the probate court directed the settlement now attacked. The curator was induced to state in said petition that his ward's entire estate consisted of a judgment against defendant for \$5,000, and 'that the said judgment is and has been in litigation, and litigation concerning the same is now pending both in the said circuit court and the supreme court of said state, and it is entirely uncertain when the said litigation will terminate; it having been begun in the year 1885, and there being two suits pending now instead of one, as then, and three claimants for the judgment now.' It was then stated that the railway company was willing to pay \$4,500 cash in compromise and settlement, and authority for accepting this proposition was asked. As already stated, the petition for this compromise was prepared by the defendant's counsel at Kansas City, and presented to the curator at St. Joseph through a lawyer who was at least in sympathy with the defendant, but whom the curator trusted under the impression that said attorney was acting in the interest of his ward. Shortly after the settlement had been effected and the \$4,500 paid, the probate court entered an order rescinding the former one authorizing the compromise, wherein it recited that said original order 'was made on a mistake of facts as to the amount due on said judgment, and as to litigation in relation thereto then pending, and in reliance by said administrator upon the representations of said railway company, which representations were not true; and it now appearing that said judgment was final; that the same, with interest, amounted to about \$6,800, instead of \$5,000, as represented; and that said railway company and its securities, who were and are liable therefor, are solvent; and it further appearing that pursuant to said order of this court said administrator accepted said sum of \$4,500 of said company, and entered satisfaction thereof in good faith, by mistake, as aforesaid,—it is now ordered that said order directing a compromise of said judgment be, and the same is now hereby, set aside, to the end that the same shall not prevent other and further proceedings for the collection of the balance remaining due and unpaid on said judgment, and that said administrator be, and he is now here, ordered to enter a credit on said judgment

for said sum of \$4,500 as of the date of the receipt thereof, instead of a satisfaction in full of said judgment.' The evidence shows that the curator and probate judge were deceived as to the extent of the judgment, and that the compromise was effected under the impression that the infant's demand amounted only to \$5,000, instead of \$6,800; and, further, it appears that the curator and probate judge were likewise deceived as to the nature of the litigation pending. They were told 'that the said judgment is and has been in litigation, and litigation concerning the same is now pending in said circuit court and the supreme court, and it is entirely uncertain when the said litigation will terminate, it having been begun in the year 1885, and there being two suits pending now, instead of one, as then,' whereas the facts were that there was no litigation pending, or dispute as to the infant's rights in the premises. The only contest then existing, if contest it may be called, related solely to the question as to who was the proper custodian of the proceeds of the judgment after the same was collected. As between the minor plaintiff and defendant, all controversies had been settled by the judgment of a court of final resort; and the way was open at any time for defendant to pay said judgment, interest, and costs. It could have safely paid to the sheriff holding the execution, or into court when filing the bill of interpleader, or even to the curator who had been appointed by its (the defendant's) own direction. But, however this may be, it is clear that the infant plaintiff was the absolute and unquestioned owner of the judgment, then amounting to \$6,800; and the defendant ought not to be permitted to satisfy this by discount of \$2,300, when for such reduction there was no consideration as between the debtor and the creditor. There was no question at any time as to the perfect solvency of the defendant, and, besides, it had given a good supersedeas bond. It is true that defendant may have further delayed payment, as it had done for two years, but yet the minor plaintiff was for this fully protected and compensated by the addition of interest which the law fixes. But these vexatious lawsuits, whether brought about by defendant to harass opposing lawyers, or to delay the collection of a judgment which its counsel pronounce a great wrong, or whether merely to have the courts settle as to who should properly represent the minor, could furnish no consideration for throwing off \$2,300 of a demand concerning which there was no longer any possible dispute. 'Payment of a lesser sum will not discharge a debtor for a greater sum, without some additional consideration. The creditor must, besides a part, receive something of benefit that he would not otherwise have had.' *Heintz v. Pratt*, 54 Ill. App. 616. I agree with Judge SMITH when he says: 'Where the rights of an infant are involved, as in this

case, courts will not search for technical rules to sustain transactions which are not characterized by the strictest fairness.' But, with all due respect, I must differ with him as to the nature of this so-called compromise. As I read this record, it discloses a transaction characterized by great unfairness towards the infant plaintiff, and one which the courts ought not to sustain.

"The contention that, before plaintiff can get the relief here sought, there should have been a tender back of the \$4,500 paid by defendant, is without merit. It seems to be well settled 'that one who attempts to rescind a transaction on the ground of fraud is not required to restore that which in any event he would be entitled to retain, either by virtue of the contract sought to be set aside, or of the original liability.' Kley v. Healy, 127 N. Y. 555, 28 N. E. 593, and authorities cited. In the case just cited it is said: 'While the sum retained should be taken into account in the award of relief, an offer to restore it is not a condition precedent to the bringing of an action to set aside the fraudulent release. * * * If her action failed, she was entitled to the sum received by virtue of the transaction itself. If she succeeded, the sum was less than she was concededly entitled to by the original judgment. In any event, therefore, she had only that which without dispute belonged to her, and a restoration or the offer thereof was unnecessary prior to the commencement of the action; for such conditions as might be essential to the protection of the defendant could be inserted in the judgment ultimately rendered.' A distinction exists between cases of this nature and where no liability at all is conceded, and was so recognized by us in *Alexander v. Railway Co.*, 54 Mo. App. 66, 71, and by the St. Louis court of appeals, in opinion by Biggs, J., in *Girard v. Car-Wheel Co.*, 46 Mo. App., at page 116, and by the supreme court in same case, 123 Mo., at page 383, 27 S. W. 648, 25 L. R. A. 514.

"Judge ELLISON concurs in the views here expressed. The judgment of the circuit court will therefore be affirmed."

Frank, Hagerman & Karnes and Holmes & Krauthoff, for appellant. Thompson & Wilcox, B. J. Woodson, and Thos. J. Porter, for respondent.

BURGESS, J. The record in this case was transferred to the supreme court by the Kansas City court of appeals on a former occasion, but not in accordance with section 6, art. 6, of the state constitution, and was for that reason retransferred to that court. After the return of the record to the court of appeals, it was corrected by nunc pro tunc entry, and the case certified and transferred to this court upon the ground that one of the judges of that court deems the opinion filed therein contrary to previous decisions by the

supreme court. The opinion of the Kansas City court of appeals was written by Judge GILL, and concurred in by Judge ELLISON. Judge SMITH wrote a dissenting opinion. Both opinions are set out in this report, and the opinion of Judges GILL and ELLISON is approved, as properly declaring the law. The judgment is affirmed.

GANTT, P. J., and SHERWOOD, J., concur.

FLECKENSTEIN v. WATERS et al.

(Supreme Court of Missouri, Division No. 1.

Feb. 12, 1901.)

CORPORATIONS—DEALINGS WITH OFFICERS—FRAUD.

Land was bought by S. for \$12,000; he giving a mortgage thereon for such sum to R., who loaned the money to make the payment. S. sold to W. and F. each an undivided one-third interest therein, subject to the mortgage; each paying him \$2,300. A corporation with capital stock of \$2,800 was formed; S., W., and F. being among the directors, and S. being president, and W. treasurer. To it was conveyed the land for the expressed consideration of \$25,200; the consideration paid being assumption of the mortgage of \$12,000, \$2,500 of its stock, and its two notes for \$5,350 each. Only \$880 was paid into its treasury, of which \$25.55 was applied on one of the \$5,350 notes, and the balance used in paying expenses of incorporation and interest on the \$12,000 mortgage. The two \$5,350 notes were discounted, and S., W., and F. each received one-third of the proceeds. The first of said notes not being paid, W. and F. took it up, and obtained judgment thereon against the corporation, and on execution sale W. became the purchaser of the land, and received a sheriff's deed. Afterwards he took up the other \$5,350 note and the \$12,000 debt. *Held*, in a suit at the instance of a stockholder, who had paid in only \$140, to set aside the sheriff's deed on the ground that the corporation was defrauded by a sale to it at a fictitious value, that there was no error in requiring, as a condition of the relief, that W. be reimbursed the amounts so invested by him.

Appeal from circuit court, St. Louis county; Rudolph Hirtzel, Judge.

Suit by Charles G. Fleckenstein, receiver of the South Webster Investment Company, against William D. Waters and others. Bill dismissed, and judgment for defendants for costs. Plaintiff appeals. Affirmed.

Charles Fensky, for appellant. Collins, Jamison & Chappell, for respondents.

BRACE, P. J. The material facts in this case, in brief, are as follows: On the 20th day of December, 1892, French R. Sessions, through other persons who held an option thereon, purchased from John H. Pipkin a tract of land in St. Louis county, containing 62.59 acres, for the sum of \$12,000, of which Pipkin received \$9,500, and the intermediaries \$2,500, and caused the title to the land to be conveyed by Pipkin to Rowland L. Johnston. Sessions borrowed the \$12,000 to pay for the land from Valle Reyburn, and, to secure the loan, caused the said Johnston to execute his promissory note in the sum

of \$12,000, payable to Valle Reyburn in three years, and six semiannual interest notes for \$360 each, and to execute a deed of trust on the land to secure the payment thereof. Afterwards, in January, 1893, Sessions sold and transferred to William D. and Frank A. Waters each an undivided one-third interest in the land, subject to said deed of trust, each of them paying him therefor the sum of \$2,300; and thereafter Johnston held the equity in trust for Sessions, Frank A. Waters, and William D. Waters, in equal proportions. Afterwards, on the 18th of March, 1893, the South Webster Investment Company was incorporated, with a capital stock of \$2,800, divided into 56 shares, of the par value of \$50 per share. The incorporators and directors were French R. Sessions, William D. Waters, Edward H. Newland, Charles A. Robinson, and George W. Willson. Sessions became president, and William D. Waters treasurer, of the corporation. Afterwards, on the 30th of March, 1893, Johnston, at the instance of Sessions and the Waterses, by deed of that date conveyed the premises, subject to the Reyburn deed of trust, for the expressed consideration of \$25,200, to the said South Webster Investment Company; the consideration actually paid being the assumption by the corporation of the Reyburn debt of \$12,000 and interest, \$2,500 of its capital stock, and two promissory notes, each for \$5,350, payable in one and two years, respectively, secured by a deed of trust on the premises executed by the corporation. At this time the corporation seems to have been a purely paper concern. Afterwards, in the following month of April, the sum of \$700 was paid into the treasury on account of subscription to stock, —\$100 each by French R. Sessions, Frank A. Waters, and W. D. Waters, and \$100 each by August Krutzborn, Mary Ostertag, R. M. Harmon, and W. W. Penny; and between the 12th of May and the 8th of June following each of these parties, except Sessions, paid in \$20 on account of first monthly assessment, and thereafter, in the month of June, Krutzborn, Ostertag, and Harmon each paid in an additional \$20 on account of second monthly assessment, thus making the sum of \$880. The whole amount was paid into the treasury on account of subscriptions to stock and assessments thereon. Of this amount, \$134.45 was afterwards applied to the payment of the expenses of incorporation, \$720 to the payment of interest on the Reyburn debt, and \$25.55 on one of the two \$5,350 notes, which upon their execution having been indorsed by Johnston, and turned over to French R. Sessions, Frank A. Waters, and W. D. Waters, were severally indorsed by them, discounted for the face value thereof, and the proceeds equally divided between these three. Upon the maturity of the \$5,350 note, payable at one year, the corporation failing to pay it, and it having been duly protested, the two Wa-

terses took it up, instituted suit thereon against the corporation, and obtained judgment. Execution issued thereon, which was levied upon the premises, and at the sale William D. Waters became the purchaser, and received a sheriff's deed therefor. Afterwards the second note for \$5,350, payable at two years, becoming due, and the corporation failing to pay it, the same was also duly protested, and thereafter taken up by William D. Waters, who thereupon caused the deed of trust securing the payment of the two \$5,350 notes to be satisfied on the margin of the record thereof. The \$12,000 note to Valle Reyburn, secured by the first deed of trust, being about to mature, William D. Waters, with money furnished by another for the purpose, took up that note; and that note, with the deed of trust securing the same, is now being held for his protection. William D. Waters has also acquired all the interest of his brother Frank A. Waters in the premises. This was the situation when, on the 18th of September, 1895, on the petition of Mary Ostertag, Howard A. Blossom was appointed receiver of the corporation, who thereafter, on the 21st of December, 1896, instituted this suit. Afterwards, Blossom having resigned, Charles G. Fleckenstein was substituted in his place, and filed the amended petition upon which the case was submitted to the court. The gravamen of the complaint is that said Sessions, being at the time the president and a director, the said William D. Waters, the treasurer and a director, and the said Frank R. Waters, a stockholder, perpetrated a fraud upon the corporation by selling the premises to it at an "enormous, fictitious value," and, by their subsequent dealings with the consideration received therefor, wrecked the corporation; and the relief asked is that the sheriff's deed to William D. Waters be set aside and annulled; that the Reyburn deed of trust for \$12,000 and interest be canceled; that the title to the land be vested in the plaintiff; that it be put in possession thereof; that all of the defendants be divested of any interest or claims against said corporation; that the said French R. Sessions, William D. Waters, and Frank R. Waters be required to account for all profit made out of the purchase and sale of said real estate from themselves to the corporation; and for judgment for costs against them. The answer of defendants to the amended petition was a general denial. The court, after hearing the evidence, on the 8th day of November, 1897, entered the following interlocutory decree: "That the deed from the South Webster Investment Company by sheriff to William D. Waters, dated 2d day of December, 1894, and recorded in Book 76, at page 400, of the office of recorder of deeds for the county of St. Louis, Missouri, be set aside and for naught held, and the title to the real estate in said deed of trust and in the amended petition in this case mentioned and de-

scribed be vested in the said South Webster Investment Company: provided, however, that the plaintiff herein shall on or before the 8th day of February, 1898, file in this cause his declaration in writing, that he will assume and agree to pay the notes, together with all interest thereon, secured by deed of trust from Rowland L. Johnston to Thomas Reyburn, trustee for Valle Reyburn, dated December 29, 1892, recorded in Book 69, page 354, of the office of the recorder of deeds for the county of St. Louis, and also all sums of money expended, paid, and laid out by defendants William D. Waters and Frank A. Waters, or either of them, in the way of taxes upon said property, as well as the sum of \$2,300 paid by the defendant William D. Waters and the sum of \$2,300 paid by the defendant Frank A. Waters as the purchase price of two-thirds interest in said property, with interest on all of said sums. And the court doth further order, adjudge, and decree that if the plaintiff herein shall on or before said 8th day of February, 1898, file herein such declaration in writing, an account shall be taken herein for the purpose of ascertaining the amounts expended, paid, and laid out, with the interest thereon. And the court doth further order, adjudge, and decree that if the plaintiff shall fail on or before the 8th day of February, 1898, to file such written declaration, then and in that case plaintiff's petition shall be dismissed." The plaintiff thereupon filed a motion to set aside the interlocutory decree, and, failing to file the written declaration therein required within the time required, on the 11th of February, 1898, the court dismissed the plaintiff's bill, and rendered judgment in favor of the defendants for costs, from which judgment the plaintiff appeals.

French R. Sessions was the originator and promoter of this speculation. It was entered upon in the "boom" days preceding the panic. Those engaged in it evidently thought there was "money" in this land at the price of \$12,000; and Valle Reyburn, who seems to have been a cool-headed financier, thought it good security for that amount. The Waters brothers, also, inquiring into the matter, became satisfied that it was a promising speculation, and they paid \$4,600 for two-thirds of the equity. The plaintiff corporation was organized for the sole purpose of realizing on this speculation. Except the paltry sum of \$880 contributed as stated, it never had any other assets. The value of its capital stock and promissory notes was entirely dependent on the success of the venture. If it succeeded, they might be worth something. If it failed, they were worthless. The panic came, the bottom fell out, all their expectations were dashed to the ground, and the stock and notes proved to be worthless. In the meantime, however, obligations had been incurred by the indorsers of its notes, that had to be met. Of

these, William D. Waters was the only one who seems to have been willing and able to—at least, he was the only one who did—meet them, and in doing so, deducting the amount received by him and his brother at the discount, and the \$25.55 afterwards paid on the notes out of the funds of the corporation, he was compelled to invest the further sum of \$3,541.40; thus, with the \$4,600 originally put in by him and his brother, making his stake in the venture, when the principal note secured by the Reyburn deed of trust was about to mature, the sum of \$3,141.11, to protect which, he, of course, had to take up that security, at a cost of \$12,360. And thus, saying nothing about interest thereafter, at the time this suit was brought he had paid for the title under which he holds the premises the sum of \$20,501.11. Of this title he is sought to be divested in this action by the corporation, of whose funds only the sum of \$745.53 ever went into the venture, at the instance of a single stockholder, of whose funds only the sum of \$140 ever went into the corporation. And the proposition presented on this appeal is that this may be done, and ought to have been done, without requiring that he be reimbursed for the amounts so invested by him under the circumstances aforesaid. If we have succeeded in stating the case clearly, this proposition needs no argument. The judgment of the circuit court is affirmed. All concur.

A. G. EDWARDS BROKERAGE CO. v. STEVENSON.

(Supreme Court of Missouri, Division No. 2.
Feb. 26, 1901.)

GAMBLING CONTRACT—CONFLICT OF LAWS.

1. Plaintiff having been authorized to buy stocks for defendant without any restriction as to the market in which the purchase should be made, the contract of purchase will be governed by the law of the state in which the stock was purchased and paid for.

2. At common law a contract legitimate on its face cannot be declared void as a wagering contract on proof that one only of the parties thereto knew and meant it to be such.

3. In the absence of a showing to the contrary, the law of a foreign state will be presumed to be the common law, and not in accordance with the statute of the forum.

Appeal from St. Louis circuit court; H. D. Wood, Judge.

Action by the A. G. Edwards Brokerage Company against William H. Stevenson. Judgment for plaintiff. Defendant appeals. **Affirmed.**

Chester H. Krum and Lyne S. Metcalfe, Jr., for appellant. Geo. L. Edwards, for respondent.

BURGESS, J. The purpose of this action is to recover of defendant a sum of money aggregating, including interest and commissions as broker, the sum of \$7,360.87, alleged to be due plaintiff on account of services ren-

dered by and moneys advanced by it for defendant at his instance and request in the purchase of Linseed Oil stock and Atchison, Topeka & Santa Fé preferred stock. Plaintiff had judgment for the amount stated, and, after unsuccessful motion for a new trial, defendant appeals to this court.

Plaintiff, a broker in the city of St. Louis, engaged in the business of buying and selling stocks and bonds in St. Louis and other markets, undertook to buy for defendant Linseed Oil Company stock and Atchison, Topeka & Santa Fé Railroad Company preferred stock. At the time defendant requested plaintiff to buy for him the Linseed Oil stock nothing was said as to the price to be paid for it, or the number of shares to be bought. With respect to the Atchison, Topeka & Santa Fé Railroad stock, plaintiff suggested to defendant that he purchase this stock, and thereupon defendant requested plaintiff to purchase 200 shares of it for him. No direction was given at any time as to where the stock should be purchased, and the result was that plaintiff purchased it in the city of New York, through some broker there. The stocks were bought on account of plaintiff, and it was charged by the New York parties who bought it to plaintiff. Defendant was not known in the transaction. The certificates of stock were held by plaintiff, and they were carried by the New York parties for it for several months. The certificates were never assigned to plaintiff, nor were they ever delivered to it, or tendered to defendant, but the New York parties carried them for plaintiff on "margins," and exacted from it securities or cash as a protection in case of a decline in the value of the stock. As soon as the purchases were made, and plaintiff was notified of them, plaintiff at once notified defendant, and charged his account with the purchase price of the stocks, which plaintiff has paid in full to the New York brokers who advanced same. Defendant never made any objection to the reports of these purchases upon receiving them, nor did he make any to the statements of account rendered him in which plaintiff charged him with the amounts paid for the stocks and credited him with the dividend paid on the Linseed stock while defendant was the owner of it, but wrote on the backs of two of these papers the indorsements: "Mr. Edwards: Purchase 200 Atchison, August 21, 1896," and "A. G. Edwards & Sons; Purchase 100 'Linseed.'" On August 28, 1895, immediately after the purchase of the Linseed Oil stock, defendant addressed to plaintiff a note, which reads as follows: "Gentlemen: Please sell my two hundred shares of Linseed at the market price at such date as I will be sure to get the dividend of \$1.00 per share, which I believe was declared on the 15th of August." Plaintiff credited defendant with this dividend. Defendant never at any time deposited with plaintiff any money to secure margins on these purchases,

nor did he agree to do so, nor did he ever pay plaintiff anything on account therefor, although plaintiff demanded of him the purchase price. Defendant testified that plaintiff was at liberty to purchase the stocks in New York. Plaintiff called upon defendant to put up margins, and in one letter suggested that the market looks "nervous," and in another that it "has gone to pot"; but nothing was put up, and thereupon, after notifying the defendant that plaintiff had rather carry the stocks than sell them, and the defendant having failed to make the demanded advances, the plaintiff sold the stocks at a loss. Defendant testified that he had no intention of receiving the stock, or of paying therefor, and claims the transactions were simply deals on margins, speculation on the rise or fall of the market, in violation of the statutes relating to option dealing, and were, therefore, illegal and void. There was no evidence that defendant told the plaintiff that he did not intend to receive and pay for the stocks. On the other hand, plaintiff's president testified that it did not intend to settle the transaction by settling on the difference in prices, and that plaintiff did not know that defendant did not intend to receive and pay for the stocks, nor that he intended to settle the transaction by paying the difference.

At the request of plaintiff, and over the objection and exception of defendant, the court declared the law to be as follows: "The court declares the law to be that, if it appear from the evidence that defendant requested plaintiff, as his agent, to buy in New York City, N. Y., the Atchison and Linseed stocks, respectively, specified in plaintiff's petition, and that pursuant to said request plaintiff bought in said city and state, for defendant, the stocks aforesaid, then the said purchases are not within the provisions of sections 3961 or 3962 of the Revised Statutes of Missouri, 1889, but are governed as to their legality and validity by the laws of the state of New York. The court declares the law to be that, no evidence having been offered as to the laws of the state of New York, it is presumed that the law of the state of New York is the same as the common law of the state of Missouri. There is no presumption that the statutory law of the state of New York is the same as the statutory law of the state of Missouri. If it appear from the evidence that defendant authorized plaintiff to buy for him in the city of New York 200 shares of the stock of the Linseed Oil Company and 200 shares of preferred stock of the Atchison, Topeka & Santa Fé Railway Company, and plaintiff, in the state of New York, did so, and paid the purchase price of said stocks, then the court declares the law to be that plaintiff is entitled to recover the money paid by it upon said purchases, although it appear from the evidence that defendant never intended to actually receive or pay for any of said stocks, unless the court further

finds that the sellers of said stock, as also the plaintiff, at the time purchases were made, understood that no shares of stock were to be delivered, but that the transactions were only to be settled by the payment or receipt of the difference in the market price; and the burden of proving this is on the defendant. If the court finds from the evidence that the plaintiff, through its brokers in New York, made purchasers of shares of stock in said city, at defendant's request, for and in behalf of defendant, in order to render such purchases void as wagering or gambling contracts it is necessary that it should have been the intention of both the seller and the purchaser at the time the purchases were made that no shares of stock should be delivered or received, but that the transaction should be settled by paying or receiving the difference in the market price. If such was not the intention of both seller and purchaser at the time the purchases were made, then the finding of the court upon the defense that the transaction was a wagering contract should be for the plaintiff, and the burden of proving that both parties intended that no shares of stock should be delivered at the time the purchases were made, but that the transaction should be settled by paying or receiving the difference in the market price, is on the defendant. If the court finds from the evidence that the defendant requested the plaintiff to buy, and that plaintiff did buy, the shares of stock for defendant, it is not enough to defeat plaintiff's recovery in this case that defendant did not intend to receive or pay for any shares of stock. It must be shown by the preponderance of evidence that both defendant and the parties from whom plaintiff purchased said shares of stock intended there should be no delivery, and that plaintiff so understood the matter at the time. In other words, it must appear from the evidence that the seller and the purchaser and the plaintiff understood it was to be a gambling speculation, to be settled only by the payment of difference in the market price, and that no shares of stock were expected to be delivered."

Defendant asked the following declaration of law, which was refused, and he duly excepted: "Upon all of the evidence adduced, the court, sitting as a jury, will find for defendant. If the court, sitting as a jury, find from the evidence that the dealings between plaintiff and defendant were upon margins, and contemplated, upon the part of the defendant, not the receipt of and payment for the stocks bought, but an adjustment of differences on the basis of the future market, then the plaintiff is not entitled to recover, and the court will find for the defendant. If the court, sitting as a jury, finds from the evidence that it was not the intention of the defendant to receive and pay for the shares of stock ordered by him through plaintiff as a broker, but that his intention was to settle the differences between the market

price of such stocks when bought and those when sold at some subsequent time, then the finding should be for the defendant. If the court, sitting as a jury, find from the evidence that it was not the intention of the defendant to receive and pay for the shares of stock ordered by him through plaintiff as a broker, but that his intention was to settle the difference between the market price of such stocks when bought and those when sold at some subsequent time; and if the court, sitting as a jury, further finds that such intention was, at the time of such order, communicated or known to plaintiff, or was shared in by plaintiff,—then the finding should be for the defendant. If the court, sitting as a jury, finds from the evidence that the defendant, in the city of St. Louis, and state of Missouri, gave to plaintiff, a broker in said city, an order to purchase for him certain shares of stock known as 'Din-seed Oil Co. stock' and 'Atchison, Topeka & Santa Fé R. R. Co. stock,' and that the intention of both plaintiff and defendant was to buy said stocks upon margins, and that no delivery of or payment for said stocks was contemplated by plaintiff and defendant, but the intention of both parties was that defendant should speculate on the difference in the market price of such stocks when bought and this when sold at some subsequent time, then the plaintiff is not entitled to recover his commissions or money paid on account of such purchases, and the finding should be for the defendant."

The position of the defendant is that the transactions were nothing more nor less than deals on margins,—speculations on the rise or fall of the market; that he had no intention of receiving or paying for the stock; and, under such circumstances, the transactions were in violation of the statutes of this state in regard to option dealing, and therefore illegal and void. Assuming, then, that the defendant did not intend to receive the stock, is the plaintiff, if ignorant of such intention, entitled to recover, and, even if it was aware of defendant's intention, is it entitled to recover? The sections of the statute (Rev. St. 1880) upon which defendant relies read as follows:

"Sec. 3931. All purchases and sales or pretended purchases and sales, or contracts and agreements for the purchase and sale, of the shares of stocks or bonds of any corporation, or petroleum, provisions, cotton, grain or agricultural products whatever, either on margin or otherwise, without any intention of receiving and paying for the property so bought, or of delivering the property so sold, and all the buying or selling or pretended buying or selling of such property on margins or on optional delivery, when the party selling the same, or offering to sell the same, does not intend to have the full amount of the property on hand or under his control to deliver upon such sale, or when the party buying any of such property or offering to

buy the same does not intend actually to receive the full amount of the same if purchased, are hereby declared to be gambling and unlawful, and the same are hereby prohibited. Any company, co-partnership or corporation, or member, officer or agent thereof, or any person found guilty of a violation of the provisions of this section, shall be fined in a sum not less than three hundred dollars nor more than three thousand dollars.

"Sec. 3932. It shall not be necessary in order to commit the offense defined in the preceding section that both the buyer and seller shall agree to do any of the acts above prohibited, but the said offense shall be complete against any corporation, association, co-partnership or person thus pretending or offering to sell, or thus pretending or offering to buy, whether offer to sell or buy is accepted or not; and any corporation, association, co-partnership or person, or agent thereof, who shall communicate, receive, exhibit or display in any manner any such offer to buy or sell, or any statements or quotations of the prices of any such property with a view to any such transaction as aforesaid, shall, for each such offense, be deemed and held to be an accessory thereto, and upon conviction thereof shall be fined the same as the principal; and any such corporation, association, co-partnership or person or agent permitting any such communication, reception, exhibit or display, shall, for every such offense, be fined a sum not less than \$300 nor more than \$2,000."

"Sec. 3936. All contracts made in violation of this article shall be considered gambling contracts and shall be void."

The question, then, is, do the facts disclosed by the record bring this case within the provisions of the statute? If so, it is clear that the plaintiff cannot recover, because the evidence showed that defendant intended that the purchases were to be upon margins, or upon the rise or fall of the stocks in the market, and that he never at any time intended to receive the stock, which is, by express provision of the statute, declared to be a gambling contract and void; and it makes no difference that plaintiff and the parties from whom it purchased the stock for defendant may not have been aware at the time of such purchase of his intention not to take the stock. *Connor v. Black*, 119 Mo. 126, 24 S. W. 184; *Id.*, 132 Mo. 151, 33 S. W. 783. Nor, under such circumstances, could plaintiff recover from defendant its advances to him, or commissions for buying the stock. But plaintiff, in its purchase of the stock, was not restricted to any particular market, and, having purchased and paid for it in the city of New York, it was to all intents and purposes a contract of that state, and, in the absence of any showing to the contrary, the presumption must be indulged that the common law prevails in that state. *State v. Clay*, 100 Mo. 571, 13 S. W. 827;

Meyer v. McCabe, 73 Mo. 236; *Benne v. Schnecko*, 100 Mo. 250, 13 S. W. 82; *Wooden v. Railroad Co.*, 126 N. Y. 10, 26 N. E. 1050. 13 L. R. A. 458; *Burdiet v. Railway Co.*, 123 Mo. 221, 27 S. W. 453, 26 L. R. A. 384; *Stat. v. Gritzner*, 134 Mo. 513, 36 S. W. 39. The rights of the parties must, therefore, be adjudicated in accordance with the principles of the common law. At common law a contract which, upon its face, appears to be legitimate, cannot be declared void as a wagering contract upon proof that one of the parties thereto knew and meant it to be such. Therefore, the arrangement for the purchase of the stocks in question, being legitimate upon its face, cannot be held void as a gambling contract, in the absence of proof that both parties knew and understood that they were purchased for defendant upon margins, or upon the rise and fall of the stocks in the market. *Crawford v. Spencer*, 92 Mo. 498, 4 S. W. 713; *Irwin v. Willmar*, 110 U. S. 499, 4 Sup. Ct. 160, 28 L. Ed. 225. With respect to the knowledge of plaintiff as to the intention and purpose of defendant in the purchase of the stock, whether upon margins or upon the rise or fall of the market, without any intention of receiving it or not, the evidence was somewhat conflicting. But its weight was for the consideration of the court; and, the court having found that, if any such intention existed on the part of defendant, plaintiff was not aware of it, we are not inclined to interfere. As the declarations of law given at the instance of plaintiff correctly presented this theory of the case, no error was committed in giving them, and, as the instructions asked by defendant were upon a different theory, they were correctly refused. It follows that the judgment should be affirmed. It is so ordered.

SHERWOOD, P. J., and GANTT, J., concur.

STATE v. HOLLAND.

(Supreme Court of Missouri, Division No. 2.
Feb. 12, 1901.)

CRIMINAL LAW—APPEAL AND ERROR—APPEAL BEFORE JUDGMENT—REMAND.

Where, on a motion for rehearing in a criminal case, it is disclosed that no judgment was rendered against defendant or sentence passed in the trial court, though motions for new trial and in arrest were filed and overruled, and a transcript in ordinary form was returned on defendant's appeal, the submission of the cause in the supreme court should be set aside, the motion for rehearing denied, and the cause remanded to the trial court, with directions to enter up a judgment on the verdict and pass sentence on defendant.

Appeal from criminal court, Buchanan county; B. J. Casteel, Judge.

Lafayette Holland was convicted of crime, and appeals. Remanded.

W. B. Norris and Huston & Brewster, for appellant. The Attorney General and Sam B. Jeffries, for the State.

SHERWOOD, P. J. A motion for rehearing has been filed in this cause, which discloses the fact (a fact verified by the certificate of the clerk of the trial court) that no judgment was rendered against, nor sentence passed upon, defendant in this cause in the trial court, notwithstanding the fact that a motion for a new trial, as well as a motion in arrest, was filed and overruled in the trial court, and notwithstanding the further fact that an affidavit for appeal was filed and allowed in such trial court, and bond given by defendant in such court for defendant's appearance in this court. The clerk was not in his duty when he sent up the transcript in a cause wherein no judgment was rendered nor sentence imposed. Nor was the judge of that court acting in compliance with his duty in the premises, since section 1594, Rev. St. 1899, prescribes: "It shall be the special duty of every judge of a court of record to examine into and superintend the manner in which the rolls and records of the court are made up and kept; to prescribe rules that will procure uniformity, regularity and accuracy in the transaction of the business of the court." Nor did counsel for the defense do their duty in failing to notice that no judgment was rendered against, nor sentence passed upon, their client. Nor did they treat this court fairly when they failed to call our attention to the omission under comment. Seeing a transcript in ordinary form before us, we had a right to assume that it came here under proper conditions, and not otherwise. In these circumstances, the submission will be set aside, the motion for rehearing denied, and the cause remanded to the trial court, with directions to enter up judgment on the verdict and pass sentence on defendant as required and provided by law. *State v. Shea*, 95 Mo., loc. cit. 93, 8 S. W. 409; 1 *Fish. Cr. Proc.* § 1203; *McCue v. Com.*, 78 Pa. 185; *Jewell v. Com.*, 22 Pa. 94; *State v. McClain*, 137 Mo., loc. cit. 317, 38 S. W. 906. All concur.

STATE v. HAINES.

(Supreme Court of Missouri, Division No. 2.
Feb. 12, 1901.)

HOMICIDE—INDICTMENT—TRIAL—DELAY—APPEAL—REPUTATION—WITNESSES—COMPETENCY—HARMLESS ERROR—INSTRUCTIONS—MANSLAUGHTER—CULPABLE NEGLIGENCE—EVIDENCE—SUFFICIENCY.

1. Rev. St. 1899, §§ 2641, 2644, require a defendant to be brought to trial before the end of the third term after the finding of the indictment, and provide that in all cities in which there are more than two regular terms of the criminal court the defendant shall not be entitled to be discharged, because not given a trial, "until the end of the third term after the indictment was found." *Held*, that this did not include the term at which the indictment was found.

2. Where a case was not tried for three terms, and the record during one term had no entry as to the disposition of the case, it will

be presumed that it was continued for want of time to try it, and the defendant would not be entitled to be discharged, no laches being shown.

3. Objections to evidence made for the first time on appeal will not be considered.

4. Where a witness introduced to testify to defendant's reputation as a peaceable law-abiding citizen testified that he had not seen defendant for five years, and that defendant lived in Topeka, Kan., while witness lived in Independence, Mo., and that he could not testify as to defendant's reputation in the neighborhood in which he resided before he moved to Kansas, his testimony was properly rejected.

5. Where the defendant was convicted of murder in the second degree, any error in an instruction defining the word "deliberate" was harmless.

6. An instruction that if the jury failed to find a verdict according to law as declared in instruction No. 2, but find that defendant feloniously, premeditatedly, on purpose, and with malice aforethought, with a deadly weapon, shot and killed deceased, he was guilty of murder in the second degree, was not bad, as depending on another instruction.

7. Where the court gave an instruction on manslaughter in the fourth degree, which was an embodiment, with but slight modification, of one which the defendant had requested, and to the refusal of which he had excepted, the error, if any, in the court's instruction, being invited by defendant, he could not complain.

8. An instruction that if defendant drew a pistol on deceased without legal excuse, and deceased seized the pistol and tried to take it from defendant, and a struggle ensued, in which the pistol was accidentally discharged and killed deceased, then defendant was guilty of manslaughter in the fourth degree, was not erroneous for not using the words "culpable negligence," as used in Rev. St. 1899, § 1834, defining the offense of manslaughter in the fourth degree.

9. Defendant, who had been drinking in a number of places, entered a saloon, where he was finally left in a wine room by the bartender, and after some time he came out, and accused the bartender of robbing him, and threatened to shoot him if the money was not restored. There was testimony that defendant had stated, after entering the saloon, that he had no money, and asked the barkeeper, whom he knew, if his credit was good, and that after the shooting he stated that he shot the bartender because he robbed him. Defendant's own testimony was that he drew the pistol, and pointed it at the bartender, who seized it, and in the struggle for its possession it was accidentally discharged. *Held*, that the evidence supported a conviction for murder in the second degree.

Appeal from criminal court, Jackson county; John W. Wofford, Judge.

John R. Haines was convicted of murder in the second degree, and appeals. Affirmed.

March K. Brown and Ralph S. Latshaw, for appellant. Edward C. Crow, Atty. Gen., and Sam B. Jeffries, for respondent.

GANTT, J. The defendant was indicted at the January term, 1899, of the criminal court of Jackson county at Kansas City. He was duly arraigned, and, declining to plead, a plea of not guilty was ordered entered of record for him. The record of said January term recites that for want of time to try the case it was continued to the April term. No entry was made of record in the cause at the April term, 1899. On the application

of the state, the cause was continued at the September term, 1899. The defendant was put upon his trial at the next or January term, 1900, and was convicted of murder in the second degree. From the sentence on that conviction, he has duly appealed to this court.

The facts attending the homicide are substantially as follows: For 17 years or more prior to January, 1899, the defendant had been a railroad ticket broker on Union avenue, opposite the Union Station, at Kansas City, Mo. He is about 60 years old, and had borne a good reputation as a peaceable, law-abiding citizen. About three years prior to the homicide he had removed to Topeka, Kan., and made that city his home, but was in the habit of making frequent visits to Kansas City, Mo. On the 18th of January, 1899, he left Topeka, and arrived at Kansas City at 5:15 p. m. He attended to his business, and it seems intended to return home on a train leaving Kansas City at 9:30 that evening. He reached the station too late for his train, and was compelled to wait until 2:30 that night, or rather the following morning. Having all this idle time at his disposal, he went to the New Albany Hotel, and the various ticket offices in that neighborhood, and spent his time with acquaintances until about midnight. About midnight he appeared in a saloon owned by one Caldwell. Charles D. Watson, the deceased, was the bartender in this saloon.

The coroner, Dr. Lester, and Dr. Langsdale, a former coroner of Jackson county, were summoned that night, and testified that when they reached Caldwell's saloon they found Watson dead. His body was still warm. They made an examination of the body, and found he had been shot through the heart by a bullet. The wound was a necessarily fatal one. It entered about the sixth rib, a little to the left of the medium line, and a little to the right of the nipple line, and penetrated the chest, through the apex of the heart. They extracted the bullet, which proved to be 38 caliber. According to their testimony, the bullet went in and through nearly on a level. There was little or no obstruction. In their opinion, death would not necessarily be instantaneous. In many similar cases, the wounded man has been known to walk or run quite a distance. The shot would not affect his mind. Deceased was a stout man, weighing perhaps 160 pounds, and apparently about 42 to 44 years old. They searched his person in the presence of the policeman, and found no weapons on his person. They examined the drawers in the saloon, and found two pistols in one drawer, one broken, and the other in a fair condition. Neither had been discharged recently. Both of these surgeons testified the deceased had on a linen or duck apron, and the powder burn and hole in it indicated that the pistol was held in a few inches of his person when he was shot. De-

ceased had only about 60 or 65 cents in money on his person.

Caldwell, the proprietor, testified that when he left the saloon early in the evening the cash register had about \$15 in it, and soon after Watson was killed he counted the cash in it, and it contained about \$28, all in silver change. There were no \$10 or \$20 bills in it. He came back to the saloon at 11 o'clock that night, and Watson, the bartender, was perfectly sober. The defendant came in about 11:30. King, Curtis, Rohring, and Vickers and perhaps others were in the saloon when defendant came in. Several were playing cards at a table. Defendant spoke to Watson, and then went over to the card table, and wanted to get in the game. He then came back to Watson and Caldwell, and asked the latter to shake dice with him, and Caldwell refused, and Watson told him to go and sit down. He then asked Rohring to shake dice for a dollar, and Caldwell refused to allow it. He then asked Watson if his credit was good, and Watson said, "Yes; but that he [defendant] had enough; he had better go and sit down." He then sat down by the stove, and some one told him it was too hot there. He then became sick, and went back to the toilet and vomited. Caldwell went out and got some sandwiches, and he and Curtis and Watson ate them. Defendant was then in the closet. This witness left the saloon at 12:30, and did not see defendant any more until after the killing. Witness lived in the building. He was summoned soon after the shooting, and when he came in he found Officers Keenan and Daily there. One of them had defendant, and Watson was lying on the floor, and just then a doctor (Chappell) came in, and pronounced Watson dead. He inquired in the presence of defendant what Watson was shot for, and the policeman said, "This fellow says that he robbed him." Curtis was living in Idaho at the time of the trial, and King was out of the state.

Vickers, a mail clerk on the Missouri Pacific Railroad, was playing pitch with Rohring, King, and Curtis when defendant came in. Defendant was intoxicated. He came up behind Rohring, took hold of his cards, and asked him to let him play his hand for him. He mused the cards up, and then bantered Rohring to play them for so much. Then he straightened up, and said he did not have a cent. He looked at Watson, the deceased, and said, "Is my face good?" and Watson answered, "You bet it is." Defendant laid his overcoat on a chair, and then went back to the closet. Watson came around, and took his overcoat and hung it for him. Witness joked Watson about his friend (the defendant), and Watson said he was sleeping all right, and he would wake him. He wanted to go off on the Santa Fé road. Witness then went upstairs and went to bed.

Bray, a police officer, testified that he was

summoned when Watson was shot, and ran immediately to Caldwell's saloon, about two blocks distant. When he reached the place he found Officer Keenan there. The defendant was sitting in a chair next to the stove, with Keenan 2½ feet from him. King was standing talking to Keenan. Bray asked King who shot deceased. He said Haines (the defendant) came out of the wine room, and accused Watson of robbing him, and that he shot him. Witness said: "I says to Haines, 'What did you do this for?' He said, 'He robbed me.' I told Officer Keenan to take defendant to No. 2 police station." King also said: "Haines came out of the wine room, and said to Watson, 'You have robbed me; I want my money back;' and thereupon Bray said to Haines, 'What did you do that for?' and defendant answered, 'He did rob me.'"

Officer Mat Dalley testified that he was on his beat about 10 minutes before 2 a. m., January 19th, waiting to send in his report at 6 minutes to 2 o'clock, when he heard the report of a pistol, when Curtis ran out of Caldwell's saloon, and cried, "Police!" whereupon Keenan and witness immediately ran into the saloon, and found defendant on the floor outside of the bar, holding a revolver in his right hand, which he was trying to point, and deceased, Watson, on or over him, holding down his pistol hand. The officer immediately took the pistol from Haines, the defendant, and said to Watson, "Charley, get up;" at which deceased attempted to rise, but fell over dead. When witness came, Haines said, "That fellow robbed me, and I shot him." This witness testified that the body of deceased was guarded, and no money or other thing was taken from it until turned over to the coroner. During the cross-examination of this witness, he was asked by counsel for defendant, "What amount did they [King and Curtis] say Haines claimed he had been robbed of? A. \$30.00." The prosecuting attorney thereupon said, "If counsel calls for part of that conversation, we have a right to call for it all." Later on, the prosecuting attorney, referring to this conversation, inquired what King and Curtis said that time about the \$30, and the witness answered, "They said Haines came in, and told Watson two or three times that he had robbed him, and if he didn't give him back his \$30 he would kill him." Counsel for defendant, without assigning any reason therefor, moved the court to strike out this answer, which the court overruled. Witness also testified that defendant not only stated, "I shot him because he robbed me," but said also, "My watch is gone," to which witness replied, "No, it isn't; your watch is there, Jack; the ring is pulled out;" and took his watch, and put the ring back in it.

Sanford, a reporter of the Star newspaper, testified that next morning after the homicide he went to the police station and saw

defendant. He was not in a cell, but sat in a hallway. He asked him about the affair. He was greatly disturbed. He told witness he had been out the day before to collect some rents. He got \$10 from Jack Daily, and there was another item of \$15, and he said he had \$5 in his pocket. That he had been drinking. That his recollection was he had \$25 in bills and some change when he went into this saloon. He went into a back room, and went to sleep. When he awoke his money was gone, and his watch was gone, and the chain twisted loose. That he went out and demanded his money of the bartender. That his overcoat was gone, and he wanted both. He said he had shot somebody.

Rohring testified he was a brakeman on the Missouri Pacific. His train came in at 10:30, and as next day was pay day he slept over the baggage room at the station that night. He was in the saloon when defendant came in, after 11 o'clock, and left there at 1:30 to go to sleep. He corroborated what Caldwell and others stated about defendant's desire to play dice for \$1, and the refusal to play with him; that he went into the closet, and afterwards came out, and asked Watson for \$30, and Watson jokingly answered, "You ought to have \$30, or I don't blame you for wanting \$30." Watson introduced him to Caldwell as "Hank's Son," and he said he did not know Hank had a son. Other witnesses corroborated the version given by the foregoing witnesses for the state.

On the part of the defendant, there was evidence that during the night, and before the homicide, defendant was seen to have \$25 or \$30 in his possession, which he counted over at the saloons, and that he played at dice with a hackman. A number of witnesses testified to his general reputation as a law-abiding, peaceful man. Defendant testified at great length to the circumstances attending the homicide. Leaving off his various trips about the city, and meetings with different acquaintances, with whom he drank, he details the occurrences in the saloon, where the killing took place, about as follows: He went into the saloon about 11:30 or 11:45. He knew Watson, the deceased. He found a social game of cards going on, and tried to get into it, but could not, and proposed to throw dice for a dollar, but Caldwell and Watson would not permit it in the saloon. He became sick at his stomach, and went back to the closet in the rear and vomited. Watson came to him, and got him to go into a small wine room, and offered him a drink to brace him up, but he did not take it. Watson told him to sit there and sleep, and he would wake him for the 2:30 Santa Fé train. He says he slept awhile, and waked up, and found his pocket had been rifled. He went into the saloon, and told Watson his money was gone. Watson inquired how much he had, and he said about

\$30. Watson said, "That's all right, Jack;" and thereupon defendant returned to the wine room to sleep, but was restless, and came out again, and said to Watson, "Charley, I guess I'll take my money, and go over to the depot, and wait until the train is ready to go out." Watson asked what money he was talking about. Defendant said the \$30 he had spoken to him about. Watson then said "It was customary for bums to come in and sit around, and then claim they had been robbed in the place." Defendant says he argued with him to try to get him to see that his money was restored. He says Watson gave him his overcoat, and that his revolver was in the outside overcoat pocket. After arguing with Watson, he went out into the air, undetermined what to do. He concluded to go back, and see Watson again. He says he stood in the middle of the room. Watson told him to "ring off about losing money; he didn't believe he had any money." He went out, and came in again, and started behind the counter. He says Watson seemed to be infuriated, and came from behind the bar and rushed at him, and struck him in the face with something harder than his fist. He thought it was an ice pick. He says Watson called him "s—n of a b—," and ordered him out. As Watson struck him, he reached into his overcoat pocket, and pulled out his pistol, and drew it to keep Watson off of him and to defend himself. Watson struck at him again, and caught at the barrel of the pistol, and knocked defendant down, and as he fell Watson jumped on him and seized the pistol. While struggling for the pistol it accidentally went off, the bullet striking Watson. Defendant testified he was 57 years old.

1. The first ground urged for a reversal of the judgment in this case is the refusal of the court to discharge the defendant because he was not brought to trial before the end of the third term after the finding of the indictment, as required by section 2644, Rev. St. 1899. The indictment was returned into open court on January 24, 1899. The plea of not guilty was entered January 30, 1899. On March 25, 1899, the cause was continued for want of time to try the case. At the April term no entry appears as to the disposition of the case. At the September term it was continued for cause shown, on the application of the state. At the January term, 1900, the prisoner was tried. Section 2644, Rev. St. 1899, must control our decision, as three regular terms of the criminal court were required to be held in Kansas City in each year. That section provides that, "in all cities or counties in which there shall be more than two regular terms of the criminal court, the defendant shall not be entitled to be discharged for the reasons and under the circumstances mentioned in section 2641, until the end of the third term after the indictment was found." This language, "after the indictment was found," has been prac-

tically the same in all the revisions since 1845. It was construed in *Robinson v. State*, 12 Mo., marginal page 592, as not including the term at which the indictment was found. With full knowledge of the construction placed upon those words by the supreme court, the general assembly has continued their use up to and including our last revision. Excluding, then, the January term, 1899, the prisoner was brought to trial and convicted before the end of the third term after the indictment was found, and consequently no error was committed in overruling his motion for a discharge.

Moreover, it appears that only one continuance was granted on the application of the state, and it must now be considered as settled law in this state that in the construction of these sections providing for a discharge that they "were intended to operate only when there is some laches on the part of the state." *State v. Huting*, 21 Mo. 464; *State v. Marshall*, 115 Mo. 383, 22 S. W. 452; *State v. Billings*, 140 Mo. 193, 41 S. W. 778. Continuances ordered by the court of its own motion, for want of time to try a case, or mistrials of the case, have never been held to authorize a discharge. The silence of the record at the April term is the only circumstance upon which the defendant could have based his motion for discharge, but, as was said in *State v. Marshall*, 115 Mo. 388, 22 S. W. 452, in the absence of proof to the contrary, it must be presumed that the case was continued for want of time to try it.

2. Much stress is laid upon the admission of the evidence of police officers Bray, Daily, and Keenan as to statements made immediately after the shooting, and in the presence of defendant and the dying man, by Curtis and King, as to the shooting. No objection was made to this evidence at the time, and no exception saved, and it is too late to make the objection for the first time in this court, and this point must likewise be ruled against the defendant.

3. Mr. W. B. Clark was offered by defendant to prove his general reputation as a peaceable, law-abiding citizen. Having testified that he had not seen defendant for five years; that witness lived in Independence, Mo., and defendant in Topeka, Kan.; and that he could not state as to defendant's reputation in the neighborhood in which defendant resided before moving to Kansas,—upon objection of the prosecuting attorney he was not permitted to testify to defendant's general reputation. Unquestionably no error was committed in excluding this testimony. The witness clearly disqualified himself. He did not know the general reputation of the defendant as a law-abiding citizen either in Topeka, where he had lived for three or four years, or in Kansas City. Neither was any cross-examination of defendant permitted as to matters concerning which he had not testified.

4. Various criticisms have been made on

the instructions given by the court. We proceed to examine these in the order of the brief of defendant. The instruction defining the word "deliberate" is challenged as error, but, as the jury found the defendant guilty of murder in the second degree, even if the court erred in that regard it can avail defendant nothing on this appeal. This has been ruled again and again. *State v. Eaton*, 75 Mo., loc. cit. 501; *State v. Sansone*, 116 Mo. 1, 22 S. W. 617. Neither was the instruction for murder in the second degree dependent upon that defining murder in the first degree. The court gave the following instruction: "The court instructs the jury that if you fail to find a verdict according to law, as declared in instruction No. 2, but shall find from the evidence that the defendant, John R. Haines, at the county of Jackson and state of Missouri, did at any time before the 24th day of January, 1899, feloniously, premeditatedly, on purpose, and with malice aforethought, with a certain revolving pistol, and that the same was a deadly and dangerous weapon, shoot and kill Charles D. Watson, you will find the defendant guilty of murder in the second degree, and assess his punishment at any time in the state penitentiary not less than ten years." It is not pretended that there was error in defining the words "premeditatedly," "willful," and "aforethought." The court defined them as they have been by this court time out of mind, and so was "malice."

5. No complaint was made in the motion for new trial of the giving of instruction No. 4 given by the court of its own motion, which permitted the jury to find defendant guilty of manslaughter in the fourth degree if he shot and killed deceased without malice, but in a heat of passion produced by a blow and opprobrious epithets. But complaint is made of instruction No. 5, which is in these words: "The court instructs the jury that if they fail to find a verdict according to the law, as declared in instructions Nos. 2, 3, or 4, but shall find from the evidence that the defendant, John R. Haines, at the county of Jackson and state of Missouri, at any time within three years next before the 24th day of January, 1899, drew a pistol upon Charles D. Watson, without legal excuse therefor, and that said Watson seized said pistol, and tried to take it from the defendant, and shall further believe that a struggle ensued over the possession of the pistol, in which said pistol was accidentally discharged, and killed said Watson, then you should find the defendant guilty of manslaughter in the fourth degree, and assess his punishment as defined in instruction No. 4." The defendant prayed the court to give an instruction No. 2, which is as follows: "If the jury believe from the evidence that there was an altercation or quarrel between the defendant and the deceased, Charles D. Watson, in which the defendant drew a pistol upon said Watson, without legal excuse therefor, and that

61 S.W.—40

the deceased seized the defendant's pistol, and undertook to take defendant's pistol away from him, and shall further believe that there was a struggle between the two men over the possession of the pistol, and in such struggle the pistol was discharged by accident, and killed the deceased, then you shall find the defendant guilty of manslaughter in the fourth degree, and assess his punishment by imprisonment in the penitentiary for two years, or by imprisonment in the county jail not less than six months, or by a fine not less than \$500, or by both a fine not less than \$100 and imprisonment in the county jail not less than three months,"—which the court refused, defendant then and there excepting. It is evident the court refused defendant's instruction because it modified it, and then adopted it. The error, if any, was invited by defendant, and he has no ground to complain.

It is however, strenuously insisted that this instruction does not define manslaughter resulting from culpable negligence. We think it does. It was not at all necessary to use the words "culpable negligence." On the contrary, it was made much plainer to the jury by telling them what facts would amount to such negligence. In *State v. Emery*, 78 Mo. 77, this court announced the doctrine that, in order to find a person guilty of manslaughter in the fourth degree, under section 1834, Rev. St. 1899, it was sufficient to show that the shooting, though unintentionally done, was the result of negligence in handling the firearm in such a manner as indicated a carelessness or recklessness of human life.

We agree that, outside of defendant's own evidence, there was nothing on which to base this instruction, but, taking that as true, it placed him in the attitude of drawing a revolver upon deceased, "without any legal excuse," and if, in his effort to prevent being shot by defendant, deceased endeavored to take the revolver from him, and was shot, the fault is directly traceable and referable to the illegal and culpably reckless act of defendant. Certainly, this is the mildest view that can be taken of his conduct at the time. We fully appreciate the situation in which the trial court was placed under the evidence of defendant. Contending one moment that he shot deceased in self-defense, and the next that it was wholly accidental, it was not easy to say what the defense was; but when the court instructed upon both theories, and left the jury to determine the fact, it is clear no harm resulted to defendant by reason of the court's giving him the benefit of either, as it might appear to the jury.

The other instructions have been so repeatedly approved no good purpose can be subserved by incumbering the record with a minute description of each.

As to the point that the evidence was insufficient to sustain the verdict, we think it is clearly not tenable. The whole disturb-

ance in that saloon originated in the wrongful acts of defendant. There was no evidence that he had been robbed by deceased or any one else in that saloon. Granting that, as a result of his evening carousal, he had lost his money, he himself furnished the evidence that he had abundant opportunities to have lost it before he went into Caldwell's saloon. The evidence was ample from which the jury could have found that, smarting under the impression that he had lost his money in Caldwell's saloon, he had determined to force the deceased to restore it or kill him. His statements that he had killed him because he had robbed him were corroborated by the facts. The law will not permit one to thus take the law into his own hands, and avenge a fancied or real wrong. He made no complaint to the officers of the law whom he met after the occurrence, several of whom were on duty in the immediate vicinity at the time. Upon a review of the whole record, we find no reversible error, and the judgment must be and is affirmed.

SHERWOOD. P. J., and BURGESS, J., concur.

RUSCHENBERG v. SOUTHERN ELECTRIC R. CO.

(Supreme Court of Missouri, Division No. 2.
October Term, 1900.)

STREET RAILROADS—INJURIES TO CHILD—EVIDENCE—STATEMENT BY MOTORMAN—RES GESTÆ—EXPERT TESTIMONY—ORDINANCE OF ST. LOUIS—SPECIAL EXCEPTION—SPEED OF CAR—CHARTER—FRANCHISE—INSTRUCTION—JUROR—PREJUDICE—DISQUALIFICATION.

1. A statement made by the motorman of the car by which plaintiff's intestate was killed, after the accident had happened, the car stopped, and the motorman alighted in the street to help extricate deceased's body from the wheels, is not a part of the res gestæ, and hence incompetent.

2. Where an expert was called to testify as to whether or not a street car was being operated in a reasonably skillful manner at the time of an accident, the question, "What means would you employ as a motorman to stop a car in the shortest time and space possible?" was improper.

3. Ordinance St. Louis No. 17,693, § 6, conferring a franchise on the Southern Electric Railroad Company, and authorizing it to run its cars over certain streets at a speed greater than eight miles an hour, is not void because in conflict with Rev. Ord. 1892, § 1275, providing that cars shall not be drawn faster than eight miles an hour, and does not repeal the latter ordinance, since the ordinance of 1892 is general in its nature and application, and the later ordinance is merely a special exception.

4. Under Rev. Ord. St. Louis 1892, subd. 10, fixing eight miles an hour as the maximum speed for street cars, and subdivision 9, requiring street-railroad companies to operate their cars according to the provisions of their charters, a company whose franchise provides that its cars may be run at a speed greater than eight miles an hour is entitled to so run them, since the franchise must be considered a part of the charter.

5. In a suit for damages for the killing of a boy by a street car, an instruction that it was

the duty of the deceased to have exercised such a degree of care and prudence in crossing the track, and in looking and listening for the approaching car, as an ordinarily careful and prudent boy, of like age and intelligence, would have exercised under like circumstances, was proper, since whether or not such a boy would look and listen before going on the track was still left a question for the jury.

6. The acceptance of a juror in an injury case, who has testified that he was prejudiced against such suits in general, but knew nothing about this particular suit, and that if the evidence convinced him that the plaintiff had a good cause of action he would give him a verdict, was not reversible error.

Appeal from St. Louis circuit court; Selden P. Spencer, Judge.

Action by Alexander Ruschenberg against the Southern Electric Railroad Company. From a judgment in favor of the defendant, plaintiff appeals. Affirmed.

Young & Althelmer and Wm. H. Reynolds, for appellant. Lubke & Muench, for respondent.

GANTT, J. Plaintiff's son, aged 6 years and 3 months, while attempting to cross in front of an electric street car, was killed on defendant's track on South Broadway, in the city of St. Louis, May 21, 1897, and this action was brought to recover the statutory penalty of \$5,000. There was a verdict and judgment for defendant, and plaintiff appeals.

In his second amended petition, plaintiff charged that the death of the boy was caused by defendant's car going south; that the motorman failed to keep a proper and vigilant lookout, and failed to exercise ordinary care to stop the car in time to avoid running against the boy; that subdivisions 4 and 10 of General Ordinance 1275 of the Revised Ordinances of the City of St. Louis of 1892 were then in force, and that thereby the operators of street cars were required to keep a vigilant watch for all vehicles and persons on foot, especially children, either on the track or moving towards it, and on the first appearance of danger to such persons or vehicles to stop the car in the shortest time and space possible; also that no car should be drawn at a greater speed than eight miles per hour. The petition alleged, further, that defendant company contracted with the city to obey all the ordinances of the city then or thereafter to be enacted; that the car which caused the death of plaintiff's son was at the time moving faster than eight miles per hour; that the motorman did not stop it in time, after seeing the boy, so as to prevent his death; and that the motors and brakes of the car were defective. Defendant's answer was a general denial, and a plea of contributory negligence as to the father, in that he failed to care for the boy properly, and as to the son himself that, without stopping to look or to listen or proceeding with reasonable caution, he came upon the track, and directly in con-

tact with the car, heedlessly and recklessly. Plaintiff's reply was a general denial.

There was no evidence of any defect in the car or its motors or brakes. The evidence shows that plaintiff is the only surviving parent of Frank Ruschenberg, the deceased boy; that the boy was killed by a car going south on the west track of defendant's street railroad; that the boy was about 6 years and 3 months old when he was killed. The boy had never been to school, and was a rather clumsy, and not particularly bright, child. Plaintiff was in the employ of the city fire department, and was required to remain at the engine house all the time, night and day, and the boy was living with an aunt, within one block west of the point where the accident occurred.

On the part of plaintiff, the evidence tended to prove that the boy, accompanied by another boy somewhat taller than he was, came out of a saloon on the east side of Broadway, and started diagonally across the street, northwestwardly, towards Haller's house, on the opposite side of the street; that the two boys went upon defendant's south-bound track at a point about where a neighborhood crossing intersected the south-bound track, and had almost crossed the same, when the car struck him, and dragged him about 81 feet before the car was stopped; that no gong or bell was sounded to warn them of the approach of the car; that the car was running at a rate of speed variously estimated at from 12 to 26 miles an hour.

On the part of defendant, the evidence tended to show that north of Itaska street there is a hill, and the conductor shut off the current of electricity, and the car was running down grade without any power on. He saw the boys coming along by the saloon door. They were sauntering along, coming slowly across the street, going slightly southwest. They were looking at the car. When the car was very near to them, one of them started and ran right across in front of the car and the other followed. They were very near to the east rail of the east or the north-bound track when they commenced to run in front of the car. The motorman at once applied his brake, and halloosed to them, but they ran ahead, one got across, and the deceased was struck and killed. The motorman testified he was not running faster than eight miles an hour. Mrs. O'Neil, who was a passenger on the car, testified as follows: "Q. Were you in the car going south when this accident occurred? A. Yes, sir. Q. Where did you get on the car? A. It was a green car. I must have got on in the city. I was going out to inspect some factories. Q. What is your business? A. Inspecting factories where women and children are employed, under the state labor commissioner. Q. What is your occupation now? A. It is the same. Q. Working for the state labor

commissioner? A. Yes, sir. Q. You were in the car when the accident occurred in May last? A. Yes, sir. Q. What seat were you occupying? A. The first seat on the left-hand side. Q. What was there between your seat and the front of the car to obstruct the view? A. Nothing. Q. Was the car open? A. Yes, sir. Q. The windows open? A. Yes, sir. Q. Do you remember this gentleman here being the motorman in charge of the car? A. Well, I wouldn't say; he does look like him. I thought he had a bigger mustache than that. Q. You remember the occurrence? A. Yes, sir. Q. Please state where you saw the boys first, and how many of them there were. A. There were two. Q. Where did they come from? A. I didn't notice. They came across the street, and seemed to be playing in the dust. Then they commenced to run diagonally—rather that way—from the car. After they got near the edge of the track, they stopped, and looked up, and we thought—I thought instantly—they were going to get on the track. When I saw them stop, I was sure they had stopped. In the meantime the brakeman had thrown on his brake. The little one looked in a different [defiant] way, and started, but he was caught. Q. Which one looked up? A. The oldest one. Q. What was he carrying? A. A little bucket. Q. Tin bucket? A. Yes, sir. Q. How close were they to the car when the little fellow looked up and ran? A. It didn't seem to be more than ten feet. Q. He got over? A. Yes, sir. Q. What did you see the other one do? A. He started after him. He was two feet behind him. He could not run as fast. He was little, and he got on the track when the car struck him. Q. On which side of the track was he when he was hit? You were going south on the west track? A. Yes, sir. Q. Which rail was he nearest to? A. He was on the right, near to the west, liable to be struck. Q. What did you see the motorman do all this time? A. He was trying to stop the car. Q. What did you observe, if anything, in reference to any gong sounding? A. The gong was sounded, certainly, and the man shouted. Q. Who shouted? A. The motoneer. Q. The distance between the front of the car, when the boy started to run, was how much? A. It could not have been over ten feet; it was close, and the child looked up in our faces. Q. Which one looked up in defiance? A. The older boy. Q. The one that got over? A. Yes, sir; he was ahead. Q. How far did the car go after it struck the boy? A. It didn't seem to me that it went very far. It might have gone further than it seemed, but it didn't seem to be very far. I couldn't say." The different assignments of error will be examined in the order of appellant's brief.

1. During the examination of Edward Reeves, a witness for plaintiff, he was asked by counsel for plaintiff if he heard the motorman make any statement as to the

cause of the accident after witness reached the car, and while the motorman was standing on the street, having left the car to assist in extricating the body of deceased from the wheels. To this question counsel for defendant objected, and the court sustained the objection. In so doing, counsel for plaintiff insists the court erred. The statement called for was incompetent as a part of the *res gestæ*. On its face, it sought to elicit a narrative of a past event. It is not pretended that it was an exclamation or statement characterizing the conduct of the motorman pending the accident. It is the settled law of this state that any statement the motorman might have made at the time indicated was incompetent as an admission of the defendant. *Barker v. Railway Co.*, 126 Mo. 143, 28 S. W. 866, 26 L. R. A. 843, and Missouri cases there cited. In *Adams v. Railroad Co.*, 74 Mo. 553, this court approved *Luby v. Railroad Co.*, 17 N. Y. 133. In that case the defendant was sued for negligently running a railroad car drawn by horses against the plaintiff in one of the streets of New York. A police officer was allowed to testify that he arrested the driver directly after the accident, the citizens having stopped the car, and the driver having got outside the crowd which had gathered, and, on being arrested, assigned as a reason why he did not stop the car that the brakes were out of order. The court of appeals of New York held it error to admit the testimony, and observed that "the alleged wrong was complete, and the driver, when he made the statement, was only endeavoring to account for what he had done." In *Adams v. Railroad Co.*, the fireman on the train remarked to the engineer, "If you had stopped the train when I told you, you would not have killed him;" and this court ruled that the statement did not constitute any part of the transaction, but, if admissible at all, would only go to show another fact, and was not of itself a fact to be proved, as verbal acts, and reversed the case because it was admitted. It is not necessary to review the long list of adjudications on this subject. Courts do not differ materially as to what the doctrine is, but are widely variant in its application. As applied to this case, we think the offer was to prove a narrative of a past occurrence, and not a circumstance so connected with the main fact as to characterize the act itself. *Adams v. Railroad Co.*, 74 Mo. 553; *Senn v. Railway Co.*, 108 Mo. 142, 18 S. W. 1007; *Devlin v. Railway Co.*, 87 Mo. 545; *Barker v. Railway Co.*, 126 Mo. 140, 28 S. W. 866, 26 L. R. A. 843.

But there is another and cogent reason why this court should not reverse the case for the exclusion of the answer, and it is this: The case might be reversed on the naked refusal to permit an answer to the question, and on retrial it might appear that the matter elicited was wholly immaterial and incompetent. The plaintiff should have gone further, and stated to the court what he proposed to prove

by the witness, and in this way advised this court of its materiality. *Bank v. Aull's Adm'r*, 80 Mo. 199; *Jackson v. Hardin*, 83 Mo. 175; *Lane v. Railway Co.*, 132 Mo. 4, 33 S. W. 645; *State v. Martin*, 124 Mo. 514, 28 S. W. 12.

2. Error is predicated also on the exclusion of an answer of the witness Meyers to the following question: "What means would you employ as a motorman to stop a car in the shortest time and space possible?" The witness had testified that he had formerly been employed as motorman four years on the Franklin avenue car line in St. Louis, but was at the time of the trial a member of the fire department, and that a large-size double-truck car, running down a grade with a fall of one inch and three and one-half hundredths to the 100 feet, and running at 8 miles an hour, on a dry track, could be stopped in a distance from 40 to 45 feet by using a brake, and, if the slack was taken up, could stop it in 20 or 25 feet. After this, he was asked what means he would have used to stop a train in the shortest time and space possible. The court correctly ruled that the question was improper. It should have been, within what time and space could a car like this have been stopped by a reasonably skillful motorman, after the motorman discovered or might have by reasonable care discovered the plaintiff's son in danger, with due regard to the safety of the passengers on the car? After the full examination of the witness, however, it is evident no harm resulted from the refusal of the court to permit this question in the form it was propounded.

3. Defendant challenges the eighth instruction given by the court as a modification of the instruction as asked by defendant: "(8) The court also instructs the jury that under the ordinance of the city of St. Louis No. 17,693, which has been read in evidence, the defendant company was entitled to operate its cars at a rate of speed not greater than fifteen miles per hour at the point where the injury occurred of which plaintiff complains; but if, from the evidence, the jury believe that the defendant's servants were at the time of the accident running the car at a speed greater than fifteen miles an hour, they may take such fact (if they believe it to be true) into consideration in determining whether or not the defendant's servants were guilty of negligence as defined in these instructions." The objection is that section 6 of Ordinance 17,693 (the ordinance which confers the franchise on the defendant company to lay its tracks upon, and operate its cars on, certain streets of the city) is void because it is alleged to be in conflict with a prior general ordinance (section 1275, Rev. Ord. 1892, subd. 10), without repealing said prior ordinance, as required by section 28 of article 8 of the city charter. The tenth subdivision of the said section 1275, Rev. Ord. 1892, provides that "no car shall be drawn at a greater rate of speed than eight miles per hour"; where-

as, the franchise granted by the city to the defendant street railroad provides that it is "authorized and permitted to run its cars over and upon that portion of its line from Market street to Russell avenue at a speed not greater than ten miles per hour, and between Russell avenue and Catatan street and on Loughborough avenue and Gravis avenue at a speed not greater than fifteen miles per hour." The provision of the city charter with which this last ordinance is supposed to collide is section 28, art. 3, which reads as follows:

"Sec. 28. Every ordinance when passed and approved by the mayor, or when it shall have become a law, shall be sent to the city register and by him shall be numbered, printed, filed and preserved in his office according to ordinance; and no special or general ordinance which is in conflict or inconsistent with general ordinances of prior date shall be valid or effectual until such prior ordinance or the conflicting parts thereof are repealed by express terms."

The point is of much importance, as well to the travelling public as to the companies operating street-car lines. In the determination of the question, we start with the presumption in favor of the validity of the ordinance, and before holding the ordinance to be in conflict with a prior general ordinance we must consider the whole of the general ordinance, and, if possible, reconcile the special ordinance granting defendant's franchise with the general ordinance (section 1275) and the charter of the city. It will be borne in mind that section 28, art. 3, of the charter is exceedingly general in its terms, and applies to all ordinances which may be enacted by the city; but the charter contains another article, to wit, article 10, which confers upon the city special authority over all street railroads then built or thereafter to be constructed in said city, and the municipal assembly was granted power by ordinance to determine all questions arising with reference to street railroads, whether involving their construction, or granting them right of way, or regulating or controlling them after their completion, and the assembly is given the power to regulate the time and manner of running cars, etc.

Is an ordinance passed by the city in strict compliance with article 10 of the charter, and fixing a new rate of speed under new and changed conditions, necessarily in conflict with the old ordinance, fixing eight miles an hour as the maximum speed for horse cars? In adjusting these general provisions of the charter, we are not called upon to construe them by any rigid technical rule, but must be governed by considerations of reason and justice. It is obvious that neither the municipal assembly nor the companies obtaining these new franchises to propel cars by electricity considered that they were repealing the old general ordinance, and we should hesitate before we

reach a conclusion which renders all these franchises void. Granting now that the old ordinance (section 1275) is broad enough to cover all street railroads, and that this franchise is inconsistent as to rate of speed with that so far as the two might both apply to the particular streets on which this road is authorized to run in excess of eight miles, upon a familiar and old rule of construction we are not required to hold it is a repeal, and is therefore void, because not an express repeal, because when there are two acts or charter provisions or ordinances, one of which is special and particular, and certainly includes the matter in question, as does article 10 of the charter and Ordinance No. 17,693 in this case, and the other general, which, if standing alone, would include the same matter, and thus conflict with the special act or provision, especially when such general and special acts or provisions are contemporaneous, the special act must be taken as intended to constitute an exception to the general act or provision, and not a repeal. *Crane v. Reeder*, 22 Mich., loc. cit. 334; *State v. Goetze*, 22 Wis. 348; *Long v. Culp*, 14 Kan. 414; *Suth. St. Const.* § 217, and cases cited. But, again, section 1275 must be read in all its parts, and, while it is true that the tenth subdivision of that section prescribes eight miles as the maximum speed, the ninth subdivision requires all street-railroad companies to operate their cars according to the provisions of their charter; and since the people of the state have conferred upon the city of St. Louis the power to regulate the speed of these cars, and in Ordinance 17,693 it granted defendant company a franchise, without which its charter to run a street-car line would be wholly inoperative, the said franchise must be read into and considered as a part of its charter, within the meaning of said section 1275, subd. 9; and, when so read, it was obligatory on defendant to conform to its charter or franchise, and not to the other provision in the same section, requiring it not to run exceeding eight miles an hour. By this construction, we give effect to the whole of said section, and not a part only. As the instruction conformed to the ordinance granting defendant its franchise, it was not erroneous.

3. Other instructions are assailed by plaintiff, particularly the modification by the court of plaintiff's first instruction. As asked, that instruction was in these words: "The court instructs the jury that it was the duty of the said Frank Ruschenberg to have exercised such a degree of care and prudence in crossing said tracks that an ordinarily careful and prudent person of his age and intelligence would have exercised under like circumstances; and, if you believe from the evidence that the said Frank Ruschenberg failed to exercise such a degree of care and prudence in going on or across the tracks, then you should find he was guilty

of negligence." As modified and given by the court, this instruction read: "The court instructs the jury that it was the duty of the said Frank Ruschenberg to have exercised such a degree of care and prudence in crossing said tracks, and in looking and listening for the car, that an ordinarily careful and prudent boy of like age and intelligence would have exercised under like circumstances; and, if you believe from the evidence that the said Frank Ruschenberg failed to exercise such a degree of care and prudence in going on or crossing the tracks, then you should find that he was guilty of negligence." We see no error in the instruction as given. After all, the measure of care required was such only as a boy of like age and intelligence would have used under like circumstances. Whether such a boy would look and listen before going on a track immediately before an approaching car was a question, under the evidence, for the jury. The instruction, as modified, is not in conflict with the views expressed in *Spillane v. Railway Co.*, 135 Mo. 414, 37 S. W. 198.

Plaintiff's instructions 2, 4, 6, and 7 were all erroneous, in that they instructed the jury that, if the car was run in excess of eight miles an hour, defendant was guilty of negligence, whereas its franchise permitted it to run at this point fifteen miles an hour.

The circuit court gave plaintiff's instruction No. 3, by which liability was declared against defendant if the servants of defendant failed "to keep a vigilant watch for all persons on foot, especially children, either on the track or moving towards it," and failed "on the first appearance of danger" to stop defendant's car "in the shortest time and space possible, by reason of which the said Frank Ruschenberg was run over and killed." The court, by its own instructions, fully and fairly placed before the jury the common-law rules of liability if the operator of defendant's car was negligent in keeping a proper lookout, or was negligent in stopping the car, or failed to exercise ordinary care after the peril of the boy was known or was discoverable with ordinary care.

4. The next and last assignment is that two of the jurors were incompetent and disqualified themselves on their voir dire examination. They both answered that they were prejudiced against personal damage suits; that there were too many such suits brought; that they knew nothing about this particular suit; that their prejudice was a general prejudice against such suits; that they knew no reason why they could not try this case fairly, and decide it according to the evidence and instructions of the court. One admitted he would start in with a bias in his mind against such cases, but, in answer to the court's question, "Then I understand you to say that your prejudice is merely against damage suits in general,—that you have no prejudice whatever against this

suit?" answered: "No, sir; not against this case in particular." Counsel for plaintiff then asked: "Q. Then I understand you to say, if the evidence in this case was sufficient to convince you that the plaintiff had a good cause of action, you would give him a verdict? A. Yes, sir." So much depends upon the manner of the juror and his tone of voice, and the opportunities of the trial judge to see and know the jurors, that it has become the settled practice of this court not to interfere with his finding unless it is manifest he has erred. The competency of a question of fact and the finding of the circuit court will not be disturbed unless clearly against the evidence. *McCarthy v. Railway Co.*, 92 Mo. 536, 4 S. W. 516; *State v. Cunningham*, 100 Mo. 382, 12 S. W. 376; *Mahaney v. Railway Co.*, 108 Mo. 199, 18 S. W. 895; *State v. Chatham Nat. Bank*, 80 Mo. 633; *Coppersmith v. Railway Co.*, 51 Mo. App. 363. Applying these principles, we cannot say the circuit court erred in accepting the two jurors in this case. Having examined all the points assigned as error, and finding no reversible error, the judgment must be, and is, affirmed.

SHERWOOD, P. J., and BURGESS, J., concur.

LEE et al. v. LEE et al.

(Supreme Court of Missouri, Division No. 1.
March 12, 1901.)

SLAVES — MARRIAGE — LEGITIMACY OF CHILDREN — GOOD FAITH — PARTITION — EJECTMENT AS CONDITION PRECEDENT — HOMESTEAD.

1. Under Rev. St. 1899, § 2920, providing that the children of persons who were slaves and were living together in good faith as man and wife at the time of the birth of such children shall be decreed to be legitimate, etc., it is no objection to such legitimacy that the parents, being slaves, had no ability to contract, and hence could not exercise good faith.

2. In partition, a decree in a former partition was pleaded as establishing the right of certain defendants to a certain part of the land, but no other claim was made under it. *Held*, that a claim of homestead not otherwise set up in the answer could not be based on the fact that homestead was set off in the first decree.

3. Ejectment is not a condition precedent to a suit for partition by persons claiming an interest in land as heirs of a common ancestor.

Appeal from circuit court, Livingston county; E. J. Broadus, Judge.

Petition by Peter Lee and others against Mary Ann Lee and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

This is a statutory partition proceeding. Plaintiffs claim to be children and heirs of Handy Lee. Two of defendants are his widow and child, and the other two are Chaney Lee, who is the owner of an undivided half of the land, and Robert E. Lee, her husband. The real contest is between the plaintiffs, on the one side, who claim to be children of Handy Lee, deceased, and his widow, Mary

Ann, and Andrew Lee, her child, on the other side. The principal facts are contained in an agreed statement, from which it appears: That Handy Lee, Margaret, and Mary Ann were negro slaves from birth, owned by a resident of this state, and have always resided here. In 1846 Handy Lee and Margaret, with the consent of their master, were married, and lived together as husband and wife until 1856. Of that union the plaintiffs Peter and Rachel were the offspring, born in 1850 and 1852. In 1856 Handy, with his master's consent, separated from his wife Margaret and married the defendant Mary Ann. The defendant Andrew Lee is the result of the second marriage, born in 1861. In August, 1865, after they were emancipated, Handy Lee and Mary Ann Lee were married in due form, and they lived together as husband and wife until the death of Handy in 1887. At the time of his death Handy Lee and Chaney Lee owned the land described in the petition, but they had some time before made a parol partition of it between themselves, whereby the north half was allotted to Handy and the south half to Chaney, and they both acted on that partition up to Handy's death. In addition to the agreed statement, defendants introduced in evidence, over plaintiffs' objection, the records of the court in another suit, showing that in 1891 Mary Ann and her son and the plaintiff Peter united as plaintiffs in a partition suit against Chaney and her husband, the result of which was that the south half of the land was set off to Chaney, and the north half to Mary Ann, for life, as a homestead, and at her death to go to Peter and Andrew,—each an undivided half,—in fee. But Rachel was left out of that suit, and the proceeding did not dispose of her interest. Now, in the suit at bar, Peter and Rachel are plaintiffs, and seek a new partition. The court, by its decree in this case, allotted the south half to Chaney and the north half to the widow and heirs of Handy,—that is, one-third for life to the widow, as her dower, and one-third in fee to each of the heirs, Peter, Rachel, and Andrew, subject to the widow's dower,—and finding that the north half was not susceptible of partition in kind among the parties interested, without prejudice, ordered that it be sold for partition, and the proceeds divided according to their interests so adjudged. From the decree the defendants appeal. No complaint is made by the appellants of the allotment to Chaney, but they say that the plaintiffs, being the children of a marriage of slaves, are illegitimate, and inherit no interest in the land.

John E. Wait, Robt. Miller, and Kitt & Kitt, for appellants. J. M. Davis & Sons, J. L. Minnis, and Jos. Barton, for respondents.

VALLIANT, J. (after stating the facts). 1. There is an interesting and learned discussion in the briefs of counsel on the question of the

legitimacy of marriage between slaves. The earlier decisions on this subject vary according to conditions. In Massachusetts slave marriages were deemed valid, but the subject was regulated by statute. *Oliver v. Sale*, Quincy, 29, and note. In New York, also, such marriages were held valid, by virtue of a statute. *Overseers of Marbletown v. Overseers of Kingston*, 20 Johns. 1. In the states where slavery more recently existed, the decisions are not uniform. Some of them hold that the subject is to be governed by the rules of the common law in reference to marriage generally, and that as marriage by the common law was a civil contract, and required the consent of parties capable of contracting, and as the slave did not have that capacity, his marriage was void. The writer of this opinion, speaking for himself alone, deems that a very narrow view of the subject. The common law is never so rigid as to require the same rules to be applied to all conditions, regardless of reason and justice. Marriage is a contract, but it is something more,—it is a relation; and upon that relation is founded the moral strength and well-being of mankind. The slave had no property that he could transmit by inheritance to the offspring of his marriage, but he could give to his children that status that comes from having been born of parents who, as far as their condition allowed, assumed the relation of husband and wife. It is said he could not consent, and therefore he could not contract. His condition of slavery subjected him to the will of his master, who, except as the law of the land otherwise required, was both lawmaker and judge for him, and what he lacked of civil rights the master had for him; so, though he might lack the technical power to consent, yet when his master gave his consent it supplied what he lacked. Those marriages of slaves were often solemnized in the presence of the master, and by the same priest or minister who officiated at such ceremonies in the master's family. And that relation was not infrequently observed by them as sacredly as by those in more fortunate condition. It seems to the writer that it would be degrading to our law to say that it could recognize no distinction between such a marriage and concubinage. This is the view taken of the subject by the courts of Louisiana and Tennessee. *Girod v. Lewis*, 6 Mart. 559; *Pierre v. Fontenette*, 25 La. Ann. 617; *Brown v. Cheatham*, 91 Tenn. 97, 17 S. W. 1033. But it is unnecessary to decide that question in this case, because, whether the marriage of the plaintiff's parents was technically legal or not, their right to inherit from their father is definitely conferred by statute. Section 2920, Rev. St. 1899, which is a part of the chapter on "Descents and Distributions," is: "For the purposes of this chapter, the children of all persons who were slaves, and were living together in good faith as man and wife at the time of the birth of such children, shall be deemed and taken to be legitimate."

dren of such parents," etc. That has been the law of this state since February 8, 1865. The argument for appellants is made that that statute is unavailing, because it applies to those who were living together "in good faith" as man and wife, and that good faith implies ability to contract, which a slave did not have. Such a construction would render the statute self-contradictory. "Good faith" has a broader meaning. Under that statute the plaintiffs Peter and Rachel inherited, as legitimate children, from their father.

2. Appellant Mary Ann insists that she ought to have a homestead set off to her in the land, or, rather, to have the whole of that part of the land that is to be set off to Handy's heirs assigned to her as a homestead. This claim she bases on the decree rendered in the other partition suit, in which Rachel was not a party. But there is no claim of that kind set up in her answer. The decree in the suit is pleaded in the answer as establishing the right of Chaney Lee to the south half of the land, but no other claim is made under it. There is no claim in the answer for a homestead, and no proof on which it could be assigned to her.

3. There is nothing in the point that plaintiffs should have first established their title by a suit in ejectment. They could not have maintained ejectment against the widow, who was lawfully in possession. The agreed statement of facts left nothing for the court to try, except a question of law, and the court took the correct view of that question. The judgment of the circuit court is affirmed. All concur, except MARSHALL, J., absent.

HAFNER et al. v. CITY OF ST. LOUIS.

(Supreme Court of Missouri, Division No. 1.
March 12, 1901.)

CITIES—POWER TO ACQUIRE REAL ESTATE—QUITCLAIM—EQUITABLE AND LEGAL TITLE.

1. Under the general power given a city by Rev. St. 1845, c. 34, § 1, to hold, purchase, and convey such real estate as its purposes shall require, it may, where necessary, acquire land outside its limits for wharf purposes, though its charter, reciting that it may purchase, receive, and hold real estate outside the city for certain purposes, does not mention wharf purposes.

2. Neither a grantor of land to a city, nor those claiming under him, but only the state, can question its power to acquire and hold the land.

3. Where land is conveyed to persons to hold in trust for the sale, use, and benefit of W., and to manage and dispose of it as W. may direct, and W. and her husband quitclaim it to a city, the legal title subsequently acquired by the trustees, conveying it to her, inures to the benefit of the city.

Appeal from St. Louis circuit court; Selden P. Spencer, Judge.

Suit by Julia A. Hafner and others against the city of St. Louis. Judgment for defendant. Plaintiffs appeal. Affirmed.

E. P. Johnson and H. M. Pollard, for appellants. B. Schnurmacher and Chas. C. Allen, for respondent.

ROBINSON, J. This is a suit in ejectment for the possession of a piece of land in the city of St. Louis bounded on the north by the south line of Dock street extended to the Mississippi river; on the west by the eastern line of city block No. 661E of said city, which latter line is the same as a proposed western wharf line under City Ordinance No. 5403; on the south by a line parallel with and 164 feet south of said south line of Dock street so extended; and on the east by said river,—being the eastern portion of lots 298 and 299 of North St. Louis. The suit, as originally instituted, was against the city of St. Louis, the St. Louis, Keokuk & Northwestern Railroad Company (which, under an ordinance of the city, had a right of way across the property in controversy, and over which at the time it was operating a railroad), and Justin E. Joy, a lessee of the city, occupying that part of the property not occupied by the railroad company. The defendants other than the city of St. Louis answered separately by general denial, and the city answered separately—First, by general denial; second, that plaintiffs, and those under whom they claim, had not been seised or possessed of the premises within 10 years before the commencement of the action; third, that defendant had been in the continuous adverse possession of them for more than 10 years before the action was commenced; fourth, that pursuant to Ordinance No. 2032 of said city, for locating and establishing a wharf north of Cherry street in said city, and for other purposes, Thomas H. West and many others, among them William H. Glasgow, Mary F. Glasgow, and Thomas A. Wright, the parties under whom the plaintiffs claim title to said premises in this suit, joined in a deed, whereby each for himself forever released and confirmed unto the city of St. Louis his right, title, interest, and claim of every description whatever in and to the premises sued for, which deed is known as the "Wharf Deed of 1853"; fifth, a plea that all questions relating to the terms, conditions, and effect of said deed have been adjudicated in the case of City of St. Louis v. Wiggins Ferry Co., 88 Mo. 615, and that by said decision the status of said deed, and the title of the city to the property thereby conveyed, had become settled and was binding upon plaintiffs; sixth, a plea that, after the execution of the wharf deed of 1853, the city of St. Louis passed numerous ordinances for the improvement of the wharf established by Ordinance 2932, appropriating large sums of money therefor, and that over \$300,000 was expended in the construction and building of dykes and revetments, and over \$35,000 in the improvement of the wharf across the very property in dispute, and that said work was done between the year 1853 and prior to the institution of this suit, during all of which time plaintiffs and their predecessors in the title knew that the city was making these improvements and

expenditures, never objected thereto, but on the contrary acquiesced therein, and accepted the benefits of the work done and the money thus expended in improving their property so fronting upon the wharf, and that neither the plaintiffs nor their said predecessors attempted, prior to the institution of this suit, to exercise any power or authority over the property in dispute, but permitted the city to do said work and to deal with said property as with the remainder of its unpaved wharf, and that they recognized same as a wharf by deeds and by other acts in relation thereto,—all of which acts are pleaded as an estoppel. To these answers plaintiffs replied by a general denial, and the case proceeded to trial by the court without the intervention of a jury, during the progress of which plaintiffs dismissed as to the defendant the St. Louis, Keokuk & Northwestern Railroad Company. The court found in favor of the remaining defendants, and against plaintiffs, and plaintiffs have brought the case here on appeal, after the usual steps taken to that end.

Since this case was heard in the circuit court, the case of *Sweringen v. City of St. Louis*, 151 Mo. 348, 52 S. W. 346, passed upon by the other division of this court, has practically determined the question of plaintiffs' paper title to the property. That was a suit in ejectment for a strip of land just 60 feet north of Dock street, in the city of St. Louis, whereas the property involved in this suit is immediately next to and south of said Dock street, both tracts being part of the accretion made to the east of the east boundary line of the Labeaume patent; and the plaintiffs here, as in that case, to sustain their paper title, were required to show that the land embraced in the Labeaume patent (under which these plaintiffs and the plaintiff in that case claimed) was riparian property. In this case, as in that, it was not claimed that the land in controversy was embraced within the actual calls of the Labeaume patent, but that it is part of an accretion formed to said land, more than a thousand feet east of what was the west bank of the Mississippi river at the time of the concession and patent of the main land acquired by plaintiffs in each case through mesne conveyance from the original patentee, Labeaume. The facts of this case, and the facts of the *Sweringen* Case, in so far as concerns the question of paper title, are identical, each depending upon the effect given to the eastern boundary line of the Labeaume grant. If the river is not the eastern boundary line of the Labeaume grant, then the paper title of plaintiffs in this case, as in that, must of necessity fall, and, if plaintiffs are to recover at all in this action, it must be upon their further claim of title by adverse possession.

On the question as to the eastern boundary of the Labeaume grant, the court in the *Sweringen* Case, speaking through Gantt, P.

J., said: "Now, in the patent to Labeaume the river is not mentioned as a boundary. On the contrary, the eastern boundary is a permanent line, fixed by courses and distances, metes and monuments, 'between high and low water mark,' and the accompanying survey exhibits a tract of 14 acres or more between the eastern boundary of the survey and the river itself." And again: "The tract in this case was confirmed, not only by fixed boundaries other than the river, but the exact number of acres was specified within that survey, and that survey excludes all idea that the United States was granting the 14 or more acres lying outside of that survey at the time it was made. The survey, moreover, says that Souldard's survey did not describe the meanders of the Mississippi or of Rocky branch, and it was impossible to determine whether the difference in area was the result of miscalculation of Souldard or by the accretion. But, whatever the cause of the discrepancy, the United States confirmed the last survey, which nowhere calls for the river as a boundary, and by that patent all these questions must be held to be forever settled." From the above, it must result that the appellants herein, claiming the land in suit as an accretion to part of the Labeaume grant, must fail, unless the holding in that case be ignored by this division.

To appellants' claim of title by adverse possession of the property in suit for a period of more than 10 consecutive years next before defendant's assertion of possession thereto, that may be disposed of with the bare suggestion that the facts upon that issue, under proper declarations of law in the nature of instructions to the court, were found adversely to the appellants' contention by the trial court, and by that finding this court will be bound.

But independent of the question as to the result of this case if the *Sweringen* Case be followed, and if it be assumed that the property covered by the Labeaume patent was riparian, bounded upon the east by the Mississippi river, and that Labeaume's grantees were entitled to all the land that formed as accretions east of the original boundary line of the river bank to the present bank of the river, the testimony in the case showed that the defendant city of St. Louis had acquired title to this, along with much other property similarly situated on the western bank of the Mississippi river, in 1853, for wharf purposes, from plaintiffs' grantors and others, by the wharf deed of that date, which deed has been several times before this court for consideration, and in each instance the city's right under it has been sustained, and for like reason the judgment of the trial court herein should be sustained. To the introduction of this wharf deed, however, two objections were made by appellants, which seem to us to be the principal questions of controversy on this appeal. While appellants do not attempt to impeach its validity as a convey-

ance, on the ground that the condition precedent therein had not been complied with by the city (as in the case of *City of St. Louis v. Wiggins Ferry Co.*, 88 Mo. 615), and for that reason deny that the property therein named had passed to the city, their contention now is that, in so far as the deed covers land beyond the city limits for wharf purposes, it was inoperative to pass title to the city for that purpose; and, second, that, as to the accretion in front of lot 299 of the property in suit, the city got no title to it for the further reason that at the time of the execution of the wharf deed by Mrs. Mary F. Glasgow and her husband, William H. Glasgow (the grantors through whom the appellants now claim the property), the title thereto was in the trustees of Mrs. Glasgow, for her sole and separate use, etc., and for that reason the deed was inoperative to pass her title to the property.

To appellants' first objection, that the wharf deed of 1853 was inoperative to pass title to the city to so much of the land named therein as was beyond the city limits, the respondent answers—First, that the record discloses no such state of facts, but that if it be true that part of the land in suit was shown to have been beyond the limits of the city at the time of the execution of the wharf deed, as claimed by appellants, and if it be further conceded that the city had exceeded the limits of its power in purchasing the land in suit of the appellants' grantor, neither they nor the appellants could try that question in a collateral proceeding, as this, or, for that matter, in any character of a proceeding; that the transaction can alone be assailed in a direct proceeding brought by the state. *Land v. Coffman*, 50 Mo. 243; *Atlantic & P. R. Co. v. City of St. Louis*, 66 Mo. 251; *Hovelman v. Railroad Co.*, 79 Mo. 632; *Insurance Co. v. Smith*, 117 Mo. 289, 22 S. W. 623. That the city of St. Louis has authority to purchase real estate under proper conditions and for particular purposes cannot be questioned. By section 1 (Rev. St. 1845, c. 34) of the act concerning corporations, in force when this wharf deed was executed, among its enumerated powers appears the following: "To hold, purchase and convey such real estate as the purposes of the corporation shall require, not exceeding the amount limited by its charter." By the charter of the city upon that subject, then in force, it also in express terms provided that "the city may purchase, receive and hold property, real and personal, beyond its limits, to be used for the burial of the dead, for the establishment of hospitals, for the receipt of persons infected with contagious and other diseases, for the establishment of a poor house, work house, or house of correction, and for the establishment of waterworks to supply its city with water," etc.

Though, among the enumerated charter powers of the city at that time in force, no express power is conferred upon the city of St.

Louis to purchase, hold, or receive land for wharf purposes beyond its corporate limits, and while it is true that the city, in that regard, must act within the express or implied authorization of its charter, by reading its charter powers in connection with its general authority under the statute "to hold, purchase and convey such real and personal estate as the purposes of the corporation shall require, not exceeding the amount limited by its charter," and remembering that no express restriction is found in the city charter against the purchase of real estate for wharf purposes, it would seem that the city, under its general statutory power, could receive and hold such property, beyond its corporate limits, not prohibited by its charter, and essentially necessary for the purpose of carrying out one of its proper corporate functions and duties, as the establishment, construction, and maintenance of a general wharf system along its river front, and by further bearing in mind the fact that in so doing the beginning or termination of a perfect wharf system must of necessity involve a disregard of the exact corporation limits of the city as at the particular time established. In our opinion, the mere directory power of the charter as to the right of the city to purchase, hold, and receive real estate outside of the corporate limits of the city for particular designated purposes should not be construed as an absolute limitation upon the general power conferred upon the city, under section 1 of the statute concerning corporations above cited, to purchase and hold real estate wherever located, when it becomes necessary for the purposes of the corporation. The necessities of the city, under the statute, constitute ample warrant for the purchase of land, wherever located, for other purposes than those designated in its charter; and if it be recognized that the city had power to purchase, and the grantors the right to sell, the land in controversy, the conveyance would operate to transfer title to the city, and neither the grantors, nor those claiming through them, can be heard to complain that the city improperly or unwisely exercised its power in that respect, to defeat its claim of title. That is a matter that concerns alone the state, and she alone will be heard to complain. Under exactly the same charter provision as those in force when the wharf deed in question was executed, and with the same general statute applicable to the municipal corporation before it, this court in the case of *Chambers v. City of St. Louis*, 29 Mo. 543, when the devise to the city under the famous Mullanphy will was up for consideration, held that the city had the power to acquire by grant or devise land outside of its corporate limits for municipal purposes other than those designated in the charter; and in the same case it was also further announced that, even if the city did not have such power, neither the grantor in such deed nor their privies could try the question in a collateral proceeding; that it

was a matter of no concern to them, but a matter solely between the state and the city.

The question that presents itself on appellants' second objection to the wharf deed, under which the city claims title to the property, is just the reverse of the one we have been considering. This goes, not to the right of the city to acquire the land in suit, but to the questions of the power and right of the plaintiffs' grantor (Mrs. Mary F. Glasgow) to convey title to the city, on account of her alleged disability, at the time the wharf deed was executed by her and her husband to the city in 1853. From the evidence in this case it appears that, in the year 1850, William H. Glasgow and Mary F. Wright (who was at that time the owner of lot 299 in controversy) entered into a marriage contract, whereby all the property of said Mary F. Wright was conveyed to William F. Wright and Theodore P. Green, in trust for her sole and exclusive use and benefit, to manage, sell, and lease, incur and dispose of, as the said Mary F. Wright by writing may direct, etc.; that the legal title to the property remained in the trustees until the year 1854, when they reconveyed same to Mrs. Mary F. Glasgow, formerly Mary F. Wright, and she afterwards by will devised and bequeathed same to her husband, William H. Glasgow, and through said William H. Glasgow plaintiffs' paper title to the property, if title they have, is derived; that in the year 1853, while the said William H. and Mary J. Glasgow were husband and wife, they joined in the execution of the wharf deed of that date, along with a number of other owners of property fronting upon the Mississippi river. Under these facts, it is claimed by appellants that, as the legal title to the land in suit was at the time of the execution of the wharf deed by Mary F. Glasgow and husband in the trustees, William F. Wright and Theodore P. Green, and as the wharf deed to the city was a mere release or deed of quitclaim, it did not undertake to pass an indefeasible estate to the city, and did not operate, in consequence, to transmit the after-acquired legal title of either Mary F. Glasgow or that of her husband thereto. Whatever may be said as to where the legal title of lot 299 rested after the execution of the deed in 1750 to the trustees, Wright and Green, Mary F. Glasgow, under that deed, undoubtedly had the equitable title to the lot when she and her husband joined in the execution of the wharf deed to the city to that portion thereof east of the west wharf line, as indicated on the plat accompanying the deed, with the absolute right to manage, use, or dispose of same as she might wish, independent of the control or restraint of said trustees. In other words, she was the sole beneficial owner of the property. At most, nothing but a bare, naked legal title to the lot was outstanding in the trustees at the time of the execution of the wharf deed in 1853, and subsequently, when

they, in 1854, executed the trust by reconveying the property to Mrs. Glasgow, the legal and equitable title became merged. Not only did the legal title thus acquired by her thus inure to the city, but, by relation, her reacquisition of the legal title took effect as of the date when she executed the wharf deed to the city, in 1853.

That the trustees, while holding the bare, naked legal title to the property in suit in 1853, could not have maintained this action of ejectment for the land against Mrs. Glasgow or her grantee (the city) will not be questioned, and yet, if so, why should those claiming through Mrs. Glasgow, after she has parted with her equitable title to the land, and with nothing but the bare legal title of her trustees reconveyed to her, be said to be more favorably situated? Since, by the deed from her trustees, Mrs. Glasgow acquired no title paramount to that which she conveyed to the city, but subordinate thereto, her after-conveyance of the property, by way of will, to her husband, must be, and at all times remain, subordinate. And since the trustees, Wright and Green, could not have maintained ejectment against Mrs. Glasgow or her grantee, the city of St. Louis, for the land in suit, on the bare, naked legal title held by them, the plaintiffs, whose sole claim is through that bare, naked legal title outstanding in the trustees, at the time Mrs. Glasgow and her husband joined in the execution of the wharf deed to the city for the then equitable interest of Mrs. Glasgow in the property, cannot now maintain this action.

Numerous other questions growing out of the case have been discussed by both appellants and respondent in the briefs filed with us, which we do not think necessary to be considered at this time, as under no phase of the case could the judgment be other than that rendered by the trial court for the defendant, and for the further reason that every point made and question raised has been discussed and disposed of by this court in some one or other of the score of cases brought to deprive the defendant city of St. Louis of portions of its wharf property obtained under the wharf deed of 1853. The judgment of the circuit court will be affirmed. All concur, MARSHALL, J., not sitting.

HUTCHINSON et al. v. MISSOURI PAC. RY. CO.¹

(Supreme Court of Missouri. Nov. 12, 1900.)
RAILROAD-CROSSING ACCIDENT—FAILURE TO RING BELL—CONTRIBUTORY NEGLIGENCE.

1. It is immaterial that the bell of an engine which struck a person at a crossing was not rung as required by statute; she having notice of the approach of the train, having heard and recognized the whistle, and seen the headlight.

2. Whether a person attempting to go over a railroad crossing, in front of a train, in the nighttime, who had stopped to pick up some

¹ For opinion on motion for rehearing, see 61 S. W. 852.

thing she had dropped, was negligent, is for the jury; the speed of the train being 35 miles an hour, while an ordinance provided it should not exceed 6 miles per hour, and there being no evidence that she knew or had reason to apprehend that it was running faster than authorized.

Robinson, Sherwood, and Marshall, JJ., dissenting.

In banc. Appeal from circuit court, St. Charles county.

Action by Robert L. Hutchinson and others against the Missouri Pacific Railway Company. Judgment for defendant. Plaintiffs appeal. Reversed.

The following opinion was delivered in division No. 1:

"VALLIANT, J. This is a suit for damages for the killing of plaintiffs' mother, which they allege was caused by the negligence of defendant. The plaintiffs are minors suing by their next friend. Their mother was a widow. The allegations of the petition are that the plaintiffs' mother on January 3, 1892, was struck and instantly killed by an engine drawing a passenger train within the limits of the city of St. Louis, while she was in the act of crossing the track at a passenger station with a view of reaching a platform provided by defendant for that purpose, from which she intended taking passage on a train of defendant. The acts of negligence charged are that the defendant ran its engine and cars without ringing the bell for the crossing as the statute requires, and ran the train at the speed of thirty miles an hour within the city, in violation of an ordinance of the city which provided that it was unlawful to run it at a higher rate than six miles an hour. The prayer of the petition is for judgment for \$5,000. The answer admits that the ordinance was in force at the time of the accident, but avers that it was repealed in 1893, denies all other allegations, and sets up a plea of contributory negligence, which is denied by the reply. The evidence for plaintiffs tended to show the following: Benton, where the accident occurred, is a station on defendant's road in the western part of the city. Defendant has a station house there, on the north side of its tracks, for the accommodation of its passengers. It has double tracks,—the north track for the west-bound, and the south for the east-bound, trains. There was a platform on each side of the tracks. That on the south side was designed for passengers taking the east-bound trains. To go from the station house to the south platform, one would cross both tracks. On January 3, 1892, Mrs. Hutchinson, the plaintiffs' mother, came to this station, with the purpose of taking the accommodation train, as it was called, going east, which train was due there at 6:38 p. m. The exact time of her arrival at the station is not established, but is approximately given. It was stated that she had left the house of her daughter to go to the station about six o'clock, and the

distance was about a half mile. A witness (Mr. Banghart), who was in the station with her, estimated it to be about 6:20 p. m. when they heard the whistle, and she and he went out of the station together to cross over to the south platform. Another witness thought it was within three or five minutes of the time for the accommodation train. Ellendale is a station a half mile to the west. A train at Ellendale coming east could be clearly seen from the platform in front of the station on the north side of the tracks at Benton, and from the north track and from the space between the tracks; but from the platform on the south side it could not be seen for more than 300 or 500 feet, owing to an embankment and pile of ties obstructing the view. Mrs. Hutchinson was in the habit of visiting her daughter, and had frequently taken the train from that station, but usually went in on an earlier train. The night of the accident was cold and dark. Mrs. Hutchinson and Mr. Banghart were in the station house, where there was a light and fire, awaiting the accommodation train. She had a ticket to the Union station. They heard a whistle in the direction of Ellendale, when Mrs. Hutchinson said: "That is our train. We will have to be in a hurry." And she and Banghart immediately arose and went out on the platform in front of the station, where they stopped and looked west. The headlight of the train coming from Ellendale was plainly visible. She said: "This is our train. We better be in a hurry, to get across." They both started to go across the tracks, Mrs. Hutchinson a little ahead, but Mr. Banghart passed her. When she reached the middle of the south track she dropped a lace scarf she was carrying in her hand, and paused and stooped to pick it up. She caught it, but while she was rising, and before she had attained an erect position, the engine of the approaching train, which proved to be the mail train, running at the speed of thirty-five miles an hour, struck her and killed her instantly. Banghart barely reached the platform in safety. The train stopped about a hundred yards from the point of the accident, in consequence of it. That station was not a stopping point for that train, and but for the accident it would not have stopped there at all. The witnesses all testified that they heard no bell, but they all heard the whistle at Ellendale, and saw the headlight. At the close of the plaintiffs' evidence the court gave an instruction to the effect that the plaintiffs were not entitled to recover, whereupon they took a nonsuit, with leave, and, after an ineffectual motion to set it aside, have brought the cause here for review.

"1. The fact, if it be a fact, that the engine bell was not rung as the statute requires, is immaterial, under the other facts of the case. The object of ringing the bell is to give notice of the approach of the train; but in this instance that was unnecessary, because Mrs. Hutchinson heard and recogniz-

ed the whistle, and saw the headlight. She knew the train was coming, and required no further warning. The failure to ring the bell, though an act of negligence, could not have contributed to the catastrophe.

"2. But the city ordinance forbade the running of the train at a higher rate than six miles an hour, and this train was running at the rate of thirty-five miles an hour. That act was negligence per se, and if it was the cause of the accident the defendant was liable, unless the deceased contributed to the result by her own negligence. This proposition has been so often and so elaborately discussed and demonstrated, and as a rule of law so often declared by this court, that it is now only necessary to restate it, and cite some of the decisions in which it is discussed: *Karle v. Railroad Co.*, 55 Mo. 476; *Bowman v. Railroad Co.*, 85 Mo. 533; *Merz v. Railway Co.*, 88 Mo. 672; *Keim v. Transit Co.*, 90 Mo. 314, 2 S. W. 427; *Rafferty v. Same*, 91 Mo. 33, 3 S. W. 393; *Eswin v. Railway*, 96 Mo. 290, 9 S. W. 577; *Schlereth v. Railway Co.*, 96 Mo. 509, 10 S. W. 66; *Grube v. Same*, 98 Mo. 336, 11 S. W. 736, 4 L. R. A. 776; *Kellny v. Same*, 101 Mo. 68, 13 S. W. 806, 8 L. R. A. 783; *Murray v. Same*, 101 Mo. 236, 13 S. W. 817; *Hanlon v. Same*, 104 Mo. 381, 16 S. W. 233; *Bluedorn v. Same*, 108 Mo. 439, 18 S. W. 1103; *Gratlot v. Same*, 116 Mo. 450, 21 S. W. 1094, 16 L. R. A. 189; *Prewitt v. Railway Co.*, 134 Mo. 615, 36 S. W. 667. When the plaintiffs' mother heard the whistle in the direction of Ellendale, and went out on the platform, and there saw the headlight of the approaching train, if she knew or could discern the rate of speed at which it was approaching, and had attempted to cross the tracks as she did, she would have been guilty of such negligence as would prevent a recovery. Whether, in the darkness of the night, and under the circumstances surrounding her, she is to be regarded as knowing or capable of discerning the speed at which the train was coming, is a question of fact upon which minds might reasonably differ, and the court could not settle it as a matter of law. And as it is a fact of common experience that railway trains, as they lawfully may, not infrequently do run past some passenger stations without stopping, and at a rate of thirty-five or forty miles an hour, if the plaintiff's mother, without knowing and without being able to discern the speed of the train, had assumed that it was running at a less rate, and, acting on that assumption, had attempted to cross as she did, the court would have been justified in adjudging her negligent, unless there was some other fact in the case to justify her assumption. But there was that other fact in this case. The city ordinance prohibited the train running at a higher rate than six miles an hour, and, in the absence of proof that she knew or had reason to apprehend to the contrary, the law will presume that she trusted, as she had a right to trust, that the de-

fendant was running its train at not more than six miles an hour, in obedience to the ordinance, and that she regulated her movements accordingly. This court has frequently so declared the law. *Eswin v. Railway Co.*, 96 Mo. 290, loc. cit. 295, 9 S. W. 577; *Kellny v. Railway Co.*, 101 Mo. 67, loc. cit. 77, 13 S. W. 806, 8 L. R. A. 783; *Jennings v. Railway Co.*, 112 Mo. 268, loc. cit. 276, 20 S. W. 490; *Gratlot v. Railway Co.*, 116 Mo. 450, loc. cit. 464, 21 S. W. 1094, 16 L. R. A. 189; *Sullivan v. Same*, 117 Mo. 214, loc. cit. 222, 23 S. W. 149. Even with the train running, as it was, at thirty-five or forty miles an hour, the movements of the plaintiffs' mother were such that she had reached the middle of the south track, and had almost reached the platform, as *Banghart*, who started across with her, in fact had done, when the engine struck her. It is, therefore, entirely reasonable to conclude that if the train had approached at the rate of only six miles an hour she would have passed in safety, even though she paused to pick up the scarf which had dropped. If, then, she was acting, as the law, in the absence of any proof to the contrary, will presume she rightfully was, on the assumption that the train was approaching at the rate of not more than six miles an hour, the court had no right to conclude, as a matter of law, that her conduct was not such as might be expected of a reasonably prudent person. The question of whether, under those conditions, she was guilty of negligence was one of fact for the jury. The instruction in the nature of a demurrer to the evidence ought not have been given. The judgment is reversed, and the cause remanded to the trial court, to be retried in accordance with the law as herein declared. All concur, except *MARSHALL, J.*, who dissents."

A. R. Taylor, for appellants. Martin L. Clardy, for respondent.

PER CURIAM. The foregoing opinion filed by Judge VALLIANT in this cause while it was pending in division No. 1 of the court is approved and adopted as the opinion of the court in banc by the majority of our number.

BURGESS, C. J., and BRACE and GANTT, JJ., concur in said opinion. ROBINSON, SHERWOOD, and MARSHALL, JJ., dissent.

WOLFE et al. v. SUPREME LODGE, KNIGHTS AND LADIES OF HONOR.

(Supreme Court of Missouri, Division No. 2.
March 12, 1901.)

LIFE INSURANCE—FALSE ANSWERS ON MEDICAL EXAMINATION—THEORY OF DEFENSE—INSTRUCTIONS—BURDEN OF PROOF—PUTTING BOOK IN EVIDENCE.

1. Defendant in an action on a benefit certificate, having, by its answer and requested in-

structions, treated the answers of insured on his medical examination not as warranties, but as material representations falsely made, cannot complain that the court instructed on that theory.

2. Where defendant in an action on a benefit certificate alleges only that the answers of insured to three specified questions in his medical examination were false, it is not entitled to an instruction authorizing verdict for it, if there were any misrepresentations in the examination.

3. Defendant in an action on a benefit certificate has the burden of proving that answers of insured on his medical examination were false.

4. Omission at the end of an instruction of the words, "You will find for defendant," is not ground for reversal, the court having told the jury that the defense was that insured in his medical examination falsely answered certain questions.

5. A book is put in evidence where a physician, being asked when he commenced to treat insured, said that he could tell by referring to the book, which he is allowed to do, and then, being asked at what dates he saw insured, he reads to the jury the dates, and, after explaining certain strokes as indicating office prescriptions, counsel for defendant said that he wanted to show it to the jury, and the book was passed round to them.

Appeal from St. Louis circuit court; H. D. Wood, Judge.

Action by Emily E. Wolfe and another against the Supreme Lodge, Knights and Ladies of Honor. Judgment for plaintiffs. Defendant appeals. Affirmed.

This is an action on a benefit certificate issued by the defendant, a benevolent organization, by the beneficiaries therein, the mother and grandmother, respectively, of Alexander L. De Mars, deceased, a member of said order, for the amount of said certificate, \$3,000. The case was tried on the issue raised by plaintiffs' reply to the affirmative defense set up in defendant's answer, the allegations in the petition being admitted. The evidence disclosed that plaintiffs were the mother and grandmother of deceased, the insured, who was a young man about 19 years old, and a brass worker, at the time his application was made for membership in the order. Just at the time he was admitted into the organization he was out of work, owing to a disagreement with his employer over his wages. The evidence was very conflicting as to the state of his health at the time of his application for membership. It appears, however, that he was duly examined by the regularly appointed physician of the order, the risk accepted, and De Mars was, on June 20, 1895, duly initiated into Royal Lodge at St. Louis. On the part of plaintiffs there was a number of witnesses who testified that he was in good health about the time of the application. Indeed, it seems uncontradicted that he participated in a cake walk and dance given by the lodge the meeting before the one at which he made his application to said lodge, and shortly afterwards, when he was initiated, he was required to walk several times around the lodge room, and was subjected to close scru-

tiny by the guides and members. The medical examiner certified the following questions and answers: "Have you made careful auscultation and percussion of the thorax?" "I have." "Is the character of the respiration full, easy, and distinct over both lungs?" "It is." "Is there any indication of disease of the organs of respiration or their appendages?" "None." "In your opinion, is there any habitual cough, or expectoration, or occasional difficulty in breathing?" "None." De Mars died in April, 1896. Payment was refused on the ground that he had made untruthful answers to questions put to him by the medical examiner. He was asked if he was "afflicted with any lung disease," and answered "No"; and asked "how long since he had been attended by a physician, or have professionally consulted one," and he answered, "Haven't had any," and stated that he was in good health at that time, and that he usually enjoyed good health. On the part of the defendant the evidence tended to show that between the dates of December 10, 1894, and March 15, 1895, De Mars consulted with and was prescribed for by Dr. Grant; that when he went to Dr. Grant's office he was accompanied by his mother; that he made three visits to Dr. Grant, and that the doctor told the mother that the boy was in a serious condition; that on April 11, 1895, De Mars, accompanied by his mother, consulted with and was prescribed for by Dr. Barker, and that Dr. Barker told the mother that the boy was afflicted with consumption. Dr. Barker, with his office book in his hands, while on the witness stand gave dates during April, May, June, July, August, and up to February, 1896, when De Mars called at his office for treatment; that the whole treatment given De Mars during all of the spring, summer, and fall of 1895 and the early part of 1896, from beginning to end, was for consumption. Dr. Barker also testified that De Mars and his mother called at his office in the month of April, the month before the application was made; that De Mars was at that time emaciated, and of a bluish color, and that he told the mother at that time that her son had lung disease, and was in a serious condition. That was also contradicted by Mrs. Wolfe, who said that it was in August when she and her son went to Dr. Barker's office. While Dr. Barker was on the witness stand he had his book in his hand, and we find in the record the following reference to it: "Q. When did you begin that treatment? A. I can give you the exact date by referring to my book. Q. Refer to it, and refresh your memory. A. I have here a memorandum, obtained from this book for convenience. The first time— Mr. Rowe: I object to your using that paper. The Court: You can refer to your book. Q. How many visits did he make to you after the 11th day of April, 1895? A. Well, if I could refer to this list I have copied from this book, I could tell in

a moment. * * * The Court: You may use your list, and refer to your book to see if it is accurate." When this witness again took the stand for defendant in rebuttal, he again made use of the book, and explained private marks made by him in it, at which time the following took place, viz.: "Mr. Estes: I want to show the jury this. (Book passed around to the jury.) Q. Where is the name De Mars there? What does that stroke mean? A. That stroke means that day, the 11th, I prescribe for him at my office. * * * " Afterwards, when the book was offered in evidence, it was rejected by the court on the ground that, if the book was intended to have been offered, it should have been offered in chief. Dr. Kerley, who was the family physician of Mrs. Wolfe, testified that he prescribed for De Mars in November, 1894, for remittent fever, and did not see the boy again until the 1st of December, 1895, when he made an examination, and found that the boy's lungs were "rapidly breaking down"; but says the boy died of gangrene of the lungs, and not of consumption. Mrs. Wolfe, the mother of the boy, stated that she never went to see Dr. Grant until this suit was instituted, and then only went at the direction of her counsel, to find out what the doctor would testify to on the trial of her case against this defendant; that her son was well and strong until the latter part of 1895; and she also stated—and in this she was corroborated by her mother, co-plaintiff herein—that she and her son did not consult Dr. Barker until August, 1896, and that the doctor told her the boy would be all right in a short while. There was testimony given by the neighbors of Mrs. Wolfe and by lodge members, many of them saying that the boy was a consumptive, and others saying that he looked all right. The case was submitted to a jury on instructions given by the court of its own motion; the plaintiffs offering no instructions, and the court refusing those offered by the defendant. The jury brought in a verdict for plaintiffs for the amount named in the benefit certificate, and, after unsuccessfully moving for a new trial, the defendant appealed.

The court, of its own motion, gave instructions Nos. 1 and 2 as follows: "(1) The court instructs the jury that it is admitted by the defendant that one Alexander L. De Mars made a written application to, and was admitted as a member of, the defendant order, and that the defendant issued to him the certificate read in evidence in the sum of three thousand dollars, payable to the plaintiffs as his beneficiaries; and that said De Mars died on April 12, 1896, and due proof of his death was furnished to the defendant. The defense is that the plaintiffs have forfeited their right to any benefit under the certificate by reason of the following answers made by said De Mars in his said application, which are alleged by the defendant to be untrue, and known by the said De Mars to be

untrue at the time of making his said application, to wit: 'Q. Have you had or been afflicted with consumption? A. No. Q. How long since you have been attended by a physician, or have consulted one? A. Have not had any.' And the following question: 'Is there anything, to your knowledge, in your physical condition, family history, or personal history or habits, tending to shorten your life, which is not distinctly set forth above? A. Nothing.' The court instructs you that the burden of proof is upon the defendant to show by preponderance of the testimony that the answers to the foregoing questions as above set forth were false, and known by the said De Mars to be false at the time they were made. (2) If the jury find for the plaintiffs, they will assess their damages at the sum of \$3,000.00, with interest thereon at 6 per cent. per annum from January 18, 1897, to March 15, 1898." In his abstract of the record counsel for defendant shows no exception to these instructions given by the court of its own motion. But he did except to the refusal of four instructions which he asked in behalf of defendant. They are as follows: "(1) The court instructs the jury that if, at the time of making application for relief fund membership to Royal Lodge, one of the subordinate lodges of defendant order, Alexander De Mars agreed and contracted with defendant that any untrue or fraudulent statement or concealment of facts in his medical examination should forfeit the rights of himself and family to all benefits and privileges therein; that said De Mars was under obligation and in duty bound to answer all questions truthfully propounded to him by the medical examiner; and if you find from the evidence that he made concealment of facts in regard to his health, and that the facts upon which inquiry was made were material, which he in honesty and in good faith should have communicated to the medical examiner, and that his answers were false which he gave in response to inquiries about his health, and were so given in order to induce the defendant to issue to him its relief-fund certificate, and that he knew he was, at the time of answering said material questions, afflicted with a serious disease of the lungs, and had not long prior thereto consulted with physicians in regard to his health, and had been prescribed for by them for disease of the lungs, and died within one year after being admitted into defendant order of disease of the lungs,—then your verdict must be for the defendant. (2) The court instructs the jury that if they find and believe from the evidence that at the time Alexander De Mars was examined for admission to defendant order by the examining physician he was asked if he ever had been afflicted with disease of the lungs, and said De Mars answered 'No,' and in response to the question by the medical examiner, 'How long since you was attended by a physician, or have professionally consulted one?' said

De Mars answered, 'Have not had any;' and in response to the questions, 'Are you in good health now?' and 'Do you usually enjoy good health?' said De Mars answered each by saying 'Yes;' and in response to the question, 'Is there anything, to your knowledge, in your physical condition, family or personal history, or habits, tending to shorten your life, which is not distinctly set forth above?' said De Mars answered, 'Nothing;' and if you find that said answers were false and untrue, and made for the purpose of deceiving the examining physician, and that the questions were vital and material to the risk about to be assumed by the defendant, then your verdict must be for the defendant. (3) The court instructs the jury that if they find from the evidence that Alexander De Mars, before becoming a member of defendant order, made to it any misrepresentations (in the papers read in evidence as Exhibits B and C) with regard to having consulted a physician, his physical condition or family history, and that the facts so misrepresented actually contributed to his death, then the plaintiffs cannot recover in this case, and the jury should find for the defendant. By 'misrepresentation' in this connection is meant any statement of fact not then known by him to be true. (4) The court instructs the jury that at the time of his medical examination Alexander De Mars was under obligation and in duty bound to answer all questions truthfully, and if you find that the facts upon which the inquiry was made were material, which he in honesty and good faith should have communicated to the medical examiner, and that he made concealment of facts material to the risk assumed by defendant, and that his answers were so made as to induce defendant to issue to him its relief-fund certificate, and that he knew that he was afflicted with a serious disease; and knowingly and intentionally made false answers, then your verdict must be for the defendant." All of which instructions the court refused, and the defendant duly excepted at the time.

Frank M. Estes, for appellant. R. S. McDonald, T. J. Rowe, and Hickman P. Rodgers, for respondents.

GANTT, J. (after stating the facts). 1. Preliminary to any discussion of the form of the instructions, it must be observed that neither the answer nor the defendant's refused instructions were drawn on the theory that the answers of the assured were warranties. Parties cannot elect to try their cases on one theory in the circuit court, and, when defeated on that line, assume a different position in an appellate court. Having elected to consider the answers of De Mars as representations material to the risk, and to show that he knowingly made false representations knowing they were false, defendant cannot complain that the circuit court

adopted its theory of defense, and instructed the jury from that standpoint. It is not an uncommon thing to find that parties assume unnecessary burdens in the trial courts, and discover it for the first time in the appellate courts; but it is a cardinal principle in such cases that the trial courts are not to be charged with error in civil cases in permitting parties to try their own cases. Having reference now to the error assigned that the circuit court should have given the instruction prayed by defendant, we think we discover why the court refused the first instruction, and it is this: That instruction did not confine the jury to the issue tendered by the answer of defendant. That answer only charged that the assured made false answers to three specific questions; and yet this instruction No. 1, which the defendant asked and the court refused, was broad enough to cover any answer which the assured made to any question in regard to his health. We think it manifest that the court properly restricted the instructions to the issue made by the parties, and did not allow the jury to consider matters of defense which defendant had not pleaded. No citation of precedents is required to support this elementary doctrine. The same observation may be made as to the third instruction, which authorized a verdict for defendant if the jury believed that said De Mars made "any misrepresentations in the papers read in evidence as Exhibits B and C; whereas the answer had singled out only three answers to three specific questions. We can scarcely conceive of a more misleading and confusing method of trying a case of this character than to submit to an ordinary jury the whole application for an insurance policy and the certificate of a medical examiner, with its questions and answers, and leave it to them to determine what questions and answers were material, when defendant only charged three were false; and yet such, in effect at least, is the purport of this third instruction. Defendant insists, however, that this identical instruction was approved in *Whitmore v. Supreme Lodge*, 100 Mo. 47, 13 S. W. 495; but a reference to that case will show that all the representations were charged to have been false, and therefore the issue embraced all of them. Moreover, the court significantly remarks that the instruction in that case was, in substance, the same as those asked by the plaintiff in that case, and adds that, where a party has asked similar instructions to those given, he is in no position to complain. The difference between the two cases is so obvious that no argument is required to show that, though such an instruction might have been proper in that case, it would afford no precedent for it under the state of the pleadings in this case. And this same vice inheres in instruction No. 4 of the same series.

Coming now to instruction No. 2 asked by defendant, by comparing it with the first-

instruction given by the court of its own motion it will be noted that the two instructions are framed to announce the same principle of law, to wit, that the defense was false representations or answers to questions, knowingly made, and not that these answers were warranties. Having asked this instruction, and received one containing the same declaration, defendant cannot complain that the court did not instruct that these answers were warranties. *Whitmore v. Supreme Lodge*, 100 Mo. 47, 13 S. W. 495; *Johnson-Brinkman Commission Co. v. Central Bank of Kansas City*, 116 Mo. 559, 22 S. W. 813. The two instructions are different in two particulars: The court, in its instruction, in addition places the burden of proving the falsity of the answers on defendant, and this was right. The learned judge, however, left off the words, "You will find for defendant." This was evidently an oversight, but is their omission reversible error under all the circumstances? Keeping in mind that this was the only issue to which the evidence was directed, and that the court told the jury this was the defense to the action, we cannot bring ourselves to believe that the jury misunderstood the issue they were trying. While the omitted words ought to have been added to make a perfectly correct instruction, we are so well satisfied that their absence in no way affected the result that we are unwilling to hold the instruction was so erroneous as to justify a reversal of the judgment in a cause otherwise so well tried. *State v. Umfried*, 76 Mo. 404.

2. The point is made that the court erred in rejecting the account book of Dr. Barker, which was offered in rebuttal after the close of plaintiff's case. The statement of the facts as to this book disposes of this objection. Dr. Barker was called by defendant in making out its case in chief. The record discloses that during his examination he was asked when he began to treat the assured, and he said he could tell by referring to his book. Thereupon the court ruled, "You can refer to your book." He was then asked how often, and at what dates, he saw him, and he answered, "Well, I could refer to this list I have copied from my books, and tell in a moment." Again the court ruled, "You may use your list, and refer to your book, to see that it is accurate;" and thereupon he testified, and read to the jury the dates on which he prescribed for the assured. At another time while testifying he explained certain strokes as indicating office prescription, when the record shows the following occurred: "Mr. Estes (counsel for defendant): I want to show the jury this. (Book passed around to the jury.)" If this did not put the book in evidence, we are at a loss to know what would. There is no merit in this point. *Charles v. Patch*, 87 Mo. 450.

3. As to the point that the verdict was so glaringly against the weight of the evidence, we need only say there was a sharp conflict

of evidence. It is true, Dr. Barker testified that prior to the application assured sought his advice, and he found him suffering from consumption, "thin, emaciated, and blue in the face"; and yet a number of other witnesses, among whom was Jeffrey, chief deputy of the circuit clerk of St. Louis, testified that De Mars participated in a cake walk and dance given by this lodge in the month in which he made his application; that he was apparently in good health, was very active and lively, and during the initiation he was required to and did march around the room, under the scrutiny of the guides, three or four times, and no one saw any suspicious indications of bad health, and the regular physician of the lodge certified that after a careful examination of the thorax by auscultation and percussion he discovered no evidence of diseased lungs. The family physician testified assured died from gangrene of the lungs superinduced by pneumonia. The weight of the evidence and the credibility of the witnesses was for the jury, and there was abundant evidence to justify their verdict if they believed it. *James v. Association*, 148 Mo. 1, 49 S. W. 978. The trial judge refused to disturb the verdict, and it is not our province to pass on the weight of evidence. After full examination of this record, we find no reversible error, and the judgment is affirmed.

SHERWOOD, P. J., and BURGESS, J.,
concur.

DE DONATO v. MORRISON et al.
(Supreme Court of Missouri, Division No. 1.
March 12, 1901.)

LANDLORD AND TENANT—EVICTION—DAMAGES—INSTRUCTIONS—APPEAL.

1. Where all the essential features of a requested instruction are included in an instruction given, its refusal is not error.

2. The refusal to give a requested instruction predicated on a theory which is not included in the issues is not error.

3. Where a tenant sues his landlord for wrongful eviction, resulting from the landlord taking possession and shoring up the walls of the building to prevent an injury thereto threatened by the removal of a building of an adjoining property owner, and damage is sought for injuries caused by dirt, it is not error to instruct that there can be no recovery for such injury resulting from the tearing down of the building belonging to the adjoining owner, since the defendant and such owner are not joint tortfeasors.

4. Where a tenant sues his landlord for an eviction, and an injury to the tenant's goods resulting from dirt is alleged as an element of damages, but there is evidence that such injury might have resulted from other causes, a judgment denying damages therefor will not be reversed.

Appeal from St. Louis circuit court; D. D. Fisher, Judge.

Action by Florian De Donato against Adele S. Morrison and others for wrongful eviction. From the judgment rendered, the plaintiff appeals. Affirmed.

In July, 1896, defendants were the owners of building No. 519 on Olive street, in the city of St. Louis. The plaintiff was their tenant from month to month, and James M. Carpenter was the owner of the premises No. 517, adjoining the same on the east. On the 11th day of that month the following notice was served on the plaintiff: "St. Louis, Mo., July 11th, 1896. F. De Donato, Esq., 519 Olive St., City—Dear Sir: Please take notice that I am about to excavate for a new building on my lot in city block 117, adjoining on the east property which you rent from Mrs. Morrison and Mrs. Peugnet; and I hereby notify you to protect your walls, stock of goods, and all persons in and about your premises from any damage that may accrue to you or them by reason of said excavation and building, as I will not be responsible for any damage done your walls, stock of goods, or to persons on your premises by reason of said excavation and building. Yours, etc., Jas. M. Carpenter." And on the same day he served each of the defendants with a notice, of which the following is a copy: "Dear Madam: I am notified by Mr. Carpenter that the east wall of the store No. 519 Olive street, rented from you, is over his line about three inches, and, as there is no foundation wall under said store, said wall may fall when he excavates his cellar, about twelve feet deep, adjoining. Should that occur, great damage will be done me, and I shall hold you responsible to me for every damage to my stock and business. Respectfully, F. De Donato, 519 Olive Street, City." To which the defendants on the 13th day of July responded as follows: "St. Louis, Mo., July 13th, 1896. F. De Donato, Esq., No. 519 Olive St., City—Dear Sir: Your note bearing date July 11th, 1896, in which you say Mr. J. M. Carpenter, the owner of the property adjoining your store on the east, has notified you of the dangerous condition of walls between No. 517 and No. 519 Olive St. Therefore please take notice that from the dangerous condition of the property occupied by you, No. 519 Olive St., you are hereby notified to vacate (at once), and we will not be responsible for any loss or damage sustained by you or your employes by your failure to vacate at once. Yours, Adele S. Morrison, by R. M. Noonan, Agt. Virginia S. Peugnet, by R. M. Noonan, Agt." As a result of this correspondence the employes of the defendants at the date last mentioned entered upon the leased premises, and commenced shoring up the walls of the endangered building from the inside, and the defendant commenced moving his stock of goods from the building, and within the next five or six days both of these undertakings were consummated. Afterwards, on the 10th of September, 1896, this suit was instituted; the plaintiff, in his petition, charging: "That on said day, without cause, peremptorily and without notice to plaintiff, defendants evicted him and took possession of said store, by placing therein

many mechanics and laborers, who, under the direction of defendants, at once proceeded to tear up the floor and to move out of place plaintiff's trade fixtures; and defendants then and there, against the protest of plaintiff, rendered said store wholly unfit for occupancy, and compelled plaintiff to vacate the same immediately. That such action of defendants in so taking possession of said premises and wrecking the same, and in forcing plaintiff to vacate them, caused plaintiff's goods to be covered with dirt and dust, and otherwise hurt, and rendered less valuable and less salable, his business to be interrupted, and his fixtures, tools, and implements hurt and destroyed, all to his damage in the sum of five thousand dollars, for which he prays judgment." The answer of defendants was a general denial; averments that plaintiff voluntarily abandoned the premises, and that, if plaintiff sustained any damage as alleged, it was the result of his own negligence. The answer also contains the further defense that the work was done by an independent contractor, but this defense was abandoned on the trial. We have gone through all the record before us, and fail to find any substantial error in the rulings of the court on the admission of evidence.

The case on the main issues was submitted to the jury on the following instructions, which have been numbered anew in part, for the sake of convenience: "(1) The court instructs the jury that upon receipt of the notice from the plaintiff to the defendants dated July 11, 1896, and read in evidence, defendants had a right to proceed in a reasonable and proper manner to protect the wall in question,—being the east wall of building No. 519 Olive street,—and to occupy so much of said building, if any, as the evidence shows was reasonably necessary for that purpose. But before doing anything in said building that would be likely to injure plaintiff's stock of goods therein, without the consent of plaintiff, it was the duty of defendants to give plaintiff notice and such reasonable time to remove his stock of goods as the circumstances, as shown by the evidence, would reasonably admit of. If the jury believe from all the evidence that defendants could, under all the facts and circumstances given in evidence, reasonably have given such notice and time to plaintiff, and failed to do so, and proceeded with the work of shoring up and protecting said wall from within the storerooms then occupied by plaintiff, without plaintiff's consent, in such a manner as to damage and injure plaintiff's said goods and fixtures, and which did injure and damage them, then your verdict should be for plaintiff, on account of such injury and damage, in such a sum as you believe from the evidence to be equal to such injury and damage, as defined in another instruction given: provided you further find from the evidence that plaintiff exercised reasonable care and diligence to protect his said goods from such damage. (2)

And if you further find and believe from the evidence that defendants proceeded to so occupy so much of said building, and in such a way as to render the same untenable for plaintiff to continue his business therein; and if you further find from the evidence that defendants could, under all the facts and circumstances as shown by the evidence, reasonably have given plaintiff notice and a reasonable time, before proceeding with the work of shoring up and protecting said wall, to procure another store, with reasonable effort, in which to remove his stock of goods, and to have, with due diligence, removed them into the same, but that they (defendants) failed to do so; and if you further find from the evidence that, immediately after defendants began said work, plaintiff, with reasonable diligence, obtained another store in which to carry on his business, and removed and set up his stock of goods therein with reasonable speed,—then if you further find from the evidence that by reason of the suspension of plaintiff's business, if you find it was suspended, he lost net profits during that time (that is, from the time it became necessary for him to move until he had so moved and set up his stock of goods) that he would have earned, had his business not been so suspended, then plaintiff is entitled to recover such further sum on that account as you may find from the evidence such net profits would have amounted to during the time his business was so suspended, provided, always, that you find that defendants proceeded with said work of protecting and shoring up said wall without plaintiff's consent. (3) The court instructs you that if you believe from the evidence that defendants could have shored up the east wall of the premises in controversy, in a reasonably safe, expeditious, and economical manner, without entering upon the premises of plaintiff, and without damaging his goods and fixtures and without obstructing his business, if you believe defendants did damage his goods and fixtures and obstruct his business, and if you believe defendants did not adopt said manner in shoring up said wall, then you will find for plaintiff, provided you believe from the evidence that the method adopted by defendants in shoring up said wall resulted in a direct and proximate damage to plaintiff's stock of goods and fixtures in said premises, and provided you believe from the evidence that plaintiff did not consent that defendants could shore up said floors and wall in the manner which you may believe from the evidence was adopted by defendants in shoring up said floors and wall. (4) The court instructs you that, if you find in favor of plaintiff for damages to his goods and fixtures, you will award him such sum on that account as you may believe from the evidence that his stock of goods and fixtures has suffered by depreciation, if any, in their fair and reasonable market value, as a direct and proximate result of the acts of defendants in taking possession of the premises

in controversy, and securing and shoring up the wall in question, and in rendering same unfit for use and habitation, if you believe from the evidence that defendants did take possession of the premises in controversy, and did render the same unfit for use and habitation. (5) The court instructs the jury that if they believe from the evidence that after receiving the notice of defendants of date July 13, 1896, introduced by plaintiff in evidence, plaintiff made no further objection to defendants' workmen shoring up from within plaintiff's store, and said workmen then, with the consent of plaintiff, proceeded to shore up and protect said building with reasonable diligence, and with reasonable care not to injure plaintiff's goods, then defendants are not liable to plaintiff for any injury sustained by him from the acts of said workmen. (6) The court instructs the jury that if they believe the injuries complained of by plaintiff were caused, in whole or in part, by the dust and dirt from taking down the building on the adjoining lot owned by Carpenter, then defendants are not liable for the damage so caused. (7) The court instructs the jury that, although they believe from the evidence that the plaintiff was injured in his business or goods by the entry upon the leased premises of mechanics and workmen to protect and support said premises, yet if they further believe from the evidence that on the 13th day of July, 1896, said leased premises were in immediate danger of injury or destruction, and that it was necessary, in order to protect same, to have said workmen and mechanics at once enter on said leased premises, and that said workmen and mechanics in performing said work exercised reasonable care and caution not to injure plaintiff's goods, and that said workmen and mechanics were reasonably competent to perform said work, then the defendants are not liable for the damages complained of, and the jury must find a verdict for defendants herein. (8) The court instructs the jury that if they believe from the evidence that the east wall of the building containing the store occupied by plaintiff, Donato, on the 13th day of July, 1896, was in immediate danger of falling by reason of the excavating of the adjoining lot, and that it was reasonably necessary for the workmen employed by defendants to shore up and protect said building to enter at once in plaintiff's store for such purpose, and that said workmen performed their work of protecting and shoring up said building with reasonable diligence, and with reasonable care not to injure plaintiff's goods, then defendants are not liable to plaintiff for any injury sustained by the acts of said workmen."

The verdict of the jury was as follows: "We, the jury in the above-entitled cause, find in favor of the plaintiff, and we assess his damages on account of injury and damages to his goods and fixtures at the sum of \$—; and we assess his damages for the loss of profits at the sum of \$100; making a total

of \$100. Theo. Shelton, Foreman." From the judgment on the verdict, the plaintiff appeals.

Clifford L. Mott, for appellant. Valle Reyburn, for respondent.

BRACE, P. J. (after stating the facts). 1. Instructions Nos. 1 and 2 were given by the court on its own motion, No. 3 was given at the request of the plaintiff, No. 4 was a modification of an instruction asked for by the plaintiff, and Nos. 5, 6, 7, and 8 were given at the request of the defendants. The plaintiff complains of the refusal of the court to give his instruction numbered 1. But, upon comparison of that instruction with No. 1 given by the court on its own motion, we find that all the essential features of the former are embraced in the latter. The plaintiff next complains of the refusal of the court to give his instruction No. 3 as asked. While the whole ground of that instruction is not covered by instruction No. 4 given by the court in modification thereof, yet it is completely covered by that modified instruction and instruction No. 2 given by the court on its own motion. The plaintiff also complains of the refusal of the court to give its instruction No. 5. But as that instruction postulates a theory of recovery on a failure to use proper methods and appliances in shoring up the walls, and there was no such issue tendered in the case, the court committed no error in refusing that instruction. The only other question on the exceptions to the action of the court on the instructions arises from the giving of instruction No. 6 for the defendants, to the effect that, if the damage to plaintiff's goods was wholly caused by dust and dirt from the taking down of the Carpenter building, then the defendants are not liable for such damage, and, if the damage was in part so caused, then the defendants are not liable for that part. The plaintiff complains of this instruction on the theory that the defendants and Carpenter were joint tort feorsors, and that each should be held liable for all the damage caused by the act of either or both. But that doctrine is not applicable to this case. In 1 Shear. & R. Neg. (5th Ed.) §§ 122, 123, it is said: "If several persons are jointly bound to perform a duty, they are jointly and severally liable for omitting to perform, or performing it negligently. Persons who co-operate in an act directly causing injury are jointly and severally liable for its consequences, if they acted in concert, or united in causing a single injury, even though acting independently of each other. * * * Persons who act separately, each causing a separate injury, cannot be made jointly liable, even though the injuries thus committed are all inflicted at one time, and are precisely similar in character." And in Chipman v. Palmer, 77 N. Y., loc. cit. 54, it is said: "The fact that it is difficult to separate the injury done by each from the others furnishes no reason for holding one tort feorsor should be

liable for the acts of others with whom he is not acting in concert." In harmony with these principles is the case of City of Independence v. Ott, 135 Mo. 301, 38 S. W. 621. The plaintiff's stock of goods may have been injured by dust and dirt falling on it at the same time from the operations of defendants' employes in shoring up their wall on their own premises, and from the operations of the employes of Carpenter in tearing down his own building. But each of these parties were acting separately, and the injury caused by each was separate. Between them there was neither community of duty nor concert of action, and each could be held liable only for the injury inflicted by him.

2. It is next insisted that as the jury found the issues for the plaintiff, and allowed him damages for his loss of profits, some damages ought also to have been allowed him for injury to his goods. Under the instructions, the jury was constrained to allow him damages on the latter account to the extent only that such damage was the proximate consequence of the operations of defendants' employes. And as there was evidence tending to show that the injury to his goods may have resulted from other causes, and was to no appreciable extent the direct consequence of those operations, we are concluded by the verdict. The judgment of the circuit court is affirmed. All concur, except MARSHALL, J., absent.

WARREN v. A. B. MAYER MFG. CO.

(Supreme Court of Missouri, Division No. 2.
March 12, 1901.)

CONTRACTS—STATUTE OF FRAUDS—WRITTEN CONTRACT—PAROL MODIFICATION— SALES—MEASURE OF DAMAGES.

1. Where a written contract for the sale of personality is modified as to the manner of payment by parol, and the modification remains executory, and the contract is one required by the statute of frauds to be in writing, the modification is unenforceable.

2. Where plaintiff purchased of defendant structural iron, stating that he wished to use it in a building he was going to erect, in an action for refusal to deliver the iron defendant was not chargeable with the amount expended by plaintiff in grading his lot to receive the iron, the matter not having been within defendant's contemplation.

3. Where plaintiff purchased structural iron that was a part of defendant's building, plaintiff to tear down the iron, and, after plaintiff had taken down some of the iron, defendant refused further delivery, and retook what plaintiff had removed, defendant was chargeable with plaintiff's expenses in taking down the iron.

4. In an action for defendant's refusal to deliver structural iron sold plaintiff, and then a part of defendant's building, the fact that plaintiff wished to use it in another building would not enhance the value of the iron to plaintiff beyond the market price of such iron.

5. Where plaintiff sued for defendant's failure to deliver iron purchased, evidence as to the value of that character of iron, by those acquainted with the market value thereof, was admissible in estimating the value of the iron in determining the damages.

6. In an action for refusal to deliver structural iron purchased of defendant, the same being taken out of defendant's building, if there was no market value for such iron the best evidence for determining the damages would be the value of the iron as ascertained from those experienced in dealing with property of such character.

Appeal from St. Louis circuit court; S. P. Spencer, Judge.

Action by Thomas Warren against the A. B. Mayer Manufacturing Company. From a judgment in favor of defendant, plaintiff appeals. Reversed.

Wm. C. & Jas. C. Jones, for appellant. Lubke & Muench, for respondent.

GANTT, J. Plaintiff sued to recover damages to the amount of \$3,000 for breach of a written contract evidenced by the following proposal and acceptance: "Mr. Thomas Warren, City—Dear Sir: We have this day sold to you such portion of the front of building, northeast corner Eighth and Olive streets, and such other iron as you may select, for the sum of \$9 per ton net ton of 2,000 pounds, delivered at Eleventh and North Market streets; you to take the iron down at your own expense. Yours, respectfully, A. B. Mayer Mfg. Co. H. Mayer." "It is understood that no wrought iron is included." "Received and accepted July 12th, 1895."

Plaintiff alleged that the said iron constituted the front of an old building, consisting of iron columns and beams, weighing about 60 tons; that he proceeded immediately to take down said columns, and defendant commenced delivering; that, after delivering 9 tons, defendant not only refused to deliver any more, but retook that which it had delivered; that said iron had a special value to him, because it was to be used in another building, which was well known to defendant; that said iron was worth \$60 per ton; and he was damaged \$3,000. The answer was a general denial, and that before any iron was delivered plaintiff and defendant mutually modified said contract by adding thereto an agreement that plaintiff would pay cash as and when said iron was delivered, and before the delivery of any part plaintiff would deposit \$300 to be held as security for the payment of the iron as it should be delivered; that plaintiff failed and refused to make said deposit or payment, whereupon defendant declined to deliver the iron until plaintiff should pay as he had agreed. Reply was a general denial.

It appeared from the evidence that a building on the northeast corner of Eighth and Olive streets, belonging to the Erskine estate, was to be wrecked to make room for a new building. The building was at least 30 years old, and the iron columns and beams in question were a part of the Eighth street and Olive street fronts. The wrecking seems to have been done by a firm named Arthur Johnson & Bro., from whom the de-

fendant had purchased the iron for cash on delivery, and the contract with whom contained other conditions. The plaintiff was brought to defendant by an intermediary named Streletski, and at the defendant's office an agreement was arrived at to sell the structural portion of the iron to plaintiff at \$9 per ton, the amount being roughly estimated at 30 or 40 tons. Henry Mayer, an employé of defendant, wrote out the proposition on the typewriter, and brought it to Cassidy, the old bookkeeper of defendant. Cassidy glanced over the paper, and then suggested the fact that the wrought iron was not included in the sale, and added the phrase below the signature that had been attached to the paper by Henry Mayer. Then the paper was handed by A. B. Mayer (president of defendant) to plaintiff, who placed it in his pocket, and moved towards the door with A. B. Mayer. Before they passed out Cassidy called them back, and reminded both parties of the fact that the contract with Johnson & Bro. required the iron to be thrown on the sidewalk, and the payment to be spot cash. Some conversation ensued, and then Warren acceded to the suggestion of Mayer for the iron as received, and further agreed to send up \$300 check on the next day to be security for the making by him of such payments. Within a few days the iron was begun to be taken down, and the defendant removed some loads thereof to Eleventh and North Market streets. Warren did not send the \$300, and Mr. A. B. Mayer looked him up at the old building, and was again promised a check, which never came. Then defendant made out and presented bills to Warren for the iron already delivered, which he refused to honor, and on July 16, 1895, wrote the following letter: "St. Louis, Mo., July 16th, 1895. A. B. Mayer Manufacturing Co., 1012 to 1022 North 12th Street, City—Dear Sirs: I hold your contract of sale for the front of building northeast corner of 8th and Olive streets, and such other iron as I may select, for the sum of \$9.00 per net ton of 2,000 pounds, delivered at 11th and North Market street, I to take the iron down at my expense. This is to notify you that I will hold you responsible for any loss or damage resulting from your failure to comply fully with the terms of this agreement, and, if you don't at once remove the iron I have had taken down and deliver as you agreed, I will feel at liberty to employ others to haul it there at your expense. Respectfully, Thomas Warren." On the same day defendant wrote plaintiff: "Office of A. B. Mayer Mfg. Co., St. Louis, July 16, 1895. Mr. Thomas Warren, City—Dear Sir: We hereby notify you that we refuse to deliver to you any of the iron that comes out of the building at northeast corner Eighth and Olive streets until you pay us for same, and you are hereby notified not to remove any of it until you pay for same and have our writ-

ten consent. Yours, respectfully, [Signed] A. B. Mayer Mfg. Co., per J. A. Cassidy." Upon plaintiff's refusal to pay, defendant resold the iron for the same amount to another party. Three witnesses for defendant testified that Warren orally agreed to pay cash as the iron was delivered, or deposit the \$300 as security. Warren denied that he made this subsequent contract. He admits he never erected the building for which he says he was buying the old iron. He estimated his expense of taking down the front at \$150, and says he was at a collateral expense of \$150 in leveling his lot for said new building. On the trial plaintiff offered to testify what this old iron would have been worth in the building which he had contemplated building, but did not build, but upon objection this testimony was rejected, and he excepted. Thomas, another witness for plaintiff, was asked: "Will you please state what was the value of that iron, not as scrap iron, but for the purpose of being used in another building?" It being admitted no building was erected, counsel for defendant objected, and the objection was sustained.

At the close of all the testimony, the court of its own motion instructed the jury as follows: "Gentlemen of the Jury: If you believe from the evidence that the letter of July 12, 1895, signed by the defendant, was accepted by the plaintiff, and became the only contract between the parties, then plaintiff was entitled to receive from the defendant all the iron called for in the said contract, and under the conditions thereof, and plaintiff was not required to pay in advance for such iron before its delivery to plaintiff; and if you further find from the evidence that the defendant did not deliver the said iron as they agreed to do in the said contract, and refused to deliver it, then your verdict should be for the plaintiff. In case you find for the plaintiff, you will assess his damages at such sum as you believe from the evidence he has been damaged by the failure of the defendant to carry out his contract; and, in estimating such damage, you will take into consideration the reasonable expense, if any, to which you believe from the evidence the plaintiff has been put to by reason of, and on account of, the defendant's failure to carry out his contract. But, on the other hand, if you believe from the evidence that the plaintiff and defendant agreed, after signing the written contract of July 12, 1897, and before the delivery of any iron thereunder, that the plaintiff was to pay for the iron mentioned in the contract in advance, or make a deposit in cash in advance for its payment, and plaintiff failed and refused to make such payment or deposit, then defendant was not bound to deliver the said iron in the contract without such advance payment or deposit, and your verdict should be for the defendant. You should, in this connection, also remember that the burden of proving any

agreed time or method of payment not mentioned in the written contract is upon the party alleging such agreement, and in this case upon the defendant, who must show, by a preponderance of the evidence, that the agreement which they allege as to the time or method of payment was as alleged by them." The verdict was for the defendant. After an unsuccessful motion for new trial, plaintiff appealed to this court.

1. The respective rights of the parties to this suit depend largely upon the admissibility of the evidence offered by defendant to prove a subsequent verbal agreement as to the time of the payment for the iron, and an offer upon its part to perform the contract in pursuance of this substituted agreement, and plaintiff's refusal to comply therewith. It is contended by plaintiff that this evidence was incompetent and its admission error. The general rule conceded everywhere is that no verbal agreements between the parties to a written contract, made before or at the time of the execution of such contract, are admissible to vary its terms or to affect its construction. All such verbal agreements are considered as merged in the written contract. But this rule does not apply to a subsequent oral agreement, made on a new and valuable consideration, before the breach of the contract, if the same is not within the statute of frauds. Such a subsequent oral agreement may enlarge the time of performance, or may vary any other terms of the contract, or may waive or discharge it altogether. Thus, it was said by Lord Denman in *Goss v. Lord Nugent*, 5 Barn. & Adol. 65: "After the agreement has been reduced into writing, it is competent to the parties, at any time before breach of it, by a new contract not in writing, either altogether to waive, dissolve, or annul the former agreement, or in any manner to add to, or subtract from, or vary or qualify, the terms of it, and thus to make a new contract, which is to be proved partly by the written agreement, and partly by the subsequent verbal terms ingrafted upon what will be thus left of the written agreement." But, while this is true as to a contract not required by the statute of frauds to be in writing, the great weight of authority in England and in this country is that subsequent verbal changes or modifications are not allowed to vary the rights of the parties under a written contract which the statute requires to be in writing. *Marshall v. Lynn*, 6 Mees. & W. 109; *Hickman v. Haynes*, L. R. 10 C. P. 605; *Harvey v. Grabham*, 5 Adol. & E. 61; *Goss v. Lord Nugent*, 5 Barn. & Adol. 58; *Stead v. Dawber*, 2 Perry & D. 447; *Blood v. Goodrich*, 9 Wend. 68; *Emerson v. Slater*, 22 How. 28, 16 L. Ed. 860. *Lanitz v. King*, 93 Mo. 519, 6 S. W. 263, relied upon by defendant, does not decide to the contrary. Indeed, the court expressly declined to pass upon the effect of the statute of frauds, as the case went off

upon a question of pleading and the laches of the plaintiff in that case.

The identical proposition here presented has not, so far as we have been able to discover by a somewhat laborious examination, been decided by this court, but has been very ably discussed by the Kansas City court of appeals in several cases, notably *Rucker v. Harrington*, 52 Mo. App. 481, in which Judge Ellison reviews both the English and American cases, and reaches the conclusion that subsequent oral variations of a written contract which was within the statute of frauds would support neither an action nor a defense. It is perfectly obvious that, under our statute of frauds, "no action" could be maintained upon a contract which the statute requires to be in writing, which rests partly in a writing and partly on parol evidence. *Goss v. Lord Nugent*, 5 Barn. & Adol. 58; *Marshall v. Lynn*, 6 Mees. & W. 109. To this point there is an absolute unanimity of authority, but there are some authorities which hold that the performance of a contract is so dissociated from the contract itself that it is perfectly competent for the parties to agree upon a new and valuable consideration upon a different performance of the contract, and, if this substituted performance be accepted by the party entitled to performance, it satisfies the contract, and is a barrier to any further insistence upon performance, according to the terms of the original contract. To this extent, again, there is a very general concurrence by the courts. *Long v. Hartwell*, 34 N. J. Law, 116. But one court (the supreme court of Massachusetts in *Cummings v. Arnold*, 3 Metc. 486) goes further, and holds that if an oral agreement is subsequently made for a substituted performance, and an action is brought upon the original contract, alleging nonperformance by the defendant, the latter may answer that he has been ready to perform according to the subsequent parol agreement, and has offered to do so, but has been prevented by the fault of plaintiff himself, and this constitutes a defense. This doctrine the English courts and the supreme court of the United States deny, and we think correctly. We think the reasoning of Judge Ellison in *Rucker v. Harrington*, 52 Mo. App. 497, 498, is a complete answer to the doctrine announced in *Cummings v. Arnold*, 3 Metc. 486. As said by the Kansas City court of appeals, *Cuff v. Penn*, 1 Maule & S. 21, did not involve a construction of the statute of frauds, and hence it is hard to discern why it was necessary to overrule it, as being an incorrect construction of that statute. Equally hard is it to make that case authority for the rule announced in *Cummings v. Arnold*. As said by Judge Ellison, referring to what was said in *Cuff v. Penn*, that the principal design of the statute was that parties should not have burdensome contracts imposed upon them which they never made: "But a contract is

only burdensome because of the consequence of performance flowing from it. Per se the contract is harmless. It is the performance that does the hurt. It is therefore, at least, equally proper to say that the principal design of the statute was to protect parties from the performance of burdensome contracts which they never made." "Such application of the statute only makes it necessary that parties have a contract in writing. Then, under the guise of performance, the contract enforced is shown by parol," or, rather, an unexecuted oral agreement for a different performance. This we hold cannot be done without nullifying the statute.

Applying, now, these principles to the parol evidence, offered and admitted by the court over the objection of plaintiff, to the effect that, after the written agreement for the sale and delivery of the iron mentioned in said contract, a further verbal agreement was made by plaintiff, without any new or other valuable consideration for so doing, to pay defendant cash on the delivery of each load of iron, and deposit his check for \$300 as security for such payments, it is clear this was a material and substantial variation of the written contract, and was not in writing. By this new verbal arrangement a new burden was imposed upon plaintiff, which he had not undertaken in his written agreement, as under his contract he was only bound to pay for the iron when the whole amount thereof was delivered. In view of what has already been said, it was not admissible. The substituted performance was not carried out by plaintiff, and, under the statute, this oral agreement, executory as it was, was incapable of enforcement.

2. The measure of damages, if any, suffered by plaintiff, becomes important, in view of the conclusion we have reached as to the modification of the contract. The court rejected plaintiff's offer to prove what this iron was worth to him for a building which he contemplated building. He admitted he had never built the house. The contract was made July 12, 1895, and the trial occurred October, 1897, more than two years afterwards. Plaintiff testified that he informed defendant that he wished to use the iron in erecting a building on Eleventh and North Market streets. It is hardly probable that he would have let an item of \$360 stop an entire building. The general rule is well established that, on the failure of the vendor to deliver goods according to contract, the ordinary measure of damages is the difference between the contract price and the market value of the goods at the time when, and the place where, they should have been delivered. *Koeltz v. Bleckman*, 46 Mo. 320; *Northrup v. Cook*, 39 Mo. 208; *Rickey v. Tenbroeck*, 63 Mo. 568. Defendant was not chargeable with the cost of grading plaintiff's lot for a building, as it had no connection whatever with the sale of the iron, and was certainly not within the contemplation

of defendant when it sold the iron. But, as plaintiff was put to the expense under his contract of pulling down the front, we think the reasonable cost of so doing is an element to be considered in estimating his damages. The defendant is liable, if at all, for such damages as naturally and reasonably resulted, in the usual course of things, from the breach of its contract.

The fact that plaintiff told defendant he intended the iron for a building would not, of itself, enhance the value of the iron beyond what such iron could have been bought for in that market, if any such there was. There was no proof that other similar iron could not be had in the market. Had plaintiff erected his house, and by reason of the failure to get this iron had been compelled to purchase other iron of like character at an increased cost, he would have fixed a definite rule for his damages; but, as he has not built, the difference between the value of such iron in that market at that time and the price he agreed to pay for this, together with his necessary expenses in taking down the front, would seem to be the natural damages flowing from the breach in this case. The offer to prove peculiar value to him for the purpose for which he was buying it opens the door to conjecture and speculation. Evidence of the value of that character of iron at that time, by those acquainted with the market value thereof, if such there was, is the only feasible method of estimating the value of said iron. If there was no market value for such iron, then the next best evidence would be its value, ascertained by those whose experience in dealing in iron of this character would enable them to state its value, either as scrap iron, or as compared with new iron designed for the same purpose. We think the court properly excluded the question in the form it was asked, and the objection was not well taken. For the error first noted the judgment is reversed, and the cause remanded for a new trial.

SHERWOOD, P. J., and BURGESS, J., concur.

COCKRELL v. MCINTYRE et al.

(Supreme Court of Missouri, Division No. 2.
March 12, 1901.)

EJECTMENT—SUIT IN EQUITY—SUBMISSION OF ISSUES—AUTHORITY OF COURT—QUESTION OF LAW—AGENT—EVIDENCE OF AUTHORITY—SALE OF LAND—STATUTE OF FRAUDS—MEMORANDUM—PART PERFORMANCE.

1. Rev. St. 1899, §§ 721, 722, provide that in all cases, except for the recovery of money or specific real or personal property, the court may direct an issue to be made, if in its opinion it becomes necessary to determine any fact in controversy by the verdict of a jury. *Held*, that the submission of a single issue to the jury in an action of ejectment, without submitting all the issues, did not constitute error, since the court had authority to submit such issues as it thought necessary.

2. The submission to the jury, as a special issue, whether the parties entered into an oral

contract to exchange the land in controversy for mining stock, though erroneous, as submitting a question of law to the jury, was not sufficiently prejudicial to justify a reversal of the judgment, as the verdict of the jury was merely advisory.

3. On the day set for the consummation of a trade of the land in controversy to defendant for mining stock, the owner sent defendant a note stating that he was sick, and that W. would attend to the matter for him. W. consummated a trade, and tendered the mining stock to the owner, who refused to accept it, stating that he wished to talk over the matter before coming to a final decision. *Held*, that the evidence was not sufficient to show that W. had authority to consummate a trade, and hence the contract was not binding on the owner.

4. Rev. St. 1899, § 5186, provides that no contract for the sale of lands made by an agent shall be binding on the principal unless such agent is authorized in writing to make the contract. An owner had been negotiating with defendant for an exchange of land for mining stock, and agreed to meet defendant at a certain time to consummate the trade. *Held*, that a note stating that the owner was sick and unable to meet defendant, but that W. would attend to the matter for him, was not sufficient to take a parol contract consummated by W. out of the statute of frauds.

5. Where an owner agreed in parol to trade land to defendant for mining stock, and defendant, without the knowledge of the owner, took possession of the land, and the owner repudiated the trade on being informed of such possession, it cannot be contended that defendant's possession constituted a part performance which took the contract out of the statute of frauds, since the owner never consented to defendant's possession.

Appeal from circuit court, Cooper county; D. W. Shackelford, Judge.

Action by George S. Cockrell against James McIntyre and another. From a judgment in favor of defendants, plaintiff appeals. Reversed.

This is ejectment for the possession of a tract of land in Cooper county. The petition is in the usual form. The ouster is laid on March 20, 1898. The damages claimed are \$250, and monthly rent is alleged to be \$20. The defendants answered separately. In McIntyre's answer, he denied all allegations in plaintiff's petition, and then alleged that he was in possession of the land as the tenant of his co-defendant, Lawson. The separate answer of defendant Lawson, after denying generally all the allegations in plaintiff's petition, proceeds as follows: "This defendant, further answering, states that on the 22d day of September, 1896, one T. J. Wallace was the owner of the lands in the plaintiff's petition described; that on said date this defendant traded for said land with said Wallace, giving in exchange therefor mining stock in the Sedalia Cripple Creek Mining Company, of the par value of six thousand five hundred dollars; that at the date of said trade or exchange said stock was of the market value of twenty-five cents on the dollar, or one thousand six hundred and twenty-five dollars for the block lot so traded; that said mining stock was duly delivered by this defendant to the said Wallace, and accepted by the said Wallace in exchange for said land,

on the 24th day of September, 1896; that, immediately upon the delivery of said stock as aforesaid, Wallace put this defendant in possession of the said land, and agreed to execute and deliver to this defendant a warranty deed to same; that said defendant, after being put in possession of said land as aforesaid, made valuable and lasting improvements upon the same, and continued in possession thereof up to 5th day of February, 1897, on which said date he conveyed said land by quitclaim deed to C. I. Wilson, which said deed was duly recorded in the recorder's office of Cooper county, Missouri, in Deed Book No. 16, at page 299, on the 8th day of February, 1897; that said Wilson has been in continuous possession of said land by tenants after same was conveyed to him by this defendant up to the 19th day of May, 1898, on which date said Wilson reconveyed said land to this defendant by quitclaim deed; and that this defendant is now in possession through his co-defendant, as tenant. This defendant further states that he has complied with all of the conditions of his said contract with said Wallace aforesaid on his part, but said Wallace has failed, refused, and neglected to comply with his part of said contract, in this, to wit: that he has failed, refused, and neglected to deliver to this defendant a warranty deed to said land, as by said contract he agreed to do. This defendant, further answering, states that whatever claim, if any, the plaintiff may have to said land, he acquired long after this defendant owned said land, and with full notice, actual and constructive, of this defendant's and this defendant's grantor's right, title, and claim to said land. This defendant further states that, whatever claim the plaintiff may have to said land, he received the same without any consideration whatever, and holds the same for the mere purpose of prosecuting this suit." Plaintiff made reply to both answers, denying all new matter in them, and pleaded the statute of frauds with respect to the contract set up by defendant Lawson. The court, over the objection of plaintiff, submitted the following question to the jury, to wit: "Did T. J. Wallace and defendant Lawson on September 22, 1896, enter into an oral contract for the exchange of the land for mining stock?" To sustain the issues upon his part, plaintiff read in evidence a deed from T. J. Wallace and wife to him for the land, dated March 10, 1898, and duly recorded in the recorder's office of Cooper county. He then proved the monthly value of the rents and profits, and rested. The facts, briefly stated, are, substantially, that on the 22d day of September, 1896, defendant Lawson and Thomas J. Wallace met at Buncheon, Mo. Lawson was the agent of the Sedalia Cripple Creek Mining Company, and was selling its stock, and offered to exchange Wallace stock of said company for the land in controversy. They were unable to agree, for the time being, as to the amount of stock to be given; but Wallace

finally agreed to take stock of the face value of \$6,500, and to consummate the trade the next day, 23d September, at the residence of B. C. Wells, who was president of said mining company. Wallace failed to appear at Wells' place to consummate the arrangement, but sent a note by a boy. Wells and Lawson were uncertain as to whom the note was addressed, but thought it was to Lawson. Lawson delivered it to Wells, however, but it was not produced at the trial, because it was said to be lost. Wells claimed to have made a slight search for it after he was subpoenaed as a witness, but failed to find it. The contents of the note, as stated by Wells, made no reference to the land. Lawson, in his testimony, over plaintiff's objection, said that the note or letter stated that Wallace was sick, and that Wells would attend to that matter. Lawson prepared a written application for stock in the Sedalia Cripple Creek Mining Company, and Wells afterwards signed Wallace's name to this application or memorandum, and delivered it to Lawson, who went to Sedalia, and later sent to Wells envelopes addressed to different parties, supposed to contain certificates of stock. Wells took to Wallace's house one of the envelopes, which was addressed to him, and handed it to him, and he said he did not want it, but took it and laid it on a desk by the side of his bed in which he was lying sick; and, when he started away, Wallace picked up the stock and handed it to him, and stated to Wells that he wished a talk with him before he finished the trade. Wells took the envelope back, and had it in his possession at the time of the trial. The application was subsequently destroyed by Lawson. The note or letter from Wallace to Lawson made no reference to the real estate or to the terms of any agreement. Lawson claims to have taken possession of the land about 30th September, 1896, and to have put defendant McIntyre on the land. McIntyre said that he entered upon the land 20th October; that he knew at the time that Wallace claimed to own the land. Lawson, in a short time after the alleged verbal contract of 22d September, 1896, called to see Wallace at his house. Wallace then denied ever having made the contract set up by Lawson, or that he had ever agreed with Lawson to exchange the land for mining stock. He became angry with Lawson, and ordered him out of his house. Wallace did not know that Lawson claimed to have taken possession of the land until the date of this interview. The plaintiff was put on the stand by defendants. He stated that Wallace told him at the date he purchased the land, March 10, 1898, that he had never traded or sold the land to Lawson. Lawson conveyed the land by quitclaim deed, dated 5th February, and acknowledged 6th February, 1897, to C. I. Wilson, one of his attorneys, for the expressed consideration of one dollar. Wilson, by his quitclaim deed, dated 1st May, 1898, after this suit was commenced, reconveyed the land to Lawson. At

the close of all the evidence, plaintiff asked the court to instruct the jury as follows: "Under the evidence in this case, the jury will find the issues for the plaintiff. Although the jury shall believe from the evidence that Thos. J. Wallace had some negotiations with one C. C. Lawson about exchange of the land in the petition described for certain mining stock, the court instructs you that the plaintiff is entitled to recover, unless the jury shall believe from the evidence that there was an agreement entered into, and a meeting of the minds of said Wallace and Lawson, and unless there was a contract entered into whereby Wallace agreed to sell the land to Lawson for mining stock." Which instructions were refused, and plaintiff duly excepted. No instructions were given. There were a verdict and a judgment for defendants. Plaintiff appeals.

W. M. Williams, John Cosgrove, and J. W. Cosgrove, for appellant. Bente & Wilson and C. D. Corum, for respondents.

BURGESS, J. (after stating the facts). While it is conceded by counsel for plaintiff that this is an equity suit, as to which we express no opinion (section 721, Rev. St. 1899; *Mayors' Heirs v. Rice*, 57 Mo. 384), and, as a sequence, the right of the court, if at any time during the progress of the cause it was of the opinion that it was necessary to determine any fact in controversy by the verdict of a jury, to direct an issue to be made up for that purpose (section 722, Rev. St. 1899), they claim that the submission to the jury was of a single issue,—that is, whether or not T. J. Wallace and defendant Lawson on September 22, 1896, did enter into an oral contract for the exchange of the land for mining stock,—when all the issues in the case should have been submitted, if any. But under section 722, supra, the court was authorized to submit such issues to the jury as it thought necessary. The vice of the issue submitted, however, was that it was one of law, which was for the decision of the court, and not one of fact, to be passed upon by the jury. A contract is an agreement between two or more persons, competent to contract, upon a sufficient consideration, to do or not to do some particular thing, the essential elements of which "are the existence of two or more contracting parties, a meeting of their minds, by which each gives his voluntary assent to the thing agreed upon, and an obligation, either created or dissolved, which constitutes the subject-matter of the undertaking." 7 Am. & Eng. Enc. Law (2d Ed.) 98. The court should have told the jury, either in submitting the issue or in appropriate instructions, what was necessary under the facts disclosed by the record in this case,—what were the necessary essentials to make a contract between Wallace and Lawson with respect to the exchange of the land in question for mining stock in the

Sedalia Cripple Creek Mining Company,—and not left them in the dark, as it did, with respect to this necessary information. However, as the verdict of the jury was merely advisory, we do not think the judgment should be reversed upon that ground alone. But, with due regard for the verdict of the jury, and the judgment of the court to the contrary, we are unable to concur in the conclusion reached by them; for there were wanting the essential elements to the contract,—the meeting of the minds of the contracting parties with respect to its terms and conditions, the delivery of the stock, and its acceptance by Wallace, and the want of authority on the part of Wells from Wallace to enter into it, as is claimed by defendants to have been done. The only authority which it is claimed that Wells had from Wallace to make the contract seems to have been contained in a note written and sent to Lawson the morning next succeeding the day that he and Wallace had the conversation in Bunce-ton, in which Lawson proposed to exchange mining stock for the land; and the most that is claimed for it is that Wallace suggested in it that Wells would attend to the matter for him. But this fell far short of an authority upon the part of Wells to close the trade for the land, and to receive in payment therefor mining stock. But even this uncertain and indefinite note was lost or mislaid, and could not be found, and was not, therefore, produced on the trial. But this is not all. After Wells received the mining stock from Lawson, he went to Wallace's house, found him in bed, sick, and handed it to him, and he said that he did not want it, took it, and laid it upon a desk beside his bed; and, when Wells started to leave, Wallace picked up the stock and handed it to him, remarking that he wished to talk with him before he finished the trade. Wells took the stock, and has kept it in his possession ever since. There cannot be, under these facts, any escape from the conclusion that Wells had no authority to enter into the contract in the first place, and that the minds of the contracting parties never met with respect to its terms and conditions in all its parts, in the same sense, which was absolutely necessary in order to constitute a contract. *Green v. Cole*, 103 Mo. 70, 15 S. W. 317. But even if there was such an agreement, and Wallace received in payment for the land the certificates of stock as agreed upon, as the contract was in parol this did not take it out of the statute of frauds, which requires all such contracts to be in writing. Section 5186, Rev. St. 1889; *Lydick v. Holland*, 83 Mo. 703. Defendant, however, insists that he took possession of the land under the contract, after complying with its terms on his part, by and with the consent of Wallace, and this was such part performance as to take the case out of that statute. But the evidence shows that Lawson did not take possession with the consent of Wallace. Upon the contrary, it shows that

Lawson, in a short time after it is claimed by him that the contract was entered into, went to see Wallace at his house, when he denied having made the contract, or that he had ever agreed with him to exchange the land for mining stock, became angry, and ordered Lawson out of his house, and that he did not know that Lawson claimed to have taken possession of the land until after the time of this interview.

It follows that, upon any theory of the case, plaintiff was entitled to recover. We therefore reverse the judgment and remand the cause, with directions to the court below to enter up judgment for plaintiff for the possession of the premises, with an order of inquiry as to amount of damages, rents, and profits, to be included in said judgment.

SHERWOOD, P. J., and GANTT, J., concur.

STATE v. PALMER.

(Supreme Court of Missouri, Division No. 2.
March 12, 1901.)

HOMICIDE — DEFENSE OF IMBECILITY — INSTRUCTIONS — OMISSIONS — OBJECTIONS ON APPEAL — EVIDENCE OF EXPERTS — VERDICT — IMPEACHMENT BY JURORS — REVIEW — REFUSAL OF CONTINUANCE — OMISSION FROM BILL OF EXCEPTIONS.

1. Denial of an application for a continuance cannot be considered if not embodied in the bill of exceptions, notwithstanding the record recites that on the denial defendant excepted.

2. In a prosecution for murder, defended on the ground of imbecility, the jury were properly instructed that mere weakness of intellect will not shield one who commits a crime, and that, though defendant was mentally deficient in some degree, yet they should convict him unless they were reasonably satisfied that at the time of committing the act his mental faculties were so weak that he was unconscious that it was wrong, and had not the mental capacity to choose between right and wrong.

3. They were also properly instructed that every man is presumed to be sane till the contrary is proved, and, where mental imbecility is interposed as a defense, defendant must prove it to their reasonable satisfaction, and that it must be proved that at the time of committing the act defendant labored under such mental defects as not to know the nature of the act he was doing, or, if he did know it, that he did not know that he was doing wrong.

4. An objection to a failure to instruct on all questions in the case cannot be raised for the first time on appeal.

5. In a prosecution for murder, defended on the ground of defendant's imbecility, the burden is not on the state to show, as in the case of a proved chronic state of insanity, a lucid interval at the time of the killing.

6. A hypothetical question based on a statement of facts of which there was no evidence in the case should have been excluded.

7. An expert testifying for the defense, never having had an opportunity to examine the accused, cannot express his opinion whether, at the time of the homicide, he was capable of deliberating like a sane person.

8. The defense, having been allowed to ask wholly incompetent questions of experts as to the condition of defendant's mind on the day of the homicide, cannot complain of error in permitting the state to pursue a similar course.

9. The rule that jurors will not be allowed to impeach their verdict by statements or affidavits is inflexible.

Appeal from circuit court, Callaway county; John A. Hockaday, Judge.

Edward L. Palmer was convicted of murder, and he appeals. Affirmed.

E. L. McCall, for appellant. Edward C. Crow, Atty. Gen., for the State.

SHERWOOD, P. J. This prosecution was instituted in Callaway county, because defendant, 20 years old, on the 23d day of April, 1899, at his mother's house in Fulton, shot and killed Thomas Gannaway, aged about 19 years, with a revolver. There were two mortal wounds inflicted by the shooting,—one on the right side of the windpipe, the neck being powder burned by the discharge, the other on the left shoulder blade, the padding of the coat being set afire; and Dr. Gordon, who testified to these facts, stated that the pistol that made the wounds could only have been a few feet away at the time of their making. An indictment for murder in the first degree was returned by the grand jury on the 10th of May next following the homicidal act, and on trial defendant was found guilty of murder in the second degree, punishment being assessed at 10 years in the penitentiary; hence this appeal.

The first question to be determined is the one relative to the denial of defendant's application for a continuance, which was sworn to by defendant. The denial of this application cannot be considered, because not embodied in the bill of exceptions (State v. Griffin, 98 Mo. 672, 12 S. W. 358, and subsequent cases); and although the record recites that, on the denial of his application, defendant excepted, yet this recital cuts no figure, because matters of exception, such as this, can only be preserved in a bill of exceptions, the sole repository known to the law for the preservation of such matters (State v. Wear, 145 Mo., loc. cit. 204, 205, 46 S. W. 1099, and cases cited). The recital by the clerk in the record has no such preservative power. *Id.*

This brings into view the merits of the cause. The plea of not guilty was entered in usual form, and in its support testimony was introduced tending to show such a degree of imbecility of mind on the part of defendant as rendered him irresponsible for the act done, and there was testimony of a contrary effect, and on this question of imbecility of the sort mentioned the decision of this cause hinges and turns. Testimony on this subject was introduced both pro and con.

Charles Mortz testified as follows: "I reside in Fulton. I am twenty-two years old. I knew Thomas Gannaway in his lifetime. Knew him for a long time. I remember walking down to Mrs. Palmer's house on the 23d day of April, 1899, with Perley Blunt, Tom Gannaway, and True Byers. It was about one o'clock or a little after. We boys were uptown together, and Tom Gannaway

said, 'Let's go down this way.' He wanted to go to see his girl, he said, and I said I would go with him; he said he wanted to introduce her to me. All of us boys went down there together, and me and Gannaway stopped in, and the other boys went on, and we told them to come on and go in, but they said, 'No; they would go on.' We stopped there then, and Gannaway went up to the door, and rang the bell, and nobody answered, and he rang it again, and nobody answered. Then he said to me, 'Come on,' and he opened the door, and we went in together. When we went in I saw — Pierson, — Hudgens, and Ed. Palmer there in the room. We went in the west room,—the front room. The house is right on the sidewalk. Gannaway went in first, and said, 'Good evening;' but I don't know whether anybody said 'Good evening' to him or not. The defendant, just after Mortz and Gannaway came into the room, went towards a cupboard that stood by the door leading into the dining room. Gannaway then said, 'I want to see Mrs. Palmer;' and the boys were sitting there, and they had their heads down, and Gannaway started to the door, and Ed. Palmer got up and said, 'I will see that you don't go in there.' I was standing, and turned around, and touched Gannaway on the arm, and said, 'We are not welcome, Orup; let's us go out.' When I touched him on the arm, and said, 'We are not welcome,' he said, 'Wait a minute;' and I turned and went out. I heard two shots fired. I was about in the middle of the street when the first one was fired. I didn't turn back. I was not very far when the second shot was fired. I did not see Gannaway any more until after he was shot. He was then in the mayor's office."

E. G. Pierson testified: "I knew Tom Gannaway during his life. Had known him some time before he was killed. I remember seeing him on the 23d day of April, 1899. I saw him that time about nine o'clock in the morning, and was with him until about noon. We ate dinner together. After dinner we went down the street, and I left him at the corner near Carter's saloon. I went to Mrs. Palmer's. When I got there I found Cal. Hudgens and Ed. Palmer there. It was only a few minutes until Tom Gannaway came in. I heard him knock at the door. He knocked three times, I think, and some one said, 'Come in,' as he stepped in the room. Charlie Mortz was with him. Gannaway asked where Mrs. Palmer was, and some one said she was in the kitchen, and he said, 'I want to see her a minute or two.' Ed. Palmer says, 'I will see whether you see her or not,' and as he said that he got up, and went to the press which was near the middle door, and opened it, and I thought he took something out of it. I cannot say what he did with it. Gannaway then said, 'Why didn't you ask me like a gentleman not to go in there, and I would not have started?' and

then Palmer pulled out a pistol and shot him. Palmer was standing in front of the middle door, and Gannaway was standing a little in front of him. They were facing each other. When the first shot was fired, Gannaway grabbed me around the neck, and Palmer kept on shooting him, and I came up and held him, and Gannaway grabbed hold of me, and swung me around in front of him, and I swung back, and Palmer shot again. I think the second shot hit him, and the third shot missed. Then Gannaway let go of me and got away. I do not know what Palmer did after he fired the shots. I went out where Gannaway was in the street as soon as I could. He was lying in front of Dr. Dorries' house, on the ground. He was not dead when I got there, but didn't live more than a minute and a half. I heard him say, 'Ed. Palmer shot me, and he shot me for nothing.' When I first saw Gannaway after he was shot the blood was coming from his mouth, and there was some on his shirt collar, and his coat was still afire on the back." Another witness also testified that some one said, "Come in," as Tom Gannaway knocked at the door.

M. S. Roberts testified as follows: "On the 23d day of last April I was living on Fourth street, east of Market street, in Fulton. I knew Mrs. Palmer, the mother of defendant, at the time. She was living on the south side of Fourth street, right opposite the house I was living in. I was at home on that day. About one o'clock, or a few minutes past one, while I was in the yard, I heard three shots fired pretty close together. I went in the house, through the school room, and then through the hall to the front door, and when I got to the front door I saw Tom Gannaway coming out from the east side of the Palmer house, and he came to the gate at the east corner which comes out on the street, and as he came out the gate he stumbled, and the blood was coming out of his mouth and nose, and when he stumbled he threw up his head. I was in the door then, and he came across the street to me, and he said, 'Bug, go for a doctor.' I said, 'My God, Crup! What's the matter?' He kept coming towards me, and was about to fall, and I started to him, but he fell before I got there. He fell in about two feet of me. He didn't live more than two and a half minutes after I got back from going up the street after a doctor. I was not gone more than two or three minutes. When I got back he was lying just where he was when I left him. He didn't live over four minutes, if that long, from the time he fell until he died. There was one shot in the throat, and the bullet went through the necktie and the collar. There was another wound under his left shoulder blade, and his throat and chin were powder burned. The wadding of his coat was burned where the bullet went through."

Calvin Hudgens testified: "I live in Ful-

ton. I am the son of Tom Hudgens, the engineer at the waterworks. I am nineteen years old. I knew Tom Gannaway in his lifetime. I had known him a long time. I was not with him Sunday morning, April 23, 1899, the day he was killed. I saw him that day at Mrs. Palmer's, the mother of defendant. I know defendant. Have known him about five or six years. I went to Mrs. Palmer's house about between twelve and one o'clock. Ed. Palmer and a blind man, named Tom Shepard, were there. I went into the main room. Guy Pierson afterwards came in. The blind man did not leave when Guy came in, but when Gannaway came in he left the house. I was in the room when Tom Gannaway and Mortz came in. I didn't hear anybody say, 'Come in,' when they were at the door. After they came in, the first thing Gannaway said was, 'Good evening, gentlemen,' and I spoke to him, and then went to reading. Tom Gannaway then asked where Mrs. Palmer was, and Ed. said she was in the kitchen. Gannaway said something about he believed he would go in and see her, and then I heard a shuffling of feet, and I looked up from my paper, and they were across the room, and Ed. was standing with his back to the dining-room door, and Gannaway was in front of him. I heard Ed. say, 'I will see whether you go in or not.' And Gannaway said, 'If you had asked me like a gentleman, I never would have started.' Then he said something low, which I didn't understand. Then Palmer says, 'I will see whether you go in there or not,' and just as he said that one shot went off. When the shot was fired I think they were not over two or three feet apart. Palmer was facing the northeast. Gannaway was facing the southwest. When the shot was fired I looked up from my paper, and saw them. Then Gannaway turned, and started to go out of the room, and Palmer followed him up, and fired two shots. Gannaway went out of the back door, and Palmer stood still in the floor, and as Gannaway went out through the dining-room door he whirled around, and I took the revolver away from Palmer. I saw no weapons in Gannaway's hands. I didn't hear him make any threats. This occurred between twelve and one o'clock."

Herman Dories testified: "I was living in Fulton on the 23d day of April last. I lived right across the street from Mrs. Palmer, the mother of the defendant. I was at home about one o'clock on the 23d day of April, 1899. I heard three pistol shots fired between five and ten minutes after one o'clock. Sounded like they came from across the street. They were close together, like as if you would pull one off and then another right away. When I heard the shots, I went to the front window, and I saw Tom Gannaway run out of the east gate of Mrs. Palmer's yard. At the gate when I first saw him he was running pretty fast, but after he

struck the corner he got more and more into a walk, and after he got across the street he fell in the street. I run out to him, but he fell before I got there. I raised his head up, and asked him who did the shooting, and he said, 'Ed. Palmer shot me.' I asked him what he was doing back there, and he said, 'Nothing,' and I never asked him any more questions. I saw both of the wounds after I turned him over, one at the shoulder and one at the neck. They were pistol-shot wounds, and the one on his neck was burned. He was bleeding at the mouth. He lived three or four minutes after he fell in the street."

J. W. Carner testified: "I am constable of this township, and deputy sheriff of Callaway county. I live in Fulton. I do not remember the day of the month that Gannaway was killed, but it was on Sunday. When the shooting occurred I was near McCue & Grant's grocery store. I heard the shooting. I walked up this way (indicating), and met Mr. Roberts running up the street to the telephone office, and he told me of the shooting, and I walked up there as soon as I could, and found Mrs. Palmer out in the street, and Mr. Dories and I think some other parties there with him. Ed. Palmer was there. He was standing out in the street. Gannaway breathed once or twice after I got there. Dories, or Doctor Gordon, one, was holding his head up. About the time Gannaway breathed his last I looked around, and asked who did it, and where he was at, and at that time I saw the defendant standing a few steps away. The defendant said, in my presence, that he had shot the deceased. I walked around on the west side of Gannaway, and I saw Ed. Palmer standing to the southeast of where Gannaway was laying, and I walked around and took him by the arm, and that's when he told me that he did the shooting. I said, 'What did you shoot him for?' He said he didn't want Gannaway in his house. I told him to come on and go with me, and he pulled back, and his brother took hold of him, and about that time Mr. Buchanan came up and took hold of his brother, and I took the defendant to the mayor's office, and stayed with him."

J. H. Buchanan testified: "I am sheriff of Callaway county. Was sheriff on the 23d of last April. I remember the occasion of Ed. Palmer shooting Tom Gannaway here in Fulton. That was on the 23d day of last April. I was at home. It was about one o'clock, just after dinner. Defendant's mother lived around the corner in the same block where I live. Not over one hundred and fifty yards away, I should think. I heard two or three shots fired about one o'clock of that day. I went out to see what was the trouble, and I saw the people running up that way, and I went up there too, as quick as I could, to see what had occurred. I saw Mr. Gannaway lying out on the street over there in front of Mr. Dories'

house, close to the north side of the street. They were holding his head up, and he was bleeding some from the mouth and nose. They told me he was shot. He was alive when I got there, but he died afterwards. Didn't live but a few minutes. I know the defendant Ed. Palmer. Saw him there that day."

Carner asked defendant where his pistol was that he did the shooting with, and defendant said it was at the house. Then witness went to the house, and asked Mrs. Palmer for it, and she handed it to him out of the cupboard or press. Carner also stated that defendant was not at all excited; that he was laughing when he first saw him out there in the street; that you could not have told by his looks that defendant had done the shooting. "He looked more like he had done something smart than that he had committed a crime." Other witnesses also testified that defendant was not excited; that Gannaway's body was searched, and no weapons found upon it; and that the two wounds inflicted on Gannaway's body were mortal.

In the above extracts is given the substance of the testimony on behalf of the state, omitting the testimony of some witnesses not important, and in this summary are included the main portions of the testimony of every witness present when the shooting occurred.

On part of defendant there was testimony introduced to the following substance and effect:

Sam Lee, an uncle by marriage of defendant, testified: "I reside about a mile and a half west of town. I married Miss Landis. I know Mrs. Palmer, the mother of the defendant. Have known her since 1865. I know the defendant. Have known him all his life. I do not think his mental condition is good. As to my opportunity of knowing his mental condition, I will state that I first knew him when he was three weeks old, and his father left the place where he was living and where the boy was born and moved to Kansas. I didn't see him after he moved away until he was about ten years old. He moved to Kansas in 1878 and came back in 1888. He stayed at my house three weeks after he came back from Kansas. He was not like my boys. I had a boy about his age, and he was not like him, or any other boy I ever saw. As long as he was at my place he had to be watched. We told the other boys to watch him, and see that he didn't go where he would be hurt. He didn't have knowledge enough to know when he was in danger. He was about ten years old then. I knew his brother Louis. I think he was about three years old when his father went to Kansas. I didn't see him any more until he came back. Louis didn't know enough or have get up enough about him to go anywhere or do anything. I had no opportunity of observing the mental condition of

Mrs. Palmer except being in the family. I do not think her mental condition is good. In my judgment, it is not. She has no learning, and would never take any. That's what I understood from her folks. I didn't know her at that time. She was about twenty years old when I first got acquainted with her. I think she is a weak woman, — never was very strong. So far as judgment is concerned, she has no judgment about anything, but can remember very well for a person of that kind. I knew defendant's father. I would not consider him hardly an average man."

Sam Lee, Jr., testified: "I live about a mile and a half west of town. I know the defendant. He is not very bright. I have known him about ten years. I have seen him often, and been with him often. From my conversations with him, and from my general knowledge of him and his mental condition, I will say that he is not able to take care of himself. He has not good sense. I always had to watch him when I was with him. I was not with him on the 23d of last April. I know his mother, and have talked with her. Have known her about ten or eleven years. She can remember things, but she don't know half the time what she is talking about. She was about like Ed., I think. I cannot see much difference between the two. I know Louis Palmer, defendant's brother. I have talked with him. I have not been with him as much as I have with Ed., but I think his mental condition is as bad as Ed.'s, or worse. I would call him an idiot. I would call his mother's condition just about like the boy's. I don't think she is any brighter than he is. She has not good sense, I don't think. That's my impression. She is not bright. All three of them are about the same. I can't see any difference worth mentioning in their conditions." On cross-examination, witness testified as follows: "I think the defendant is an idiot, but he has never been confined in an asylum for feeble-minded folks. I don't know of his working for anybody. If he has been engaged at manual labor for several years past, I do not know of mental condition during that time. He went to the public school I think, but I don't know how long. I don't know how far he got in his books. I don't know whether he can read or write. Don't know anything about his education. I know he has more sense than his brother Louis. Louis works, and does as you tell him. He performs labor right along. He was never confined in a home for feeble-minded that I know of. The defendant had more sense than his brother Louis. He lived at my house one time. He would do whatever I told him to do, but had to be watched. I am a first cousin of the defendant."

Defendant, in addition to the foregoing testimony, introduced a number of witnesses for the purpose of showing that he was of weak mind, and unable to determine the

difference between right and wrong; in fact, that he was an imbecile, and not a responsible or accountable person.

Among the curious features presented by this record is this excerpt: A physician, testifying as an expert as to the mental status of defendant and of his mother, was asked, as to the latter, these questions, and gave these answers: "Q. State to the jury, in your opinion, from what you have learned, and what you know of her mental condition, by your own observation and knowledge, what is her mental condition. A. She is feeble-minded, too. Q. To what degree is she feeble-minded? A. I could not say. Perhaps she has more rationality than a person that would be more feeble-minded than she is." A palpable truism. Other witnesses on the part of defendant and on part of the state testified that defendant could read and write; that he was the brightest of all the three brothers; that his older brother William, regarded as the dullest of the brothers, owned and lived on a farm near Cedar City, was married, had one child, and making a living; that Louis worked around town at odd jobs, and did good work. Now Louis, as well as his mother, were witnesses at the trial on behalf of defendant; and it was in evidence that defendant's father was a bright and skilled mechanic, but indolent. Other witnesses, both for state and defendant, gave testimony that they did not think that defendant was an idiot, or fool either, but rather thought he was feeble-minded; that defendant worked in the post office two or three months as janitor, and did his work well; that he worked also in cutting up a crop of corn, and his employer stated that he never had a hand that obeyed instructions more implicitly or did his work more satisfactorily; other witnesses thought defendant not a man of much intellect, but that he could tell right from wrong, under ordinary circumstances; that he knew it was wrong to take human life. At this stage of Dr. Dorries' testimony defendant's counsel was permitted, over the state's objection, to ask the physician this question: "Q. Suppose, doctor, that the defendant was in a room, in his own home, with a lot of boys, that came in there in a drunken condition, and demanded a right to go in where the defendant's mother was in another room, and that a controversy arose between him and one of the other parties as to whether or not that other party could go into the room where the defendant's mother was; do you think that this defendant, Ed. Palmer, would be capable of distinguishing his acts of right from wrong, under those circumstances? * * * Q. Surrounded, as he was, by that excitement, and by those boys coming in there, and demanding the right to go through the house and to see the defendant's mother, and his telling the boy he could not go into the room where his mother was, and surrounded in that way, and un-

der those circumstances, and the defendant getting against the door, and telling the other fellow that he could not go in there, would you think, in your judgment, doctor, that the defendant, Ed. Palmer, would be capable of deliberating like a sane person? A. I think not, in the sense that you or I would. I would not like to risk him in that state myself."

None of the physicians who had testified in the case on the part of defendant had ever seen the boy under excitement, or had any conversation with him on the street save speaking to him in passing, and none of them had ever examined him in the slightest way or manner.

The foregoing testimony has been carefully examined, and there was ample testimony to support the verdict of the jury, and to the triors of the facts was committed the duty, under the instructions, of determining whether defendant was criminally responsible, and they have found he was. This leaves to be examined the correctness of the instructions given.

The jury were instructed as to murder in the first and second degrees in usual form. These instructions were also given:

"(2) The jury are instructed that mere weakness of intellect will not shield one who commits a crime, and in this case, although you may believe from the evidence that the defendant is mentally deficient in some degree, yet unless you are reasonably satisfied by the evidence that, at the time the alleged crime is charged to have been committed by the defendant, his mental faculties were so weak, and his mind so deficient, that he was unconscious at the time of committing the act that it was wrong, and that he ought not to do it, and that he had not the ability or mental capacity to choose between right and wrong, you will find the defendant guilty as charged in the indictment.

"(3) The jury are instructed that every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proven, and where insanity or mental incapacity or imbecility is interposed as a defense, as in this case, the law requires the defendant to prove to the reasonable satisfaction of the jury; and, to establish such defense, it must be proven, to the reasonable satisfaction of the jury, that at the time of committing the act the defendant was laboring under such defect of reason, from natural deficiency or disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong."

The instructions just quoted presented to the jury the law very fairly in its more particular bearing on the case at bar. Exceptions were taken on behalf of defendant to all of the instructions given at the instance of the state.

In addition to those given, the court, at request of the defense, gave these instructions:

"(1) The jury are instructed that the plea of insanity or imbecility of mind is a lawful one in this case, and, to establish the insanity or imbecility of the defendant, positive and direct proof of it is not required by law, and to entitle him to an acquittal by reason of his mental insanity or imbecility of any character circumstantial evidence which reasonably satisfies your minds of its existence is sufficient.

"(2) The jury are instructed that insanity is a physical disease located in the brain, which disease so perverts and deranges one or more of the mental and moral faculties as to render the person suffering from this affliction incapable of distinguishing right from wrong in reference to the particular act charged in the indictment, and incapable of understanding at the time the particular act in question was a violation of the laws of God and society; wherefore the court instructs the jury that if they believe and find from the evidence that at the time the defendant killed the deceased, Thomas Gannaway, if they find he did kill him, as charged in the indictment, the defendant was so perverted and deranged in one or more of his mental or moral faculties, or was so afflicted with imbecility or weakness of mind, as to be incapable of understanding, at the moment of said killing, that such killing was wrong, and that he, the said defendant, at the time, was incapable of understanding that this act of killing was a violation of the laws of God and man, if the jury find he was so afflicted they should find him not guilty.

"(3) The jury are instructed that the indictment in this case is a mere accusation or charge, and is no evidence of defendant's guilt, and no juror should permit himself to be influenced or prejudiced against the defendant for or on account of such indictment.

"(4) The jury are further instructed that the law presumes the defendant not guilty of the charge in the indictment, and this presumption of innocence remains and abides with the defendant in all stages of the trial, until overcome by evidence which convinces the jury of his guilt beyond a reasonable doubt. If, therefore, after a consideration of all the evidence in the case, the jury entertain a reasonable doubt of defendant's guilt, it is their sworn duty to acquit him.

"(5) If the jury believe from the evidence beyond a reasonable doubt that the defendant, at the county of Callaway and state of Missouri, on or about the 23d day of April, 1899, intentionally shot and killed Thomas Gannaway, in a heat of passion, suddenly aroused by reason of said Gannaway threatening or attempting to pass through his house against his consent, then the law presumes that such killing was not done with

malice, but was the result of such passion, and in such case you cannot find the defendant guilty of murder in either degree, but you should find him guilty of manslaughter in the fourth degree, and assess his punishment at two years' imprisonment in the penitentiary, or by imprisonment in the county jail not less than six months, or by fine of not less than five hundred dollars, or by both a fine of not less than one hundred dollars and imprisonment in the county jail not less than three months. If the jury find the defendant not guilty otherwise than on the ground of insanity, the form of the verdict will be: 'We, the jury, find the defendant not guilty. —, Foreman.' If you find the defendant not guilty on the ground of insanity or imbecility, and that he is insane at the present time, the form of the verdict will be: 'We, the jury, find the defendant not guilty, on the ground of insanity, and we further find that he has not recovered from such insanity. —, Foreman.' If you find the defendant not guilty on the ground of insanity, and that he has recovered from such insanity, the form of the verdict will be: 'We, the jury, find the defendant not guilty on the ground of insanity, and we further find that he has recovered from such insanity. —, Foreman.' "

Eighteen other instructions were asked by defendant, but refused by the court, and properly refused, because those given certainly presented the law in a very favorable light for defendant.

Presenting, as these instructions on both sides did, the whole law of the case, they afford no cause of just criticism, and this remark answers any objection made to them. Besides, defendant took no exceptions as to the court's failure to instruct the jury on all questions, etc., and so is foreclosed from raising any such objection in this court. *State v. Cantlin*, 118 Mo. 100, and many subsequent cases of the like tenor and effect.

It is insisted for defendant that in his case an habitual chronic state of insanity, extending all through his life, was shown to have existed, and that the burden of proof was on the state to show a lucid interval at the time of the killing; and *Lowe's Case*, 93 Mo. 547, 5 S. W. 889, is cited in support of that position; and it does support it, but that case is totally foreign to the one before us, for this is a case not of insanity either in acute or chronic form, but a case of weak-mindedness, usually called "imbecility," which is a long shot from insanity, and this defendant's own medical witnesses testified was the case here. A recent text writer of more than ordinary excellence, touching the topic now in hand, states: "Imbecility, for example, in law may not only include general weakness of mind, which may be ex natiuitate, as in the case of idiots, but dementia, or the breaking down of the intellect, caused by disease or old age." *Clevenger, Med. Jur.*

Insan. p. 204. Elsewhere the learned author says: "One may be criminally responsible where he is so under the guidance of reason as to be legally answerable for his acts, though he is suffering from mental derangement, and though he may not be capable of weighing the reasons for and against the act. The possession of sound faculties and full vigor of mind, unimpaired by disease or infirmity, is not required as a condition of criminal responsibility. In order to be criminally responsible, one must have intelligence and capacity to have a criminal intent and purpose, and if his mental powers are so deficient that he has no will or conscience or controlling mental power, or if from the overwhelming violence of mental disease his intellectual power is for the time obliterated, he is not criminally responsible; the question to be determined being whether, at the time of the act, he had the mental capacity to entertain a criminal intent, and whether in point of fact he did entertain it. Mental disorders cannot be regarded as evidence of insanity which will confer legal irresponsibility for crime, however, unless they are caused by or result from disease or lesion of the brain, and the criminal act must have resulted from the unsoundness of mind, and they must be so excessive as to overwhelm the reason, conscience, and judgment. Thus, mere weakness of mind does not excuse crime, nor will bad education or bad habits, nor the fact that the person is of a low order of intellect. * * * Neither is crime excused because committed under the influence of fear and excitement, or bad passion, or jealousy. And reasonable wrath and anger do not affect criminal responsibility where the reason is not actually dethroned, and the rule is the same though they may temporarily dethrone reason, or for the time being control the will, where the inability to control it arises from passion, and not from insanity. Mere frenzy or ungovernable passion, however furious, is not insanity, within the meaning of the law." *Id.* pp. 125-127. And he further states that "Imbeciles afford every grade of intelligence below the normal, and education, station, resources, etc., modify the aspects of their mental deficiencies, so that no possible standard can be invented that will divide imbeciles, even with approximate correctness. Hoffbauer's suggestion of three stages of imbecility failed, as some superiority of intellect would be included in an inferior grade, and vice versa." *Id.* p. 229.

The quotations made are fully supported by the authorities there cited, and they sustain the correctness of the two instructions copied above, given at the instance of the state; and, although the defense in this case is weak-mindedness or imbecility, yet the same test, that of the ability to distinguish right from wrong in the doing of the particular act, must be applied to imbecility as well as to insanity. I have heretofore quoted certain questions propounded to Dr. Davis on behalf of defend-

ant, and to which the doctor gave a certain answer. These questions were objected to by the state, though the stenographer has not preserved the reasons given for the objections made, but which the court overruled. These objections should have prevailed, or the court should of its own motion have prevented the questions from being asked or the answer given; and for these reasons: In the first place, there was not a particle of evidence that defendant exhibited any signs or tokens of excitement on the occasion of the shooting; the evidence is entirely the other way. In the second place, there was not an iota of evidence that any of the young men who went to defendant's house on that Sunday were in a drunken condition. Nor, in the third place, that they, or any one of their number, demanded the right to go into another room of the house, where defendant's mother was. Nor, in the fourth place, that any controversy arose as to going into the other room. In the fifth place, the very point at issue was whether defendant could distinguish right from wrong in doing the act charged as criminal. This was for the determination of the jury, and an expert cannot be allowed, by answer to an improper question, to usurp the province and functions of the triors of the facts. *Graney v. Railway Co.* (Mo. Sup.) 57 S. W. loc. cit. 280; *Lawson, Exp. Ev.* (2d Ed.) 172. An expert witness cannot be asked his opinion as to whether the accused was capable of judging between right and wrong. *Shults v. State*, 37 Neb. 487, 55 N. W. 1080; *Reg. v. Layton*, 4 Cox, Cr. Cas. 149. Nor to express an opinion that the accused acted under an insane delusion or was impelled by an irrepressible impulse. *Patterson v. State*, 88 Ga. 70, 12 S. E. 174. And an expert witness may give his opinion as to the state of mind of the accused, but not as to his responsibility; that being a question for the jury. *Reg. v. Richards*, 1 *Fost. & F.* 87; *Reg. v. Burton*, 3 *Fost. & F.* 772; *People v. Thurston*, 2 *Parker, Cr. R.* 49; 1 *Clevenger, Med. Jur. Insan.* pp. 585, 586. And it has been generally, if not universally, held, in cases where the objection has been made that the question covered the point in issue, that the experts cannot be asked the broad question whether they considered the person whose sanity is being litigated is out of his mind, or whether his mind was so affected as to be unfit to transact business (*Deshon v. Bank*, 8 *Bosw.* 461; *Chickering v. Brooks*, 61 *Vt.* 554, 18 *Atl.* 144); or to give their opinions on the whole case, as it would necessarily include a determination of the facts (*Negroes Jerry v. Townshend*, 9 *Md.* 145; *Yardley v. Cuthbertson*, 106 *Pa.* 395, 1 *Atl.* 765; *In re McCarthy*, 55 *Hun.* 7, 8 *N. Y. Supp.* 578; *People v. Lake*, 12 *N. Y.* 358; 1 *Clevenger, Med. Jur. Insan.* p. 542, and cases cited). These authorities effectually show the incompetency of the question asked Dr. Davis as to what was the condition of defendant's mind on the day of the homicide. Notwithstanding it was permitted defend-

ant to ask Dr. Davis and others such questions as above quoted over the state's objections, yet when the state attempted to do the same thing, and was granted the privilege, exception was saved there, and complaint made here because of that fact. Having enjoyed permission to successfully ask wholly incompetent and improper questions on a certain subject, it does not lie in the mouth of the party thus doing to complain of error in permitting his adversary to pursue a similar course. This is enough to say about the point that error occurred in overruling defendant's objection to an incompetent hypothetical question asked by the state.

It has already been stated that none of the physicians who were witnesses for the defendant had seen defendant under excitement, or had conversed with him, or had made any examination of him; and they evidently—that is, most of them—felt on that account a hesitancy in testifying on the subject, and such hesitancy was based on the correct principle, as shown by the authorities. Thus, the testimony of a physician who had not studied the progress of the disease in question, and whose opportunities were limited for observing the personal habits and conduct of the person whose sanity is questioned, possesses little, if any, value, and so it has been ruled. And so, where a person is alleged to be an imbecile, such imbecility has been held not established "on the evidence of two medical witnesses neither of whom had ever conversed with him until the day before the filing of their report, and who had had no opportunity to test his mental condition." 1 Clevenger, Med. Jur. Insan., and cases cited.

Relative to the point about the affidavit of defendant's counsel that two of the jurors made admissions to him derogatory to, and inconsistent with, their verdict, it suffices to say, what indeed every lawyer is supposed to know, that for about three-quarters of a century in this state the inflexible rule has been that a juror neither by his statement nor by his affidavit is allowed to impeach his verdict. I have thus considered the salient points presented in this record; the others, not mentioned, are frivolous and without merit. The premises considered, the judgment will be affirmed. All concur.

STATE ex rel. BELT v. CITY OF ST. LOUIS.
(Supreme Court of Missouri. Feb. 19, 1901.)

MUNICIPAL CORPORATIONS—ORDINANCES—PUBLIC IMPROVEMENTS—APPROPRIATIONS—HIGHWAYS—PRIVATE USE—FRANCHISE—EXCLUSIVE PRIVILEGES—MANDAMUS.

1. Under St. Louis City Charter, art. 6, § 27, declaring that the assembly shall have no power to contract for any public work or improvement, but the board of public improvements shall prepare and submit estimates, and under the direction of ordinance advertise and let contracts to the lowest bidder, City Ordinance 19,984, directing the board of public improve-

ments to erect and maintain boxes on the streets to serve as receptacles for litter, and to contract therefor, being a public work, was invalid, it not being recommended by the board, or passed on estimates submitted by them.

2. St. Louis City Charter, art. 6, § 17, provides that the board of public improvements shall recommend to the assembly ordinances for the repairing and cleaning of all highways. Section 27 declares that the assembly shall have no power to contract for any public work, but the board shall submit estimates and let contracts. Section 28 enacts that "every ordinance requiring such work shall contain a specific appropriation from the revenue fund." Held, that section 28 was simply another limitation on the assembly, and did not permit them to pass an ordinance requiring the board to make a contract for public work consisting of boxes erected on the street as receptacles for litter, merely because the cost therefor was borne by the contractor in return for the privilege of posting advertising on the boxes, so that no appropriation therefor was necessary; but such contract was controlled by sections 17 and 27, and could only be made under ordinance on recommendation and estimates by the board.

3. St. Louis City Ordinance 19,984, requiring the board of public improvements to erect boxes on the streets as receptacles for litter, and to contract with a contractor to erect such boxes in consideration of the exclusive privilege of posting advertisements thereon, is invalid as an attempt to subject the public streets to a purely private use.

4. St. Louis City Ordinance 19,984 required the board of public improvements to contract with a certain person or his assigns for the erection on the streets of boxes as receptacles for litter, on terms allowing such person the exclusive privilege of posting advertisements on such boxes; but the ordinance was not passed on any specifications submitted by the board, and none were provided by the ordinance. Held, that mandamus would not lie to compel the board to make the contract, as the court would not specify the number, design, etc., of boxes to be erected.

5. St. Louis City Ordinance 19,984, entitled "An ordinance authorizing, directing and empowering the board of public improvements to erect and maintain at suitable locations on the streets boxes or receptacles for the collection of litter, and to contract with B. or assigns to erect said boxes or receptacles without cost to the city," provided that, in consideration of the erection of said boxes by B., he was to be granted the exclusive privilege of posting advertisements thereon, without which privilege the contract would be worthless. Held, that the ordinance was void, as not expressing the object in the title.

Sherwood and Marshall, JJ., dissenting.

In banc. Application for mandamus by the state, on the relation of Fred R. Belt, to compel the city of St. Louis and the board of public improvements to enter into a contract with the relator in pursuance of a city ordinance. Denied.

G. B. Webster, for relator. H. A. Haeussler, A. B. Shepley, and Chas. S. Reber, for respondent.

GANTT, J. This is an original proceeding of mandamus instituted in this court to compel the board of public improvements of the city of St. Louis to enter into a contract with relator for the erection and maintenance for 10 years of boxes to be placed in the streets of said city, to be used by relator for advertising purposes, and by the

city of St. Louis for the purpose of holding any waste paper that might be thrown on said streets. On the return of the writ respondents city of St. Louis and Emory S. Foster filed returns, alleging, among other matters, that they were not proper parties to the suit. On the same day the remaining respondents, the board of public improvements of St. Louis, filed a motion to quash the alternative writ for the reason that relator's petition failed to state facts which entitled him to any relief; thus raising at once the question as to the validity of the ordinance set forth in his petition. The ordinance which relator claims imposes a plain, legal duty on said board, which duty it has refused to perform, is as follows:

"19,984. An ordinance authorizing, directing and empowering the board of public improvements of the city of St. Louis to erect and maintain, at convenient and suitable locations upon the streets and public places of said city, boxes or receptacles for the collection, casting and temporary deposit therein of such waste paper or other litter as now are or are likely to be cast upon said streets or public places, and to contract with Fred R. Belt, or his assigns, to erect and maintain said boxes or receptacles, for the purposes aforesaid, without cost or expense to the city.

"Be it ordained by the municipal assembly of the city of St. Louis, as follows:

"Section 1. The board of public improvements of the city of St. Louis is hereby authorized, directed and empowered to erect and maintain, at such convenient and suitable locations, upon the streets and public places of said city, as may, from time to time, be designated by said board, suitable boxes or receptacles for the collection, casting and temporary deposit of such waste paper or other litter as now are or are likely to be cast upon the streets or public places of said city, and to provide and arrange for the cleaning and keeping clean of such boxes and receptacles, and the removal of such waste paper and other litter; and to accomplish the purposes aforesaid said board of public improvements is hereby authorized, directed and empowered to enter into a contract with Fred R. Belt, or his assigns, for the exclusive right of said Belt, or his assigns, to erect and maintain, at such convenient and suitable locations upon the streets and public places of said city as may be designated from time to time by said board, suitable boxes or receptacles for the collection, casting and temporary deposit therein of such waste paper or other litter as now are or are likely to be cast upon the streets or public places of said city, and to provide and arrange with said Belt, or his assigns, for the cleaning and keeping clean of such boxes or receptacles, and the removal of such waste paper or other litter.

"Sec. 2. The contract with said Belt or his

assigns is to be made for and during the full term of ten years from and after the execution of the contract.

"Sec. 3. It shall be specified in said contract with said Belt, or his assigns, that the said Belt or his assigns, during the term aforesaid, erect, renew and maintain said boxes or receptacles at all such locations upon any of the streets and public places of said city as may, from time to time, be designated by said board of public improvements, without cost to said city for the erection or maintenance of said boxes or receptacles, or for keeping said boxes and receptacles clean.

"Sec. 4. That for and in consideration and as full compensation to said Belt, or his assigns, for erecting, maintaining and keeping clean all said boxes or receptacles, said Belt, or assigns, are to have and possess all waste paper and other litter cast and deposited in said boxes or receptacles, and are also to have the exclusive right and privilege to place advertisements on such boxes or receptacles, for the benefit of himself or assigns: provided, however, that no advertisement which is of an immoral or disreputable character shall be placed thereon; and provided that all advertising signs shall be made of tin or other metal, and no bill or advertisement on paper is to be posted upon said boxes or receptacles: and provided, further, that no advertisement of any kind shall be placed on any of said boxes or receptacles until the same shall have first been submitted to and approved by the board of public improvements of said city.

"Sec. 5. In consideration of the granting of the privileges aforesaid to said Belt, or his assigns, said Belt, for himself and his assigns, agree, during the continuance of the contract provided for as aforesaid, to submit a quarterly statement to the register of the city of St. Louis, showing the amount collected in each quarter for the advertisements placed on said boxes or receptacles, and to pay in to the city treasurer of the city of St. Louis, at the end of each quarter, fifteen per cent. of the gross receipts received by the said Fred R. Belt, or his assigns, during the lifetime of the franchise granted by this ordinance.

"Sec. 6. Said Fred R. Belt, or his assigns, shall, in connection with said contract, give his or their bond in the penal sum of five thousand dollars, with two or more sureties, to be approved by the mayor and council, conditioned for the observance of all said terms, provisions and conditions, and for the prompt submission of said quarterly statement, and the prompt payment of all sums of money herein by him and his assigns agreed to be paid.

"Sec. 7. Where a remonstrance is filed by a majority of the residents of any block or blocks in the city against the erection of any box or boxes, as described in this ordinance, then it shall be unlawful to plac

said box or boxes on said block or blocks.

"Sec. 8. If said Fred R. Belt, or his assigns, shall fail to make true and correct returns of receipts as aforesaid, or shall fail to keep said boxes in a sanitary condition to the satisfaction of the street commissioner, or shall fail to clean out said boxes daily, he shall forfeit all rights granted herein.

"Approved March 19, 1900."

The validity of the ordinance requiring "the board of public improvements" to enter into the contract with relator, Belt, for the exclusive right to erect and maintain boxes to be placed upon the streets and public places of St. Louis for the collection and temporary deposit of waste paper and other litter must be determined by the charter of St. Louis. So much of section 27 of article 6 of the charter as is pertinent to this inquiry is in these words: "The assembly shall have no power directly to contract for any public work or improvement or repairs thereof, contemplated by this charter, or to fix the price or rate therefor; but the board of public improvements shall, in all cases, except in case of necessary repairs requiring prompt attention, prepare and submit to the assembly estimates of costs of any proposed work, and, under the direction of the ordinance, shall advertise for bids as provided for purchases by the commissioner of supplies, and let out said work by contract to the lowest responsible bidder subject to the approval of the council. Any other mode of letting out work shall be held as illegal and void." This article of the charter has been considered by the St. Louis court of appeals in *Cole v. Skrainka*, 37 Mo. App. 427, in an opinion by Judge Rombauer, in which he says: "The board of public improvements of the city of St. Louis are the agents of the city in regard to all street improvements. All ordinances for such purposes must emanate from the board." Rev. St. 1879, p. 1608, §§ 14-16. "The assembly had no power to contract, either directly or indirectly, for any public work." Section 27, p. 1610, Rev. St. 1879. "The ordinances are all framed by the board. * * * It is an initial and necessary step of the contract," etc. Judge Bond dissented upon another point, and that case came to this court, and the opinion of Judge Rombauer was affirmed. *Cole v. Skrainka*, 105 Mo. 303, 16 S. W. 491; *Verdin v. City of St. Louis*, 131 Mo. 26, 33 S. W. 480, 36 S. W. 52. In *City of St. Louis v. Gleason*, 89 Mo. 67, 14 S. W. 768, a condemnation proceeding under a charter provision akin to this came before this court, and the counsel for the property owners insisted that the judgment must be reversed, because "the ordinance failed to show that it was passed upon by the unanimous recommendation of the board of public improvements, or on the petition of the owners of the major part of the property fronting on the proposed street"; citing article 6, § 2, of the St. Louis charter.

This court unanimously ruled that the municipal assembly had no power to act, no jurisdiction over the subject-matter, until directed by the board of public improvements, or the owners of a major portion of the ground fronting on the proposed street. Until such action was taken by the board of public works or the owners of the ground, there was no authority in the assembly to pass the ordinance. By section 17 of the same article 6 it is provided that "the board of public improvements shall recommend to the assembly ordinances for the repairing and cleaning of all streets, alleys and highways and for the construction of cross-walks, and no ordinance therefor shall be passed without such recommendations."

With this understanding, then, of the charter and the construction placed upon it by the courts, let us inquire, first, what is the purpose of Ordinance No. 19,984? Clearly, it is twofold: to clean the streets of waste paper or other litter, and to give Belt the exclusive right to use the boxes for advertising purposes for 10 years. The ordinance was not recommended by the board of public improvements, and they deny the power of the assembly to pass and enforce it. If the ordinance provides for public work, within the meaning of the charter, it must be held void. The cleaning of a public street is so obviously a public work that it requires no argument to make it more so. Unless the purpose was to rid the streets of an unseemly appearance by removing the loose paper and litter, no reason can be perceived why the assembly shall have entertained the matter at all. If such was the purpose of the ordinance, it involved a public duty and a public work, which the assembly sought to cast upon a public body, the board of public improvements. If the ordinance was not enacted to subserve a public purpose, the assembly had no power or authority to impose the duty it did on the board of public improvements, whose functions are public. But, as the charter required the board to recommend the ordinance, and prohibited the passage of an ordinance without its recommendation in the first instance, the ordinance was invalid for this, if no other, reason. Counsel for relator, however, insists that the assembly is forbidden to contract for public work only when the work is to be paid for out of the city treasury, because section 28 of article 6 provides that "every ordinance requiring such work to be done shall contain a specific appropriation from the revenue fund," etc.; and, as this ordinance does not contemplate the expenditure of public funds, sections 17 and 27 of article 6 do not apply to the ordinance in question. We do not so construe section 28 of article 6. In our opinion, it was simply another limitation upon the assembly, and not upon section 27. Section 27 expressly prohibits the assembly from directly contracting for "any public work contemplated by this charter," which neces-

sarily includes the street cleaning mentioned in section 17. The purpose of the freeholders in thus restricting the assembly is manifest and twofold. They sought to create a board whose experience and ability would especially fit it for the duty of contracting for a vast system of public improvements, and whose estimates should guide the assembly in entering upon them; and, secondly, to guard against extravagance by requiring that, before public work was ordered to be done, there should be expert estimates made thereof. The argument of counsel for relator is strikingly similar to that of counsel in *State v. Barlow*, 48 Mo. 17. In that case a contract had been awarded to one Henry for lighting, cleaning, and repairing the street lamps of St. Louis for one year. It was assigned to Dunn with the consent of the city, and extended from year to year. At the time the contract was awarded, the charter did not require public work to be let to the lowest bidder, but prior to the last renewal the charter was so amended. After the amendment the city entered into a new contract with one Zeider, and the comptroller, having signed Zeider's contract, refused to countersign Dunn's extension. Thereupon Dunn brought a proceeding for mandamus in this court to compel the comptroller to countersign his contract. It was admitted there (as it must be here) that, if Dunn's contract was for public work, it violated the amended charter. But it was insisted then, as it is now by relator, that the charter did not apply to that particular contract. The argument is reported thus: "The meaning of section 17, article 8, Amendment Charter, approved March 4, 1870, is obvious: (1) The council shall not contract directly, but may contract indirectly, for work indicated in that section, after plans, profiles, estimates, advertisements, and bids approved by the council. (2) But no work, improvement, or repairs mentioned in that section is to be let out after advertisements and bids, unless it be of nature to admit of plans, profiles, and estimates of costs. That is perfectly clear. Section 18 enforces the same view wherein it says every ordinance requiring such work shall contain a specific appropriation from the proper revenue or fund, based on an estimate of cost. Now, what is meant by such work? Evidently that of which profiles and plans may be made and submitted." This is precisely the same argument that is now made. Section 18 of the amendment of 1870 (now section 28) provides that every ordinance involving such work shall make an appropriation therefor, and requires plans and specifications to be prepared, and an estimate of the cost made. It was argued in that case that the contract did not contemplate public work, because the work to be done did not admit of plans and specifications, and that by section 18 only work that did so admit was public work. Here it is said that the contract does not involve public work,

because the ordinance requiring it to be done does not contain an appropriation therefor, and that only work to be done under an ordinance so requiring is public work under the charter. This court rejected the argument in *Dunn's Case*, and held that, although that particular contract did not call for plans, profiles, and estimates of cost, the spirit of the ordinance and the amended charter required specifications and competitive bids, and denied the assembly or city council the power to contract directly for such work. Counsel cite *State v. City of St. Louis*, 56 Mo. 277, but very candidly admit it is open to criticism, because it was ruled that the ordinance and amended charter required the city engineer to make the plans and estimates, and let to the lowest bidder, only when the work was to be done by the city, and paid out of the city treasury, and did not require such plans, specifications, and estimates, and competitive bidding when the work was done by ordinance and contract of the city, to be paid by property holders. This distinction—if it can be so denominated—condemns the whole decision. In either case it was clearly public work, and, if the principle of competitive bidding should ever be applied and enforced, it is when the city makes public improvements at the expense of the owners of private property. So, in this case, this provision of the charter in section 27—one of the most admirable and salutary in the charter—applies in full force. The cleaning of the streets had been especially confided to the board of public improvements. If deemed advisable to have boxes or receptacles for waste paper or litter, it was eminently proper that the board should specify the character, size, and material out of which they should be made, and an estimate of the number to be required, and the contract should be let to the lowest bidder, and without these essential prerequisites no valid ordinance could be passed.

But there is another view to be taken of this ordinance. It subjects the public streets to a purely private purpose, to wit, the advertising of individual business and enterprises. Can the city devote its streets to such a purpose? We hold that it cannot. The charter gives the city power "to regulate the use of the streets." Under this grant it may, it is true, not only regulate the travel thereon, but it may allow gas, water, and sewer pipes to be laid therein, and permit telegraph and telephone poles to be erected therein, because all of these uses are consistent with the use for which they are dedicated or condemned. *Schopp v. City of St. Louis*, 117 Mo. 136, 22 S. W. 898, 20 L. R. A. 783. But it has been held by this court that it has no power to lease out portions of the street for huckster stands and stalls. The "public highways belong from side to side and end to end to the public," and the public are entitled, not only to a free passage along the highway, but to a free passage along

any portion of it not in the actual use of some other traveler, "and the abutting property owner has the right to the free and unobstructed passage to and from his property." *Schopp v. City of St. Louis*, 117 Mo. 136, 137, 22 S. W. 898, 20 L. R. A. 783; *Sherlock v. Railway Co.*, 142 Mo. 172, 43 S. W. 629; *Knapp, Stout & Co. v. St. Louis Transfer Ry. Co.*, 126 Mo. 26, 28 S. W. 627; *Schulenburg & Boeckeler Lumber Co. v. St. Louis, K. & N. W. R. Co.*, 129 Mo. 455, 31 S. W. 796. And it was held in *Glaessner v. Association*, 100 Mo. 508, 18 S. W. 707, that a franchise to lay a railroad track in a street must be for a public, and not for private, purposes. Referring now to the ordinance, it will be observed that it confers upon Belt the exclusive right to place advertisements on such boxes for the benefit of himself and his assigns. In a word, the city has attempted to farm out its sidewalks and streets to a private person for advertising. Belt is free to make his own charges for advertising. No power is reserved to the city, even if it were a purpose to which it could devote the streets, to regulate the charges for advertisements. The legislative authority of the city could not thus be delegated, nor could it abdicate its control over the public streets, held by it in trust for the public, and create a monopoly in favor of one advertiser. *Matthews v. City of Alexandria*, 68 Mo. 115; *Cooley, Const. Lim.* (6th Ed.) 247-253; *Gale v. Village of Kalamazoo*, 23 Mich. 344; *City of Oakland v. Carpenter*, 13 Cal. 540.

But it is said that it is no objection to a public franchise that its owner may derive a private gain therefrom. This is unquestionably true when the use is public, and the gain arises out of that use; such as street cars, telegraph and telephone lines. In this case, however, the pecuniary profits to Belt arise from a source wholly distinct from any public use. They will not flow naturally from his right to erect and maintain boxes for waste paper, but solely from a distinct privilege in which the public are not interested, to wit, his exclusive right to use the streets for advertising purposes, a purely private and collateral enterprise. We are clear that the streets cannot be devoted to such a private purpose. With what sort of propriety or fairness can the city farm out to Belt and his assigns the right to erect a box on a sidewalk in front of a business house, and not only thus deprive the proprietor, who has been compelled to construct the sidewalk and pay for improving the street in front of his premises, of the free access, ingress, and egress from his store, but to advertise the goods of a rival in the same line of business? The question furnishes its own answer. The city had no such power.

We have considered the two paramount purposes of this ordinance separately, and our conclusion is that the cleaning of the streets is a public duty, required to be ac-

complished by public work, and the charter negatives the power of the assembly to directly contract therefor, but it must be first recommended by the board, as required by the charter. Second. The city has no power to let out the sidewalks and streets to a private person for advertising purposes, even though he should pay it a per cent. of the property; and the combining of these two illegal purposes in one ordinance does not make it valid. *The Julia Building Case*, 88 Mo. 258, *State v. Schweickhardt*, 109 Mo. 496, 19 S. W. 47, and the *Subway Case*, 145 Mo. 551, 46 S. W. 981, have no bearing on the questions here decided. The *Julia Building Case* and the *Subway Case* were put upon the distinct ground that they were public uses, and the *Schweickhardt Case* involved only the validity of an ordinance granting him the privilege of selling refreshments in Forest Park. This court held that a park was a place devoted to amusement, comfort, and recreation of the public; that the power to regulate parks included the power to make all reasonable regulations to promote such objects.

2. This is a proceeding for a writ of mandamus to compel the board of public improvements to make a contract with Belt for the erection of boxes or receptacles in which to put waste paper and other litter on the streets. The relative duties of the board and Belt are not defined in the ordinance, save as to certain restrictions, but, as the board have been denied their charter privilege and duty of making the necessary specifications and estimates, how can this court proceed to make the contract for the parties by commanding the board to contract for a certain number of boxes of a certain dimension and of certain material. Suppose Mr. Belt desires the boxes large enough to properly advertise a circus, and the board should think such boxes would constitute an unsightly obstruction of the sidewalk, amounting to a nuisance to the merchant who does business in the abutting building, are we to determine it by our peremptory writ? We do not think the writ can be used to subserve such a purpose.

3. It remains only to consider the further contention that this is clearly a franchise legislation, and as thus construed it is not obnoxious to the objection that it attempts to grant a monopoly of the advertising business in the streets of St. Louis, or that it is a grant of an exclusive privilege. While its purpose was obviously to grant an exclusive privilege, and without this privilege the contract would be wholly undesirable and profitless, no intimation that such was its purpose is disclosed in its title, and it falls within the rule laid down by this court in *City of Kansas City v. Payne*, 71 Mo. 162, wherein it was aptly said, "The body of the bill expresses its object; the title disguises and conceals it." The city was, moreover, without authority, as already said, to grant

such a franchise. The alternative writ must be held to have been improvidently granted, and it is therefore ordered quashed, and the proceeding dismissed, at the cost of relator.

BURGESS, C. J., and ROBINSON, BRACE, and VALLIANT, JJ., concur. SHERWOOD and MARSHALL, JJ., dissent.

MARSHALL, J. This is an original proceeding by mandamus to compel the board of public improvements of St. Louis to enter into a contract with relator pursuant to the provisions of an ordinance of the city numbered 19,984. That ordinance, briefly stated, authorizes and directs the board of public improvements to erect and maintain at such convenient and suitable locations upon the streets as the board may designate suitable boxes or receptacles for the collection and temporary depositing of such waste paper or other litter as is or is likely to be cast upon the streets, and to provide for keeping such boxes clean, and for the removal of such deposits; and, to accomplish the purpose intended, the ordinance directs the board to enter into a contract for 10 years with relator to erect, maintain, and keep clean such boxes, and to remove such litter at the relator's expense, and without cost to the city at all. The consideration to the relator for such work, labor, and expense is that he shall have the right to place on such boxes such advertisements, made of tin or other metal, as might be approved by the board of public improvements, but not such as are of an immoral or disreputable character. The ordinance required relator to make quarterly statements of the amount he receives from such advertisements and to pay the city 15 per cent. of such gross receipts. The ordinance prohibits the erection of such boxes on any block or blocks if a majority of the residents of the block remonstrate against it. It also provides that the relator shall give a \$5,000 bond to secure performance of the contract on his part, and for a forfeiture of his rights if he fails to make true and correct returns of receipts, or fails to keep the boxes in a sanitary condition, or fails to remove such deposits from such boxes daily. The defendants set up three grounds for refusing to enter into such a contract: (1) That the ordinance is void, because it requires the board of public improvements to make a contract with relator which involves public work; (2) that the ordinance is void because it undertakes to grant to relator the right to use the streets for a private purpose; and (3) that the ordinance is void because it contains more than one subject.

Every one will at once concede that, if all or any of these objections is well taken, the ordinance is void. If the ordinance involves any public work or improvement, or repairs thereof, it is void, for section 27 of article 6 of the city charter expressly prohibits the

municipal assembly from directly contracting for such matters or from fixing the price or rate therefor, and requires the board of public improvements in all cases (except in case of necessary repairs requiring prompt attention) to prepare and submit to the assembly estimates of the cost of any proposed work, and, under the direction of the ordinance, to advertise for bids, and let out such work by contract to the lowest responsible bidder, subject to the approval of the council; and makes any other mode of letting out work illegal and void. Section 14 of article 6, prohibits the assembly from passing any ordinance for the construction or reconstruction of any street, alley, or public highway unless such ordinance is recommended by the board of public improvements. Section 15, art. 6, provides that "all ordinances recommended by said board shall specify the character of the work, its extent, the material to be used, the manner and general regulations under which it shall be executed, and the fund out of which it shall be paid, and shall be endorsed with the estimate of the cost thereof," etc. Section 17, art. 6, provides: "The board of public improvements shall recommend to the assembly ordinances for the repairing and cleaning of all streets and highways, and for the construction of crosswalks, and no ordinance therefor shall be passed without such recommendations." From these charter provisions it is clear that the assembly has no power to pass any ordinance for the doing of any public work, or making any improvement or repairs thereof, or for cleaning streets, or constructing sidewalks, unless the ordinance is recommended by the board of public improvements. The reason for all which is manifest not only from the charter of the city, but also from the history of the evolution of that charter, and of similar provisions in the charters of other cities.

The board of public improvements is composed of persons specially selected because of their ability and skill to deal with such questions. The members of the assembly are not required to possess, and do not generally possess, such ability or skill. There are many features of protection preserved to the citizen before even the board of public improvements can recommend such ordinances. There must be notice and public hearings, opportunity to consent or object, given to the citizen before even the board can act. So, while the board is a check upon the assembly, the people themselves are a check upon the board. These provisions are wise and salutary. They afford the greatest opportunity of ascertaining, regarding, and protecting the rights of the people, and are safeguards against improper or jobbing contracts. It may be broadly and emphatically stated, therefore, that no contract for any kind, character, or species of public work, or improvements or repairs thereof, or for cleaning streets, is valid unless the ordinance au-

thorizing it is recommended by the board of public improvements, after it has faithfully complied with all charter prerequisites to its action. This proposition cannot be stated too strongly or unequivocally. If, therefore, the ordinance before the court in this case contemplates, involves, or provides for the doing of any public work, or the making of any public improvement, or the cleaning of the streets, it falls within the condemnation of the rule announced, and is void. The crucial question, therefore, is, does the erection, maintenance, and keeping clean of boxes in which waste paper and litter may be deposited fall within the terms "public work," "improvements," or "street cleaning," as these words are used in the charter? The cases of *Cole v. Skrainka*, 37 Mo. App. 427, and *City of St. Louis v. Gleason*, 89 Mo. 67, 14 S. W. 768, throw no light on the inquiry, for the ordinances questioned in both of those cases were recommended by the board of public improvements, and the attack was upon the alleged disregard of the board to obey the charter requirements as to its proceedings, and hence they did not involve the right of the assembly to pass an ordinance unless it was recommended by the board. The ordinance in the *Cole Case* was for the reconstruction of a street, which is clearly public work or improvement, and the ordinance in the *Gleason Case* was for the establishment of Benton street, which is clearly a public improvement, and such an ordinance is expressly required by section 2, article 6, to be recommended by the board of public improvements. The case of *State v. Barlow*, 48 Mo. 17, involved this question: Dunn had a contract with the city to light, clean, and keep in repair the street lamps, which had been made by the city engineer, and extended from time to time, and which was perfectly legal when made. The charter of the city was amended by the act of March 4, 1870, and it was then provided for the first time that the city council should have no power directly to contract for any public work or improvements, or repairs thereof, nor to fix the price or rate therefor, but that the city engineer should in all cases except in cases of necessary repairs prepare and submit to the council plans, profiles, and estimates of cost of any proposed work, and under the direction of ordinance should advertise for bids, and let out the work by contract to the lowest and best bidder, subject to the approval of the council. It will be observed that this provision is substantially the same as section 27 of article 6 of the present charter, except that the board of public improvements takes the place of the city engineer. After the act went into effect, the city contracted in the manner provided by the charter with one Lider to light, clean, and repair the street lamps. Thereupon Dunn brought mandamus to compel the city comptroller to approve an extension of his contract made by the city engineer on the 3d of January,

1871, for a year ending March 1, 1872. It was held that the amended charter superseded the ordinance regulation in force when the charter was enacted, and that the power given the city engineer by the ordinance to make such a contract was ipso facto taken away by the amendment to the charter. There can be no doubt that the lighting, cleaning, and repairing of the street lamps is public work, within the meaning of that term as used in the charter of 1870 and in the present charter of St. Louis, and hence the municipal assembly did not then have, and has not now, the power to directly contract therefor. These are all the cases that have been cited to show that the ordinance in question relates to public work, and it is too plain to admit of debate that they do not determine, or solve, or settle the question involved. This leaves this case without direct controlling or binding precedent in the decisions of the courts of this state. In fact, no case from this or any other jurisdiction has been cited which attempts to, define whether placing such boxes for such purpose on the streets constitutes public work or improvements or not. The solution of the problem must, therefore, be found in fundamental principles, or be reasoned out by analogy.

In considering the meaning of the terms "public works" and "improvements," used in section 27 of article 6, the provisions of paragraph 2, § 26, art. 3, of the city charter must also be borne in mind. Those provisions are: "The mayor and assembly shall have power within the city by ordinance not inconsistent with the constitution or any law of this state, or of this charter, * * * to establish, open, vacate, alter, widen, extend, pave or otherwise improve and sprinkle all streets, avenues; * * * to construct and keep in repair all bridges, streets, sewers and drains, and to regulate the use thereof." Section 27 of article 6 and section 26 of article 3 are in pari materia, and must be construed together, and full force given to every part of each, if possible. It will thus be seen that, if the purpose of an ordinance relates to public work or improvements, the assembly cannot, under section 27, art. 6, legally pass the ordinance, unless it is recommended by the board of public improvements, and the work must be let by competitive bidding to the lowest responsible bidder; whereas, if the ordinance simply regulates a particular use of a street, the municipal assembly has full and sole power to deal with the matter, under section 26 of article 3, and the board of public improvements has nothing to do with it. The plain reason is that the board is constituted of experts as to the question of "the character of public work and improvements, its extent, the material to be used, the manner and general regulations under which it shall be executed," but the assembly is just as qualified as the board to properly and intelligently regulate the use of the streets. In other words, because of their special edu-

cation and training, the board is given the power to determine, in the first place, the manner, method, character, extent, and plans to be observed in creating, doing, or making public work or improvements (in this case a street), but the assembly is authorized by the charter to regulate the use of the street after it is improved. The board deals in engineering or building problems, while the assembly deals with governmental questions or questions of proprietorship. An architect is better qualified to judge of the construction of a house than the owner, but the owner is probably better qualified than the architect to judge of the business question of what use the house shall be applied to after it is constructed. There is a practical, common sense, and generally accepted difference in meaning between a public improvement and a public use of a public improvement. This difference is recognized in section 26 of article 3, for the mayor and assembly are given power by ordinance not inconsistent with the other provisions of the charter to improve, construct, and keep in repair all streets, and to regulate the use thereof; thereby plainly contemplating that, if the street is to be improved, or constructed, or repaired, the provisions of section 27 of article 6 apply, and an ordinance therefor can only be passed when recommended by the board of public improvements, and the work thereby authorized can only be done by contract, let by competitive bidding; but, if the ordinance is simply to regulate the use of the street after it is improved or constructed, the assembly alone has power to deal with the question. This distinction is made more apparent if the ordinance should relate to the use of an unimproved street, for in such cases no engineering or expert skill is needed, and the question is purely a governmental or business one as to whether the use is a proper one. There is also in law and in common sense a well-defined difference between a public improvement and a public utility. Constructing or improving a street, an alley, or wharf, a sewer, a drain, a public highway of any kind, waterworks, gas works, and other like matters, constitute a public improvement, and all work done in relation to repairing, lighting, and cleaning streets is public work. Ordinances relating to such matters can only be passed upon the recommendation of the board of public improvements. But among the public utilities which the assembly may, without the recommendation of the board of public improvements, permit the streets to be used for may be mentioned, as illustrations merely, street cars, telegraph, telephone, electric light, heat and power, poles and wires, gas pipes, water pipes, subways, overhead or underground street-car wires, and the like. 2 Dill. Mun. Corp. (4th Ed.) § 680 et seq. In short, as is well stated by Judge Dillon (2 Dill. Mun. Corp. [4th Ed.] p. 844, § 703, note 1): "In the absence of special constitutional restric-

tions, and where property rights are not invaded, the power of the legislature over all streets and highways and public places, and their uses, is plenary." And the same learned author, in section 688, says: "The power of the public, or of the municipal authorities representing by delegated authority the public [as shown above, this power is expressly delegated to the assembly of St. Louis by section 26 of article 3] over streets is not confined to their use for the sole purpose of travel, but they may be used for many other purposes required by the public convenience. The uses to which streets in towns and cities may legitimately be put are greater and more numerous than with respect to ordinary roads or highways in the country. With reference to the latter, all the public requires is the easement of passage and its incidents, and hence the owner of the soil parts with this use only, retaining the soil, and, by virtue of this ownership, is entitled, except for purposes of repairs, to the earth, timber, and grass growing thereon, and to all minerals, quarries, and springs below the surface; and he may maintain actions against those who obstruct the road or interfere with his rights therein. But with respect to streets in populous places the public convenience requires more than the mere right to pass over and upon them." Illustrating the difference of the uses which a city may authorize of its streets, the author devotes 76 pages (pages 817-894) to the enumeration of uses which has been held legal and proper, all of which fall within the term "public utilities," and not one of which can be classified as "public work" or "improvements." It is true that in some degree every improvement is a public utility, and likewise every utility is a public improvement. Among lexicographers a distinction is made between a public improvement and a public utility, and by some a public utility is distinguished from a public use, and it is said, "Utility is somewhat more abstract and philosophical than usefulness or use, and is often employed to denote adoption to produce a valuable result, while usefulness denotes the actual production of such result." Stand. Dict., tit. "Utility." But no layman, lexicographer, or lawyer has ever failed to mark the difference between an improvement and a use of a street, and the instances above cited clearly define that difference to the judicial mind. It is manifest that this ordinance does not rest upon the power or duty to clean the streets, and, if it did, it would be void, under section 17 of article 6 of the charter, because such ordinances must be recommended by the board of public improvements. The purpose of the ordinance, and the practical utility or use to the public, is to prevent the streets from being littered by affording storekeepers and the general public a convenient and suitable place to deposit litter instead of sweeping it or throwing it upon the street, thereby making them dirty, and making it necessary for

the city to go to the expense of cleaning them. The city charter requires all ordinances for cleaning the streets to be recommended by the board of public improvements, and that course is observed as to cleaning the streets. But, while a sidewalk is a part of a street, the city does not clean the sidewalks. It requires the abutting property owner to do that work. Rev. Ord. St. Louis, art. 9, c. 14, § 374. The city ordinance also makes it a misdemeanor for any person to deposit dirt or rubbish of any kind or description upon any street, alley, or public or private highway. Rev. Ord. St. Louis, § 375. Storekeepers, therefore, will be benefited by this ordinance by being afforded convenient and suitable receptacles for depositing the waste paper and litter that daily accumulates in their stores. This is itself no small or inconsiderable utility and saving to them, and therefore the use of the street for this purpose is a legitimate public use, and the power, under the city charter, is vested solely and exclusively in the assembly, and the board of public improvements has no control over such matters, or over ordinances authorizing such a use. This ordinance, therefore, does not involve public work, and hence the first objection of the defendant is untenable.

2. It is argued that the use of the streets authorized by this ordinance is for a private purpose; that is, it is claimed that the ordinance authorizes the relator to place advertisements on the boxes, and hence the profit to the relator is the primary purpose of the ordinance, and, this being a matter of private gain, the use is private, and not public. The same objection can be made, and has been unsuccessfully made, to ordinances granting the use of streets to street-car lines, telegraph, telephone, electric light, heat and power lines, gas, water, and subway companies, and the like. All such companies are organized for private gain, and individuals get usually 95 per cent. (in some cases all) of the profits arising from the use of the streets for such purposes. Yet, because they subserve a public use,—constitute a public utility,—the use has uniformly been held public, and not private. The same objection as to advertisements can be made to street-car lines, for such companies derive a profit from permitting advertisements to be placed in their cars, and the city gets no part of the profits arising from such advertisements, whereas here the city gets 15 per cent. of the gross receipts. But the fact that the city gets all or any proportion or none of the profits arising from advertisements placed on such receptacles, or allowed by street-car companies to be placed in their cars, or by telegraph or telephone companies to be placed on their poles, does not in any manner even tend to determine the question of whether the receptacles or street-car lines or telegraph or telephone poles are or are not public utilities which make the

use of the streets public, and not private. Neither does the question whether the primary and principal purpose of and inducement to the persons granted such franchises is for private gain, and the public profit or advantage is of only an insignificant and secondary nature, a fair or determining test to apply to the validity of such an ordinance; for these conditions are present in all cases of public utilities that are furnished by private persons at their own cost. The crucial and final test is, does the use—utility—subserve a public purpose; does it furnish a natural need of the city or its citizens; does it contribute to their comfort, prosperity, or happiness? If it does, it is public; otherwise not. The proportion between the public and the private benefit derived from the use is not a determining factor in the problem. If the public is benefited in any degree, the use is public, even though the individual who furnishes the small benefit to the public may be benefited many times as much as the public. The cases of *Mathews v. City of Alexandria*, 68 Mo. 115; *Glasgow v. City of St. Louis*, 87 Mo. 678; *Cummings v. City of St. Louis*, 90 Mo. 259, 2 S. W. 130; *Glaessner v. Association*, 100 Mo. 508, 13 S. W. 707; *Schopp v. City of St. Louis*, 117 Mo. 131, 22 S. W. 898, 20 L. R. A. 783, and *Berry-Horn Coal Co. v. Scruggs-McClure Coal Co.*, 62 Mo. App. 93,—relied upon by the defendants, were all cases where the use of the streets was solely and exclusively for private purposes, and where the public derived not the slightest atom of benefit. Hence they do not sustain the objection to the validity of this ordinance, but, on the contrary, illustrate and illumine the differences here pointed out. And when those cases are read in connection with the cases of *Julia Building Ass'n v. Bell Tel. Co.*, 88 Mo. 258; *Atlantic & P. R. Co. v. City of St. Louis*, 66 Mo. 228; *Porter v. Railroad Co.*, 83 Mo. 128; and the multiplicity of cases cited by Judge Dillon (2 Dill. Mun. Corp. [4th Ed.] pp. 817-894) relating to allowable uses of a street by individuals or private corporations whose primary object is private gain, but which furnish a public utility in some modicum,—the conclusion is logically and legally irresistible that this ordinance falls within the latter class of cases, and is a legal exercise of the governmental power conferred by the charter upon the assembly of St. Louis, and that the purpose is public, notwithstanding 85 per cent. of the profits inures to a private person. It is urged, however, that it would enable the relator to place in front of a merchant's store an advertisement of his rival in business, and hence the ordinance is unfair. This might be a proper argument when made to the assembly against exercising its charter power in considering and adopting the ordinance, but, the power being vested in that body, the courts have no right to review it, or reverse its conclusions. But the objection at

once fades away when the ordinance itself is examined, for section 3 vests the power in the board of public improvements to designate the location of all boxes, and section 4 prohibits the placing of any advertisement on the boxes "until the same shall have first been submitted to and approved by the board of public improvements of said city," and section 7 makes it unlawful to place any such receptacles on any block if a majority of the residents of the block object to it. These appear to be ample answers to the possible injury suggested of having a rival's business advertised in front of one's store.

3. There is no merit in the objection that the ordinance is void because it contains more than one subject. The purpose is single. The incidents are germane to the subject. The title expresses the object, and the body of the bill carries into effect the object expressed. The title is not a cloak to hide the object intended. The title is not required to be an analytical index to the body of the bill. *Lynch v. Murphy*, 119 Mo. 163, 24 S. W. 774. For these reasons I think the peremptory writ should be awarded.

SHERWOOD, J., concurs in my views.

SMILEY v. ST. LOUIS & H. RY. CO.

(Supreme Court of Missouri, Division No. 1.
Feb. 12, 1901.)

PERSONAL INJURIES—NEGLIGENCE—DAMAGES —EVIDENCE—INSTRUCTIONS—OBJECTION NOT RAISED BELOW.

1. Contributory negligence not being pleaded, and there being no evidence thereof, in an action against a railroad company for injury to a postal clerk from derailment of the train on which he was riding in the discharge of his duty, an instruction is not erroneous because placing the burden of proof on defendant, without requiring a finding that plaintiff was without fault.

2. Evidence that an injury is permanent, and that further pain to body or mind is reasonably certain, is sufficient basis for compensation for future suffering.

3. The case having been tried on the theory that the petition sufficiently alleged plaintiff was made insane from the accident, objection that the petition did not do so cannot be raised for the first time on appeal.

4. Though one of the facts on which witness bases his opinion was learned from the statement of another, admission of the opinion is harmless, the fact being undisputed and conceded.

5. Where plaintiff sues for an injury that resulted in insanity, the fact that he does not introduce the depositions of the doctors who treated him before he became insane, and that one of them, when treating him, told him that his then condition was due to the motion of the train on which he was constantly riding, is immaterial.

Appeal from circuit court, Boone county; John A. Hockaday, Judge.

Action by Samuel W. Smiley against the St. Louis & Hannibal Railway Company. Judgment for plaintiff. Defendant appeals. Affirmed.

J. D. Hostetter and Geo. A. Mahan, for appellant. Ohas. J. Walker, Norton, Avery & Young, and Turner & Hinton, for respondent.

BRACE, P. J. This is an action for personal injuries, in which the plaintiff obtained judgment in the court below for \$5,000, and the defendant appeals.

The errors assigned for reversal are the giving of instructions numbered 2 and 3 for the plaintiff, the refusal to give instruction numbered 11 for the defendant, the admission of illegal evidence for the plaintiff, the exclusion of legal evidence for the defendant, and the refusal of the court to grant a new trial on the ground of excessive damages. The pleadings and evidence, so far as is necessary, will be noticed in the course of the opinion. Instructions numbered 2 and 3 given for the plaintiff are as follows: "(2) The court instructs the jury that if they believe from the evidence that the plaintiff was a postal agent in the employment of the United States, and that at the time of the accident, while in the discharge of his duties as such postal agent, he was being transported on defendant's passenger train in a postal or mail car, with the knowledge and consent of defendant, and that such train was derailed, overturned, and thrown down an embankment, and that the plaintiff thereby received injuries to his head, body, or ankle, then it devolves upon the defendant to prove to the satisfaction of the jury that such derailment and overturning of said train was not caused by any fault, negligence, or carelessness on its part in running said train, and in providing and maintaining a reasonably safe track and roadbed over which to run the same; and, unless it is so shown, the verdict should be for the plaintiff. (3) If the jury find for the plaintiff, then, in assessing his damages, they will allow the reasonable expense, if any, which they may believe from the evidence that he has incurred for medical treatment growing out of the injuries sustained by him in the derailment of defendant's train. They will also allow him a reasonable compensation for the loss of time and earnings, if any, that they may believe from the evidence that he has sustained up to the present time in consequence of such injuries; and the jury may take into consideration the impairment, if any, in plaintiff's capacity to earn a livelihood, which they may believe from the evidence that he has sustained in consequence of such injuries, and allow him a reasonable compensation therefor; and the jury may also take into consideration the physical pain and mental anguish, if any, that they may believe from the evidence that he has suffered in consequence of such injuries, and allow him a reasonable compensation therefor; and also they may take into consideration the physical pain and mental anguish, if any, that they may believe from the evidence that he will suffer in the future in consequence of su-

injuries, and allow him a reasonable compensation therefor,—not to exceed in all the sum of ten thousand dollars.”

1. The first objection urged to plaintiff's instruction No. 2 is that it “transfers the burden of proof to defendant, without requiring the jury to find that the plaintiff was without fault at the time of receiving his injury”; in answer to which it is only necessary to say that while, in a proper case, such a qualification of an instruction of this character may be necessary, there was no necessity for it in this case. The answer was simply a general denial. Contributory negligence on the part of the plaintiff was not alleged, nor was there a scintilla of evidence tending to prove such negligence on his part. On the contrary, the undisputed evidence was that the plaintiff was at his post, in the discharge of his duties, at the time the train was derailed, overturned, and thrown down the embankment by reason of the defective condition of the defendant's roadbed, inflicting upon him the injuries of which he complains. The law presumes that he was in the exercise of ordinary care at the time, in the absence of any proof to the contrary, and, as this instruction properly told the jury, devolved upon the defendant the duty of showing that the derailment and overturning of the train was not caused by its negligence. *Buesching v. Gaslight Co.*, 73 Mo., loc. cit. 233; *Dougherty v. Railroad Co.*, 81 Mo. 325; *Mogoffin v. Railway Co.*, 102 Mo. 540, 15 S. W. 76; *Furnish v. Railway Co.*, 102 Mo. 438, 13 S. W. 1044; *Clark v. Railway Co.*, 127 Mo. 197, 29 S. W. 1013; *Och v. Railway Co.*, 130 Mo. 27, 31 S. W. 962, 36 L. R. A. 442; *Hite v. Railway Co.*, 130 Mo. 132, 31 S. W. 262, 32 S. W. 33.

It is next urged that this instruction is vicious, because there was no evidence on which to base a finding for injury to the “body.” While the particular physical injuries testified to were to the head, neck, and ankle, the evidence tended to prove that the whole organization of the plaintiff, physical and mental, was shocked, impaired, and injured in the accident; and this objection is no more tenable than the first. Upon the facts of this case, the instruction was unobjectionable.

2. That part of plaintiff's instruction No. 3 which tells the jury that “they may take into consideration the physical pain and mental anguish, if any, that they believe from the evidence that he will suffer in the future in consequence of such injury,” is objected to on the ground that there was no evidence upon which to base a finding for future suffering. The accident occurred on the 14th of May, 1896. The evidence tended to prove that in the wreck the plaintiff received a blow on the left temple, above the ear; another on his right eye; another on the top of his head; and an injury to one of his ankles, causing an incomplete dislocation of one of the bones, and a rupture of the inter-

osseous ligament; and that, as a result of these injuries to the head and neck, there followed a continuous headache, buzzing in the ears, accompanied by a dizziness that at times rendered him unconscious, a pain and numbness in the back of the neck at the base of the brain, where a knot about the size of a walnut was afterwards developed. These symptoms continuing, it also soon became apparent that his mind was seriously affected. His mental disorder gradually growing worse until the following February, when he became violently insane, and thereafter, on the 18th day of April, 1896, was taken to St. Vincent Asylum, at St. Louis, where he remained under treatment until July, 1896; but, getting no better there, he was afterwards, in September, 1896, taken to the insane asylum at Fulton, where he remained under treatment until discharged in March, 1897. The case was tried in the lower court on the 22d of February, 1898. The plaintiff was then sane, and testified as a witness on the trial. As to the condition of his ankle he testified that when he walked it pained him, and the evidence of the physician who then examined him tended to prove that the injury was permanent, and calculated to give him pain when walking on uneven ground. The evidence of the medical experts also tended to prove that, while he was then sane, he was not wholly restored, but was liable to a recurrence of his mental disorder. “When it appears that the injury is permanent, and further pain to body or mind is reasonably certain, a sufficient basis is laid for compensation for these elements.” *Gerdes v. Foundry Co.*, 124 Mo. 347, 25 S. W. 557; *Gorham v. Railway Co.*, 113 Mo. 408, 20 S. W. 1060; *Rosenkranz v. Railway Co.*, 108 Mo. 9, 13 S. W. 890; *Chilton v. City of St. Joseph*, 143 Mo. 192, 44 S. W. 766. When the whole of the evidence on this subject is taken into consideration, this objection to this instruction is found to be untenable. The remaining objection to this instruction will be considered in connection with defendant's refused instruction numbered 11, which is as follows: “(11) The court instructs the jury that there is no evidence that plaintiff's insanity resulted from injuries received in the wreck, and you will not include such insanity as an element of damages in making up your verdict.”

3. While this refused instruction is predicated solely upon the insufficiency of the evidence, the contention of counsel for the defendant is that the petition “did not sufficiently allege any specific injury to the mind, so as to authorize either the reception of testimony as to plaintiff's insanity or the taking into consideration of such insanity as an element of damages,” and for this reason the court erred in refusing this and in giving plaintiff's instruction No. 3. The fact that the plaintiff became insane after the accident was proven beyond dispute, and there was much evidence tending to prove that his in-

sanity was produced by the injuries received in the wreck. The court could not be convicted of error in its action on these instructions on the ground that there was not evidence sufficient upon which to predicate such action. Hence the attack is now changed from the evidence to the pleadings; and the sufficiency of the petition in the particular mentioned, not raised in the trial court by demurrer, by objection to the evidence on this subject, or even by these instructions, or in any other manner, is now sought to be raised for the first time in this court. Although the plaintiff's insanity might have been charged more specifically, and the petition might have been obnoxious to a timely motion to make it more definite and certain, yet, no objection having been made to it on this ground in the lower court, and the whole case having been fought through that court upon the theory that the petition sufficiently charged that the plaintiff's insanity, characterized in the petition as "mental ailments," for which he had been confined in a "lunatic asylum," and resulting in "mental injuries," for which he asked damages, was caused by the derailment and wrecking of defendant's train through its negligence. It is now too late to raise this objection. *Mellor v. Railway Co.*, 105 Mo. 455, 16 S. W. 849, 10 L. R. A. 36, and cases cited; *Bogges v. Railway Co.*, 118 Mo. 338, 23 S. W. 159, 24 S. W. 210.

4. On the trial the deposition of Dr. Henry W. Herman, the physician in charge of St. Vincent Asylum at the time the plaintiff was under treatment at that institution, was read in evidence in his behalf, in which the following question and answer occurs: "Q. From the examination that you made of him, and the history of his case, to what causes did you attribute his insanity? A. I attributed them mainly to an accident that had preceded, from what I learned, a severe railroad accident. This I learned from statements of those who brought him there." This answer was objected to on the ground that it was an opinion formed from hearsay testimony. The only hearsay fact disclosed by his answer was the "severe railroad accident," which, with other facts proven in the case, was afterwards stated in a hypothetical case, to which the defendant made no objection, and upon which the witness gave his opinion as an expert. It does not appear from this answer, nor from any of his evidence in the case, that he predicated his opinion of the cause of the plaintiff's insanity upon any statement of others, except as to this undisputed and conceded fact, so that no error affecting the merits of the case was committed in the admission of this evidence.

5. On plaintiff's cross-examination he was asked: "Did the doctor [Baskett] tell you or not that your then condition was due to the train motion simply, and to that alone?" And at the close of the plaintiff's testimony

he was called by the defendant, and asked this question: "Among those depositions that you gave to the jury in this case you and your attorney have not offered to read to the jury the depositions of Dr. Bishop and Dr. Baskett, either of them, have you?" These were the physicians who treated the plaintiff for his physical ailments in the earlier stages of his afflictions, and before his alienation of mind had become pronounced, and it is so obvious on the face of the record that the affirmative answer which these questions sought to elicit, if given, could not have materially affected the merits of the case, that we deem it unnecessary to consider their propriety.

6. The amount of damages awarded by the jury and sanctioned by the trial court for the plaintiff's injuries, physical and mental, are within the bounds of reasonable compensation. Our sense of justice is not shocked thereby; nor does that amount, or the facts in evidence, for a moment suggest that the jury, in awarding it, were swayed by partiality, passion, prejudice, or any unworthy motive. Although the record in this case has been thoroughly and industriously combed by the learned counsel for the defendant, and every possible objection to the judgment presented with their usual force and skill, no substantial error warranting a reversal has been disclosed. The judgment of the circuit court will therefore be affirmed. All concur.

STARK v. PUBLISHERS: GEORGE KNAPP & CO.

(Supreme Court of Missouri, Division No. 1.
March 12, 1901.)

LIBEL AND SLANDER—PLEADING—ANSWER—JUSTIFICATION—EVIDENCE—PREVIOUS GOOD CHARACTER—ADMISSIBILITY—INSTRUCTIONS—HARMLESS ERROR—OBJECTIONS—SUFFICIENCY.

1. Evidence of plaintiff's previous good character is not admissible in chief to prove that he is not guilty of the matters charged in a libel, but such evidence is admissible as bearing on the question of damages.

2. The exclusion of evidence of plaintiff's previous good character as bearing on the question of damages for libel was not prejudicial error when the question of damages was never reached by the jury.

3. Where the defamatory matter complained of in a suit for libel is a mere conclusion or inference of facts, the particular facts relied on by defendant as warranting the inference charged must be set forth specifically in a plea of justification, so plaintiff may know the particular matter he will be called on to meet; but, when the defamatory matter charged is itself specific, it is sufficient to answer generally that the charge is true.

4. Where the defamatory matter complained of in a libel suit charged that plaintiff, as the representative of a corrupt combine of a city school board, and the leader of a lobby composed of contractors and go-betweens, was a malign influence working to defeat a legislative measure affecting his tenure of office and the existence of the board as then constituted, the charge was sufficiently specific to advise him of the particular matter he would be called on

to meet, and a general plea that the charge was true was, therefore, sufficient.

5. A question as to the sufficiency of a pleading cannot be raised for the first time on appeal.

6. A general objection that evidence admitted is incompetent and immaterial saves no question for review.

7. Where the defamatory matter complained of in a libel suit charged that plaintiff, as the representative of a corrupt combine of a city school board, and the leader of a lobby composed of contractors and go-betweens, was a malign influence working to defeat a legislative measure threatening the existence of the school board as then constituted, it was not error to charge that the board had no right to engage any one to lobby for or against any bill affecting their tenure of office.

Appeal from St. Louis circuit court; Sel-den P. Spencer, Judge.

Action by Charles B. Stark against Pub-lishers: George Knapp & Co. From a judg-ment for defendants, plaintiff appeals. Af-firmed.

Chester H. Krum, for appellant. Boyle, Priest & Lehmann and Morton Jourdan, for respondents.

BRAOE, J. This is an action for libel against the defendants, publishers of the St. Louis Republic. The petition charges: "That heretofore, to wit, on the 18th day of March, 1897, at the said city, the said defendant maliciously published in the said newspaper, in an editorial entitled 'That Lobby Settles It,' of and concerning the plaintiff, the fol-lowing false and defamatory matter, to wit: "'Malign" is a good word to apply to the in-fluences working at Jefferson City to defeat the civic federation school bill in the state senate. Led by Attorney Stark, who rep-resents the Filley combine of the school board, the lobby against the bill is composed of con-tractors and go-betweens who have fattened on the corruption of the present system, and are working for a continuance of fat oppor-tunities. For Democratic senators to yield to the blandishments of a corrupt Filley com-bine would be the hardest blow that could be delivered against the Democracy of St. Louis in the approaching election. It would gain for the combine a continuation of pow-er, and would deprive the Democrats of a strong advantage which the success of the bill would give them. The Republic has too much confidence in the wisdom and integrity of the senate majority to credit reports that the bill will or can be defeated by the Filley lobby.' That the school board mentioned in the foregoing publication was a public cor-poration created under the laws of this state, and designated and entitled 'The Board of President and Directors of the St. Louis Public Schools.' That at the time of the said publication the said corporation was in charge of, and had the conduct and manage-ment of the affairs of, the public schools of the city of St. Louis, and the plaintiff was at the said time the attorney of the said cor-poration. That in and by the said publica-

tion the defendant charged, and intended to have it so understood and believed, that plaintiff then and there represented a corrupt combination of members and directors of the said public school corporation designated in the said publication as the 'Filley combine of the school board'; also that plaintiff then and there was the leader of a corrupt lobby, which was engaged in endeavoring to defeat a certain bill then pending in the senate of the general assembly of the state of Missouri, designated in the said publication as the 'civic federation school bill,' and whose pur-pose and object was, among other things, the repeal of the laws under which the cor-poration entitled 'The Board of President and Directors of the St. Louis Public Schools' had been organized, and by virtue of which it enjoyed its powers and privileges as such corporation; and also that the said lobby so alleged to have then and there been under the leadership of plaintiff was composed of contractors and persons designated as 'go-betweens,' by whom were meant persons who had been used and employed by plaintiff to approach and corruptly influence others, so that plaintiff would not be brought directly in contact with those thus approached and corruptly sought to be influenced, and who, thus designated, had unlawfully made and obtained large profits by reason of corrupt practices and combinations made and carried on with the members of said school-board corporation designated in said publication as the 'Filley combine,'—which said combina-tions and practices were in violation of the duties of and of the oaths of the said mem-bers as directors of the said corporation and as public officers of this state. That at the time of the said publication herein com-plaind of the term 'Filley,' as applied to a political combination or a combination of in-dividuals for the purposes of controlling legis-lation or otherwise, had come, in the said city and elsewhere within the limit of the circulation of said newspaper, to be regarded, understood, and known to most persons be-longing to the Democratic party and to many persons belonging to the Republican party as an opprobrious epithet as applied to an in-dividual as a member of an alleged combina-tion for political purposes, or any purposes whatsoever,—had come to be understood to mean that the individual so charged with being a member of a 'Filley' combination was ready and prepared to resort to and would resort to improper, unlawful, and fraudulent practices in order to accomplish the result which was had in view by the combination to which he was so alleged to belong. That the individual from whom the appellation and term 'Filley' was derived by the defend-ant was then and there reputed to be the leader and in control of the Republican party in the said city of St. Louis. That at the time of the publication complained of here-in a general municipal election was about to be held in the said city, which was and is

referred to in said publication as the 'approaching election.' That plaintiff was then and there, and had for years, as defendant then and there well knew, been, a member and identified with the Democratic party in said city; and that accordingly, in printing and publishing the statement that 'for Democratic senators to yield to the blandishments of a corrupt Filley combine would be the hardest blow that could be delivered against the Democracy of St. Louis in the approaching election,' the said defendant then and there intended to have understood and believed, and did in substance and effect falsely charge, that plaintiff, as a member of the corrupt 'Filley combine' and as a Democrat, was secretly and fraudulently working and endeavoring to accomplish the defeat or embarrassment of the Democratic party in said city at the approaching municipal election, by bringing about, as the leader of a corrupt lobby composed of persons under the control of the individual designated as 'Filley,' the defeat of the so-called 'civic federation school bill.' That in and by that portion of the publication herein complained of, to wit, 'The Republic has too much confidence in the wisdom and integrity of the senate majority to credit reports that the bill will or can be defeated by the Filley lobby,' the defendant intended to have it understood, and did in fact mean and charge, that under the leadership of plaintiff the lobby designated as the 'Filley lobby' stood ready to corruptly influence by bribery and other unlawful practices a majority of the members of the senate and of the general assembly of this state, so as to obtain the defeat of the said civic federation school bill, and that the said lobby had given out and caused to be made reports to such effect, to the detriment of the reputation of a majority of the members of such senate for wisdom and integrity. That the said publication herein complained of in its meanings and innuendoes, its context and purposes, was maliciously made and caused to be made by the defendant of and concerning the plaintiff. That the same is false, and known to be false to the defendant. That it was and is calculated to deprive him of public confidence, to expose him to public hatred, contempt, and ridicule, and to deprive him of the benefit of social intercourse; and that by reason of the said publication he has been damaged in the sum of twenty thousand dollars; and that the further sum of ten thousand dollars should be assessed against said defendant by way of punishment for the malicious defamation of the plaintiff and to deter others from the perpetration of like offenses. Wherefore the premises the plaintiff asks judgment against the said defendant in the sum of thirty thousand dollars and for his reasonable costs."

The answer is as follows: "Now comes the defendant, and, answering the petition of plaintiff herein, for its first defense says: That it did publish the article set forth in

the plaintiff's petition, and it further says that the matters and things in the said article contained are true. For further answer and defense, defendant says: That at the time of the publication complained of there was in the city of St. Louis a body known as 'The Board of President and Directors of the St. Louis Public Schools,' and that said board was charged with the conduct and management of the public school system of the city of St. Louis. That in the opinion of many of the citizens of St. Louis the said board had become tainted with favoritism and corruption, especially in the conduct of the business interests of said school system; and as a means of reforming its evils and abuses it was generally believed that the said board should be abolished altogether. That, to carry this public opinion into effect, there had been submitted to the general assembly of the state of Missouri, and was pending before it at the time of said publication, a bill which had for its purpose the abolition of said board, and the formation of a new board, to be constituted upon a different plan, in its stead. That said bill so pending as aforesaid, and especially in so far as the same provided for the abolition of the old board of president and directors, was generally approved by the citizens of the city of St. Louis, and did thereafter pass the said general assembly, and receive the sanction of the governor of Missouri. That while the said bill was pending before the said general assembly the same was opposed by contractors and others who had theretofore been favored by the said old board in its administration of the school system of the city of St. Louis, and who were interested for personal, selfish, and pecuniary reasons in defeating the said bill so pending before the legislature, and in perpetuating against the will of the people of the city of St. Louis, despite the abuses which had grown about it and the disrepute which had come upon it, the old system of the board of president and directors of the St. Louis public schools; and a number of persons so interested, or their representatives, were present in Jefferson City, while the legislature was in session, as a lobby, to defeat, if possible, the said bill. That among the persons who were present at Jefferson City while the said bill was pending, and opposing the same, was the plaintiff, Charles B. Stark. That he was interested to do so because he was at the time one of the retainers of the said board, being the attorney of said board at an annual salary, and thus interested personally, selfishly, and peculiarly in continuing the then existing system of school government, despite its corruption and abuses, and despite the objection of the people of the city of St. Louis thereto. That the said Charles B. Stark was known to this defendant to be a lobbyist, and had at previous sessions of the legislature, for personal, selfish, pecuniary, and improper reasons, sought to influence legislative action

with respect to the school system of the city of St. Louis, and was known to have theretofore resorted to practices as a lobbyist which were illegal in their method and corrupt in their tendency. That as a lobbyist theretofore it was well known that the said Stark had not confined himself to the legal methods of public argument before committees of the legislature or before the whole house, but had employed the sinister and illegal method of private interviews and personal solicitation with members, and had, while so acting as a lobbyist, and personally interested through the expectation of a large pecuniary reward, suppressed the fact of this interest, and had presented himself to members as a disinterested official, who had only a public purpose to serve, and only the public welfare to inspire him. That such practices had become so general as to constitute an enormous public abuse, and, regularly as the general assembly of Missouri convened, it was attended by a large lobby, popularly known as the 'Third House,' whose members represented no public constituency, but were the mercenary agents of special interests, and who yet, without regard to the general welfare, for personal, selfish, and pecuniary reasons, by personal solicitations and persuasion and other methods, legal or illegal, as might be most convenient, attempted to promote or retard legislative action. That the defendant was at the time engaged in the publication of a daily newspaper known as 'The St. Louis Republic.' That as publisher of such newspaper it was its right and duty to publish the proceedings of the legislature of the state of Missouri, and also to publish the facts with respect to the influences that were at work seeking to mold the action of such legislature; and especially, as the publisher of one of the daily papers of the city of St. Louis, was it the duty of the defendant to inform its readers fully with respect to the course and progress of said school bill, and with respect to the means and agencies which were being employed to obstruct and defeat it. That, the plaintiff being at the time of said publication personally and pecuniarily interested against said school bill, and being engaged, with contractors and others, who were also personally and pecuniarily interested against said bill, in a lobby to prevent its passage; and the defendant believing, as it still believes, and alleges the fact to be, that such lobby interference is a malign influence in public affairs, and an illegitimate mode of affecting legislative proceedings, and that the same is corrupt in its tendency and effect,—it made the publication complained of, without malice, and as a proper and legitimate comment upon the conduct of the plaintiff in respect of a matter of vital public interest. Wherefore, having fully answered, defendant prays to be dismissed, with its costs in this case expended."

The reply is a general denial. The issues

were submitted to the jury under the following directions of the court:

"Gentlemen of the Jury: The plaintiff, Charles B. Stark, alleges that the defendant, Publishers George Knapp & Co., published of and concerning the plaintiff the following article: 'That Lobby Settles It. "Malign" is a good word to apply to the influences working at Jefferson City to defeat the civic federation school board bill in the state senate. Led by Attorney Stark, who represents the Filley combine of the school board, the lobby against the bill is composed of contractors and "go-betweens" who have fattened on the corruption of the present system, and are working for a continuation of fat opportunities. For Democratic senators to yield to the blandishments of a corrupt Filley combine would be the hardest blow that could be delivered against the Democracy of St. Louis in the approaching election. It would gain for the combine a continuation of power, and would deprive the Democrats of a strong advantage which the success of the bill would give them. The Republic has too much confidence in the wisdom and integrity of the senate majority to credit reports that the bill will or can be defeated by the Filley lobby.' And that the same is false and malicious and libelous. Under the constitution of the state of Missouri, the jury in cases like this are empowered to determine, under the direction of the court, the law and the facts, which means that in this case the jury may themselves determine whether the publication complained of is or is not a libel. For their information in determining this, the court declares that a libel is the malicious defamation of a person, made public by any printing or writing which tends to provoke him to wrath or expose him to public hatred, contempt, or ridicule, or to deprive him of the benefits of public confidence and social intercourse; or it may be said a libel is a malicious publication, expressed either in printing or writing, tending to blacken the reputation of a man, and expose him to public hatred and contempt or ridicule; or a libel may be defined as a censorious or ridiculing writing, made with a mischievous and malicious intent, towards governments, magistrates, or individuals. The court instructs the jury that by malice is not meant necessarily spite or ill will,—though an act done because of spite or ill will would be malicious,—but is also meant the doing of a wrongful act intentionally, without just cause or excuse; and that, therefore, if the jury believe in this case that the article complained of was not true, and was a libel upon the plaintiff, then the law presumes that it was maliciously published. A man is presumed by law to intend what are the natural, ordinary consequences of his acts; and if an article is published, and is untrue, and has the effect of injuring the reputation of him of

whom it is written by exposing him to public hatred, contempt, and ridicule, or affecting him as herein above described in the definition of libel, then the publisher is presumed to have intended that effect. In determining the question as to whether the article complained of was or was not libelous, you are to take the entire article into consideration, and give it that plain, ordinary, usual, natural interpretation which would be usually given to it by the general reader thereof. Neither the sense in which the plaintiff may have understood it nor the meaning which the defendant may have contemplated is to govern you in your determination. You are to look at it and regard it in the meaning in which it would ordinarily be accepted by the average man, for whom it was intended. If, therefore, you believe that the article complained of, or any part thereof, was untrue, as referring to the plaintiff, and was libelous, it being admitted to have been published by the defendant, your verdict will be for the plaintiff. If your verdict is for the plaintiff, you will assess his compensatory damages at such sum as, from the evidence and under the instructions, you believe will fairly compensate him for the injury he has sustained by reason of said publication; and in determining what is such a fair compensation you may take into consideration the extent of said circulation of the defendant's newspaper at the time of the said publication both in the city of St. Louis and elsewhere, as shown by the evidence; the general character of the publication, and the probable effect, if any, of the said publication upon the reputation of the plaintiff considering his standing and repute in the community at and prior to March 18, 1897, as shown by the evidence; the mortification, if any, to his feelings, which plaintiff may have suffered by reason of the publication; the distress of mind, if any, which he may have suffered on account thereof; and, considering all these matters, you may assess the compensatory damages of the plaintiff at such sum as, in your opinion, will be a fair compensation to him for the injury, if any, you believe he has suffered from the publication of the said article. In addition to compensatory damages, you may, if you think proper, under all facts and circumstances shown in evidence, assess in favor of the plaintiff such further sum as exemplary or punitive damages, or smart money, as, in your judgment, considering all the facts and circumstances in evidence in the case, you believe ought to be assessed against the defendant by way of punishment for the act complained of, and to serve as a warning to prevent the defendant and others from being guilty of a like act; and in determining such damages you may take into consideration the capital and resources of the defendant, as shown in the evidence, and the motive or purpose of the defendant in making the publication

as you may find it from the evidence; and in determining the motive or purpose you may consider any information or reports concerning or relating to the subject-matter of the alleged libel which the defendant received before the publication complained of, and on which you may believe it acted in good faith, and the meaning in which you may believe from the evidence the defendant intended to convey by the article complained of, and any other publication of the defendant shown in evidence, whether published before or after the publication of March 18, 1897. On the other hand, the defendant contends that the article complained of is true, and that it has the right to make the publication if made in good faith, and that it published the article without any malice, as a proper and legitimate comment upon the conduct of the plaintiff in respect to a matter of vital public interest. As regards the truth of the article published, if you believe from the evidence that, so far as it relates to the plaintiff, it was true,—that is, that the statements as made therein of and concerning the plaintiff were true, giving to them their natural meaning as hereinbefore defined,—then your verdict should be for the defendant. As regards the right of the defendant to make the publication, you are instructed that a newspaper has no right to publish in a case like this an untruthful article of another. So far as plaintiff's actual or compensatory damages are concerned, it makes no difference what defendant's belief may have been in regard to the truth of the article, or its good faith, or its motive or purpose. It had and has the right, as has every individual, to write on any subject; and thus it had the right to publish any matter pertinent and material to the pendency in the state legislature of the civic federation school bill, provided it acted in good faith and without malice; but it is responsible for all abuse of that liberty, and that liberty is abused wherever it publishes of any one an untruthful or libelous article, except in certain instances of absolute privilege, among which this case is not to be classed. As regards the motive of the defendant, or any malice or lack of malice in the publication, you have already been instructed as to what constitutes malice, and when it is presumed, and as to its bearing and application in this case upon the question of punitive damages, or smart money, as it is sometimes called. To further enable you to decide the questions submitted to you in this case, the court instructs you: (1) That, in the absence of evidence to the contrary, the law presumes the reputation and character of a man to be good. That the board of president and directors of the St. Louis public schools had no right to engage any one to lobby for or against any bill in the legislature affecting in its provisions their terms of office, and to appropriate or expend any of the public funds under their

control for such purpose; nor had any officer of theirs, as a representative of the board, the right, nor was it his duty, in his official capacity to lobby for or against any such bill, or work for or against any such bill affecting their terms of office, and to receive public money of the school fund for expenses in such employment; and that any such conduct, and appropriation of money, or acceptance of the same under such appropriation is without warrant of law, is against the policy of republican form of government, and can properly be criticised, commented upon, and rebuked by any paper or individual in any appropriate and proper terms. For while any individual is permitted, and often is moved by duty, to present by way of petition or public argument his views and opinions and reasons for or against any measure pending before the legislature of the state, this right belongs to him as a constituent part of the sovereignty, and cannot be employed by an individual acting officially or by public officials while serving the people, and intrusted only with certain duties, responsibilities, and trusts. It is their duty to carry out the law within the limits of the powers conferred upon them, and not otherwise to either persuade, direct, or force legislation, or attempt so to do, in regard to matters affecting their terms of office, or duties relating thereto. That a lobbyist is one who frequents the lobby or precincts of a legislature or other deliberative assembly with the view of influencing the votes of members, or who solicits or seeks to influence the votes of members, or seeks to influence their official action, whether in the lobby of the legislature or elsewhere. The court further instructs you that, if you believe from the evidence that any witness has willfully sworn falsely to any material fact, you may reject and disregard all of the testimony of such witness. In your verdict, if it be for the plaintiff, you will assess and state separately your finding as to compensatory damages and your finding as to punitive or exemplary damages. If your verdict is for the defendant, you will merely state that you find issues in this cause in favor of the defendant."

The errors assigned for reversal will be noticed in the order of their assignment.

1. The refusal of the circuit court on the trial to permit the plaintiff to introduce evidence of his good character, prior to the publication of the alleged libel, in chief, and before any evidence whatever had been introduced by the defendant, is assigned as error. In 1 Greenl. Ev. (16th Ed.) pp. 40-42, it is said: "Because of the slight probative value of a party's character, and its confusion of issues to little purpose, and for other reasons variously stated by different judges, and not easy to disentangle or define, it has come to be generally accepted that the character of a party in a civil cause cannot be looked to as evidence that he did or did not do an act

charged. * * * It is sometimes said that the plaintiff in an action for defamation charging him with crime may, upon plea of truth, use his good character as evidence in disproof of the charge on the theory that he is practically in the position of a defendant charged with crime; but this exception is generally repudiated." The authorities on both sides are cited in note 17, p. 42. In Townsh. Sland. & L. § 387, it is said: "It is a much-vexed question whether, in an action for slander or libel, the plaintiff may, in aggravation of the damages he has sustained, introduce evidence of his good reputation prior to the publication complained of. On this point, as upon all others relating to proceedings in an action, we can do no more than call attention to the decisions upon the subject. Although it may be true that in an action for slander or libel the reputation of the plaintiff is in issue, it is nevertheless true that, as a general rule, the reputation of the plaintiff is assumed to be good until the contrary is shown, and that, unless some blot upon the plaintiff's reputation is set up as a mitigatory circumstance, or his reputation is otherwise assailed, he is not permitted for any purpose to introduce any evidence on the subject. Thus it has been held that evidence cannot be given of the fairness of plaintiff's character (reputation) even where a justification is pleaded, unless attacked by the defendant. But held, also, that, where the general issue only is pleaded, the plaintiff may give evidence of his good character." The authorities on both sides of this proposition are cited in notes 1, 2, p. 646. So far as we are advised, the question has never been passed upon directly by this court. In Vawter v. Hultz, 112 Mo., loc. cit. 639, 20 S. W. 689. It was said that "in civil actions the character of neither party until assailed can be inquired into," unless it is put in issue by the nature of the proceeding. Gutzwiller v. Lackman, 23 Mo. 168; Rogers v. Troost's Adm'r, 51 Mo. 470; Dudley v. McCluer, 65 Mo. 241. It is so put in issue only in that class of cases, such as libel, slander, etc., in which its value is to be considered in assessing the damages. In Dudley v. McCluer, 65 Mo. 243. It is said: "'Putting character in issue' is a technical expression, which does not mean simply that the character may be affected, but that it is of particular importance in the suit itself; as the character of plaintiff in an action of slander, or that of a woman in a suit for seduction." Porter v. Seller, 23 Pa. 424. In those excepted cases character affects the amount of the recovery. The jury are by law permitted to consider it in assessing damages, and it is in that sense that it is said that "the nature of the action puts the character in issue." The rule to be deduced from the weight of authority, and recognized in this state, seems to be that, while proof of plaintiff's good character is not admissible, in the first instance, as evidence tending to prove that he was not guilty of

the matters with which he is charged in the publication, it is so admissible as bearing upon the question of damages to be assessed therefor in the event that the jury should so find. As that question was never reached by the jury in this case, conceding that there was error in refusing this evidence, it is not reversible error.

2. In the plaintiff's motion for new trial error in the admission of evidence for the defendant is assigned as follows: "The court erred in admitting incompetent evidence offered by the defendant; in this: that the court, against the objection of the plaintiff, admitted the record, opinion of the court, and other proceedings in *State ex rel. Kelleher vs. The Board of President and Directors St. Louis Public Schools et al.*; in this: that evidence was permitted in regard to the subject-matter of *State ex rel. Rutledge vs. Board of President and Directors St. Louis Public Schools*; in this: that the court admitted the evidence of Itner as to the contract with Diedrich with the said corporation; in this: that the court permitted to be read the depositions of Dyer, Mabry, Vieth, Elsner, Sweaney, McMonigle, and Harrel, and parts thereof objected to by said plaintiff; that the court admitted the vouchers for expenses of March, 1897, and April, 1897, and evidence in relation thereto; and that the court permitted the examination of plaintiff as to the legislation in regard to the merchants' tax, which occurred in 1893." The ground upon which it is contended here that the trial court erred in admitting this evidence of the defendant is that its plea of justification was not specific. Where the defamatory matter complained of is in general terms,—as that plaintiff is a murderer, thief, or other imputation which is a mere conclusion or inference of facts,—the particular facts relied upon warranting the inference charged must be set forth specifically in a plea of justification, so that the plaintiff may be advised of the particular matter that he will be called upon to meet. But, when the defamatory matter charged is itself specific, it is sufficient to allege generally that the charge is true. *Fenstermaker v. Publishing Co.*, 12 Utah, 439, 43 Pac. 112; *Kuhn v. Young*, 78 Tex. 344, 14 S. W. 796; *McLaughlin v. Cowley*, 127 Mass. 316; *Dever v. Clark*, 44 Kan. 745, 25 Pac. 206; *Vanwyck v. Guthrie*, 4 Duer, 268. "Justification on the ground of truth need not go further than the charge, and it is sufficient to justify so much of the defamatory matter as is actionable, or so much as constitutes the sting of the charge. It is unnecessary to repeat and justify every word of the alleged defamatory matter. It is sufficient if the substance of the libelous charge be justified." *Townsh. Stand. & L.* § 213. The substance of the defamatory matter charged in this instance was that the plaintiff, as the representative of a corrupt combine of the school board, and the leader of a lobby composed of contractors and go-betweens, who have fat-

tened on the corruption of the present system, and are working for a continuance of fat opportunities, is a malign influence working at Jefferson City to defeat the civic federation school bill in the senate. It would seem that this charge is sufficiently specific to advise the plaintiff of the particular matter he would be called upon to meet, and that a plea of the truth of that matter as alleged was sufficiently specific. But, be that as it may, the plaintiff is in no position to urge that objection against the answer in this court. The attention of the court below was not called to this or any other defect in the answer by motion, plea, objection to the introduction of evidence thereunder, instruction, or even in the motion for a new trial, or its sufficiency questioned in any manner in that court; and it is now entirely too late to be urged as ground for reversal here. *Smiley v. Railway Co.* (not yet officially reported) 61 S. W. 667; *Adair v. Mette*, 156 Mo. 496, 57 S. W. 551, and cases cited.

3. It is further contended that the opinion of this court in the *Kelleher* Case and the evidence in regard to the *Rutledge* Case ought to have been excluded on the objections made thereto on the trial. This evidence seems to have been admitted as bearing upon the question of punitive damages, as to which a wide field was opened by plaintiff by the introduction of a score of editorials from the defendant's newspaper; in view of which we cannot say it had no bearing upon that subject, which, however, the jury never reached in its deliberations. The objections made to this evidence were that it was "incompetent and immaterial." If competent for any purpose, it was admissible over such objections, which are general in their nature, and save nothing in particular for review; and we have uniformly held that in such case this court will not consider the objections, nor "look into the question to see or conjecture on what ground the evidence was objectionable." *Public Schools v. Risley's Heirs*, 40 Mo., loc. cit. 369; *Bauer v. Franklin Co.*, 51 Mo., loc. cit. 206; *Liggett v. Morgan*, 98 Mo. 39, 11 S. W. 241; *State v. Adams*, 108 Mo. 208, 18 S. W. 1000; *Bank v. Scalzo*, 127 Mo. 164, 29 S. W. 1082; *State v. Wright*, 134 Mo., loc. cit. 418, 35 S. W. 1145; *Lumber Co. v. Rogers*, 145 Mo. 445, 46 S. W. 1079. We find no error in the rulings of the court on the admission of evidence for which the judgment should be reversed.

4. It will be observed in the directions of the court that, after instructing the jury very fairly upon all the issues of the case, the court, to further enable the jury to decide the questions in the case, instructed the jury as follows: "That, in the absence of evidence to the contrary, the law presumes the reputation and character of a man to be good. That the board of president and directors of the St. Louis public schools had no right to engage any one to lobby for or

against or work for or against any bill in the legislature affecting in its provisions their terms of office, and to appropriate or expend any of the public funds under their control for such purpose; nor had any officer of theirs, as a representative of the board, the right, nor was it his duty, in his official capacity to lobby for or against any such bill, or work for or against any such bill affecting their terms of office, and to receive public money of the school fund for expenses in such employment; and that any such conduct and appropriation of money or acceptance of the same under such appropriation is without warrant of law, is against the policy of republican form of government, and can properly be criticised, commented upon, and rebuked by any paper or individual in any appropriate and proper terms. For, while any individual is permitted, and often is moved by duty, to present by way of petition or public argument his views and opinions and reasons for or against any measure pending before the legislature of the state, this right belongs to him as a constituent part of the sovereignty, and cannot be employed by an individual acting officially, or by public officials while serving the people, and intrusted only with certain duties, responsibilities, and trusts. It is their duty to carry out the law within the limits of the powers conferred upon them, and not otherwise to either persuade, direct, or force legislation, or attempt so to do, in regard to matters affecting their terms of office, or duties relating thereto. That a lobbyist is one who frequents the lobby or precincts of a legislature or other deliberative assembly with the view of influencing the votes of members, or who solicits or seeks to influence the votes of members, or seeks to influence their official action, whether in the lobby of the legislature or elsewhere. The court further instructs you that, if you believe from the evidence that any witness has willfully sworn falsely to any material fact, you may reject and disregard all of the testimony of such witness." Of that part of these last directions commencing with the words "the board of president and directors of the St. Louis public schools" and ending with the words "or duties relating thereto," the plaintiff bitterly complains. The only purpose of these additional directions was to assist the jury in making an intelligent application of the facts of the case to those that preceded them. No serious objection can be found to the principle therein announced; and in view of the undisputed fact that the plaintiff was the salaried attorney of the school board, that he went to Jefferson City at the instance of some of its members, that the existence of the board as then constituted and his tenure of office was threatened by the civic federation bill then pending before the senate, that he spent two weeks in lobbying against the measure, and that his expenses during such

service were demanded of and paid by the board out of the public school moneys, and that on a former occasion he had in like character performed like services in regard to another bill for which he presented a demand against the corporation for several thousand dollars, we cannot say that the court committed error in advising the jury of those principles in this case. Taken as a whole, we think the directions placed the case fairly before the jury; and, finding no reversible error, the judgment of the circuit court should be affirmed, and it is accordingly so ordered. All concur.

**STATE ex rel. MAHAN, Collector of Revenue,
v. MERCHANTS' BANK OF
JEFFERSON CITY.**

(Supreme Court of Missouri, Division No. 2.
March 12, 1901.)

BANKS AND BANKING—TAXATION—STOCK-HOLDERS—LIABILITY—ASSESSMENT AGAINST BANK—ACTION ON TAX BILL—DEFENSES—EVIDENCE—ADMISSIBILITY—PAYMENT—COUNTY BOARD OF APPEALS—APPEAL—PLEADING—INDEFINITENESS—WAIVER.

1. In an action against the "Merchants' Bank of Jefferson City, Missouri," on a tax bill made out against the "Merchants' Bank," it was not error to admit the tax bill in evidence, since as the words, "of Jefferson City, Missouri," were merely descriptive of the bank, and not part of its name, the bill was properly made out.

2. Where, in an action on a tax bill against a bank, defendant, after the overruling of its motion to make the petition more definite and certain, filed its answer and went to trial, it thereby waived its objection to the petition.

3. Act 1891 (Sess. Acts 1891, p. 195), declaring that bank shareholders need not list their stock for taxation, but that the shares shall be listed by the bank with its property; and Rev. St. 1889, § 7540, requiring that taxes assessed on bank shares shall be paid by the bank, which may recover the amount so paid from the shareholders,—do not authorize the assessment of bank shares to the bank, but such shares must nevertheless be assessed against the owners of the stock.

4. Where, in an action against a bank on a tax bill, the tax book showed that the assessment was erroneously made against the bank instead of against its stockholders, the tax bill did not establish a prima facie case.

5. In an action against a bank on a tax bill for taxes which should have been assessed against the stockholders, and not against the bank, a claim that as the bank president appeared before the county board of appeals and objected to the amount of the assessment, and not to the manner of it, the defendant should have appealed from the action of the board if it was not satisfied with it, was without merit, since no appeal lies from the board of appeals.

6. In an action against a bank on a tax bill, it was error to exclude evidence that it was bank stock which was assessed, since as bank stock should be assessed to the stockholders, and not to the bank, such evidence showed a defense to the action.

7. In an action against a bank on a tax bill, it was error to exclude evidence that the taxes for that year had been paid prior to the commencement of the action.

Appeal from circuit court, Cole county; D. W. Shackelford, Judge.

Action by the state of Missouri, on relation of Thomas B. Mahan, collector of the revenue of Cole county, against the Merchants' Bank of Jefferson City. From a judgment in favor of plaintiff, defendant appeals. Reversed.

This is an action by the collector of Cole county to recover certain personal taxes, amounting to the sum of \$237.83, claimed to be due the state and county for certain taxes for the year 1896, as follows: \$47.57, state fund tax; \$85.62, county fund tax; and \$104.04, school fund tax. With respect to the property upon which the tax is supposed to be due, no information is given, either in the petition or tax bill upon which the action is based, except in the tax bill, in the column marked "Dolls.," are the figures "19,025"; and, because of the indefiniteness of the petition, defendant filed its motion to make it more definite and certain, which was overruled, and it duly excepted, but thereafter filed its answer, in which it denied all allegations in the petition except its incorporation. It then alleged that it had tendered to the plaintiff, collector, before the institution of this suit, all taxes legally assessed against it, and his refusal to receive anything less than the full amount thereof, whether legal or illegal, and demanded the payment of all taxes assessed against it; that he knew that the assessor's book and what he called a "back-tax bill" showed no property assessed against the defendant other than that for which defendant tendered the just and true amount assessed against it, but demanded of defendant a compromise assessment, with which defendant had nothing to do, but was a compromise made by the board of appeals, in violation of law, without authority, and in direct violation of the statute; that, under the statute, assessment against all incorporated banks should be made against the shareholders of such banks, and not against the banks themselves. The case was tried by the court. Upon the trial defendant objected to the introduction of any evidence, upon the ground that the petition fails to state a cause of action. The objection was overruled, and defendant duly excepted. Plaintiff then, over the objection of defendant, read in evidence the tax bill sued on, which is as follows:

Plaintiff then closed his case, whereupon defendant asked an instruction in the nature of a demurrer to the evidence, which was refused, and it excepted. Defendant then offered to prove by J. H. Diercks, its cashier, that he had paid to plaintiff all taxes assessed against the bank for the year 1896, which on a general objection by plaintiff was excluded, and defendant excepted. At the close of all the evidence, defendant asked an instruction in the nature of a demurrer thereto, which was refused, and it again excepted. Judgment was then rendered in favor of plaintiff for the sum of \$316.65, from which defendant appeals.

Edwards & Edwards, for appellant. A. M. Hough, for respondent.

BURGESS, J. (after stating the facts). On the trial plaintiff offered the tax bill in evidence, to which defendant objected upon the ground that it is not made out against the defendant, the "Merchants' Bank of Jefferson City, Missouri," but against the "Merchants' Bank." The objection was overruled, and the tax bill read, and this is assigned for error. The words "of Jefferson City, Missouri," which follow immediately after the words "Merchants' Bank" in the title of the suit, are merely descriptive of the bank, and are no part of its name; hence the tax bill, in so far as the name of the bank is concerned, was properly made out against the "Merchants' Bank." It follows that this objection was not well taken.

However uncertain and indefinite the petition may have been, defendant waived that point by pleading over and going to trial after its motion to make it more definite and certain was overruled.

The petition alleges that the defendant is a corporation organized under the laws of the state of Missouri, and doing a general banking business. By the act of 1891 (Sess. Acts 1891, p. 195) amending the statute concerning the "assessment and collection of the revenue," persons owning shares of stock in banks, or any joint-stock institution or association doing a banking business, are not required to deliver to the assessor a list thereof; but the president or other chief officer of

"Back-Tax Bill—Personal Property. State of Missouri, County of Cole—ss: I, Thos. B. Mahan, collector of the revenue within and for the county of Cole, in the state of Missouri, do hereby certify that the following amounts of back taxes remain delinquent in favor of the several funds for the several years, and on the personal property in said county and state owned by the Merchants' Bank, and under his care, charge, and management, on the first day of June of the year for which assessments were made, to wit:

Name of Owner.	Years for Which Taxes are Due.	Valuation.		State Tax.		Co. Tax.		School Tax.		Penalty.		Com.		Total.	
		Dolls.	Cts.	Dolls.	Cts.	Dolls.	Cts.	Dolls.	Cts.	Dolls.	Cts.	Dolls.	Cts.	Dolls.	Cts.
Merchants' Bank	1896	19,025	00	47	57	85	62	104	64	7	14	9	52	254	49

"In witness whereof I have hereunto set my hand at the city of Jefferson, in said county and state, this 25th day of March, 1897. Thos. B. Mahan, Collector Cole County, Mo."

such corporation is required, under oath, to deliver to the assessor a list of all shares of stock held therein, and the names of the persons who hold the same, with the face value thereof, as well, also, as a complete statement of all reserve funds, undivided profits, premiums, or earnings, and all other values belonging to such corporations; and such statement of shares of stock, together with the statement of reserve funds, undivided profits, premiums, or earnings, and other values, so delivered to or furnished the assessor, shall, for the purpose of taxation, be treated as that amount of money, less the taxable value of the real estate and fixtures, subject to the right of the parties in interest to show the impairment of such shares of stock before the board of equalization. Section 7540, Rev. St. 1889, provides that the taxes assessed on shares of stock embraced in such list shall be paid by the corporations, respectively, and they may recover from the owners of such shares the amount so paid by them, or deduct the same from the dividends accruing on such shares; and the amount so paid shall be a lien on such shares, respectively, and shall be paid before a transfer thereof can be made. It is therefore clear that such bank assessment of taxes must be made against the owners of the stock, and not against the corporation. *City of Stanberry v. Jordan*, 145 Mo. 371, 46 S. W. 1003. While the tax bill is *prima facie* evidence that the taxes as therein stated are due by the defendant (Acts 1895, p. 245; *State v. Hutchinson*, 116 Mo. 399, 22 S. W. 785; *State v. Phillips*, 137 Mo. 259, 38 S. W. 981), it shows that the assessment was made against the Merchants' Bank. The tax book for 1896, which was in evidence, also showed that the assessment was made against the bank, when it should have been made against its stockholders. So that this *prima facie* case was overcome when it was shown that the tax bill was not based on a valid assessment. *State v. Cunningham*, 153 Mo. 642, 55 S. W. 249.

But it was shown by the evidence that defendant bank, by its president, appeared before the board of appeals of the county, and objected to the amount of the assessment, and not to the manner of it, and it is claimed by plaintiff, if defendant was not satisfied with the action of the board, it should have appealed from it. But no appeal lies from the board of appeals in any case, and that the right of appeal from the assessment was not intended by the statute to be exclusive is manifest from the fact that the tax bill is only *prima facie* evidence of what it contains, and may be overcome by extrinsic evidence. *State v. Phillips*, *supra*; *State v. Cunningham*, *supra*. If the only remedy by the taxpayer is by appeal from the assessment, then all defenses by him thereafter are cut off, to which we are unable to give assent.

Moreover, the act of 1895, *supra* (section

9246, Rev. St. 1890), provides that in all actions for personal taxes the general laws of this state as to practice and proceedings and appeals and writs of error in civil cases shall apply, as far as applicable to such actions, and that the remedy provided for the collection of personal tax bills is cumulative, which would seem to add force to what we have already said upon that question. Defendant offered evidence to show that it was bank stock that was assessed, and that all taxes against the bank for 1896 had been paid prior to the institution of this suit, which, upon objection of plaintiff, was excluded; and in this, also, we think error was committed, for either was a good defense to the action. The demurrer to the evidence at the close of plaintiff's case should have been given. For the reasons indicated, the judgment is reversed, and the cause remanded.

SHERWOOD, P. J., not sitting. GANTT, J., concurs.

LORE v. AMERICAN MFG. CO.

(Supreme Court of Missouri, Division No. 2.
March 12, 1901.)

MASTER AND SERVANT—NEGLIGENCE—GUARDING MACHINERY—STATUTES—CONTRIBUTORY NEGLIGENCE—ASSUMPTION OF RISK—INSTRUCTIONS.

1. In an action for injuries founded on an act of the general assembly approved April 20, 1891, declaring that all dangerous shafting and gearing in manufacturing establishments shall be safely guarded, it is not necessary that the complaint should refer to the title of the act, or aver that defendant's negligence was in violation of the act; it being sufficient if it states facts bringing the case within the statute.

2. An act of the general assembly approved April 20, 1891, declares that all dangerous shafting and gearing in manufacturing establishments shall be safely guarded. *Held*, that where the rods protecting the gearing had become bent so as to produce an opening which the sheet iron within the rods did not guard, and plaintiff, in passing around the machine in the discharge of her duty, slipped on the floor, rendered slippery from the spraying of oil from the machinery, and her hand passed through the opening in the guard, and was crushed in the cogwheels, she was entitled to recover; the master being guilty of negligence, under the statute, in not maintaining a proper guard.

3. There was no evidence of contributory negligence on the part of the plaintiff.

4. Plaintiff was not chargeable with the action of former employes who had bent the rods by taking hold of them to prevent themselves slipping on the floor while passing about the machine, the rods having been bent when plaintiff was employed.

5. A contention that there could be no recovery, in that plaintiff assumed the risk of falling on the floor, and that such fall was the proximate cause of the injury, was without merit, since, though she had fallen, she would not have been injured had it not been for the negligence of the master in failing to properly guard the gearing.

6. In an action for injuries sustained by reason of plaintiff's hand being caught in cogwheels which were insufficiently guarded, it was proper to refuse an instruction that the employer does not guaranty or insure the employe against in-

jury from machinery, but he discharges the measure of his duty if he provides such guards for the protection of the employes as a person of ordinary care would deem sufficient, since the instruction called for a less degree of care than that required by the statute.

Appeal from St. Louis circuit court; Jacob Klein, Judge.

Action by Rose Colliott Lore against the American Manufacturing Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

This is a civil action for damages to plaintiff, an employé in a jute factory owned and operated by defendant, on the 24th of November, 1894, alleged to have been caused by the negligence of defendant in failing to safely guard its gearing on a machine used for spinning jute in the manufacture of bagging, as required by an act of the general assembly approved April 20, 1891, and in permitting the guard to said gearing to become and remain out of repair, whereby plaintiff's right hand and forearm were, without fault on her part, thrown through said guard and into the cogwheels and gearing of said machine, and were torn, lacerated, and crushed. The answer was a general denial and a plea of contributory negligence. There was a verdict and judgment for plaintiff for \$2,750, from which defendant appeals.

The facts appear to be that at the time of the accident plaintiff was a girl about 16 years old. She brought the action soon after she reached her majority. The cause was tried in 1896, upon a special jury, and she was awarded \$2,000. Defendant appealed to the St. Louis court of appeals, and that court, for error in the instructions, reversed and remanded the cause. The case is reported as *Colliott v. Manufacturing Co.*, 71 Mo. App. 163. Since then plaintiff has married, and her present name is Rose Lore. There is little, if any, conflict in the evidence. Plaintiff was employed at the time of the accident as a spinner in the defendant's factory or bagging mill, known as the "Southern Mills," in the city of St. Louis. The machine by which she was injured is a large machine, some 19 feet in length and about 4 feet wide, and is known as a "spinning machine." It is operated by two girls,—the spinner, who is ordinarily in front, and the end minder, whose ordinary position is in the rear; but it is the duty of both girls to keep the machine running, and to pass around the frame to help one another whenever necessary. The material used is what is commercially known as "jute butts," which is manufactured into bagging for covering bales of cotton. In the rear of the machine are 48 cans filled with this material in the form of long strings called "sliver," which are carried through the machine from the rear to the front in the process of spinning. This sliver is loose and flimsy, and easily parted, and it is the business of the

two girls to watch and "fix up" the ends whenever they break down; that is to say, whenever one of the strings of sliver happens to break, there is what is known as an "end," which has to be fixed up by the operators. Ordinarily, it is the duty of the spinner to fix up the ends in the front, and of the end minder in the rear, but it frequently happens that a number of ends break down at once in the rear of the machine, and it is necessary on these occasions, in order to keep the machine running, for the spinner to pass around to the rear, and help the end minder put them up. In behalf of plaintiff at the trial was produced the testimony of plaintiff herself and five other employes of the factory, spinners and end minders, all of whom testified that it was the duty of the spinners and end minders to help one another in their work whenever it was necessary in order to keep the machine running, and to pass around the machine, whenever necessary, for that purpose. The floor of the factory is conceded to have been very slippery,—so much so as to be very hard to walk upon,—and persons walking were liable to slip and fall at any moment. The jute material was prepared for spinning with an oil, which was rubbed into the floor by the constant sweeping of the waste jute over the floor, and there was also a considerable quantity of oil which was used for lubricating the machinery which was thrown off upon the floor, and rubbed in in the same manner. The driving machinery or gearing of the machine was located at one end,—being the end opposite to plaintiff's ordinary position in operating the machine,—and was located on a narrow passage between plaintiff's machine and the next machine in the same row. This passage was only about two feet wide, or barely wide enough to allow the girls to pass through in the discharge of their ordinary duties; and, in order to protect the employes passing through this narrow aisle from the cogwheels at the end of plaintiff's machine, there was placed in front of and around this gearing a guard, consisting of vertical iron rods about three-eighths of an inch in thickness, fixed above and below to iron bars or crosspieces. These rods or guard wires in front of the gearing were located about an inch and one-half apart, and were made of soft iron, round, and about three feet in length; but prior to the accident to plaintiff several of these rods or wires had become bent, so as to produce a considerable opening just at the corner of the machine, which was large enough to allow the hand of any ordinary person who might fall on the slippery floor to pass through so as to come into contact with the dangerous cogwheels or gearing of the machine. Several of plaintiff's witnesses testified that the opening was large enough to allow the first volume of the Revised Statutes of Missouri of 1880 to be passed through

in the direction of its thickness. According to all the witnesses, the opening which existed beforehand was several inches wide, and large enough to allow plaintiff's hand to easily pass through. The opening was probably produced by the employes who had been working on the machine in previous years taking hold of the wires in order to hold themselves up and keep themselves from falling upon the slippery floor in going around the machine, and there is some testimony going to show that this has been the custom of some of the girls in the factory. That this custom is probably the cause of the opening is indicated by the fact that the opening was located just at the corner, which was the place where the employes were in the habit of taking hold of the wires in passing around the machine. Owing to the greasy floor, there was danger of slipping, and consequently of falling, just at the corner, and at the place where this opening in the guard was located. At the time of the accident, plaintiff had been working on the machine for less than three days, having been put to work on this machine on Thursday, and the accident occurring on Saturday afternoon. Her ordinary position in tending the machine was at the opposite end from the defective guard, and she did not notice or see the opening until the same day when she was hurt. Immediately prior to the accident, plaintiff and her end minder began to run out of material, and the ends were rapidly breaking in the rear of the machine, and it became necessary for plaintiff to go around to the rear to help the end minder put up the ends in order to keep the machine running. That this was the duty of the plaintiff under the circumstances is unanimously testified to by all the girls who work at the factory who were sworn at the trial, being six in number, who state that such was the universal custom among all the girls in the factory, and that they were scolded by the foreman when they neglected to do so. In order to induce the girls to help one another to keep the machine running, they were put upon piece work, or paid according to the amount of work which was turned out by their machine, thereby making it to their interest to help one another at all times. The evidence very clearly establishes that in going from her end to help the end minder plaintiff was in the discharge of her ordinary duties. In passing around the corner of the machine she slipped and fell, and her arm was thrust through the unguarded opening, and was caught in the cogs, and was drawn through up to her elbow. The evidence shows her hand and arm were terribly mangled and lacerated. If she is entitled to recover at all, no doubt can exist that the verdict was a very moderate compensation for her injuries. The various witnesses testified that the opening in the guard had existed from two months to two years, according to the

time they had worked in that vicinity. It was shown that the foreman, Mr. Comerford, was constantly in the room. Indeed, he testified that he saw the opening after she was hurt. It appears that the guard comes with the machine from the factory, but, not deeming it sufficient, Mr. O'Boyle caused a piece of sheet iron to be placed inside of the guard and between the cogwheels and the guard, but it did not extend east far enough to protect the corner.

At the close of all the evidence the defendant demurred to the evidence, which the court overruled. The court thereupon instructed the jury as follows: Instruction No. 1: "The laws of this state require the belting, gearing, and drums in all manufacturing, mechanical, and other establishments, when so placed as to be dangerous to persons employed therein or thereabout while engaged in their ordinary duties, to be safely and securely guarded, whenever they are so situated as to admit of guards being placed about them without interfering with their free operation, or with necessary access to them, or necessary passageway by or around them. The guards required are safe and secure ones,—such guards as will protect the employes from contact with the machinery by the use of ordinary prudence and caution on their part. This duty, imposed upon the master or employer, does not make the master or employer an insurer of the safety of the servant or employe. The guards which the master is required to provide are such as will protect the employe, using ordinary care, against all dangers that can be foreseen by ordinary human foresight; but the master is not required to guard against the negligence of the employe, nor against such dangers or accidents as no human knowledge or experience could anticipate. The failure of the master to so guard the gearing, belting, and drums of his machinery so situated is negligence, because it is a violation of a duty imposed by the statute on that subject. Now, in this case, if you find and believe from the evidence that the plaintiff, at the time of the injury complained of, was in the employ of the defendant company in its bagging factory, and that she was engaged at the time in tending a spinning frame or machine, and that said spinning frame or machine was operated by means of belting, drums, and cogwheels; and if you further believe from the evidence that such belting, drums, and cogwheels of said spinning frame or machine were so situated or placed as to be dangerous to persons employed about the same while engaged in the performance of their ordinary duties; and if you further believe from the evidence that such spinning frame or machine and the belting, drums, and cogwheels thereof were at the time so situated as to admit of guards being placed about such belting, drums, and cogwheels without interfering with their free operation, or with necessary access to them, or necessary passageway

by or around them; and if you further find from the evidence that prior to the time of the injury complained of the defendant had placed a guard about the gearing and cogwheels of said spinning frame or machine; and if you further believe from the evidence that at the time of the injury complained of, and prior thereto, two or more of the iron vertical bars forming part of such guard has been, and then were, so bent as to produce an opening in such guard large enough to allow the hand of an ordinary person to pass through and come in contact with said gearing or cogwheels, and that by reason of this the guard in question was not then and there a safe and secure guard, and such as would protect an employé, while engaged in her ordinary duties with or around said spinning frame or machine, and while exercising ordinary care, against all dangers that could be foreseen or anticipated by ordinary human foresight; and if you further find from the evidence that the plaintiff was, at the time of the injury complained of, engaged in the performance of her ordinary duties, and was exercising such care as a person of ordinary prudence and of her age and experience would have exercised under similar circumstances, and that while so engaged she slipped and fell by reason of the slippery condition of the floor, and that by reason of the unsafe, or insecure condition of the guard around said cogwheels and gearing of said machine (if you find from the evidence that it was unsafe and insecure) her hand and forearm, while so falling, passed through such opening, and thereby came in contact with said gearing, and that plaintiff was injured thereby,—then your verdict should be for the plaintiff.” Instruction No. 2: “The court instructs the jury that if they shall find from the evidence the facts to be as stated in the foregoing instruction, it is not necessary, to entitle plaintiff to a recovery, for her to prove that the slippery condition of the floor was occasioned by any negligence of the defendant.” Instruction No. 3: “If you find and believe from the evidence that the guard in question around the gearing of the spinning machine or frame mentioned in the evidence was at the time of the injury complained of a safe and secure guard, as explained in instruction No. 1, then you should find for the defendant.” Instruction No. 4: “And so, if you find and believe from the evidence that the injury complained of happened from a cause or accident which no human knowledge or experience could anticipate, your verdict should be for the defendant. And unless you find from the evidence that the gearing and cogwheels of the machine in question were so placed that they could be safely and securely guarded, as explained in instruction No. 1, without interfering with their free operation, and with necessary access to them or necessary passageway by or around them, then your verdict should be for the defendant.” Instruc-

tion No. 5: “And so, unless you believe from the evidence that the gearing and cogwheels of said machine were so placed as to be dangerous to the employés engaged around the same, or in operating said machine, while engaged in the performance of their ordinary duties, then your verdict should find for the defendant.” Instruction No. 6: “The court instructs you further that, if you find a verdict in favor of the plaintiff, you should fix her damages in such a sum as you may find and believe from the evidence will afford her a fair and adequate compensation for the injuries sustained, and for the bodily pain and mental anguish suffered by her in consequence of her said injuries; and if you find from the evidence that said injuries are permanent in character, you should also take that fact into consideration in estimating said damages. If, under the evidence and instructions given you, you find in favor of the defendant, you need merely state in your verdict that you find the issues joined in this case in favor of the defendant.” To the giving of which instructions, and to the giving of each of them, the defendant then and there duly excepted; and the defendant thereupon asked the following instructions, each and all of which the court refused. Said instructions are as follows, to wit: “(1) Upon all the evidence in the cause the verdict must be for the defendant. (Offered and refused at end of whole case.) (2) When the plaintiff took employment in defendant’s factory, she assumed all the ordinary risks incident to the service, viz. all those risks which are part of the natural and ordinary method of conducting the business. (3) The employer does not guaranty or insure the employé against injury from machinery about which the latter may be employed, but he discharges the measure of his duty if he provides such guards for the security and protection of the employé against injury by the machinery as a person of ordinary care and prudence would deem sufficient for the purpose. (4) If the jury believe from the evidence that the rods in the guard mentioned in the petition were bent or loosened by the act or conduct of plaintiff’s fellow servants, then the defendant is not liable for any injury that may have resulted to the plaintiff from the fact that the rods were bent or loose at the time she was injured. (5) If the jury believe from the evidence that the injuries received by plaintiff at the time and place mentioned in the petition were due to accident or misadventure, then the defendant is not liable. (6) If the jury believe from the evidence that the condition of the floor at and prior to the time of plaintiff’s injuries was the natural and ordinary consequence of operating defendant’s spinning machines, and that such condition of the floor was apparent or obvious to the plaintiff, then it was one of the risks which she assumed in entering defendant’s service, and plaintiff cannot recover for any injury caused by the condition of the

floor. (7) If the jury believe from the evidence that the condition of the guard at and prior to the time of plaintiff's injury was apparent and obvious to her, then it was one of the risks which she assumed in entering defendant's service, and plaintiff cannot recover for any injury caused by the condition of the guard. (8) The employer does not guaranty the safety of the machinery about which the servant is employed, nor does he insure the servant against injury from the use of such machinery. (9) If the jury find from the evidence that the injuries sustained by the plaintiff were due to her own want of ordinary care at the time of the injury, the verdict must be for the defendant." A motion for new trial was filed and overruled, and the case is regularly in this court.

Kehr & Tittmann, for appellant. Martin & Bass and T. Percy Carr, for respondent.

GANTT, J. (after stating the facts). 1. The petition in this case is obviously bottomed upon the third section of an act of the general assembly of this state entitled "An act relating to manufacturing, mechanical, mercantile and other establishments and places and the employment, safety, health and work hours of employes," approved April 20, 1891, which provides that "the belting, shafting, gearing, and drums, in all manufacturing, mechanical and other establishments in this state, when so placed as to be dangerous to persons employed therein or thereabout while engaged in their ordinary duties, shall be safely and securely guarded when possible; if not possible, then notice of its danger shall be conspicuously posted in such establishments." It is true, the pleader does not refer in express terms to the title of the act, or aver that the failure of the defendant to safeguard its jute machine was a violation of said act; but this is not at all necessary. It is sufficient, when the law—as it is in this case—is a public act, to state the facts which bring this case clearly within the law; and this she has done. *Kennayde v. Railroad Co.*, 45 Mo. 255; *Reynolds v. Railroad Co.*, 85 Mo. 90; *Emerson v. Railway Co.*, 111 Mo. 161, 19 S. W. 1113. The act of April 20, 1891, is similar to the act of the British parliament, 7 & 8 Vict. c. 15, § 21, which provides that "all parts of the mill-gearing in a factory shall be securely fenced." The act is remedial and salutary. The purpose of the legislature was to preserve the lives and limbs of those whose daily life is spent working on and about machinery wielding irresistible mechanical power, and was obviously intended to make plain the duty of the master to his servants employed around or about dangerous machinery, and to modify the common-law doctrine that, in absence of a statute, the master was not bound to fence his dangerous machinery. A failure to comply with such a statute is negligence. As said by the court of appeals

in *Colliott v. Manufacturing Co.*, 71 Mo. App. 163, "The failure of the master to so guard the gearing, etc., of his machinery, would be a violation of a statutory duty, and be negligence per se." The character of the required guards is defined by the statute itself. They are required to "be safe and secure." The constitutionality of such laws is no longer in doubt. Laws like this, created for the safety of those whose necessity compels them to submit to hazards which they would otherwise be unwilling to assume, have been sustained in all the states of the Union,—such as provide for fire escapes, inspection of boilers, ventilation of mines, and for covering and otherwise protecting machinery. *Durant v. Mining Co.*, 97 Mo. 62, 10 S. W. 484; *People v. Warden of City Prison*, 144 N. Y. 529, 39 N. E. 636; *People v. Smith*, 108 Mich. 531, 66 N. W. 382. Did the proof bring the case within the statute? The mill was a jute factory. The machines were constructed with cogwheels on one end, which were so placed as to be exceedingly liable to catch the clothing and limbs of the employes working about them. So clearly was this recognized that the manufacturer of the machines sent guards along with the machines, and the defendant company deemed them insufficient, and placed sheet iron inside of the guards and between them and the cogwheels, so as to more effectively prevent injury to the operatives,—a danger which was greatly enhanced by the slippery condition of the floor, caused by the constant spray of oil and sweeping the oily waste jute over it every day. In addition to this, the machines were separated by narrow passways not exceeding 30 inches in width, through which the employes—the spinners and end minders—were compelled to go in the discharge of their duty. No more satisfactory evidence of the dangerous position of these machines could be adduced than their own recognition of the fact, by the officers of the company, that guards were necessary to protect the employes. That plaintiff was lawfully and rightfully present at the machine, and engaged in her ordinary duties, at the time she slipped and her hand fell into the gearing, was established beyond a peradventure. The efforts to show she was a volunteer, and out of her place, were wholly unsuccessful.

It is next insisted that there was no evidence that the guards were insufficient; that no human foresight could have foreseen that an employe's hand would have been thrown through the opening caused by the bending of the rods on the guard railing. The jury have found that fact against the defendant under the most rigid requirement, and, we think, properly so. Two special juries have found that this gearing, placed as it was within a few inches of a narrow, slippery passageway through which the employes were constantly called to pass attending to their duties, was dangerously placed, and required

a safe and secure guard, and have found the guard was not safe and secure, and by reason of its insufficiency plaintiff's hand and arm were caught and crushed in the cogwheels. How can it be said that no human foresight could anticipate danger at this point when experience had already taught that former employes had often slipped, and had caught the rods to keep from falling, on the oily, slippery floor, until they were so bent as to make this opening in the guard? Without a guard, one can scarcely conceive of a more dangerous place for the spinners and minders, who necessarily passed rapidly from one side of the machine to the other, when occasion required. The floor, as all admit, was saturated with oil, and very slippery, and the liability to slip and fall was greatest in their efforts to turn the corner, and in falling the natural tendency of the feet and lower limbs was to be thrown outward, and the head and arms in the opposite direction, or right into the gearing; and the same considerations which dictated the necessity of a guard at this place demanded that this guard should be in repair,—in other words, "safe and secure," as the statute prescribed. No less measure of diligence can be written into the statute. As was said in *Durant v. Mining Co.*, 97 Mo. 65, 10 S. W. 485: "When the meaning of a statute is clear, courts have no power to make qualifications or additions to cover seemingly omitted cases." It was shown that this hole had been in this guard railing for several months at least, and that the superintendent was constantly in the room. The duty was cast by the statute on the company and its superintendent not only to have the guards erected in the first instance, but to keep them in repair. Nothing was more likely to happen than that some employe might slip on this floor, and be thrown against this guard, and, in the effort to avert a fall, have his or her arm thrust into this gearing. The situation suggested the danger. The witnesses testified that a volume of the General Statutes of this state of 1880 could easily have been put through the hole that had been left for months at this corner in the guard. This hole had remained so long, defendant was bound to take notice of it, whereas plaintiff, who only went to work on Thursday at this machine, had not noticed it, and was not aware of the risk she was running when she was precipitated against the guard by falling on the slippery floor on the following Saturday afternoon. We think the evidence was sufficient to show negligence in not repairing this guard or closing this opening in it. The circuit court correctly ruled, as did the court of appeals, that there was no evidence whatever of contributory negligence on the part of plaintiff. Neither was there any evidence upon which to predicate an instruction as to the negligence of a fellow servant. The duty of furnishing a safe and secure covering or guard around the dangerous gearing was the

master's duty, and could not be delegated to a servant, and had not been; nor was plaintiff chargeable with the action of former employes, who, it was attempted to be shown, had bent these rods. Surely, that rule cannot be made to apply to a servant before that relationship has begun. The opening was in the guard when she was employed. This appeared by all the evidence, and, moreover, there was no evidence from which it could be inferred that the employes who bent the rods were still employes of the company.

2. But it is argued by the learned counsel for defendant that plaintiff assumed the risk of falling on the slippery floor; that its condition was perfectly obvious, and, if she had not fallen, the guard, notwithstanding the bent rods and the hole, would have protected her against the cogwheels; if she had not fallen, she would not have been hurt, and, consequently, the fall, caused by the slippery condition of the floor, was the proximate cause of her injury. On this point the circuit court instructed the jury that, if they found the facts to be as stated in the first instruction, it was not essential to plaintiff's recovery for her to prove that the slippery condition of the floor was occasioned by the negligence of defendant. In a word, the question is raised whether, if the defendant was negligent in allowing the guard around the machine to become and remain out of repair, whereby plaintiff was injured, it can be held liable for that negligence notwithstanding the fact that she would not have received that injury if she had not first stepped on the slippery floor. It must be apparent from what has already been said that the slipping was not the sole cause of the injury. If the injury would not and could not have happened but for another cause, to wit, the insufficient and insecure guard around the gearing, and plaintiff was in the exercise of ordinary care at the time she accidentally slipped, and, but for the unsafe guard, would not have been hurt, then, under the decisions of this court, she is entitled to recover. The leading case in this state on this subject is *Bassett v. City of St. Joseph*, 53 Mo. 290. In that case Mrs. Bassett was walking along a street in said city, in the exercise of ordinary care, when she came to an excavation adjoining the sidewalk, which had been left negligently unguarded, when a mule hitched near by attempted to kick her, and in attempting to avoid the mule she fell into the excavation. It was urged there, as it is here, that if it had not been for the attempt of the mule to kick, the injury would not have occurred, and, as defendant was not responsible for the mule, and as the excavation was not the sole cause of the injury, she could not recover. But this court said: "It is true that, if it had not been for the attempt of the mule to kick, the injury might not have occurred, and it is equally true that, if there had been no excavation at hand, the

kicking of the mule would have been harmless. How can it be said in such case that either the one or the other was the sole cause of the injury? Necessarily each cause contributed, but it took both causes combined to produce the injury. We think that if the street or sidewalk was out of repair, and after the city authorities were notified of the dangerous condition of the street or sidewalk they carelessly permitted the street to remain in this dangerous condition, and the plaintiff, while passing along said thoroughfare, was precipitated into the excavation and injured, while using ordinary diligence and care on her part, and guilty of no fault, she would have a right to recover, notwithstanding the cause contributing to the injury was the attempt of a mule to kick plaintiff, and she, in attempting to protect herself from injuries about to be inflicted by the mule, fell or jumped into the excavation and was thereby injured." To the same effect are *Hull v. City of Kansas*, 54 Mo. 598, and *Brennan v. City of St. Louis*, 92 Mo. 482, 2 S. W. 481, in the latter of which *Bassett v. City of St. Joseph*, 53 Mo. 290, is expressly approved and followed. A case strikingly like this is *Musick v. Packing Co.*, 58 Mo. App. 322. In that case an employé of the company slipped and fell into a tank of hot water negligently left uncovered by some repairers in the employ of the company. In that case it was urged that, if plaintiff slipped upon a piece of ice, and in that way slipped into the dip vat of hot water, the slipping upon the ice was the proximate cause, and he could not recover. But the court, through Presiding Judge Smith, said: "It is true that, if the plaintiff had not slipped, his limb would not have been plunged into the hot-water tank. It is equally true that, though he slipped, the disaster would not have overtaken him had not the tank been uncovered. The slipping was not the sole cause of the injury. The latter would not have occurred except for the presence and co-existence of both causes. The cause of plaintiff slipping was altogether accidental. If it was the sole cause of the injury, the defendant is not liable; but the injury would not have resulted had not another cause combined with the accidental cause. If the plaintiff was in the exercise of ordinary care and prudence at the time he slipped, and the injury is attributable to the absence of the cover over the tank, together with the slipping, then the plaintiff should recover." These cases announce the settled law of this state, and fully answer defendant's contention that plaintiff's slipping was the cause of her injury.

3. As to defendant's third and eighth instructions, which the court refused, and which were as follows: "(3) The employer does not guaranty or insure the employé against injury from machinery about which the latter may be employed, but he discharges the measure of his duty if he provides

such guards for the security and protection of the employé against injury by machinery as a person of ordinary care and prudence would deem sufficient for the purpose." "(8) The employer does not guaranty the safety of the machinery about which the servant is employed, nor does he insure the servant against injury from the use of such machinery." The third substitutes a less degree of care than that imposed by the statute, and the eighth was given by the court of its own motion in its first instruction. We think the learned circuit judge properly construed the statute, and his instructions are marked by his usual care and thoroughness. Two special juries have found for plaintiff, and their verdicts have met the approval of the circuit court. We think the judgment is for the right party, and it is affirmed. All concur.

KANSAS & T. COAL RY. CO. v. NORTH-WESTERN COAL & MINING CO. et al.

(Supreme Court of Missouri. Jan. 25, 1901.)

EMINENT DOMAIN—RAILROADS—COAL MINING COMPANY—DIRECTORS AND STOCKHOLDERS—PRIVATE ROAD—PRIVATE PROPERTY—PUBLIC USE—JUDICIAL DETERMINATION—RIGHT OF WAY—RIGHT TO SELECT—INTENTION.

1. Where a railroad company is regularly organized as such under laws making it a common carrier, the fact that its officers, directors, and stockholders are the same as those of a coal-mining company, from which the railroad company will probably draw the major portion of its business, and that the mining company has loaned the railroad company the most of the capital required to build the road, does not render it a private road, so as to deprive it of the power of eminent domain.

2. Under Const. art. 2, § 20, providing that, whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and as such judicially determined, without regard to any legislative assertion that the use is public, the general course of judicial decision, that use by a regularly organized railroad corporation is a public use, is a sufficient "judicial determination" to entitle a railroad company to exercise the power of eminent domain without a special investigation of the facts of the particular case.

3. In a proceeding by a railroad company to condemn a right of way over the lands of a coal-mining company, the fact that a coal company which has the same officers and stockholders as the petitioning railroad company, and which will furnish nearly all of the business of the plaintiff company, is authorized by statute to condemn land and build a tramway to transport its product to market, is not a defense to the action.

4. In an action by a railroad company to condemn a right of way over the lands of a coal company, the fact that the right of way might just as easily be located on the land of another coal mining company, whose officers and stockholders are the same as those of the plaintiff company, and which will furnish the bulk of the plaintiff's company's business, is no defense, since a railroad company is given by the legislature the right to select the location it prefers for its right of way.

5. Rev. St. 1889, § 2741 (section 1272, Rev. St. 1899), providing that, in case lands sought to be appropriated for a railroad right of way are held by any corporation, the right to appro-

appropriate the same shall be limited to such use as shall not materially interfere with the uses to which the corporation holding the same is authorized by law to put such lands, does not forbid the appropriation of the lands of a corporation engaged in coal mining for use as a railroad right of way, even though such use materially interferes with their use by the coal company, since Const. art. 12, § 4, declares that the right of eminent domain shall never be abridged so as to prevent the taking of the property of any incorporated company, and subjecting it to public use, and the use by the railroad company is a superior public use to that by the coal company.

6. Plaintiff railroad company sought to condemn a right of way over the property of a mining company which owned and operated a short railway in such manner that the tracks of plaintiff and defendant would run parallel, and it would be 14 feet from the center of one track to the center of the other. The shaft to the mine of defendant was from 56 to 72 feet from the strip of land sought to be condemned, and the main track, switches, and loading tracks of the defendant were on the strip of 56 to 72 feet, which was between the strip sought to be appropriated and the shaft to defendant's mine. *Held*, that the appropriation of the right of way desired by the plaintiff would not materially interfere with the operation of defendant's mine, so as to preclude plaintiff's right to condemn the same.

7. Under Rev. St. 1889, § 2741 (section 1272, Rev. St. 1899), providing that the right of a railroad company to appropriate land held by any other corporation shall be limited to such use as shall not materially interfere with the use to which the corporation holding the land is authorized by law to put the same, the allegation by defendant that it "intends" to make such use of its lands that the use by plaintiff railroad company of a right of way, which it seeks to condemn over them, will materially interfere with its business, is not a good defense, since the court must deal with conditions that exist at the time condemnation is asked, and cannot consider conditions that may arise.

Burgess, C. J., and Valliant and Gantt, JJ., dissent.

In banc. Error to circuit court, Macon county; N. M. Shelton, Judge.

Proceeding by the Kansas & Texas Coal Railway Company against the Northwestern Coal & Mining Company and others to condemn land for a right of way. From a judgment refusing to appoint commissioners to appraise damages, plaintiff appeals. Reversed.

The plaintiff is a duly organized and chartered railroad company, under the provisions of article 2, c. 42, Rev. St. Mo. 1889, for the purpose of constructing and operating a broad-gauge railroad "for public use in the conveyance of persons and property from a point in, at, or near the town of Ardmore, Macon county, Missouri, to a point in, at, or near the town of Bevier, in the same county and state, a distance of ten miles or more." The plaintiff is also the lessee for a term of 20 years from July 1, 1899, from the Wabash Railroad of its branch railroad from Excello to Ardmore. So that the plaintiff's railroad, with the leased line aforesaid, will form a continuous railroad from the town of Excello, on the Wabash Railroad, to the town of Bevier, on the Hannibal & St. Joseph Railroad. The defendant the North-

western Coal & Mining Company is a business corporation, organized under the provisions of article 8, Id., for the purpose of acquiring, selling, and operating coal lands and coal mines, and to buy, sell, and deal in merchandise, and to own, operate, and sell electric light and power plants, and to furnish and sell electric light and power. The said defendant holds, as owner or lessee, considerable land on which there have been opened and are being operated coal mines, and in connection with the defendant Watson owns a railroad, and right of way therefor, beginning at a mine owned by defendant Watson, and located several thousand feet southeast of the coal company's mine, and extending in a general northwardly direction to and beyond the mine of the coal company, called "Mine No. 7," and to or near a bridge over Sulphur creek, at which point it connects with a railroad owned by the Kansas & Texas Coal Company (likewise a business corporation), and over which last-named road the cars of the railroad owned by the defendant coal company and Watson are run, under a contract therefor with the Kansas & Texas Coal Company, for a distance of about 1,300 feet, to the town of Bevier, on the line of the Hannibal & St. Joseph Railroad. In this way the output of coal from the Watson mine and the Northwestern Coal & Mining Company's mine No. 7 is transported to the line of the Hannibal & St. Joseph Railroad, and over that road to the markets of the world. The mine of the Northwestern Coal & Mining Company, called "Mine No. 7," was leased by that company to the Kansas & Texas Coal Company on the 15th of March, 1898, for a term beginning on the 1st of January, 1898, "until such time as the coal in and underlying said lands shall be entirely worked, and in the manner" provided in the lease, unless the lease is sooner terminated, as therein provided. The lease provided that the lessor was to receive a royalty of 5½ cents per ton of 2,000 pounds, and that the lessee should so operate the mine as that the royalty should exceed or equal the sum of \$550 a month, and the lessee should also pay such royalty of 5½ cents per ton on all coal mined in excess of 120,000 tons a year. The lessor reserved the right to cancel the lease on the 1st of April, 1901, or on the 1st of April of any subsequent year, by giving six months' notice of intention so to do. Under the terms of this lease, the Kansas & Texas Coal Company is, and at all the times since the date of the lease has been, operating mine No. 7, and the average daily output of the mine is 700 tons, while that from the Watson mine is from 500 to 600 tons, daily. The railroad of the Kansas & Texas Coal Company, over which the cars of the defendant run from Sulphur creek to Bevier, extends southwestwardly from the intersection of those roads to Mine No. 43, which mine is also operated by the Kansas & Texas Coal Company.

This was the condition of affairs on the 16th of April, 1889, when the Kansas & Texas Coal Railway instituted this proceeding, under the provisions of article 6, c. 42, Rev. St. 1889, for the purpose of condemning a right of way over five pieces of real estate, three of which pieces lie immediately east of the main line of the railroad of the Northwestern Coal & Mining Company, and such strips commence 7 feet east of the center line of the main or most eastward track of the Northwestern Coal Company's railroad, and extend from Sulphur creek for a distance of some 3,700 feet, to a point 1,700 feet south of mine No. 7, where it is proposed to cross the railroad of the Northwestern Coal Company. In other words, the purpose of this suit is to condemn a right of way for the plaintiff railroad beginning at Sulphur creek, and paralleling the most easterly track of the Northwestern Coal Company's railroad for a distance of 3,700 feet, and there crossing the defendant's track, so as to proceed to the town of Ardmore. The western line of the right of way sought to be acquired by the plaintiff is 7 feet from the center of the defendant's main or most easterly track, and the center of the plaintiff's track is 14 feet from the center of the defendant's main track.

The plaintiff's petition is in the usual and proper form. The answer of the defendant the Northwestern Coal & Mining Company is a general denial and special defenses. The special defenses are: (1) That the plaintiff has not the right to condemn land. (2) That the St. Louis Trust Company is a necessary party defendant, because it is the holder of bonds issued by the Kansas & Texas Coal Company. (3) That the plaintiff is not a public railroad corporation, and has no intention to build a railroad for public use, but that the plaintiff corporation has been promoted and organized by, and is owned and belongs to, the defendant the Kansas & Texas Coal Company; that said coal company and said railway have the same officers, and largely, if not entirely, the same stockholders; that the Kansas & Texas Coal Company owns and controls a large number of mines and coal lands in Macon county near Bevier and Ardmore, and between those two places, and has furnished the plaintiff company about \$70,000 to build the road, and holds a mortgage therefor on the plaintiff company's property; that the plaintiff railroad is organized solely in the interest and for the benefit of the Kansas & Texas Coal Company; and avers that it would be a fraud to take the defendant's property for the purpose of a right of way for the plaintiff railway. (4) That the defendant coal company is engaged in the mining business near Bevier, and owns the land the plaintiff railway proposes to condemn, and, in connection with defendant Watson, it has built and owns and operates a railroad to carry its coal to the Hannibal & St. Joseph Railroad for ship-

ment to the markets; that it has only a right of way of 40 feet, and that all of it is necessary for the proper operation of its mines and railroad; that plaintiff's proposed right of way is within 7 feet of the center line of defendant's railroad, and, if plaintiff is allowed to condemn the right of way so described, it will largely, if not wholly, destroy the defendant's business, and that the plaintiff ought not to be allowed, under the guise of building a railroad, to destroy the business of the defendant for the benefit of its rival in business, the Kansas & Texas Coal Company. (5) That the construction of the plaintiff's road as contemplated would also ruin Watson's business, and would force him and the defendant coal company to use the plaintiff's road, and put them at the plaintiff's mercy as to charges and railroad rates. (6) That there is no necessity for the plaintiff to condemn this land, because it owns a right of way 100 feet wide adjoining the defendant's right of way on the east, and the plaintiff could and should be compelled to build the road on the land it already owns. (7) That it is inequitable, unjust, and contrary to law and good conscience to allow the plaintiff to condemn this land, since it is not for a public purpose, but for the benefit of the Kansas & Texas Coal Company, and that "its business would be greatly injured, not to say ruined, by allowing plaintiff to build and construct the railroad upon the line marked out." The answer asks that the petition be dismissed, that the court refuse to appoint commissioners to assess damages, and that the plaintiff be enjoined from condemning, or attempting to condemn, a right of way along the specified line, or from building a railroad thereon.

The trial court heard evidence upon the issues so raised by the answer, and decided that the plaintiff had a right to condemn land, as the purpose was a public use, but that the condemnation and use by the plaintiff railroad of the three tracts of land owned by the defendant coal company would materially interfere with the uses which the defendant coal company is authorized by law to subject such lands to, and therefore the plaintiff could not condemn this land under section 2741, Rev. St. 1889, and hence the court refused to appoint commissioners to assess the damages, and entered a final judgment for the defendants. After proper steps, the plaintiff brought the case to this court by writ of error.

Adiel Sherwood, for plaintiff in error. Ben Eli Guthrie and Dysart & Mitchell, for defendants in error.

MARSHALL, J. (after stating the facts). 1. The plaintiff is a regularly organized and chartered railroad company under the laws of this state, and therefore it has power of eminent domain to condemn land for a right of way not exceeding 100 feet wide.

This is conceded by defendants as a general proposition in this case, and it is further conceded by the defendants that a railroad charter regular on its face cannot be attacked or questioned collaterally or in any manner except by quo warranto. But it is contended by the defendants—First, that the plaintiff is a private, and not a public, railroad, and therefore it has no power of eminent domain; and, second, that the use to which the land is here attempted to be condemned and appropriated and applied is a private, and not a public, use. In support of the first contention, it is claimed that the plaintiff is a mere tool or creature of the Kansas & Texas Coal Company; that the officers and directors of the two are the same, and the stockholders substantially the same; that the coal company furnished \$70,000 to the plaintiff to build its railroad, and holds a mortgage on its property for that amount, and that the coal company owns large coal mines and large tracts of coal lands in Macon county, near Bevier and Ardmore, and between those places; and that the plaintiff is organized solely for the purpose of benefiting the coal company, and hence the plaintiff is a private, and not a public, railroad. And, in support of the second contention, it is claimed that, the first contention being true, the use to which the land is to be applied is a private, and not a public, use.

If, as it is conceded, the plaintiff is a regularly organized railroad company, and its charter and rights cannot be questioned except by quo warranto, it is difficult to understand how the courts in a proceeding of this character can hear evidence as to whether the officers, directors, or stockholders of the plaintiff company are the same as those of the Kansas & Texas Coal Company, or whether the coal company loaned the plaintiff company \$70,000 or any other sum; for, if all this be conceded, it would avail nothing in this case, unless the rights inherent to, and expressly granted to, a railroad company could be inquired into and taken away from such a company in a collateral proceeding. *National Docks Ry. Co. v. Central R. Co.*, 32 N. J. Eq., loc. cit. 755-760. But, aside from this, the contention is untenable. There is nothing in the letter or spirit or policy of the law which prohibits the same persons from forming and conducting two or more different corporations, one a business, and the other a railroad, company. Neither is there any prohibition in the law against a railroad company borrowing money, on bonds secured by mortgage on its property, to build and operate its road, from a business corporation, rather than from a bank, a trust company, or an individual.

The second contention is equally untenable. The charter of the plaintiff and the laws of this state expressly require the plaintiff to transport persons and freight, and the plaintiff can be compelled by mandamus

to do so if it refuses. The fact that almost the entire volume of business now in sight for the plaintiff to do will be the transportation of coal produced by the Kansas & Texas Coal Company does not destroy the character of the plaintiff as a railroad company, nor convert it into a private, and not a public, railroad, nor does it make the use to which the land sought to be condemned is to be applied any the less a railroad right of way, and therefore a public use. So long as the company holds its charter, it speaks in the name of the state when it comes into court and asks to condemn land for a railroad right of way, and it would be intolerable that, whenever it seeks to exercise the extraordinary power by this summary process, the courts should stop to inquire into the charter or regularity or legality of its organization, or into the motives of the incorporators, or their relations to, or holdings in, other corporations of a different character. The law is settled in this and other states that the use of land for railroad tracks is a public use. *St. Louis, H. & K. C. Ry. Co. v. Hannibal Union Depot Co.*, 125 Mo. 82, 28 S. W. 483; *Dietrich v. Murdock*, 42 Mo. 279; *Railway Co. v. McGrew*, 104 Mo. 282, 15 S. W. 931; *Railroad Co. v. Moss*, 23 Cal., loc. cit. 328; *Colorado E. Ry. Co. v. Union Pac. Ry. Co.* (C. C.) 41 Fed. 293; *De Camp v. Railroad Co.*, 47 N. J. Law, 44; *Railway Co. v. Petty* (Ark.) 21 S. W. 884; *Arkansas & O. R. Co. v. St. Louis & S. F. R. Co.* (C. C.) 103 Fed. 747.

So that while it is true that the constitution (section 20, art. 2) provides "that, whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and as such judicially determined, without regard to any legislative assertion that the use is public," it is also true that it has been judicially determined that the use of land for a railroad right of way is a public use, and not a mere private use. There can be no doubt that if the Wabash Railroad was asking to condemn this land, to extend its branch that now runs from Excello to Ardmore so as to reach these coal mines, or if the Hannibal & St. Joseph Railroad was seeking to condemn a right of way for a branch from Bevier to these coal fields, it would be a condemnation of land for a public use; and, if either of these existing roads did this, they would serve the same public purpose, get the same business, and act under, and be subject to, the same laws, as the plaintiff is seeking to do. There is no difference, in right or in principle, whether it be done by either of these great railroad systems as a mere branch thereof, or whether it be done by the plaintiff, whose road and leased line is only about a dozen miles in length. The length of the road does not determine the right, or the nature or character, of the use of the land. Many

roads of less mileage than the plaintiff's serve most useful public purposes, are almost indispensable to commerce, and are veritable gold mines to their owners. The output from mine No. 7, leased by the defendant coal company to the Kansas & Texas Coal Company, averages 700 tons a day. This alone is quite a considerable business, and, if the plaintiff company serves no other purpose than to help to get that much coal to the markets every day, it will serve a most useful public purpose, even if it gets no other business; and, as herein pointed out, it can be compelled to carry other freights and passengers.

This case is not without precedent in the law, and all of the defenses that are made here have been made and held insufficient in other cases. A reference to a few will suffice: *Dietrich v. Murdock*, 42 Mo. 279; *Railroad Co. v. Moss*, 23 Cal. 323; *Colorado E. Ry. Co. v. Union Pac. Ry. Co.* (C. C.) 41 Fed. 293; *New Central Coal Co. v. George's Creek Coal & Iron Co.*, 37 Md. 537; *Powers v. Railway Co.*, 33 Ohio St. 429; *Butte, A. & P. Ry. Co. v. Montana Union Ry. Co.* (Mont.) 41 Pac. 232, 31 L. R. A. 298; *National Docks Ry. Co. v. Central R. Co.*, 32 N. J. Eq. 755; *De Camp v. Railroad Co.*, 47 N. J. Law, 44; *Mining Co. v. Seawell*, 11 Nev. 394; *Mining Co. v. Corcoran*, 15 Nev. 147; *Boyd v. Negley*, 40 Pa. 377; *Phillips v. Watson*, 63 Iowa, 28, 18 N. W. 659.

The cases of *Dietrich v. Murdock*, 42 Mo. 279; *Railroad Co. v. Moss*, 23 Cal. 323; *Colorado E. Ry. Co. v. Union Pac. Ry. Co.* (C. C.) 41 Fed. 293; *New Central Coal Co. v. George's Creek Coal & Iron Co.*, 37 Md. 537; *Powers v. Railway Co.*, 33 Ohio St. 429; *Butte, A. & P. Ry. Co. v. Montana Union Ry. Co.* (Mont.) 41 Pac. 232, 31 L. R. A. 298; *De Camp v. Railroad Co.*, 47 N. J. Law, 44; *Mining Co. v. Seawell*, 11 Nev. 394; *Mining Co. v. Corcoran*, 15 Nev. 147; *Boyd v. Negley*, 40 Pa. 377; and *Phillips v. Watson*, 63 Iowa, 28, 18 N. W. 659,—are in all essential particulars similar to the case at bar. They were cases where an existing railroad was endeavoring to condemn a right of way for a railroad that would reach coal or mineral mines, and transport the products thereof to the markets, or where a new railroad company, organized practically for that purpose, was seeking to do the same thing. In *Dietrich v. Murdock*, 42 Mo. 279; *Railroad Co. v. Moss*, 23 Cal. 323; *Colorado E. Ry. Co. v. Union Pac. Ry. Co.* (C. C.) 41 Fed. 293; *New Central Coal Co. v. George's Creek Coal & Iron Co.*, 37 Md. 537; and *Powers v. Railway Co.*, 33 Ohio St. 429,—the same persons owned the coal mines, and the railroad was organized principally to transport the products of the coal mines to the market, and precisely the same objections and defenses were made in those cases as are made in this case; yet in each instance the right of eminent domain was sustained, and the use declared to be a public use. These precedents are in entire

consonance with reason, principle, and the spirit, letter, and policy of the law, and abundantly support the ruling of the trial court in this regard.

Of course, if a railroad company should undertake to condemn land for a purpose that was not within the scope of the powers and purposes legally allowed to railroads, such a proceeding would not only be ultra vires, but would be a taking of land for a private use. But the condemnation of land, for the purpose of constructing and operating thereon a railroad, in its very nature and essence, cannot be the taking of land for any other than a public use. Section 14, art. 12, of our constitution declares: "Railroads heretofore constructed or that may hereafter be constructed in this state, are hereby declared public highways, and railroad companies common carriers. The general assembly shall pass laws to correct abuses and prevent unjust discrimination and extortion in the rates of freight and passenger tariffs on the different railroads of the state, and shall from time to time pass laws establishing reasonable maximum rates of charges for the transportation of passengers and freight on said railroads and enforce all such laws by adequate penalties." And the general assembly has passed such laws (section 1126 et seq., art. 2, c. 12, Rev. St. 1899), and provided for punishing any railroad that refuses to receive freight or passengers (section 1122, Id.); and has required the railroad commissioners to see to the enforcement of the law (section 1145 et seq., Id.); and has expressly prescribed that mandamus shall lie to enforce the rights so secured, and in addition imposes a fine for a violation of the law (section 1154, Id.).

If the constitution is to be respected, it follows, as surely as the shadow does the sun, that land condemned by a railroad can only be used for a public purpose,—is a public highway,—and therefore cannot be used for private purposes. The land so appropriated and used is as much a public highway as a street in a city, so far as the use is concerned, and can no more be employed or used for private uses than a street can be. This is the purpose, and this the use, for which the land is sought to be condemned. The right must exist unless it be true that the length of the road, or the volume of business likely to be done, at once limits or qualifies or takes away the right or changes the character of the use. Such a contention manifestly disproves itself. But authority is not wanting to show that the courts have always refused to put any such construction upon such provisions in a constitution or in the laws. *Talbot v. Hudson*, 16 Gray, 417; *Colorado E. Ry. Co. v. Union Pac. Ry. Co.*, supra; *Railroad Co. v. Moss*, supra; *De Camp v. Railroad Co.*, supra; *Gaslight Co. v. Richardson*, 63 Barb., loc. cit. 448; *Fanning v. Gilliland* (Or.) 61 Pac. 636; *Hartwell v. Armstrong*, 19 Barb. 166; *Aldridge v. Railroad*

Co., 2 Stew. & P. 109; Gilmer v. Lime Point, 18 Cal. 229; Coester v. Water Co., 18 N. J. Eq. 54; O'Relley v. Draining Co., 32 Ind. 169; Riche v. Water Co., 22 Alb. Law J. 498; Phillips v. Watson, 63 Iowa, 28, 18 N. W. 659; National Docks Ry. Co. v. Central R. Co., 32 N. J. Eq. 755; Railroad Co. v. Porter, 43 Minn. 527, 46 N. W. 75; Ross v. Davis, 97 Ind. 79; Irrigation Co. v. Mehrrens, 97 Cal. 676, 32 Pac. 802; Waterworks Co. v. Bird, 130 N. Y. 249, 29 N. E. 246. These cases decide that the principle is the same whether all the people of the state, or only all the people of the same locality, have a right to demand and receive service from the corporation,—then the use or purpose is public, and not private. In Dietrich v. Murdock, 42 Mo., loc. cit. 283, this court settled the law on this subject in this state in the following concise and clear annunciation: "The legislature, in the exercise of its discretion in delegating to this company the right of eminent domain, evidently proceeded upon the idea that the public interest was to some extent, at least, to be subserved by its creation. What the precise degree of its usefulness to the public might be is not, in our view of the case, necessary to be determined. We think the courts of the country ought not to interfere with the exercise of this discretion, except in those cases where it is manifest that private interests alone are to be promoted, and private rights violated, to the extent of taking the property of one individual and transferring it to another. The sixth section of the act (Acts 1846-47, p. 153), under which this company claimed its corporate existence, declares that 'said company shall have the exclusive power to acquire, own, and employ steam power, or animal power, locomotives, cars, and carriages necessary for the transportation of passengers, coal, and every description of personal property on said road for themselves and other persons.' Whether the private interests of this company were such as to require the construction of this road, or constituted the main reason for the act of incorporation, with the power conferred by it, is not material. It is enough that, by the terms of the law, it is made a public corporation for the use and benefit of that particular section of the state. The public had a right to demand that the means of transportation, both for passengers and freight, commensurate with its wants, should be provided by the company. Any failure of its duty to the public in this particular, and to transport passengers and freight when offered for that purpose, would have subjected the company to an action for damages. It must be assumed, then, that the grant of authority to the company to condemn the land necessary for a roadbed was a rightful exercise of legislative discretion." To my mind, the principle is axiomatic,—a truism,—and needs no precedent to prove or support it. It is absolutely incomprehensible to my mind to contend for

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such a construction in the face of the constitution and laws of this state. If the plaintiff condemns this land, the constitution at once imposes it with a public use. The plaintiff cannot use it for any other purpose. It must serve all people alike, or it can be compelled by mandamus to do so, and forced if it refuses. The fact that all the people of the state do not need it does not change its character or the use it can legally put the land to. No railroad serves all the people. It can only serve the public living along its line, or desiring to travel over it, and if it does this its rights and powers and duties are the same, under the constitution and laws of this state, whether it is only 10 miles long or is a monster railroad girding the state from one end to another.

2. The defendants contend, however, that there is no necessity for this railroad or this proceeding, because the Kansas & Texas Coal Company has an ample remedy, under section 1119, Rev. St. 1899; that is, that section provides that when any person owns a coal, lead, iron, or zinc mine, located near or within a reasonable distance of any railroad track, and the railroad commissioners are of opinion that the amount of business is sufficient to justify it, such owner may, at his own expense, build and keep in repair a switch leading from the railroad to such mine, and the railroad company is required to furnish the switch stand and frog and other necessary material for making connection with its track, and to make such connection, the mine owner to pay the actual cost thereof. It is apparent, however, that this could only be done where the mine owner owns the ground or right of way over which the switch is to run. If he does not own it, he is, of course, not in a position to construct a private switch; for he has no power to condemn a right of way, and cannot demand that the railroad company shall exercise its power of eminent domain to acquire such a right of way. This thought evidently came to defendants' counsel when making this claim, for they follow it up by calling attention to sections 9559, 9560, Rev. St. 1899, as affording another remedy. That is, those sections provide that, if any person owns land lying within 20 miles of a railroad, and has no access to such railroad by any public road running from such lands to such railroad, "convenient for mining, agricultural, or commercial purposes," such owner may petition the county court for the establishment of a private road, and the court shall appoint commissioners to assess the damages to the owners of the lands through which such private road will pass, and the proceedings shall be the same as provided for the establishment of a private road (section 9459, Rev. St. 1899 et seq., the petitioner to pay the damages), but such owner may construct and use on such private road a tramway for the purpose of hauling and carrying coal and other products to such railroad, and such road shall

not be less than 20 nor more than 40 feet wide. In other words, the contention amounts to this: That the Texas & Kansas Coal Company, a business corporation, without the power of eminent domain, may in this way have the county court condemn a private road, not less than 20 nor more than 40 feet wide, and that company may construct thereon a tramway for hauling its coal to the railroad, and in this way other persons' land, or even defendant's land, may be condemned for a use which it is claimed is a private, and not a public, use, but the plaintiff railroad cannot condemn this land. Even if all this be true, it is no defense to this action. Neither of the remedies afforded by these provisions of the statutes is exclusive, nor do they supersede or take away the right of eminent domain possessed by the plaintiff. It may also be doubted if the last-named remedies would be adequate even for the transportation of the volume of coal now being produced. Seven hundred tons of coal a day may possibly be moved over such a tramway along a private road, but it would be rather an obsolete method of hauling that much freight every day in the year, and might have a tendency to increase the price of coal to the consumers. A wagon train of sufficient number might haul 700 tons of coal a day, but it would scarcely be deemed an up-to-date method of transporting that much freight. A tramway is better than a wagon train, but is as much inferior to a railroad train as it is superior to a wagon train for such purposes.

3. The defendant further claims that there is no necessity for locating the plaintiff's railroad at the proposed place, and that it could just as easily be located somewhere else (as, for instance, on the 100-foot strip to the east of this property, which is owned by the Kansas & Texas Coal Company), where it would not interfere with the defendant's road or its business. The answer to this is obvious: The railroad company has the right of eminent domain. It is given the privilege by the legislature to select the location it prefers, upon paying therefor, and therefore the courts have no right to deny the exercise of the power vested in the company either absolutely, or because the court may think some other location is as good or better. In speaking on this subject, Lewis, Em. Dom. § 286, says: "This is a matter which rests wholly with the legislature. The legislature may designate particular property to be taken, or this may be left to the discretion of those upon whom the authority is conferred, with or without limitations. In the absence of any statutory provision, the particular route to be followed between designated points, in case of a railroad or similar way, rests in the discretion of the company." This question, however, was set at rest in this state in the case of *St. Louis, H. & K. C. Ry. Co. v. Hannibal Union Depot Co.*, 125 Mo., loc. cit. 93, 94, 28 S. W. 486, where Macfarlane, J.,

said: "But it is said that there is no such necessity for the appropriation of a part of defendant's property as justifies the exercise of the power of eminent domain. The use of land for railroad tracks has ever been regarded as a public use. Counsel does not question this proposition, but insists that defendant's property ought to be exempt if plaintiff has other routes over the lands of other proprietors which could be used in reaching the terminus of the road. In other words, that defendant's property, being already devoted to one public use, cannot be taken unless the necessity is so absolute that without it the grant itself will be defeated; that the necessity must be beyond plaintiff's control, and not one created by itself for its own convenience, or for the sake of economy. It is undoubtedly true that 'the right of eminent domain rests upon necessity, and that alone. Beyond this there is no right.' *Pennsylvania R. Co.'s Appeal*, 93 Pa. 150. But it is also true that the sovereignty must be the judge of the necessity of taking the property, and the legislature has delegated to railroad corporations the right to exercise the power, and the courts of this state have always held the use of land by a railroad to be for a public use. The sovereignty has lodged with railroad companies the power of selecting and adopting their own routes, subject only to such limitations as have been imposed. Whenever the use of private property on the line adopted is necessary, the necessity exists. There is no distinction in this respect between private and corporate property, except when the exercise of the power as to the latter should 'materially interfere with the uses to which, by law, the corporation holding the same is authorized' to apply it." The defendant is in error in saying the plaintiff owns a right of way 100 feet wide lying just east of the land sought to be condemned. The plaintiff does not own any such land. The Kansas & Texas Coal Company owns a strip of land 100 feet wide, which lies east of the defendant coal company's land, and by refusing to recognize the separate identities of the plaintiff and the Kansas & Texas Coal Company, and treating the latter as the owner of the plaintiff, the defendants base their claim that the plaintiff owns the 100-foot strip. This contention is without legal foundation. The Kansas & Texas Coal Company would have the same right to object to the condemnation of its land that the defendants have to object to the condemnation of their land. If the contention were well founded, the result would be that the plaintiff could not condemn any land; for every other landowner would likewise have the same right to object to his land being condemned. Yet in *McGrew's Case* the right of condemnation was held to exist, and *McGrew's* land was taken, notwithstanding it was used as a coal mine.

4. The defendants next insist, and the trial court decided, that this plaintiff cannot

condemn this land because the use of the land by the plaintiff for a railroad track would materially interfere with the use of the land to which by law the defendant coal company is authorized to put the line. This contention and decision is based upon a construction put upon section 2741, Rev. St. 1889 (section 1272, Rev. St. 1890). That section is as follows: "In case the lands sought to be appropriated are held by any corporation, the right to appropriate the same by a railroad, telephone or telegraph company shall be limited to such use as shall not materially interfere with the uses to which, by law, the corporation holding the same is authorized to put said lines," etc. The plaintiff contends—First, that this statute only applies to any corporation that possesses the power of eminent domain, and has already applied the land to a public use, and that it does not apply to land owned by a business corporation, organized for private gain, and that performs no public function, and renders no public service, and that the defendant coal company is not within this class. And, second, that, if this is not so, then the section is void, because in conflict with section 4, art. 12, of the constitution, which provides that "the exercise of the power and right of eminent domain shall never be so construed or abridged as to prevent the taking, by the general assembly, of property and franchises of incorporated companies already organized, or that may be hereafter organized, and subjecting them to the public use, the same as that of individuals. The right of trial by jury shall be held inviolate in all trials of claims for compensation, when in the exercise of said right of eminent domain, any incorporated company shall be interested either for or against the exercise of said right." And, third, that the proposed use of the land by the plaintiff company will not materially interfere with the use thereof by the defendant coal company. Section 2741, Rev. St. 1889, first appeared in the statutes of this state as section 8, c. 66, Gen. St. 1865, and has been continued in the revisions in the same words ever since, except that the word "telephone" has been inserted between the words "railroad" and "telegraph." This section 2741, Rev. St. 1889, follows section 2740, *Id.*, which provides: "No telephone or telegraph company shall, by virtue of this article, be authorized to enter or appropriate any dwelling, barn, store, warehouse or similar building, erected for any agricultural, commercial or manufacturing purposes, or to erect poles so near thereto as materially to inconvenience the owner in their use or to occasion any injury thereto;" and this section was section 7, art. 66, Gen. St. 1865, except that the word "telephone" has been added. It has been decided in this and other jurisdictions, and as the accepted law, that the fact that land sought to be condemned for a public use is held, owned, and used by a corporation or-

ganized for private gain is no defense to the right of condemnation. *Twelfth St. Market Co. v. Philadelphia & R. T. R. Co.*, 142 Pa. 580, 21 Atl. 902, 989; *Lewis, Em. Dom.* § 274, and cases cited. The same principle is declared, even where the property sought to be condemned is held and used by a corporation possessing the power of eminent domain, and is using the same for a public purpose. *St. Louis, H. & K. Ry. Co. v. Hannibal Union Depot Co.*, 125 Mo. 82, 28 S. W. 483; *Kansas City v. Marsh Oil Co.*, 140 Mo. 458, 41 S. W. 943; *Kansas City S. B. R. Co. v. Kansas City, St. L. & C. R. Co.*, 118 Mo. 509, 24 S. W. 478; *Lewis, Em. Dom.* § 274, and cases cited. The only qualification to this rule is that such property cannot be taken from one corporation by another corporation, to be used for the same purpose, in the same manner that it was used by the corporation that first appropriated it to such use and purpose. *Id.* § 276. In other words, every corporation holds property subject to the right of the state to take it for another public use, whenever, in the discretion of the legislature, the exigencies require its use for such other purpose; and this is true, even as to the franchise itself, of any corporation. *Twelfth St. Market Co. v. Philadelphia & R. T. R. Co.*, 142 Pa., loc. cit. 580, 21 Atl. 902, 989; *In re Sunderland Bridge*, 122 Mass. 459; *In re Opinion of Justices*, 66 N. H. 629, 33 Atl. 1076; *New York Cent. & N. H. R. Co. v. Metropolitan Gaslight Co.*, 63 N. Y. 326; *In re Bellona Co.*, 3 Bland, 412; *Enfield Toll-Bridge Co. v. Hartford & N. H. R. Co.*, 17 Conn. 40; *Boston & L. R. Corp. v. Salem & L. Ry. Co.*, 2 Gray, 1. This is what is meant by section 4, art. 12, of the constitution, which declares that the exercise of the power and right of eminent domain shall never be so construed or abridged as to prevent the taking by the general assembly of the property and franchises of any incorporated company, already or hereafter organized, and subjecting them to public use, the same as that of individuals. In *Railway Co. v. McGrew*, 104 Mo. 282, 15 S. W. 931, it was held that the property of an individual coal miner might be taken for railroad purposes. In *Railway Co. v. Wolf*, 137 Ill., loc. cit. 365, 27 N. E. 78, the property of a coal mining company was held subject to condemnation for railroad purposes, notwithstanding the construction of the railroad would destroy a tramway that extended from the shaft of the mine to the tracks of another railroad. In *St. Louis, H. & K. Ry. Co. v. Hannibal Union Depot Co.*, 125 Mo., loc. cit. 82, 28 S. W. 483, the property of a corporation used for a union depot was held subject to condemnation for railroad purposes. In the *Twelfth St. Market Case*, 142 Pa. 542, 21 Atl. 902, 989, the property of a corporation used as a public market was held subject to condemnation for railroad purposes.

In the light of this constitutional provision, and of these adjudications in this, and

even in other, states, that have no such constitutional reservation, it cannot be said that the legislature intended by section 2741 to say, or had the constitutional right to say, that property held by any corporation, public or private, possessing or not possessing the power of eminent domain, should not be subject to condemnation for another or superior public use. That section is a simple legislative declaration that the use of the land for railroad purposes is not a superior use to the use of the land by the company that owns it, and has already devoted it to one use authorized by law. It goes without saying that one railroad company could not condemn the right of way of another railroad company, and use it for the same purpose as the first company was using it. But the state has the power to condemn and take away, not only the right of way of a railroad company, but also its franchises.

Applying these principles to the case at bar, we find that the defendant company's charter does not authorize it to hold or use land for railroad purposes, but that it is only authorized to buy, sell, and operate coal lands and coal mines, to buy and sell merchandise, and to own and operate electric light and power plants, and to sell electric light and power. The power to build and operate a railroad is not expressly conferred, nor is it necessarily implied in the powers conferred. So, while the defendant coal company can own and use lands for mining coal, that is the full extent of the use which its charter gives it to make of this land. And if it be true, as was decided in *Railway Co. v. McGrew*, 104 Mo. 282, 15 S. W. 931, that the property of an individual miner, used for mining coal, can be condemned for railroad purposes, then it follows that, under section 4, art. 12, of the constitution, the property of any incorporated company used for the purpose of mining coal is likewise subject to condemnation, and this and all courts are expressly prohibited by that section of the constitution from construing the property of an incorporated company exempt from condemnation when the property is held by an individual would be subject to condemnation. The legislature, therefore, has not said by section 2741 that property held as this property is held shall be exempt from condemnation, and if the legislature had said so it would be an unconstitutional act, because it did not make property held and used in like manner by an individual also exempt from condemnation. It is within the province of the legislature to exempt any kind of property from the power of eminent domain delegated by the state to a corporation, and section 2740 does exempt dwelling houses, etc., from being taken or used by telegraph or telephone companies; but, under the constitution, it is beyond the power of the legislature to exempt any class of property from condemnation if it is owned by any kind of an

incorporated company, and to make it subject to condemnation if it is owned by an individual.

5. The circuit court, however, assumed that section 2741 was a valid enactment, and held that the condemnation of this land by the plaintiff for railroad purposes would materially interfere with the use to which the defendant was authorized by law to apply it. It has already been pointed out that the defendant coal company has no power under its charter to construct, operate, or maintain a railroad, and hence it is not authorized to use any part of the land for railroad purposes. But, aside from this, the facts are simply these: The center of the defendant's track will be 14 feet from the center of the plaintiff's track. The defendant's testimony shows that tracks 13 feet from center to center is a safe construction. The evidence further shows that the New York Central and Pennsylvania roads have parallel tracks, whose centers are only 12 feet and 12 feet and 2 inches apart. Assuming that the cars are 9 feet in width, a car on one road would extend $4\frac{1}{2}$ feet towards the cars on the other road, so the two would occupy 9 feet of the 14 feet space between the centers of the two tracks. This would leave a space of 5 feet between passing cars. It needs nothing but common sense to determine that, as cars must run on fixed rails, there can be no danger in running cars on separate tracks when they cannot get closer than 5 feet to each other. It is too plain to admit of debate that the plaintiff's railroad, so constructed, could not interfere in any manner with the operation of the defendant's railroad. The plaintiff's railroad could not interfere with the operation of the mine, for the shaft to the mine (which is operated by the Kansas & Texas Coal Company, and not by the defendant coal company) is from 56 to 72 feet west of the west line of the strip sought to be condemned, and where the plaintiff's railroad will run. The switch or loading tracks used by the defendant company are located on this strip of 56 to 72 feet of land, and are all between the main track of the defendant company and the shaft to the mine. So that it cannot be said that the construction of the plaintiff's road will in any manner whatever interfere with the operation of the mine, or the use to which the defendant has applied or is authorized to apply the land. But, even if it did so interfere, the *McGrew* Case, *supra*, is ample authority for holding that the land is not exempt from condemnation for railroad purposes. The defendants evidently realize that this is true, for they seek to strengthen their case by showing that they contemplate opening a new mine south of the Watson mine, and have already surveyed and located a track to such new mine, which will leave the track running to Mine No. 7, and run to the Watson mine, and that it will need the land here

sought to be condemned to use for such new track. Courts must deal in cases like this with the conditions that exist at the time the condemnation is asked, and cannot take into account conditions that may or may not arise or be created thereafter. *Butte, A. & P. Ry. Co. v. Montana Union Ry. Co.*, 18 Mont. 504, 41 Pac. 232, 31 L. R. A. 298; *Colorado E. Ry. Co. v. Union Pac. Ry. Co.* (C. C.) 41 Fed. 293. It furthermore appears from the record herein that the defendant company on the 21st of February, 1899, proposed to the plaintiff company to accept \$3,000 for the right of way here sought to be condemned, with an agreement as to crossings and protection to defendant's road where the grade of the plaintiff's road is below that of defendant's road. The plaintiff offered \$300, and refused to pay \$3,000. Manifestly, it cannot be true that the location and operation of the plaintiff's railroad upon this land would materially interfere with the present or future use of the land for mining purposes, or with the operation of the defendant's railroad, much less that it would practically destroy defendant's business and road, if the defendant was willing to sell this identical land to the plaintiff for a railroad right of way for \$3,000. The real dispute between the plaintiff and defendant, therefore, is the difference between \$3,000, the price the defendant offers to take, and \$300, the price the plaintiff offers to give, for the property in question to be used for a railroad right of way. It follows from what has been said that the circuit court erred in refusing to appoint commissioners to assess the damages for the taking of the land for railroad purposes, and in entering judgment for the defendants, and therefore the judgment of the circuit court is reversed, and the cause remanded, with directions to appoint such commissioners, and to proceed in accordance herewith.

SHERWOOD, ROBINSON, and BRACE, JJ., concur. BURGESS, C. J., and VALLIANT and GANTT, JJ., dissent.

VALLIANT, J. (dissenting). The principle of law involved in this suit is so important, and the consequences that may result from the establishment of the doctrine contended for by the plaintiff are so serious, that I feel constrained to, at least briefly, express the reasons why I am unable to concur in the opinion of the majority of the court. The evidence in the record showed to the satisfaction of the trial court, and it shows to my satisfaction, that this is a controversy between two rival coal companies, wherein one, having assumed for the purpose the legal garb of a railroad corporation, is endeavoring to shut its rival out from the market and reduce it to a dependency. The Kansas & Texas Coal Company and the Northwestern Coal & Mining Company are both owners and operators of coal mines in the same vi-

cinity, and rivals in business. Each company owns railroad tracks which it uses for the sole purpose of carrying the products of its own mines to a convenient point on the nearest public railroad. The defendant company is incorporated under the general statute relating to business and manufacturing corporations, and the Kansas & Texas Coal Company is a corporation of like character. But the stockholders and officers of the latter company have availed themselves of the provisions of the general statute in relation to railroads, and have taken out a charter under that statute also, under the name of the Kansas & Texas Coal Railway, and that corporation holds title to the railroad tracks in the service of the Kansas & Texas Coal Company, and is the plaintiff in this case. The identification of the two corporations in actual unity of interest and personnel of the incorporation is shown beyond question. That the so-called "railroad corporation" is but the agent of the coal company of that name, with no business, past, present, or in contemplation, but that of carrying the coal company's product to the nearest railroad, is also beyond question. Now, the Kansas & Texas Coal Company proposes in this proceeding, in the name and in the garb of its alter ego, the Kansas & Texas Coal Railway, to condemn a right of way over the property of the defendant coal company for the construction of other railroad tracks, which are in fact designed for the exclusive use of the Kansas & Texas Coal Company. The defendant by its answer says, and by its proof shows, that this is in fact but the taking of private property for a private use; that, if the plaintiff is permitted to do as it proposes, it will shut the defendant out from market, and ruin its business; that it is an abuse, not a use, of the power of eminent domain. But the court is asked to say, in reply: "That question of fact we cannot look into. The plaintiff comes with a charter in due form, which denominates it a railroad corporation. No one but the state can question its right to exercise all the prerogatives of a railroad corporation, and, if it condemns land for its use, no one can question that that is a public use. Its charter is conclusive on that point, and, if the effect is to shut you out from market except upon such terms as your rival may see fit to prescribe, still the court cannot look beyond the charter for the real truth." The defendant shows by its answer and evidence that the plaintiff's demand is for but a wanton destruction of defendant's business; that the plaintiff already has a right of way just as available as that sought to be condemned. But we are told that our answer to the defendant must be: "We cannot dictate to a railroad corporation where it will locate its lines, nor can we question its motives. The defendant, being only a mining corporation, has no power to condemn. Therefore, if its rival in this proceeding is permitted to lay its tracks as it may, and as

It is apprehended it will, the defendant cannot cross the tracks with its railroad, and is shut in." The evidence shows that if the plaintiff lays and operates its tracks so close to those of the defendant, while there may yet be room for trains to pass, still the appliances required for conveniently and economically handling its business cannot be used, and even the lives of its employees will be endangered. But the answer to all this is that the charter is conclusive, and the courts are not only powerless to grant any relief, but must even suffer themselves to be used to effect the gross wrong and abuse. If that is the law, we are in a bad way. If courts are so incrustated in form that they are not only powerless to do right, but must even yield themselves as instruments to effect a wrong, we are far from perfection. I do not believe that that is the law. When a suitor comes into court and asks its aid, the court has a right to know in what character he comes, real or fictitious. In my opinion, therefore, when the trial judge became satisfied that the real plaintiff in this case was the Kansas & Texas Coal Company, wearing the mask of a railroad corporation, he had the authority, and it was his duty, to refuse to appoint commissioners looking to a condemnation of the defendant's property.

Even if a real railroad corporation should come into court seeking to condemn land ostensibly for railroad use, and it should be shown to the court, as clearly as the true facts were shown in this case, that the real object was to obtain a site for a summer villa for its president, the court should refuse to appoint commissioners. Property taken for the real use of a real railroad company is taken for a public use, and the courts so declare as a matter of law; but the courts have never declared that all property sought to be taken in the name of a railroad corporation is conclusively adjudged to be sought for a public use, and that no inquiry into the truth can be had. It is argued in behalf of plaintiff in error that a railroad corporation, chartered for the sole purpose of carrying to market the product of coal mines owned by the same men who own the railroad, is engaged in a public service, and may exercise the right of eminent domain, and numerous cases are cited as supporting that proposition. But that proposition does not measure up to the point the plaintiff seeks to reach in this case. If it has ever been decided that a coal company could take on itself the character of a railroad company for its own private use, and exercise the right of eminent domain for the sole purpose of closing out its rival in business, and preventing another coal mining company from bringing its product to market, and that the courts were bound to assist it in that purpose, I have not seen such decision, and, indeed, would not care to see it. There is nothing in the condemnation procedure prescribed by our statute that marks such narrow bounds for

the court as to reduce it to a mere ministerial office, without judgment or discretion; and, if there is no precedent for the court in such matter to exercise a judicial power to reach the truth and justice of the case, it is our duty to make a precedent.

It is also argued that, whatever may be the purpose of the plaintiff in seeking to condemn its right of way over defendant's land, when its road is once built it becomes a public highway, and the plaintiff can be compelled by mandamus to carry the defendant's coal on the same terms that it carries the coal of the Kansas & Texas Coal Company. True as that may be in theory, courts cannot pretend not to know that is only theory. The court should not require the defendant to submit to a wrong in the first place, with a half promise to redress his injury at some future time.

The trial court was of the opinion that the condemnation of the 40-foot strip of defendant in question, and the subjecting of it to the use of the plaintiff's purpose, would materially interfere with that use; that defendant corporation had by law the right to use it, and the condemnation was therefore forbidden by section 2802, Rev. St. 1889, now section 1350, Rev. St. 1899. That section provides that, when the property sought to be condemned is already held by a corporation, the right to condemn "shall be limited to such use as shall not materially interfere with the uses to which by law the corporation holding the same is authorized to put said property." Article 12, § 4, Const., ordains that the power of eminent domain shall not be so abridged as to prevent "the taking of property or franchises of incorporated companies, * * * and subjecting them to the public use, the same as that of individuals." But that does not mean that the property of a corporation which is already being applied to a particular public use may be taken from it by another corporation for the purpose of applying it to the same, or even to another, public use, if thereby the public use which it is already serving is to be destroyed or impaired. So this section of the statute is not repugnant to that clause of the constitution.

It is contended by plaintiff that the corporation whose property is by the statute protected to some extent from condemnation is only a corporation which has the right to exercise eminent domain, and that the property so exempted is such as is held by it either by grant or condemnation for a public use. On the other hand, it seems to be argued that it applies to all property of all corporations. I am not inclined to the extreme view of either side of that question. But I think that the statute was intended to limit the condemnation of property held by a corporation for a public use, even though the corporation was not such as is authorized to exercise the right of eminent domain, and I do not think that it was designed to affect property that is held for merely private use. We may suppose two

concerns, each conducting the same kind of business,—say a mercantile business,—side by side; the one is owned by a corporation, the other by an individual. The law could not have contemplated that the property of the individual might be taken, and that of the corporation exempt. And, on the other hand, we recognize that there are corporations whose property is being used for a public purpose; yet which have not the power to condemn, because they are not organized under the statute which confers such power. Many street-railroad companies and some other corporations are of this character. They are public carriers, and their property is in public use, but they are not organized under the general railroad statute.

Now, it is argued in this case that, although the defendant corporation owns and operates a railroad, yet, as it is not chartered as a railroad corporation, its railroad is not devoted to a public use, whereas, the plaintiff being so chartered, its use is a public use. But we have seen that the actual use, past, present, and prospective, to which the railroads of each corporation is devoted, is exactly the same. The fact is the same in each instance. If a difference exists, it is only in theory, and that theory purely fictitious. We are asked to say that it is lawful for the plaintiff to condemn the defendant's property on the theory that in defendant's hands it is being devoted to private use, yet when condemned it is in plaintiff's hands to be in fact devoted to exactly the same character of use; that the charter makes one private, and the other public, though they are in fact the same. If there is any force in the decisions referred to, which hold that a railroad designed and used exclusively to bring to market the product of a coal mine is in a public service, they establish the fact that the use to which the defendant is devoting the 40-foot strip in question is a public use, and, that being so, the plaintiff, even if it be a railroad corporation, is, by the terms of the statute quoted, forbidden to impair the defendant's use of the same. For these reasons, the action of the trial court in refusing to appoint commissioners was right, and its judgment should be affirmed.

BURGESS, C. J., and GANTT, J., concur in the above views.

DAVIS et al. v. WOOD et al.

(Supreme Court of Missouri, Division No. 1.
March 12, 1901.)

EJECTMENT—ANCIENT DEED—GENUINENESS—
WITNESSES—COMPETENCY—ADVERSE
POSSESSION—ESTOPPEL.

1. Under Rev. St. 1889, § 8918, providing that, in actions where one of the original parties to the contract or cause of action is dead, the other party shall not be admitted to testify in favor of any party to the action claiming under him, the widow of a deceased grantor is not a competent witness against the genuineness of

an alleged deed from herself and husband, under which defendants claim title in an ejectment suit brought by the grantees in a later deed from herself.

2. In ejectment, an ancient deed, under which defendants claimed, having the appearance of genuineness, was found in possession of defendants' grantor; and the only signature susceptible of proof—that of a witness—was proven with reasonable certainty. Possession had been held by those claiming under it for over 80 years, with the knowledge and acquiescence of the grantor and his heirs; the grantor himself being present at a sheriff's partition sale, where the land was sold by the heirs of his grantee in the deed. The widow and other heirs of the grantor in the deed lived in the immediate neighborhood of the land, and made no claim to it until immediately before this action, when the widow made a deed to the plaintiff. Held sufficient evidence to establish the fact that the deed was genuine, and that the defendants were entitled to possession thereunder.

3. In ejectment, where both parties claimed under G.,—the plaintiff by descent, and the defendant by an ancient deed, which had all the appearance of genuineness, and also by adverse possession,—an instruction that the plaintiff was entitled to judgment if it were shown that he and his grantors were the legal heirs of G., thus entirely ignoring the defendant's claims, was erroneous.

Appeal from circuit court, Stoddard county; John G. Wear, Judge.

Action by J. O. Davis and others against Dempsey Wood and others. From a judgment in favor of plaintiffs, defendants appeal. Reversed.

This is a suit in ejectment for 80 acres in Stoddard county. Both parties claimed under Thomas Galloway, who, it is conceded, acquired title by patent from Stoddard county dated April 21, 1800. Galloway died May 15, 1876. Plaintiff J. O. Davis claims in right of his wife, who was one of the children of Galloway, and also by deed from Galloway's widow and his other children, dated July 21, 1894. The other plaintiffs claim under their co-plaintiff Davis by deed to undivided half of the land, dated August 27, 1894. Defendants claim under a paper purporting to be a deed from Thomas Galloway and wife to Samuel Holmes, dated March 24, 1800, the execution of which is disputed. The other deeds in defendants' chain were: A sheriff's deed in partition conveying the title of the heirs of Samuel Holmes to Henry H. Bedford, dated December 19, 1874, recorded August 27, 1875; warranty deed from Bedford and wife to Thomas J. Davis, dated December 23, 1888, recorded same day; warranty deed from Thomas J. Davis and wife to Elizabeth Sissler, November 9, 1889, duly recorded; warranty deed from Elizabeth Sissler and husband to John R. Connor, to part of the land, November 14, 1890, recorded same day; and warranty deed from Connor to J. A. Sissler, for same part, February 6, 1892, recorded same day. Defendant Wood is the tenant of the Sisslers, and they were made parties defendants on their own motion. Besides their paper title, the defendants claim title by adverse possession for more than 10 years. They also

plead certain acts as estoppel, which will be noticed later, when we come to discuss them. The cause was tried by the court, jury being waived. The plaintiffs' evidence consisted of their deeds above mentioned, and evidence as to who were the heirs and widow of Thomas Galloway, and the rental value of the land. Defendants offered their paper purporting to be a deed as above mentioned from Thomas Galloway to Samuel Holmes. This was, in form, a warranty deed from Galloway and wife, purporting to bear their signatures and seals, and to have been executed in the presence of Henry Kennedy, justice of the peace; but there was no certificate of acknowledgment, and it was not recorded until 24th April, 1894. The document, the original of which, by agreement of the parties, has been filed in this court, has all the appearance of a deed 30 years or more old. When this was offered in evidence the plaintiffs objected, and in support of their objection offered evidence tending to show that it was not what it purported to be. The evidence consisted of the deposition of Alsyrta F. Galloway, widow of Thomas Galloway, and the testimony of two witnesses,—John E. Liles and W. S. Phelan. When the deposition of Mrs. Galloway was offered, defendants objected on the ground that no notice had been given for taking it, and that the witness was incompetent, because she was a party to the deed, and the other party was dead. The court overruled the objection, and the defendants excepted. Her deposition on this point was to the effect that she knew Samuel Holmes in his lifetime; that he died during the war, in 1863 or 1864; that her husband died in 1876; that her husband was unable to write his name, and usually made his mark to papers that he was to sign. "Q. I will get you to state if you on or about March 24, 1860, or at any time, signed your name to a warranty deed conveying land to Samuel Holmes. A. No, sir; I never signed any deed to Samuel Holmes. Q. State whether or not you can write your name. A. Yes, sir; I can write my name. Q. I will get you to state if you have frequently signed your name to instruments of writing, and, if so, did you always write your own name? A. Yes, sir; I have signed several instruments, and have always wrote my own name." The testimony of Liles and Phelan was to the effect that they knew Galloway, and that he could not write his name, but signed papers by making his mark. The last witness, who was the clerk of the court, was asked, on cross-examination, to compare the signatures to the deposition with that purporting to be the signature of Mrs. Galloway to the deed, and say if, in his opinion, they were the same writing, to which he replied: "The handwriting is similar." W. H. Miller and Linus Sanford, lawyers, were called by defendants, and asked to make the same comparison, and they testified that the

handwritings of the two were similar. The court sustained the plaintiffs' objection, and excluded the deed from evidence, and defendants excepted. Defendants then proceeded with their evidence, introducing, among other witnesses, Henry H. Bedford, the purchaser at the sheriff's partition sale. He testified: That Galloway was present at that sale, and that two other men, whom he named, bid on the property. That after the sale there was some question about the record not showing title in Samuel Holmes, and witness, with some other gentlemen, went to see Galloway about it, and on that occasion Galloway told them that he and his wife had sold the land to Holmes, and acknowledged a deed before Henry Kennedy, a justice of the peace. That at the time of the sheriff's sale there was a small house on the land, and about eight acres were cleared. That witness immediately took possession, and, through various tenants, held possession and paid taxes until he sold to Thomas J. Davis in 1888. "There never was a time after I purchased this at partition sale that I was not in possession, until I sold to Davis." That after his purchase at sheriff's sale, in 1873 or 1874, he sold to certain parties timber on the land, and, not knowing the exact location of the lines, asked Thomas Galloway to point them out to him, telling Galloway his purpose. That Galloway went with witness and the timber purchasers, and pointed out the lines. Witness also testified that he knew Henry Kennedy in his lifetime; that he was a justice of the peace in that neighborhood, and died during the war; that witness, as a lawyer, had practiced his profession before the justice, and was acquainted with his signature; and that the signature of that name on the deed in controversy was the genuine signature of Henry Kennedy. Upon cross-examination, witness testified: That he never had the Galloway-Holmes deed in his possession until a short while before, and his impression was that it was given to him by Thomas J. Davis. Did not know who placed it on record. That Davis resides at Maldin, and was not present at the trial. That witness had not seen Henry Kennedy's writing since 1860. "Q. Will you be certain that this is Henry Kennedy's signature? A. I am morally certain of that fact, but, of course, I could not say beyond controversy that it is. I would have no hesitation in saying that it is his signature. I would say that it is, because I have frequently seen him writing when I appeared before him." Cross-examined on the point of his possession, he was able to give the names of some of his tenants, but could not remember them all, nor the course of their succession. Admitted that sometimes there was a period of several months between the going of one tenant and the coming of another, and that at one time the house and fence burned down, and it was about 18 months before he rebuilt, but that he did re-

build, "either in 1878 or 1879, somewhere along there, or in 1880," and it was occupied from that time on. R. W. Thompson testified: That he was brother to the administrator of Galloway's estate, and attended to winding it up. That it consisted of personal property only. He never heard of any real estate as belonging to it, and none was inventoried. He knew Mrs. Galloway, the widow. Saw her often. She lived in the neighborhood of this land. Witness remembered Henry Kennedy, and that he was a justice of the peace, but could not give the date. It was a long time ago. Witness was then a boy. Knew the land in 1861. Could not say who was in possession then. Remembered some of the tenants who had lived on the place since 1872, but not all of them, nor the duration nor dates of their occupancy. They claimed to hold under Bedford. In 1872 there were 10 or 12 acres cleared. On cross-examination he said that from 1874, to the time Thomas Davis went on the place, he was under the impression the place was lying out. "It was lying out from June, 1874, until Davis went there on the place. So far as I remember, there was nobody occupying it until Davis went on the place. There may have been others, but I don't remember." W. C. Brown testified that when Thomas J. Davis moved off, the Sisslers moved in, and, by themselves and their tenants, have occupied it ever since. In rebuttal J. N. Patterson testified that he had known the land since 1880, and that there was no house on it until Thomas J. Davis took possession and built one. In explanation he said that there was a house that was supposed to be on the land, and was used in connection with the clearing,—by whom built, he did not know,—but that when a survey was afterwards made the house was shown to be six or eight feet outside of the line. Plaintiff J. O. Davis testified that he was 32 years old, and had known the land since he was a boy; lived within two miles of it, but no one was in possession when he first knew it, nor until T. J. Davis took possession. The court gave two instructions, or declarations in that nature, at the request of the plaintiffs: "(1) The court declares, as a matter of law, that the evidence is insufficient to establish the execution and delivery of the deed purporting to have been executed by Thomas Galloway to Samuel Holmes, and offered in evidence by defendants, and that plaintiffs' objections to its introduction should be sustained, and the deed excluded. (2) The court further declares, as a matter of law, that, since it appears from the evidence that both parties claim under Thomas Galloway, the court, for the purposes of this trial, will consider him to have had title to the premises in controversy; that if the court shall find from the evidence that Thomas Galloway left, as his widow, Alsyrila Galloway, and his heirs at law, W. T. Galloway, John Galloway,

Mary Galloway, intermarried with J. O. Davis, Amanda Galloway, intermarried with W. P. Dowdee, and Nancy A. Galloway, intermarried with John H. Smith; that John Galloway died unmarried and without issue; and that the said Mary Davis, the wife of J. O. Davis, had issue by him, born alive, and died,—then, under the evidence, plaintiffs are entitled to recover, and the finding should be for them." To the giving of which instructions defendants excepted at the time. These instructions sufficiently show the theory upon which the court tried the case, without considering the defendants' instructions refused. There were a finding and a judgment for plaintiffs, from which defendants appeal.

Mozely & Wammack, for appellants. Wilson Cramer, for respondents.

VALLIANT, J. (after stating the facts). 1. Mrs. Galloway was not a competent witness to break down the deed from herself and husband to Holmes. Our statute removing the common-law disability of a witness on account of interest qualifies the enabling act by this proviso: "That in actions where one of the original parties to the contract or cause of action in issue and on trial is dead, or is shown to be insane, the other party to such contract or cause of action shall not be admitted to testify either in his own favor or in favor of any party to the action claiming under him." Rev. St. 1889, § 8918. The term "contract or cause of action in issue and on trial," in that connection, has been interpreted by this court to include a deed relied upon by one of the parties in an action of ejectment. *Chapman v. Daugherty*, 87 Mo. 617; *Messimer v. McCrary*, 113 Mo. 382, 21 S. W. 17. In the deed in dispute, Mrs. Galloway was a party, and the other party is dead. If that is a valid deed, she thereby sold to Holmes in 1860 the interest that she pretended to sell to the plaintiffs in 1894, and which they are claiming in this suit. She is called as a witness in behalf of her later grantees, who are living, to deny that she conveyed the interest to her former grantee, who is dead. If she was herself suing the heirs of Holmes for the land, she would clearly not be a competent witness, and by the terms of the statute she is equally incompetent to testify in favor of any party to the action claiming under her.

2. This is a suit at law, and was tried as such. Although a jury was waived, yet the court, as the trier of the fact, was in that respect in the place of a jury, and as such distinct from its capacity as the court proper. If a jury had been present when the defendants offered their Galloway-Holmes deed, it would have been the duty of the court to have heard in the first instance such evidence as defendants had to show the authenticity of the instrument, and, if such evidence made a *prima facie* case, the paper

would then be admitted in evidence and read to the jury. But admitting it in evidence would not be conclusive as to its validity. The due execution of the document was still a question for the jury, and it was for the jury to say, upon the whole evidence, whether it was what it purported to be; and it was not for the court to say, as a matter of law, as it did say in the first instruction, that the evidence was insufficient to prove the deed. 1 Greenl. Ev. (16th Ed.) § 81e; 11 Am. & Eng. Enc. Law, 497; Ross v. Gould, 5 Me. 204. The plaintiffs were, therefore, premature in their evidence to disprove the deed. It was not necessary for the establishment of this deed at the trial that it should have been proven in the manner prescribed in section 2409, Rev. St. 1889, to which we are referred. That section relates to the character of proof required to entitle the deed to a certificate that would admit it to record in the office of recorder of deeds. Neither is this deed to be judged by the provisions of section 4809, Rev. St. 1889, to which our attention is also called. That section has reference to a deed that has been 10 years on record before it is offered in evidence. The paper in question is what is denominated an "ancient deed." Such a deed, because presumably all those who witnessed or participated in its execution are dead, draws the evidence of its authenticity from the conditions and circumstances surrounding it. Because, in the nature of things, it is not susceptible of proof, like a deed of recent date, the law, in its search for truth, examines the proofs of which it is susceptible, and these must necessarily vary with the peculiarities of each case. Greenleaf says: "An ancient deed (by which is meant one more than thirty years old, having nothing suspicious about it) is presumed to be genuine, without express proof, the witnesses being presumed dead; and if it is found in proper custody, and is corroborated by evidence of ancient or modern corresponding enjoyment, or by other equivalent or explanatory proof, it is to be presumed that the deed constituted part of the actual transfer of the property therein mentioned, because this is the usual and ordinary course of such transactions among men." 1 Greenl. Ev. (16th Ed.) p. 720. And in a note to that text the editor says: "It has been made a question whether the document may be read in evidence before the proof of possession or other equivalent corroborative proof is offered, but it is now stated that the document, if otherwise apparently genuine, may be first read; for the question whether there has been a corresponding possession can hardly be raised till the court is made acquainted with the tenor of the instrument. Doe v. Passingham, 2 Car. & P. 440. A grave question has been whether, in the case of a deed or will of land, the proof of possession is indispensable, or whether its absence may be supplied by other satisfactory corroborative evi-

dence." The same eminent law writer summarizes the requirements of the rule thus: "(a) The document must have been in existence for thirty years or more; (b) it must have been found in proper custody, i. e. in a place consistent with its genuineness; (c) it must not have a suspicious appearance; and (d) there must be, if it purports to convey land, some other attendant circumstances corroborating its genuineness,—either possession of the land, or some other item of corroboration." Id. p. 721. This document seems to have been covered by all of these requirements. It is dated March 24, 1860, and its appearance does not belie that date. This suit was instituted October, 1894. Therefore it was over 30 years old. It was found in the possession of Thomas J. Davis, who had purchased the land from Bedford in 1888, and held possession of it until he sold it to the Sisslers. It is natural that Davis, having bought the land, and being in possession of it, and finding on the record no deed further back than the sheriff's deed conveying the title of the Holmes heirs to Bedford, should seek and find, if it was to be found, a deed from Galloway to Holmes; and therefore the possession of the land by Davis was a fact consistent with its genuineness. The only signature on the document that, under the circumstances, seemed at all susceptible of proof,—that of the subscribing witness Kennedy,—was proven with as much certainty as could be expected. It was shown that Galloway could not write his own name. Therefore, of course, he would have to have some one else write it for him, and such signature was not susceptible of proof. There was no actual proof that Holmes was ever in possession of the land, but he died in 1863, and the memory of no witness went back that far as to the possession. The learned counsel for the plaintiffs, in his brief, very aptly says: "This period of time embraced the war, by which the affairs of Stoddard county were very much disturbed and unsettled. No county in the state suffered more." Galloway was present when the sheriff made public sale of the land for partition between the heirs of Holmes, and when the purchaser afterwards inquired of him about the title he told him that he had sold it to Holmes, and a year afterwards went with the purchaser at that sale and pointed out the lines to him, to enable him to indicate to the timber men where they might cut timber. At that time and until his death he lived within two miles of the land. Three years later Galloway died, and his estate was duly administered, but no land was in the inventory. His widow and children continued to live in the same neighborhood, but they never informed the administrator that there was any land belonging to the estate, and they never were heard to assert any claim to it until the deeds preparatory to bringing this suit were made. In the meantime they saw the land occupied; saw a

house built on it; destroyed by fire, and another one built. These acts were committed while the land, if the Holmes deed was not genuine, belonged to Galloway or his heirs, and before any claim of third parties intervened. All of these acts of Galloway and his heirs, the defendants insist, estop them and their grantees from now asserting a claim inconsistent with them. However that may be, those acts have a more direct bearing on the question at issue than by way of estoppel. They supply all the requirements of the law in reference to the authentication of an ancient deed, and they are intelligible only on the theory that the Holmes deed was genuine, and that Galloway and his heirs knew it. The plaintiffs, who acquired a half interest of the Galloway heirs just upon the eve of the institution of this suit, did so in the face of the adverse possession of the defendants, and with notice of their claim, and hence there is no innocent purchaser in the case. *Bartlett v. Glascock*, 4 Mo. 62; *Martin v. Jones*, 72 Mo. 28; *Davis v. Briscoe*, 81 Mo. 27; *Wiggenhorn v. Daniels*, 149 Mo. 160, 50 S. W. 807.

3. The second instruction given declares, as a matter of law, that, since both parties claim under Thomas Galloway, if the court finds that certain parties named are the widow and children of Thomas Galloway, and that the wife of J. O. Davis had issue born alive, and died, then the plaintiffs were entitled to recover. This instruction ignored not only defendants' claim of title under the Holmes deed, but also their title by adverse possession. While the plaintiffs' evidence on the question of defendants' possession may be said to be sufficient to make a conflict of evidence on that subject, yet the decided preponderance of evidence sustained the defendants' claim to possession under the sheriff's deed from 1872, with the interruption consequent on the change of tenants and the burning of the house and fence above mentioned, down to 1879 or 1880, when the house was rebuilt; and the testimony is almost undisputed that since 1880 the possession has been continuous. The instruction was erroneous.

4. There is nothing in the plaintiffs' case that commends it to the favorable consideration of the court. There is no substantial evidence upon which a finding in their favor could be based, and no good purpose can be served by a retrial. Therefore the judgment of the circuit court is reversed. All concur, except MARSHALL, J., absent.

BETHEL et al. v. DURALL et al.¹

(Court of Appeals of Kentucky. March 22, 1901.)

HUSBAND AND WIFE—FAILURE TO PLEAD COVERTURE.

Where an action was brought against a married woman before the married woman's

act took effect, but the issues were not completed until after that time, it was not error to render a personal judgment against defendant in the absence of a plea by her that she was under the disability of coverture when the debt was contracted.

Appeal from circuit court, Muhlenberg county.

"Not to be officially reported."

Action by Florence A. Durall and another against E. A. Bethel and another. Judgment for plaintiffs, and defendants appeal. Affirmed.

Jonson & Wickliffe, for appellants. E. R. Weir, for appellees.

PAYNTER, C. J. On issues made, the lower court found that Elizabeth A. Bethel was indebted to the appellee Florence A. Durall in certain sums. We cannot say the conclusion of the court is not sustained by the evidence. It is insisted by counsel for appellants that the court erred in giving a personal judgment against the appellant Mrs. Bethel, for the reason the debt was contracted before the enactment of the statute commonly called the "Married Woman's Act." It is true, the liability existed before that act was in force, and this action to enforce it was instituted before that time, but the issues were not completed until thereafter. The judgment was rendered against her long after the act was in force. Coverture was not pleaded. While the writer of this opinion did not agree with the other members of the court in its conclusion, this court, in *Turner v. Gill* (Ky.) 49 S. W. 311, held, on substantially the same facts as here appear, that, although a woman laboring under the disability of coverture when she contracted the debt, if she did not, in the action to enforce it, plead coverture, she could not, on appeal to this court, have the personal judgment rendered therein reversed. It is urged, however, that it did not appear in *Turner v. Gill* that Mrs. Turner was laboring under the disability of coverture at the time the debt was contracted, and, as it does appear in this case that Mrs. Bethel was laboring under the disability of coverture at that time, the doctrine of the case cited does not apply to this case. It is true that the court did say in *Turner v. Gill* that the pleadings did not show that Mrs. Turner was a married woman when the note in suit was executed. A careful reading of the opinion shows that the case was not made to turn upon that fact, for the court based its conclusion upon an entirely different ground. It said: "In litigating this question appellant stood just as a widow would have stood under the former practice, and might put in such defenses as she saw proper. If she failed to make a defense that would have been available to her, she is bound by her pleading like any other litigant; and the judgment against her cannot be reversed on account of her coverture, as this defense

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

appears first to have been presented to this court." The court held that she should have pleaded coverture as a defense, and, as she failed to do so, and allowed a personal judgment to go against her after the married woman's act went in force, it was as binding on her as judgment would be against one not laboring under the disability of coverture. The judgment is affirmed.

BOTTOM v. COMMONWEALTH.¹

(Court of Appeals of Kentucky. March 22, 1901.)

CRIMINAL LAW—APPELLATE JURISDICTION.

No appeal lies from a judgment imposing a fine of \$10.

Appeal from circuit court, Fayette county.

"Not to be officially reported."

E. D. Bottom was convicted of the offense of Sabbath breaking, and he appeals. Dismissed.

Webb & Farrell and W. S. Bronston, for appellant. R. J. Breckinridge and Henry Jackson, for the Commonwealth.

PAYNTER, C. J. The judgment in this case imposed a fine of \$10 for Sabbath breaking. The court has no jurisdiction of the appeal; therefore it is dismissed.

SAUNDERS v. ARMSTRONG et al.¹

(Court of Appeals of Kentucky. March 21, 1901.)

FIRE INSURANCE—INTEREST OF TRUSTEE IN INSURANCE OBTAINED BY CESTUI QUE TRUST.

Insurance of a chattel effected by a cestui que trust in her own name, without naming the trustee, does not inure to the benefit of the trustee, and therefore the entire proceeds of the insurance may be subjected by the creditors of the cestui que trust, though she had only a life interest in the insured property.

Appeal from circuit court, Franklin county.

"Not to be officially reported."

Action by R. D. Armstrong and L. P. Tarleton against Emma J. Collins and others to enforce a judgment. Judgment awarding to plaintiffs the proceeds of a policy of insurance, and J. H. Saunders, trustee of Emma J. Collins, appeals. Affirmed.

Ira Julian, for appellant. T. L. Edelen, for appellee Williams. D. W. Lindsay, for appellee Armstrong.

O'REAR, J. The question involved in this appeal is whether an insurance of a chattel effected by a cestui que trust in her own name and without naming the trustee will, in event of the destruction of the chattel by fire, inure to the benefit of the trustee. In this case Mrs. Emma J. Collins, a married woman (formerly Miss Emma J. Gowdy), effected an insurance in her own name on

a parcel of furniture, including a piano. The piano had been transferred by Mrs. Collins' father, A. F. Gowdy, to appellant, by a writing executed September 4, 1874, containing the following recital: "To have and to hold the same to the said trustee for the use of said Emma J. Gowdy under the following conditions, viz. for her natural life; and, if said Emma J. Gowdy should die without issue, the said piano to be given back to said A. Gowdy, or his heirs, if dead. The said trustee to have full power to control the said piano when, in his judgment, it may become necessary." The value of the piano at the time of the insurance and loss was \$500, and after the fire creditors of Mrs. Collins sought to subject the insurance fund by attachment. This controversy is between the trustee and the attaching creditors. Insurance is a personal contract, and appertains to the person called the "insured," and not to the thing which is subject to the risk against which he is protected by the contract of insurance. It is not a contract running with land in case of real estate, nor running with the personality, so to speak, in the case of a chattel. An insurer generally contracts not alone with reference to the kind and location of property insured, but also with reference to the character and probity of the insured. If the insured has an insurable interest in the property, he may effect an insurance as indemnity to him against loss by fire, or tornado, or other mishaps. That a life tenant, or owner of less than the complete title, may insure his interest against its loss by fire, is well established. The owner of the remainder or other interest may also have an insurance on the same property to protect himself from loss. If, however, the remainder-man does not effect such an insurance, but the life tenant does, and a loss ensues, the former has no interest in the insurance fund. And it matters not to him whether the insured took indemnity greater than the value of his estate, for that is a question solely between the insurer and the insured. It therefore follows that the trustee had no interest in the insurance in this case, and that the fund was subject to the attachment of Mrs. Collins' creditors. The circuit court having so held, the judgment is affirmed.

COMMONWEALTH v. JACKSON et al.¹

(Court of Appeals of Kentucky. March 20, 1901.)

TAXATION—SHARES OF STOCK IN NATIONAL BANK.

The owners of shares of stock in a national bank may be compelled to list them for taxation.

Appeal from circuit court, Laurel county.

"Not to be officially reported."

Proceeding by the commonwealth against R. M. Jackson and others to compel defendants to list certain shares of stock for tax-

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

tion. Judgment for defendants, and plaintiff appeals. Reversed.

Robt. J. Breckinridge, Jas. Sparks, and J. A. Wilburn, for the Commonwealth. Tinsley & Faulkner and Chas. R. Brock, for appellees.

PAYNTER, C. J. This proceeding was instituted for the purpose of compelling the owners of shares of capital stock in a national bank to list them for taxation. The same question was before this court in the case of *Scobee v. Bean*, 59 S. W. 860, wherein the court held that such shares are subject to taxation. It would require an unnecessary expenditure of time to repeat the reasons which the court gave in that case for so holding. It is sufficient to say that by the authority of that case the judgment is reversed for proceedings consistent with this opinion.

STEITLER et al. v. HELENBUSH'S EX'RS.¹

(Court of Appeals of Kentucky. March 21, 1901.)

EXECUTORS AND ADMINISTRATORS—ACTION BY NONRESIDENT EXECUTOR—NECESSITY OF BOND—ATTACHMENT—BURDEN OF PROOF—PARTIES TO ACTION.

1. To authorize a nonresident executor to sue upon a debt contracted after the death of the testator, he need not execute bond as required by Ky. St. §§ 3878, 3879, as those sections apply only to actions upon debts which were due the decedent.

2. Where the ground of attachment is that defendant has not enough property in the state subject to execution to satisfy the plaintiff's demand, and that its collection will be endangered by delay in obtaining judgment and return of "No property found," and defendant denies that the collection of the demand will be endangered by delay in obtaining judgment and return of "No property found," but fails to deny that he has not enough property in the state subject to execution to satisfy plaintiff's demand, the attachment should, in the absence of evidence, be sustained, as the presumption of danger from delay follows from the admitted fact.

3. Where a creditor had brought an action to have certain preferential acts of the debtor declared to operate as an assignment for the benefit of creditors, making the debtor and the preferred creditors defendants, the court properly refused to permit him to be made a party defendant to an action brought by the preferred creditors against the debtor in which an attachment was issued and levied, it being the duty of the court to have the two actions consolidated.

Appeal from circuit court, Daviess county.

"Not to be officially reported."

Action by the executor and executrix of Clemens Helenbush against Elijah Steitler and another. Judgment for plaintiffs, and defendants appeal. Affirmed.

Sweeney, Ellis & Sweeney, for appellants. Walker & Slack, for appellees.

PAYNTER, C. J. On January 17, 1893, Clemens Helenbush died testate, in Hamilton county, Ohio. In his will he nominated the appellee Lucia Elizabeth Helenbush executrix, and the appellee Clemens Helenbush executor, and they duly qualified as such. By the terms of the will, they were to continue the business conducted by the testator during his life in Cincinnati, Ohio, for such period as they deemed advisable. Since their qualification as personal representatives they have conducted the business, and several years after the death of the testator the appellant Steitler became indebted to them, on which indebtedness this action was instituted. So it will be seen that the debt was contracted after the death of the testator, and to the personal representatives, in the course of the business which they were carrying on. The judgment was rendered in the action without the plaintiffs executing either of the bonds required by sections 3878, 3879, Ky. St., and it is insisted that the court erred in not requiring bonds to be given under these sections. Section 3878 reads as follows: "By giving bond, with surety, resident of the county in which the action is brought, non-resident executors or administrators of persons who, at the time of their death, were non-residents of this commonwealth, may prosecute actions for the recovery of debts due to such decedents." Section 3879 reads as follows: "In such actions the plaintiff's letters, testamentary or of administration, granted by a competent tribunal, properly authenticated, must be filed; and no judgment shall be rendered until the plaintiff executes bond, with good surety, resident of the county, to the commonwealth, conditioned to pay any debt due by his decedent to any resident of this state to the extent assets shall come to his hands. Actions may be brought on this bond for the use of any creditor of said decedent for three years after the date of each receipt of assets by such executor or administrator in this state, but not after."

It will be seen that section 3879 has reference to an action in which a plaintiff is required to execute a bond under section 3878. The bond required by that section is in an action brought by a nonresident executor or administrator of a person who, at the time of his death, was a nonresident of this commonwealth, for the recovery of a debt due to such decedent. The debt in suit was not due the decedent, because it was contracted long after his death. It was a personal obligation to the executors, and the sections of the statute quoted have no application to this case, and impose no duty in the matter of executing bonds upon non-resident executors and administrators. The language of the section shows that it relates alone to debts which were due the decedent, and this court, in *Wayland v. Porterfield's Ex'r*, 1 Metc. 638, so interpreted the words of the statute.

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

The ground of attachment was that the defendant did not have enough property in the state subject to execution to satisfy the plaintiffs' demands, and its collection was endangered by the delay in obtaining judgment and a return of "No property found." The answer did not deny the averment of the petition that the defendant did not have enough property subject to execution to satisfy the demands, but it did deny that the collection of the debt was endangered by delay in obtaining judgment and a return of "No property found." No testimony was introduced by either plaintiffs or defendants, and the court sustained the attachment. It is urged here that the court erred in doing so, because the plaintiffs failed to offer proof to show that the collection of the demand was endangered by the delay, etc. In *Johnson's Assignee v. Bank* (Ky.) 56 S. W. 710, the exact question here was adjudged. It appeared in that case that the debtor did not deny the averment that he had no property subject to execution, but denied that the collection of the demand would be endangered by delay. On the motion to discharge the attachment, the debtor did not offer any evidence. The court sustained the attachment, holding that from the debtor's insolvency the presumption arose that the collection of the debt was endangered by delay. This conclusion is supported by *Dunn's Trustee v. McAlpin*, 90 Ky. 78, 13 S. W. 863.

Mary Meissenheimer presented her petition in this action, in which she asked to be made a party defendant. She averred certain acts of the defendant Steitler were done with the intention of preferring the plaintiffs to his other creditors. She also averred that she had instituted a suit in the Daviess circuit court within six months after the commission of the alleged preferential acts, in which she made the plaintiffs, the appellees, and the debtor defendants. The court sustained a motion to strike her petition from the files, of which action she here complains. As to whether the facts averred in her petition constitute a cause of action we do not determine, because, from our view, the question is not before us. Where one is guilty of preferential acts, under section 1910, Ky. St., which operates as an assignment of property for the benefit of all of his creditors, any creditor, or any number of his creditors, may complain in a court of equity. See section 1911. Under section 1912, Ky. St., his creditors may unite in a petition for the purpose of having the question adjudged as to whether the act claimed to be preferential is so, and in which action it is not necessary to make any persons defendants except the debtor and the transferee. She averred in her petition that she had made the debtor and the appellees defendants to her action. It was pending in the same court in which this action was pending, and under such circumstances it was the duty of the court below to con-

solidate the actions. By that method she could get the relief to which she might show herself entitled. For this reason (if no other, which we do not decide) she was not entitled to be made a defendant in this action. The judgment is affirmed.

RYAN et al. v. SUGG.¹

(Court of Appeals of Kentucky. March 22, 1901.)

CONSTRUCTION OF CONTRACT—TRANSFER OF SALE BOND—EFFECT OF RESALE.

The purchaser of mortgaged property at decretal sale executed bond for the excess of the purchase price over the mortgage debt, and that bond was transferred by the mortgagors to S. in consideration of his release of an attachment lien upon other property, the mortgagors undertaking that, in the event the sale should not be confirmed, they would convey to S. the mortgaged property upon his payment of the mortgage debt. The sale was set aside, and thereupon the mortgagors refused to convey the property, except with the reservation of an interest in a party wall, the whole of which had been adjudged to be sold; and therefore S. refused to accept the property, and it was resold, bringing more than the mortgage debt, but less than it had formerly brought. *Held*, that S. is entitled to the excess over the mortgage debt.

Appeal from circuit court, Logan county.
"Not to be officially reported."

Action by H. H. Sugg against C. H. Ryan and others on a promissory note, and for an attachment. Judgment for plaintiff, and defendants Katie G. Ryan and C. H. Ryan appeal. Affirmed.

James H. Bowden, for appellants. W. P. Sandidge, for appellee.

GUFFY, J. The appellee, Sugg, held a note on the appellant C. H. Ryan for \$300, and instituted suit in the Logan circuit court against the said Ryan, and obtained an attachment against his property, which was levied on various pieces of property as the property of said Ryan. Afterwards, by an amended petition, it appeared that the property levied on by the attachment was claimed by the appellant Katie G. Ryan by virtue of deeds made to certain parties by C. H. Ryan, and by C. H. Ryan's vendors conveyed to said Katie. The plaintiff, Sugg, by appropriate proceedings, attacked said conveyances as fraudulent, and as made to hinder and delay the creditors of said Ryan. During the progress of various suits against the Ryans, it was adjudged that certain property known as the "Brister Property" should be sold to pay the Logan County Bank the sum of \$1,500, with interest at 8 per cent. from the 24th of May, 1894, until it is paid, and the commissioner was directed to sell the same. Such proceedings were had that the Brister property was sold in satisfaction of the lien of the said bank, and also for \$438 in excess thereof; and George Edwards,

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

being the purchaser thereof, executed his bond to the master commissioner for the sum of \$438, which sum was held subject to the further order of the court. It also appears that the appellee, Sugg, had his attachment levied on various pieces of property as the property of the defendant C. H. Ryan, and that the Ryans desired to mortgage some of the property on which the attachment had been levied, and the party from whom they expected to borrow the money, and to secure which a mortgage was expected, was not willing to accept the mortgage and lend the money unless Sugg's attachment lien was released on such property. In order, therefore, to obtain the loan, it was agreed by Sugg and the appellants that in consideration of the following agreement he would and did release his attachment lien on the property intended to be mortgaged to secure the desired loan. The agreement entered into reads as follows: "The master commissioner is hereby directed to assign and transfer to H. H. Sugg that part of the bond executed by Geo. B. Edwards to the said master commissioner for the purchase price of the storehouse and lot now occupied by Hezekiah Bristler on Main street, in Russellville, Ky. The amount of said purchase money was \$2,105.00, of which \$1,667.00 is payable to Logan County Bank, and the balance of \$438.00 to the said master commissioner. And, in case the said sale to said Edwards shall not be confirmed, we, the said C. H. Ryan and Katie G. Ryan, hereby agree to convey said storehouse and lot to H. H. Sugg upon his paying to the Logan County Bank its lien debt of \$1,667.00, above named; and the other parties hereto agree that they will join in said deed, and release any lien they may have upon the same. [Signed] C. H. Ryan. Katie G. Ryan. Jno. W. Caldwell, President Logan Co. Bk." It turned out that said Edwards filed exceptions to the sale, and said sale was set aside, and his bonds canceled. It is also claimed by appellee that the Ryans refused to convey to him the said property, and therefore he refused to pay the bank debt, and accept a conveyance of the property theretofore sold. Appellants controvert this proposition, and it is their contention that Sugg accepted an option as to the purchase of the property in question in satisfaction of his claim, and that, having refused to accept or comply with the option, he has no further claim upon the property or the proceeds thereof. It should have been before stated that a resale of the property was ordered, and that the property was purchased by the appellant Mrs. Ryan at a sum exceeding the lien of the said bank by the sum of \$387, for which she executed bond with security, payable to the commissioner. It appears from the record in this case that the original purchaser, Edwards, claimed, among other things, that Mrs. Ryan was claiming certain interest in the party wall, which the purchaser supposed he had pur-

chased entire; and he also entered other objections not necessary to state. It is claimed by appellee that the Ryans refused to convey to him the said wall, which, according to his contention, was the same adjudged to be sold, and purchased by Edwards. This is all denied by the Ryans, but we think the proof establishes the truth to be as contended for by appellee, and as also asserted by Edwards. It seems to us that, if it be conceded that Sugg accepted the assignment of the \$438 bond in satisfaction of the balance of his debt, and that the sale was set aside, and the bond canceled, he was still entitled to be subrogated to whatever right the supposed beneficiary in the \$438 bond would have been entitled, and that upon a resale of the property in question he would be entitled to whatever sum the property brought in excess of the sum necessary to pay the bank debt aforesaid. The judgment of the circuit court sustained the contention of Sugg, and that judgment is clearly sustained by the law, facts, and equities in this case, and the same is therefore affirmed.

ILLINOIS CENT. R. CO. v. JOSEY'S
ADM'X.¹

(Court of Appeals of Kentucky. March 21, 1901.)

MASTER AND SERVANT—FELLOW-SERVANTS—ACTION FOR CAUSING DEATH—RECOVERY FOR ORDINARY NEGLIGENCE—CONTRIBUTORY NEGLIGENCE.

1. A section foreman, whose duty it was, in going over the road with his men, to control the brakes on the handcar, was, in performing that duty, the superior of the men on the car, and not their fellow servant, and therefore the master was liable for the death of one of them through his negligence in suddenly applying the brakes without giving notice of his intention to do so.

2. The negligence of deceased in not supporting himself by holding to the lever on the car does not preclude a recovery for his death, as the foreman, having knowledge of that fact, should have been the more careful not to suddenly check the speed of the car.

3. An instruction that there could be no recovery for plaintiff's intestate's death unless the negligence of the superior servant was gross, was more favorable to defendant than it was entitled to, as that rule applies only to actions for injuries not resulting in death.

4. There can be no reversal for misconduct of counsel in argument unless the objectionable argument appears from the bill of exceptions.

Appeal from circuit court, Muhlenberg county.

"To be officially reported."

Action by the administratrix of F. M. Josey against the Illinois Central Railroad Company to recover damages for the death of plaintiff's intestate. Judgment for plaintiff, and defendant appeals. Affirmed.

Jonson & Wickliffe and Pirtle & Trabue, for appellant. Chas. Eaves, for appellee.

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

PAYNTER, C. J. F. M. Josey was a section hand employed by the appellant, being one of the force of which G. W. Gayle was foreman or boss. One of the duties of the section foreman and such of his force as he desired to aid him was to go over the section on certain days to ascertain whether any stock had been killed along the line of the road, and see the condition of the track. To accomplish this it was necessary to go on a hand car, which the appellant furnished for that purpose. In July, 1898, Gayle took a number of his section men, together with Josey, and started along the line to perform the duty mentioned above. Some of the men rode on the rear end of the car, with their faces in the direction it was moving, and others with their backs in that direction. Among the latter was Josey. The car was moving down grade at a pretty rapid rate of speed, when, as the testimony of appellee conduces to show, foreman Gayle unnecessarily put his foot upon a lever which applied the brakes to the wheels, thus causing the car to suddenly check its speed, throwing Josey in front of it, and it passed over his body, inflicting injuries from which he shortly thereafter died. The testimony introduced by plaintiff conduces to show that the foreman gave no warning of his intention to apply the brakes to stop the car. The defendant sought to show that deceased fell off of the car by reason of his own carelessness and negligence, and thus lost his life, and that the foreman did not apply the brakes until the deceased was in the act of falling off of the car, and it was done in an effort to prevent it from passing over him. The defendant sought to show that the deceased fell off of the car because he did not have hold of the lever which was used in propelling it. The court, in instructions, submitted the questions at issue to the jury, and it could not have found against the appellant except upon the idea that Gayle applied the brakes to the wheels of the car, thus causing a sudden stop, and consequently threw the deceased therefrom, which resulted in the loss of his life.

Counsel for appellant urge in argument that, when a superior is engaged with an inferior servant in performing services ordinarily performed by the latter, he becomes a fellow servant, and the master is not liable for his negligence; that the same person may in some things be a superior, and in others a fellow servant, and in the latter event the master is not liable for injuries caused by his negligence. If the principle contended for by counsel is conceded to be correct, still it has no application to this case. The section foreman, Gayle, directed the movements of his force. He determined when the car should be placed upon the track and the place where it should be stopped. His duty placed him on the car, where he was when this accident occurred; and, furthermore, it was his duty to manage and control the brakes.

He was not performing the duty of one of the section men in manipulating the brakes on the car, thus controlling its movements, but was performing the duty imposed upon him by reason of the fact that he was foreman of the crew, directing and controlling their movements, as well as the car. He controlled the brakes on that car as an engineer upon a locomotive engine does the air brakes upon a train. While it is not done by steam, as in the former case, he supplied the force which applied the brakes to the wheels of the car. When a fireman is present performing his duties on the engine by supplying it with fuel, thus generating the steam which propels the engine, and makes it possible for the engineer to control the movement of the train by applying the brakes, the relation of fellow servant does not exist between them; and, if the engineer should negligently apply the brakes, and cause the train to give a sudden movement, throwing the fireman from the engine, certainly no one would contend that the master was not responsible for the negligent act of the engineer. In such case he is not the fellow servant of the fireman; neither was the foreman of the section crew the fellow servant of the deceased.

Counsel for appellant cite the case of Railroad Co. v. Gann (Tenn. Sup.) 47 S. W. 493, in support of their position. That is a case of the Tennessee supreme court, which recognizes that the foreman of a section crew is not the fellow servant of the section men. The facts of that case were substantially the same as in this case, and the court there held that, although the foreman was not the fellow servant of the section men, still, as he was performing a service ordinarily performed by section men, he became a fellow servant. The facts of that case show that it was the duty of the foreman to manipulate the brakes of the hand car, and control its movements, as well as direct the men in charge of it. We fail to understand, in view of those facts, how the court concluded that the section foreman was performing a service ordinarily performed by one of the inferior servants. Under the facts of that case the court, in our opinion erroneously, reached the conclusion that the foreman was performing a service ordinarily performed by a fellow servant. In that as in this case he was performing a duty which was imposed upon him by reason of the fact that he had charge of the force and of the hand car, the brakes of which it was his peculiar duty to manipulate. In the case of Railroad Co. v. Coleman, 59 S. W. 13, this court held that a yard master was not a fellow servant of one of the servants employed in the yard when he was assisting that servant in the manipulation of car couplings.

It is urged that the deceased was negligent in not supporting himself by holding to the lever on the car while it was traveling at the rate of speed it was when the accident happened. The testimony offered by the de-

had the contrary effect. If he was standing upon the hand car without any support, then the greater reason why the section foreman should not have applied the brakes to the car so as to suddenly check its speed. The foreman could see his position, and must have known the peril in which he would be placed if the car was suddenly checked. According to the testimony of all the witnesses in this case, there was no occasion for stopping the car at the place where the accident happened. The appellant did not endeavor to show that it was necessary to apply the brakes at that place, except in an effort to protect the deceased when he was discovered falling from the car.

The instructions which the court gave the jury were more favorable to the defendant than it was entitled to receive. Under them the plaintiff could only recover compensatory damages by showing gross negligence. The administratrix was entitled to compensatory damages if the death resulted from negligence, and to punitive damages if it was the result of gross negligence. Section 6, c. 1, Ky. St. There are many decisions of this court to that effect. It is only by virtue of the constitution and the statute that there can be a recovery of damages for the loss of life occasioned by negligence. If the accident had not resulted in Josey's death, and he had sustained injuries thereby, he could have maintained his action by showing that it was the result of gross negligence. This peculiar condition of the law results from the facts that the right of action for the loss of life is given by the constitution and statute, and the other right to recover for injuries exists at common law.

Counsel urge that the case should be reversed because of objectionable argument or language employed by counsel for appellee on the argument of the case before the jury. The bill of exceptions does not even show what counsel said in arguing the case before the jury; hence there is nothing for the court to consider in respect to that matter. The judgment is affirmed.

GREEN v. SOUTHARD et al.

(Supreme Court of Texas. April 8, 1901.)

INTOXICATING LIQUORS—LICENSE—APPLICATION—PLACE—BOND—SALE TO MINOR.

Under Rev. St. art. 5060c, providing that every person desiring to engage in the sale of liquors shall make application for a license, designating the place in which it is proposed to engage in the sale, and article 5060e, providing that the particular place and house shall be designated in the license, a license for the sale of liquors, in a town where the streets are not named or buildings numbered, is valid, though in the application and license the place is designated only as in such town; hence the failure to designate the place more definitely is not a defense to an action on the bond given

supreme judicial district.

Action by W. T. Green against J. D. Southard and others. From a judgment of the court of civil appeals (59 S. W. 839) reversing a judgment for plaintiff, plaintiff brings error. Reversed, and judgment of the district court affirmed.

Daniel & Keith and Geo. A. McCall, for plaintiff in error. Orrick & Terrell and W. P. Gibbs, for defendants in error.

GAINES, C. J. This suit was brought by the plaintiff in error to recover of defendants in error penalties for breaches of a liquor dealer's bond, the alleged breaches consisting in the dealer's selling intoxicating liquor to the plaintiff's minor son, and in permitting the son to enter and remain upon the premises where the dealer was engaged in the business of selling such liquors. Southard was the principal obligor upon the bond, and the other two defendants were sureties upon the obligation. The plaintiff recovered a judgment for \$1,000, but, upon appeal, the court of civil appeals reversed the judgment, and dismissed the cause.

The dealer's place of business was in the town of Gordon, in Palo Pinto county, in which it does not appear that the streets were named or the houses numbered. Southard, the dealer, made his application for license, filed the bond, paid his tax, and procured a license, and thereupon began and carried on the business of selling intoxicating liquors. The proceedings were all regular save that neither the application nor the license designated the particular house in which the business was to be prosecuted. The application was to do business "at Gordon, in the town of Gordon, in Palo Pinto county." The designation of the place of sale in the license was merely "in the city of Gordon, county of Palo Pinto, Texas." The contention on behalf of defendants in error is that, because of the fact that neither the application nor the license designates the house in which the liquors were to be sold, the license was void, and did not protect the defendants in selling liquors, and that, therefore, the bond was of no effect. We are of opinion that the proposition that the license was void cannot be maintained. Article 5060c of the Revised Statutes provides that "every person, firm, corporation or association of persons desiring to engage in the sale of spirituous, vinous or malt liquors, or medicated bitters capable of producing intoxication, in this state, as set forth in article 5060a of this chapter, shall, before commencing the sale of such liquors or medicated bitters, file with the county clerk of the county in which he or they propose to sell the same, an application under oath, on forms provided by the comptroller, and shall designate the place in which it is proposed to engage

in the sale of such liquors or medicated bit-
ters, if [in] any city or town in which streets
are named and houses numbered, the street
and number of house shall be given," etc.
Article 5060d makes it the duty of the county
clerk to issue a license to the applicant upon
his paying the tax and filing the bond as pro-
vided by law, and article 5060e prescribes
that "the particular place and house where
the liquor is to be sold shall be designated
in the license." In the case of *Pearce v.*
State, 35 Tex. Cr. R. 150, 32 S. W. 697, our
court of criminal appeals held that a license
which designated the town in which the li-
quors were to be sold, but which failed to des-
ignate the particular house, was valid, and
that a defendant who had sold under such
license could not be lawfully convicted under
an indictment merely for selling without a
license. This being the construction placed
upon a criminal statute by the court of last
resort in criminal cases, the rule is binding
authority upon us, and disposes of the ques-
tion, so far as it is affected by the irregulari-
ty of the license. If the license which was
granted to Southard was valid,—if it protect-
ed him from a prosecution for selling liquor
without a license,—then the bond was not
void by reason of the omission to designate
the house therein.

It is difficult to say that the application is
not in strict conformity to the statute. The
requirement as to the license is that both
"the place and house" shall be designated;
but, in regard to the application, only "the
place" is to be pointed out, unless it be in a
street or town where the streets are named
and the houses numbered. It would seem,
therefore, that the word "place" in the pro-
vision in regard to the contents of the appli-
cation does not mean house, but only the
general locality in which the business was
to be carried on,—either city, town, village,
or hamlet, as the case might be. But, waiv-
ing this question, if the omission to name the
house in the license does not make it void,
for a much stronger reason, we think, it
ought to be held that a like omission in the
application cannot have such effect. We
find it unnecessary to pass upon other ques-
tions discussed upon the hearing. We con-
clude that the judgment of the court of civil
appeals ought to be reversed, and that of the
district court affirmed; and it is so ordered.

SAN ANTONIO TRACTION CO. v. WHITE.

(Supreme Court of Texas. April 4, 1901.)

DAMAGES—DEATH OF A MINOR SON—MEASURE
OF DAMAGES—INSTRUCTIONS—ERROR NOT
CURED—POSITIVE ERROR—FAILURE TO RE-
QUEST INSTRUCTION—EFFECT.

1. In an action by a parent to recover for the
death of her 12 year old son, an instruction
that plaintiff could recover the contributions
which she had a reasonable expectation of re-
ceiving from the son after his majority was
erroneous, since the true measure of damages
was present compensation for the loss.

2. Where the error in an instruction was a
positive one, it was assignable without the re-
quest of a special charge stating the true rule.

3. In an action by a parent to recover for
the death of her 12 year old son, an erroneous
instruction that plaintiff could recover the con-
tributions which she had a reasonable expecta-
tion of receiving from the son after his ma-
jority was not remedied by the further instruc-
tion that the jury should "consider the money
value" of the deceased as "hereinbefore in-
structed," where a preceding part of the in-
struction stated the correct rule as to the mea-
sure of damages, as the jury were only referred
to the preceding part to ascertain the measure
of "money value."

Error to court of civil appeals of Fourth su-
preme judicial district.

Action by Bettie White against the San
Antonio Traction Company. From a judg-
ment of the court of civil appeals (60 S. W.
323) affirming a judgment in favor of the
plaintiff, defendant brings error. Reversed.

Houston Bros. and R. J. Boyle, for plain-
tiff in error. C. A. Keller and Mason Wil-
liams, for defendant in error.

WILLIAMS, J. The judgment from which
this writ of error is prosecuted was recover-
ed by defendant in error in the district
court and affirmed in the court of civil ap-
peals (60 S. W. 323) for damages sustained
by her from the death of her minor son, Wil-
liam H. White, caused, as found by the
jury, by the negligence of the street-rail-
way company of which plaintiff in error is
successor. The only one of the assignments
of error which we find it necessary to dis-
cuss is that which complains of the charge
of the trial judge upon the measure of dam-
ages. The plaintiff sought to recover dam-
ages for the loss of the services of deceased
during minority, and also for the loss of
benefits which would have been received by
her from him after his majority. The
charge upon the measure of damages was
as follows: "Should you find for the plain-
tiff under this charge, then plaintiff would
be entitled to recover the pecuniary value
of said Wm. H. White's services until he
should arrive at the age of twenty-one years,
less the cost and expense of his care, sup-
port, and maintenance during the remaining
period of his minority. And if you believe
that plaintiff had a reasonable expectation
of receiving from said Wm. H. White, had
he lived, considering his disposition and abili-
ty, contributions to her wants and necessi-
ties after he reached his majority, then plain-
tiff is entitled to recover whatever pecuniary
aid she had a reasonable expectation of so
receiving, if any. You are instructed that,
if you find for the plaintiff, you must not
allow plaintiff anything for the bodily pain
and suffering of the said Wm. H. White, or
the mental pain and suffering, if any, under-
gone by plaintiff by reason of the death of
said Wm. H. White, and you must not con-
sider the loss of society of said Wm. H.
White to plaintiff, but consider alone the
money value, if any, of said Wm. H. White.

as hereinbefore instructed." The instruction was erroneous, in that it required the jury, in effect, to allow the amount of the pecuniary contributions which they might find the deceased, had he lived, would have made to his mother after becoming of age. The true measure of damages is compensation for the loss sustained by plaintiff from the death of her son; and what sum, allowed now, will give such compensation, is a question for the jury under all the circumstances of the case. The plaintiff lost the contributions which her son would have made to her, but it does not necessarily follow that nothing short of an amount equal to the sum of such contributions, if paid now, would be compensation. We had occasion to pass upon this question in the case of *Railway Co. v. Morrison*, 98 Tex. 527, 56 S. W. 745, and a charge in substance the same as that under consideration was held to be erroneous. In that case a special instruction was requested to submit a correct rule, but the charge of the court was held to be erroneous. As the error in this case was a positive one, it is assignable without the request of a special charge. The deceased was only twelve years old when killed, and the plaintiff, had her son lived, would have received none of the contributions for the loss of which she seeks compensation until after eight or nine years had passed, and this makes obvious the error of a charge requiring the jury to allow her in advance the sum which she would have received after such time. The charge in such cases should leave the jury free to allow compensation. It is urged that the instruction, "consider alone the money value of said Wm. H. White, as hereinbefore instructed," so explains and qualifies what preceded it as to remove the objection; but we do not think this is true. This part of the charge refers the jury to the preceding portion to ascertain what the court means by money value. What we have said has no reference to the first part of the charge, as to the recovery of value of services during minority.

PHOENIX LUMBER CO. et al. v. HOUSTON WATER CO.

(Supreme Court of Texas. April 1, 1901.)

LIMITATION OF ACTIONS—PETITION—AMENDMENT—CAUSE OF ACTION—CHANGE.

A petition alleged an express contract between defendant and a certain lumber company, to whose rights and property plaintiff succeeded, to protect the lumber company's property from fire. It further alleged a breach of such contract, and loss by fire on account of defendant's failure to furnish sufficient water pressure as agreed. After the expiration of limitations an amendment was filed, which abandoned all reference to the express contract, and alleged facts tending to impose a duty on defendant, by implication of law, to exercise ordinary care to supply sufficient water to protect the premises from fire, and alleged that, by reason of defendant's negligent failure to

supply sufficient water, plaintiff was damaged, etc. Held, that the cause of action alleged in the petition and amendment being essentially different, as requiring different proof, and being subject to different defenses, the amendment was improper, and the action was barred.

Error to court of civil appeals of First supreme judicial district.

Action by the Phoenix Lumber Company and others against the Houston Water Company. From a judgment of the court of civil appeals (59 S. W. 552) affirming a judgment of the trial court in favor of defendant, plaintiffs bring error. Affirmed.

Ewing & Ring and O. T. Holt, for plaintiffs in error. Hutcheson, Campbell & Hutcheson, for defendant in error.

BROWN, J. On June 19, 1891, the plaintiff in error, with Charles Dillingham, who had been appointed receiver of the property of that corporation, sued the Houston Water Company in the district court of Harris county to recover the value of certain property which was alleged to have been destroyed by fire in the city of Houston on the 20th day of May, 1891, on account of the failure of the defendant in error to furnish a sufficient supply of water to extinguish the fire. The insurance companies named in the application intervened, and the venue of the case was changed to Ft. Bend county. In the original petition the plaintiff sought to recover upon a contract entered into by the defendant in error with the city of Houston whereby the water company agreed to furnish to the city of Houston water sufficient to extinguish fires which might occur in the said city. This ground of action was abandoned in the sixth amended petition, and is not necessary to be set out more fully here. The original petition alleged also, in substance, that in 1883 the defendant in error entered into a contract with the M. T. Jones Lumber Company, a corporation, by which it agreed, for \$25 per month, to furnish to the lumber company all water necessary for use in connection with its business, including a supply sufficient at all times to extinguish a fire which might occur in the said property. It was alleged that in the year 1889 the Phoenix Lumber Company purchased the plant and property of the M. T. Jones Lumber Company, which included all water pipes, hose, mains, and hydrants which had been placed upon said premises by the M. T. Jones Lumber Company, together with all the apparatus necessary for applying the water to fire in case it should occur, and "that among other things sold and transferred to plaintiff by the said M. T. Jones Lumber Co. was the contract for fire protection last aforesaid made by and between the M. T. Jones Lumber Company and defendant, of which assignment the defendant then and there on, to wit, the — day of —, 1889, took due notice and agreed to such transfer, and then and there promised and agreed with plain-

tiff, in consideration of the sum of \$25 per month, which said sum plaintiff each and every month from said last-named date up to the said 20th day of May, 1891, paid upon demand to defendant, to supply at any time and all times adequate and sufficient water protection to protect plaintiff's said property from damage, loss, or destruction by fire, and also for boiler and other purposes." The petition then set up the loss of the property by fire on May 20, 1891, alleging the exercise of all possible diligence to extinguish the fire, and that the failure to extinguish it was caused by the want of water, which the defendant in error failed to supply in accordance with its agreement, and that, on the sole ground of inadequate and insufficient supply of water, the property "was wholly destroyed and consumed by fire, which was the direct and proximate result of the negligence of defendant in not maintaining a proper waterworks system and an adequate pressure, as it was in duty bound to do; that plaintiff could have easily extinguished the fire before any damage resulted, had there been a reasonable pressure of water through the hose. By reason of defendant's negligence as aforesaid, plaintiff's said property was wholly destroyed by fire without its fault, to its damage one hundred thousand dollars. (10) That, by reason of the defendant's contract with the city of Houston, it has had for more than ten years hitherto the exclusive right to furnish water to the inhabitants of the city of Houston, and the plaintiff, in common with the other property owners thereof, has been compelled to rely exclusively upon defendant for adequate and sufficient protection from fire, and the plaintiff, * * * relying upon said private agreement of defendant made with plaintiff to protect plaintiff's said property from fire, had made no other arrangement and had no other means of protecting its said property from fire; but so it was that the defendant neglected to discharge the duties so imposed and obligations so incurred by it, and did not maintain a sufficient system of waterworks and did not maintain a proper amount of pressure, all of which it and its officers and agents had full knowledge and notice at the time of said fire and for a long time prior thereto, and by use of reasonable diligence could have known, and, by reason of the breach of defendant's contract as aforesaid and the negligence of defendant, the said property of plaintiff was destroyed by fire on, to wit, the 20th day of May, 1891." On July 28, 1899, the plaintiff filed a sixth amended petition, in which the cause of action based upon the contract with the city of Houston was abandoned. Plaintiff set up its purchase of the property from the Jones Lumber Company, and that when it received possession it found upon the premises the hydrants, piping, fire plugs, nozzles, water hose, and other appliances necessary for extinguishing fires, all of which had been pro-

vided at the expense of the M. T. Jones Lumber Company, and belonged to the said premises, and also the plaintiff, when it purchased and took possession of the said premises, found that they were supplied with water by the Houston Water Company for all business purposes, including water for the extinguishment of fires by the use of the pipes, hydrants, etc., which were located upon the said premises, for which service the water company was then being paid at the rate of \$25 per month, and at that time the waterworks company had extended its mains and water service to and beyond the premises purchased by the plaintiff. "(8) That upon the purchase by said Phoenix Lumber Company of said lumber plant, and continuously subsequent thereto until after the fire hereinafter mentioned, in a uniform and continuous course of dealings between said lumber company and said Houston Waterworks Company, it, said waterworks company, being engaged in the business aforesaid, did perform for it, said lumber company, being engaged in the business aforesaid, the service of supplying water by means of its aforesaid water system to said lumber company's aforesaid lumber-plant premises for the use (besides other use or uses) of fire protection or extinguishment, through and by means of the aforesaid private fire equipments and hydrants on said premises, for the price or compensation to it, said waterworks company, paid by it, said lumber company, monthly, of twenty-five (\$25) dollars for each month of such service, upon monthly water bills made out against and in the name of said lumber company, and collected by it, said waterworks company, and retained by it, whereby it, said waterworks company, undertook and became in duty bound, by implication of law, to exercise ordinary or reasonable care to the end of so supplying water to said premises available for use for fire protection or extinguishment purposes thereon." To this amended petition the defendant excepted upon the ground that it appeared from its allegations that it set up a new cause of action, which was barred by the statute of limitations. This exception was sustained by the court, and, the plaintiff having failed to amend so as to avoid the objection, the petition was dismissed, which judgment was affirmed by the court of civil appeals. 59 S. W. 552. The allegations of the intervening amended petitions are unimportant, and are therefore omitted.

The courts have found it very difficult to give any general definition of the phrase "cause of action" which would apply to all cases alike, and few courts have attempted to do so. Pom. Rem. § 452. However, the following definition will be sufficient for the disposition of the case now before us: In the abstract, a cause of action consists of "the right, claim, or the wrong suffered by the plaintiff, and of the duty or delict of the defendant." *Kennerty v. Phosphate Co.*, 17 S.

C. 411. When used with reference to the pleadings by which the cause of action is alleged, the phrase signifies "the facts upon which the plaintiff's right to sue is based, and upon which the defendant's duty has arisen, coupled with the facts which constitute the latter's wrong." *Hutchison v. Ainsworth*, 73 Cal. 455, 15 Pac. 82; *Veeder v. Baker*, 83 N. Y. 160; *Box v. Railway Co. (Iowa)* 78 N. W. 696; *Lee v. Boutwell*, 44 Tex. 154. If the facts alleged in the sixth amended petition do not express substantially the same contract as that set up in the original petition, then the judgment of the court sustaining the exception must be affirmed. It is not sufficient that the causes of action be similar in their nature, but they must be essentially identical. Four tests are laid down by which to determine the identity of causes of action: (1) Would a recovery had upon the original bar a recovery under the amended petition? (2) Would the same evidence support both of the pleadings? (3) Is the measure of damages the same in each case? (4) Are the allegations of each subject to the same defenses? 1 Am. & Eng. Enc. Pl. & Prac. p. 556. We are of opinion that the second and last furnish the best tests by which to determine the matter before us, and we can safely say that if the same testimony would not support the allegations in each of these pleas, and if the same defenses could not be interposed to each of them, they are not identical, and therefore the amended petition presents a new cause of action. *McLane v. Belvin*, 47 Tex. 493; *Bigham v. Talbot*, 63 Tex. 271; *Railroad Co. v. Pape*, 73 Tex. 502, 11 S. W. 526; *Railway Co. v. Scott*, 75 Tex. 84, 12 S. W. 995; *Boyd v. Beville*, 91 Tex. 439, 44 S. W. 287; *Cotton v. Rand*, 93 Tex. 24, 51 S. W. 838, 53 S. W. 343; *Whalen v. Gordon*, 37 C. C. A. 70, 96 Fed. 314; *Scovill v. Glasner*, 79 Mo. 449. If the case were on trial upon the original petition, the plaintiff would be required to prove that the defendant contracted and agreed with the M. T. Jones Lumber Company to furnish to it water sufficient at all times to extinguish any fire that might originate upon the premises of the company, and that the M. T. Jones Lumber Company transferred that contract to the plaintiff; also that the property was destroyed by fire; that the plaintiff was prepared to apply the water, and used all necessary diligence to make application of the water to the fire, but that the defendant failed to furnish water in sufficient quantity to enable the plaintiff to extinguish the fire, from which cause the property was destroyed; and also to prove the value of the property. If the trial were upon the amended petition, the plaintiff must prove that it was prepared for applying water to fires, the circumstances relied upon to show that the defendant had undertaken to furnish water to it for the purpose of extinguishing fire, and that the defendant had negligently failed to furnish the water, whereby the loss had occur-

red. Evidence of an express contract would not be admissible under the allegations of, and if admitted would not establish, an implied contract; neither would the evidence from which the contract would be implied be admissible under the allegations of the original petition, nor would that evidence, if admitted, establish the existence of such a contract. Against the original petition the defendant could defend by disproving the making of the contract, or by proving that it furnished the water according to the terms of the agreement. Proof that it did not make the express contract would not be admissible, nor would it disprove the allegations of the implied contract contained in the amended petition; but in answer to the amended petition the defendant would be required to meet a great number of circumstances and facts, originating at different times and dates, arising out of transactions by different persons in its employ, all of which would be inadmissible in answer to, and would constitute no defense to, the original petition. The obligation, under the express contract, would be to furnish water, or to answer in damages for the failure to do so. Under the allegations of the implied contract, the defendant undertook to use ordinary care, and such means as persons or corporations engaged in a like business would use to furnish water for like purposes. From the view point of the plaintiff or the defendant, the allegations present different causes of action. They demand different proof of each party. They impose different duties upon the defendant, and are subject to different defenses. If we consider the allegations as descriptive of an object, they reflect features and characteristics so essentially different that it is impossible that they could represent the same thing. If there was an express contract, there could be no implied contract arising out of the acts of performance of it. The one is destructive of the other. Two things which cannot co-exist will not constitute one and the same thing. The judgments of the district court and the court of civil appeals are affirmed.

GALVESTON, H. & S. A. RY. CO. v. MORRIS.

(Supreme Court of Texas. April 8, 1901.)

**DEPOSITIONS—NOTICE TO TAKE—MISNOMER—
SUPPRESSION—RAILROADS—INJURIES—INSTRUCTIONS.**

1. Under Rev. St. art. 2274, providing that a notice of the taking of depositions shall contain the name and residence of the witness, a difference between the names given in a notice of the taking of depositions and those signed to the depositions is not a cause for suppression of the depositions at the trial, where it appears that the deponents had been witnesses at a former trial of the same case, and that the party against whom the depositions were to be used filed cross interrogatories, and hence was not misled by the misnomer.

2. Where a railroad company, which was sued for injuries alleged to be caused by a sud-

den jerk in stopping the train at a station, requested an instruction that "if the jury should find that the plaintiff was injured as alleged, but that at the time of such injury he was trying to get off the train while it was moving so rapidly that an ordinarily prudent person would not have made the attempt, they should find for defendant," the same idea was contained in two contiguous instructions to the effect that, "without regard to defendant's negligence, plaintiff could not recover if he was contributorily negligent," and that "whether or not plaintiff was negligent, and contributed to his own injury by riding on the platform and jumping on and off the train while in motion, was a question for the jury," so that a refusal to give the requested instruction was not error.

Error to court of civil appeals of First supreme judicial district.

Action by C. M. Morris against the Galveston, Harrisburg & San Antonio Railway Company. From a judgment in favor of the plaintiff, affirmed by court of civil appeals (60 S. W. 813), defendant brings error. Affirmed.

A. L. Jackson and G. G. Kelley, for plaintiff in error. O. T. Holt, J. C. Baldwin, and J. V. Meek, for defendant in error.

WILLIAMS, J. In passing upon the application for writ of error in this case, we were of the opinion that all of the questions of law raised in the court of civil appeals had been correctly disposed of, save two, viz. those raised upon the refusal of the district court to suppress the depositions and to give requested charge No. 5.

1. The interrogatories and notice under which the depositions were taken gave the names of the witnesses as Herman Walters and Mrs. Herman Walters, while the depositions returned were those of Herman Walter and N. E. Walter. The only explanation given by the trial judge of his refusal to sustain the motion to suppress was that it was shown that Mrs. Herman Walters and Mrs. N. E. Walter is one and the same person, and that she was the wife of Herman Walters, residing at the place given in the notice and interrogatories as the residence of the witnesses interrogated. Under the decision in the case of *Faver v. Robinson*, 46 Tex. 204, it would seem that there is a material difference between the name Walters and Walter, and, since the statute (article 2274, Rev. St.) contains the requirement, which must be substantially observed, that the notice of an intention to take depositions shall give the name of the witness, it would seem to follow that the depositions in question were not legally taken, and were not admissible, unless it was shown that the purpose of the law had been substantially met. This, we thought, was not done by showing only that the witnesses who testified were the persons whose depositions were intended to be taken. One purpose of the statute is to enable the party against whom the deposition is to be used to identify the witness at the time when the notice is served, and the only information by which this is ordinarily done is the name and resi-

dence given. If a wrong name is given, we think that, in order to obviate the effect of the mistake, it should appear that the party was not misled or prejudiced by it, but in fact knew what witness was intended. The explanation of the trial judge on which we acted in granting the writ does not show such facts, but a further examination of the record discloses that both Herman Walter and N. E. Walter had testified at a previous trial of the case, and the cross interrogatories propounded by plaintiff in error show that its counsel knew that the persons whose depositions were to be taken were the ones who had so testified. Under these circumstances, the motion to suppress their depositions was properly overruled. *Jones v. Ford*, 60 Tex. 131.

2. Special charge No. 5 was as follows: "If you believe from the evidence that the plaintiff was injured as alleged, but that at the time of the injury he was in the act of attempting to get upon the train while it was in motion, or was in the act of getting from the train while it was in motion, and that at such time said train was moving so rapidly that the plaintiff endangered his person in so attempting to get off or on the train, and that an ordinarily prudent person under the same or similar circumstances would not have made such an attempt as was then made by plaintiff, and that such conduct of plaintiff directly contributed to his injury, then in such event plaintiff cannot recover, and you will find your verdict in favor of the defendant." This sought only to have the act of plaintiff in getting on or off the train submitted as an act of negligence. The contention of fact to which it was directed was that plaintiff was not hurt by being thrown from the car by a sudden jerk thereof, as claimed by him, but was injured while engaged in jumping on and off the train in motion. The charge of the court gave full definitions of negligence and contributory negligence, and instructed that, "when an injured person is guilty of contributory negligence, he cannot recover for the injuries, even though the party inflicting the injury was also guilty of negligence." This was immediately followed by this instruction: "Whether or not there was negligence on the part of the defendant in this case, or its agents or servants, in the operation and control of its train, and failure to furnish seats for its passengers, if such was the fact, and this fact was that which caused the injuries to the plaintiff, if such was a fact, or whether there was negligence on the part of the plaintiff which contributed to his own injuries by riding on the platform or by jumping on and off the train at night while it was in motion, if such was so, or whether plaintiff knew the platform was a more dangerous place than the inside of the car, and whether or not plaintiff was a youth of such immature judgment and discretion that he was unable to understand the nature and extent of the per-

il to which he was exposed, under the circumstances as shown by the evidence, are questions of fact for you to determine from the evidence in the case." Together, these instructions not only gave the law in the abstract, but directly applied it to the evidence relied on by both plaintiff and defendant, and they were a sufficient compliance with the rule which requires that the facts relied on to establish a defense shall be affirmatively presented by the court upon proper request. The differences between the general charge and the requested instruction are merely in arrangement and verbiage. They state, in substance, the same proposition. Affirmed.

HARTFORD FIRE INS. CO. v. WALKER.
(Supreme Court of Texas. April 8, 1901.)
INSURANCE-AGENT-WARRANTY-WAIVER-STATUTES-CONSTRUCTION
-JURY-CHARGE.

1. A soliciting agent of defendant, who had taken an application for insurance on plaintiff's gin house in another company, which was rejected, took plaintiff's application, containing the statement, in the agent's writing, that no application had been rejected by any company. By the terms of the application, and of the policy issued thereon by defendant's general agent, the statements in the application were made warranties. *Held*, under Rev. St. art. 3093, which provided that any person who solicited insurance on behalf of any insurance company should be held to be the agent of the company, as far as related to all the liabilities, duties, requirements, and penalties set forth in that act, it was error to charge "that, if such soliciting agent knew that the risk had been declined, then the fact that plaintiff made such statement in the application would not defeat his right to recover," since by the statute the company was not bound by the agent's acts beyond the terms of the statute, which did not include the right to waive a warranty.

2. Rev. St. art. 3093, provides that any person who solicits insurance on behalf of any insurance company shall be held to be the agent of the company, "as far as relates to all the liabilities, duties, requirements and penalties set forth in this chapter." This article is a copy of the act of the 16th legislature entitled "An act to define who are agents of insurance companies," etc. *Held*, under the act authorizing the revision of the laws, which required the codifiers to include the former laws without making radical change therein, and Rev. St. p. 1105, § 19, providing that the Revised Statutes, so far as they are substantially the same as the laws in force at the time the statutes shall go into effect, shall be construed as continuations thereof, that the "liabilities, duties and penalties" referred to in article 3093 are only those referred to in the act of 1879, from which the article was taken, and hence the article does not confer any power or authority on any such person with reference to the making of insurance contracts, or make the insurance company liable for his acts, except as specified in that law.

Error to court of civil appeals of Second supreme judicial district.

Action by A. J. Walker against the Hartford Fire Insurance Company. From a judgment of the court of civil appeals (60 S. W. 820) affirming a judgment in favor of plaintiff, defendant brings error. Reversed.

Finley, Harris, Etheridge & Knight, for plaintiff in error. Stuart & Bell and C. R. Pearman, for defendant in error.

BROWN, J. On the 2d day of November, 1898, the Hartford Fire Insurance Company, through its general agent for the state of Texas, D. E. Grove, issued and delivered to A. J. Walker, the defendant in error, a policy of insurance for \$1,692.71 upon a gin house and certain gin machinery, consisting of engines, boilers, etc., all situated in Montague county, the property of said A. J. Walker. The property was destroyed by fire, and, the company having refused to pay the policy, this suit was instituted by Walker to recover the amount named in the policy. No question is presented in this court upon the pleadings of either party, but the pleadings of both are sufficient to present the issues which the evidence tends to support. The facts are, briefly, that J. H. Blanton was local agent for the insurance company at the city of Gainesville, Tex., with authority to receive applications for insurance upon gin property, and to forward them to D. E. Grove, at Dallas, Tex., who alone had the power to issue a policy upon that class of property. Blanton had no authority to issue a policy for the plaintiff in error upon gin property. When the policy was sent by Grove to Blanton, it was accompanied by the application, upon which was the following indorsement, which Walker was required to sign before the policy should be delivered: "I acknowledge receipt of policy No. 11,680, issued on this application, and hereby warrant that I have read and considered all the questions and answers in the application; and said answers are correctly recorded under my direction, and I warrant them to be true as written. [Signed] A. J. Walker, Assured." When the policy was delivered, Walker signed the indorsement above copied, and the application was returned to Grove, at Dallas. In the application the following question was asked: "Has any company declined this risk?" Answer: "No." Walker had before that time applied, through Blanton, to another company for insurance upon the same property, which application was refused; and, when the application to plaintiff in error was made, Walker did not know that it was to be sent to a different company, and Blanton knew at that time that the application had been rejected by another company. Walker could neither read nor write, except to sign his name. The application contained these provisions: "[He] covenants and agrees to and with the said company that this application is a just, true, and full exposition of all the facts and circumstances in regard to the condition, situation, value, and risk of the property to be insured, and that no fact or information material to the risk has been omitted or withheld, and further submits the statements and answers foregoing as a

basis on which the insurance is to issue, and that they are understood as forming the basis and a part of any policy contract that may be issued hereon by the Hartford Fire Insurance Company. * * * It is further understood and agreed that the general agent of the Hartford Fire Insurance Company alone has authority to act for the company in any manner as to the insurance hereby requested." Upon the face of the policy, in large red letters, was this indorsement: "As per written and printed form attached hereto; special reference being had to the assured's application, No. 11,630, on file in this company's office at Dallas, Texas, which is hereby made his warranty and a part of this policy. It being specially stipulated that the general agent signing this policy alone has authority to represent or act (as agent or otherwise) for the company in any manner as to this policy." The policy contained the following provisions pertinent to the question presented: "This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements, or conditions as may be indorsed thereon or added thereto; and no officer, agent, or other representative of this company shall have power to waive any condition or provision of this policy, except such as by the terms of this policy may be subject to agreement indorsed hereon or added hereto, and, as to such provisions and conditions, no officer, agent, or other representative shall have such power or be deemed or held to have waived such provision or condition, unless such waiver, if any, shall be written upon or attached hereto; nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached." And further: "Special reference being had to the assured's application, on which this policy is issued, and which is made a part hereof." The policy also contained the usual clauses of forfeiture.

The trial judge gave the following charge to the jury: "In his application for this insurance the plaintiff was asked the following question, viz.: 'Has any company declined this risk?' To which he answered: 'No.' Now, you are instructed that, if any company had declined such risk, then the plaintiff cannot recover, unless you believe from the evidence that said Blanton knew that said risk had been declined; but, if said Blanton knew that said risk had been declined, then the fact that plaintiff answered said question 'No' would not defeat his right to recover." The jury returned a verdict for the plaintiff, upon which judgment was rendered by the district court, and affirmed by the court of civil appeals. 60 S. W. 820.

The evidence did not authorize the district court to assume that Blanton had authority to issue policies, and, upon that assumption, to charge that his knowledge of the former

rejection of the risk would estop the company to claim the benefit of the warranty. The charge complained of can only be sustained upon the ground that article 3093 of the Revised Statutes declares the solicitor of insurance to be the general agent of the company, and conferred upon Blanton authority to issue policies of insurance in the name of the Hartford Fire Insurance Company.

The 16th legislature enacted a law entitled "An act to define who are agents of insurance companies and to fix their liability for acting without authority of law," the first section of which reads as follows: "Be it enacted by the legislature of the state of Texas, that any person who solicits insurance on behalf of any insurance company, whether incorporated under the laws of this or any other state or foreign government, or who takes or transmits other than for himself any application for insurance or any policy of insurance to or from such company, or who advertises or otherwise gives notice that he will receive or transmit the same, or who shall receive or deliver a policy of insurance of any such company, or who shall examine or inspect any risk, or receive or collect, or transmit any premium of insurance, or make or forward any diagram of any building or buildings, or do or perform any other act or thing in the making or consummating of any contract of insurance for or with any such insurance company other than for himself, or who shall examine into or adjust or aid in adjusting any loss for or on behalf of any such insurance company, whether any of such acts shall be done at the instance or request, or by the employment of such insurance company, or of or by any broker or other person, shall be held to be the agent of the company for which the act is done or the risk is taken, as far as relates to all the liabilities, duties, requirements and penalties set forth in this act." Sp. Sess. 1879, c. 36. This section of the law of 1879 constitutes article 3093, except that for the word "act," as used in the original statute, the codifiers used the word "chapter," as shown in parentheses. In the act of the legislature authorizing the revision of the laws of the state which became a law in 1891, the codifiers were required, in revising the laws, to include all articles of the former Revised Statutes which had not been repealed, and to add in their order the amendments of the Revised Statutes, where they were expressed as amendments of certain articles, in the order in which they should come according to their subjects and the numbers of the articles given; and concerning other statutes this language is used: "And all other of said statutes passed as aforesaid which are general and permanent in their nature shall be collated and arranged into their proper titles, chapters and articles with marginal references and chapter head-lines similar to those used in the present Revised Statutes; provided, that in revising the statutes referred to in this sec-

tion, said commissioners shall, without making radical changes therein, so revise them as to render them concise, plain and intelligible." The commissioners for revision were not authorized to make changes in the substance of the statute laws of the state, but simply to arrange them in convenient form. To make sure that the laws of the state were not materially changed by such revision, the legislature which adopted the Code as revised enacted a chapter of general provisions to govern in the construction and application of the laws embraced in the Revised Statutes (page 1105), of which general provisions section 19 is in these words: "That the provisions of the Revised Statutes, so far as they are substantially the same as the statutes of this state in force at the time when the Revised Statutes shall go into effect, or of the common law in force in this state at the said time, shall be construed as continuations thereof and not as new enactments of the same." Article 3093 is substantially the same as section 1 of the act of 1879, before quoted, and we must construe the language of that article as we would the act of 1879. By using the language, "shall be held to be the agent of the company for which the act is done or the risk is taken as far as relates to all the liabilities, duties, requirements and penalties set forth in this act," the legislature meant the liabilities, duties, and penalties prescribed in the subsequent sections of the act named, which were that the person who performed such acts for any insurance company which had not complied with the laws and requirements of the statute should be guilty of a misdemeanor, subject to the fines and penalties prescribed in section 2 of the act, and that such person should be personally liable for the taxes which might be assessed against the companies thus represented, and should also be liable to the policy holder for any loss sustained upon the policy issued by him. The liability of the company prescribed by the act was that, being thus represented in the state, it should be considered as doing business in this state, and subject to taxation, the same as other insurance companies that were regularly engaged in the business. This law declared the person performing the acts specified to be the agent of the company for which he acted, either by appointment, or who assumed to act without authority for the purpose of punishing the person performing the acts, and to make him liable to the state and others for acts so performed, and also to make him agent of the company so far as to render it liable for taxes for doing business within the limits of this state; but that act did not purport to confer any power or authority upon such persons with reference to the making of contracts, or to make the insurance company liable for any act that he did, except as specified in that law. If the language quoted from article

3093 be construed to refer to the chapter of which it is a part, instead of the original act of the legislature for the scope of the agency, then the effect of the law in declaring such person to be the agent of the insurance company cannot be held to confer powers to contract which are not expressed in the law, but the matter of authority would depend upon the terms of his appointment, or upon facts which would show the extent of his power. The construction which the court of civil appeals places upon the law would constitute one a general agent who advertises as agent of a company, or makes and forwards a diagram of a building for another, for the statute applies to such in the same terms as to a solicitor of insurance. For the error committed by the trial court in giving the instruction complained of, the judgments of the district court and the court of civil appeals are reversed, and the cause is remanded.

BRADSHAW v. STATE.

(Court of Criminal Appeals of Texas. March 20, 1901.)

ADULTERY—EVIDENCE—SUFFICIENCY.

Evidence that defendant and her alleged paramour lived in the same house, occupying separate rooms, is not sufficient to support a verdict that defendant was guilty of adultery, in the absence of proof of any carnal intercourse between them, or that he contributed to her support.

Appeal from Johnson county court; W. D. McKay, Judge.

Pearl Bradshaw was convicted of adultery, and appeals. Reversed.

W. H. Bledsoe and D. M. Watkins, for appellant. D. E. Simmons, Acting Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of adultery, and her punishment assessed at a fine of \$100, and she prosecutes this appeal.

The indictment was in two counts,—one for carnal intercourse between appellant and Jim Johnson, appellant being married to another person, and the paramours alleged to be living together; the other count charging adultery by habitual carnal intercourse, the parties not living together. Appellant complains of the charge of the court on the ground that there was no evidence justifying a charge on habitual carnal intercourse between the parties, nor was there any evidence justifying a charge on carnal intercourse on the allegation that the parties lived together; so that really the contention of appellant is to the effect that the evidence does not support the conviction. We have examined the record carefully, and, in our opinion, the testimony fails to show that the parties lived together. True, one witness says in a general way that the parties lived together, but when cross-examined it is evident

that his statement was not based on knowledge of any fact. To support the conviction upon the count charging the parties with living together and committing adultery, there must be something more than the fact that the parties lived on the same place, or even in the same house. *Ledbetter v. State*, 21 Tex. App. 345, 17 S. W. 427; *Bird v. State*, 27 Tex. App. 635, 11 S. W. 641; *Thomas v. State*, 28 Tex. App. 300, 12 S. W. 1098. While the proof on the part of the state showed that the parties lived in the same house, it was also shown that they lived and inhabited separate and distinct rooms in said house. There is no testimony suggesting that Johnson supported, maintained, or aided in supporting his paramour, Pearl Bradshaw, the appellant. More than this, there is no act of carnal intercourse shown between the parties. The most that can be said is that there are circumstances indicating they might have had carnal intercourse, but certainly there is nothing to show they had habitual carnal intercourse. Because, in our opinion, the evidence does not support the verdict of the jury, the judgment is reversed, and the cause remanded.

Ex parte WHITNEY.

(Court of Criminal Appeals of Texas. March 20, 1901.)

HABEAS CORPUS—APPEAL.

Where the evidence is not in the record on an appeal from an order denying the relief sought by a writ of habeas corpus, the decision of the trial court will be sustained.

Appeal from district court, Harris county; A. C. Allen, Judge.

Habeas corpus by Ralph Whitney, alias Ralph Winston. From a judgment denying the relief demanded, the petitioner appeals. Affirmed.

D. E. Simmons, Acting Asst. Atty. Gen., for the State.

BROOKS, J. Appellant sued out a writ of habeas corpus before the judge of the criminal district court of Harris county asking for a discharge from further prosecution under the indictment, or, in the event that the court should not do this, that his bail be reduced. Appellant is indicted for rape. There is no statement of the evidence in the record before us, and hence nothing upon which to predicate a conclusion other than that reached by the trial court. The trial court has fixed the bail of appellant at the sum of \$4,000. The judgment is affirmed.

GRAHAM v. STATE.

(Court of Criminal Appeals of Texas. March 20, 1901.)

HOMICIDE — SELF-DEFENSE — EVIDENCE OF CO-CONSPIRATOR—INSTRUCTIONS.

1. Where the evidence shows that deceased was coming towards defendant and attempting

to draw his pistol when he was killed, an instruction that if deceased drew and presented a pistol towards defendant, and if the latter killed deceased while acting under a reasonable expectation or fear of death or great bodily injury, he cannot be convicted therefor, is erroneous, since it makes defendant's right of self-defense dependent on the actual presentation of the pistol.

2. An instruction that if deceased made an attack on defendant of a manner and character causing the latter to have a reasonable expectation of death or great bodily injury, and deceased was killed by defendant as a result thereof, the latter cannot be convicted, is erroneous, since defendant was not required to wait until deceased actually assailed him.

3. Where a homicide is charged as the result of a conspiracy, and the evidence thereof is conflicting, the jury should be instructed that acts and declarations of an alleged co-conspirator of defendant cannot be considered unless the conspiracy is shown beyond a reasonable doubt.

Appeal from district court, Robertson county; W. G. Talliaferro, Judge.

Guy Graham was convicted of murder in the first degree, and he appeals. Reversed.

Frank Andrews and Campbell & Gann, for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of murder in the first degree, and his punishment assessed at confinement in the penitentiary for life.

The court charged the jury: "If you believe from the evidence that, on or about the time alleged, defendant was passing near the place where deceased, A. L. Boswell, was at work in his field, and deceased drew and presented a pistol at and towards defendant, and that such conduct on the part of the deceased caused defendant to have a reasonable expectation or fear of death or serious bodily injury, and that, acting under such reasonable expectation or fear, defendant shot and killed deceased, you should acquit defendant." Exception was reserved to this charge. The testimony in the record in this connection was that detailed by appellant. He stated that, while passing near the cross fence between his property and that of deceased, his brother, who was some distance away, hallooed at him: "Look out! Boswell is about to shoot you. Run." I whirled to look, and as I had my left side towards him— I could not see out of my left eye, and not very well out of the right one, owing to bruises and swelling on my face. As I turned I saw Boswell make a step or two towards me. He seemed to be saying something, which I did not understand; and I saw him throw his right hand around to his left side, and saw him draw out a pistol. Just as he did this I shot him." The statement of appellant on the cross-examination in regard to this matter is, in substance, the same as that above detailed. This charge was erroneous. It made appellant's right of self-defense depend on the fact that deceased drew and presented a

pistol at and towards appellant. This eliminates the right of self-defense on apparent danger. The evidence does not show that deceased presented a pistol at and towards defendant.

The court also charged in this connection that if the jury believed at the time of the killing that deceased had made an attack on defendant, which, from the manner and character of it, caused him to have a reasonable expectation or fear of death or serious bodily injury, and that under those circumstances the killing occurred, the jury should acquit. This was also an infringement of the doctrine of apparent danger, under the facts of this case. *Phipps v. State*, 34 Tex. Cr. R. 560, 31 S. W. 397; *Stewart v. State*, 40 Tex. Cr. R. 649, 51 S. W. 907.

Exception was also reserved to the following charge of the court: "If you do not believe from the evidence, beyond a reasonable doubt, that there was an agreement or conspiracy between defendant and Eugene Graham to take the life of deceased, or to do him serious bodily injury that might result in his death, you will not consider any facts or circumstances in evidence, if any, that may tend to show preparation on the part of Eugene Graham for the commission of such offense, in reaching your verdict." This is the only charge on the subject of conspiracy given by the trial court. Upon another trial this issue should be presented affirmatively, and the jury instructed substantially that, before the acts and declarations of Eugene Graham can be considered as evidence, it must be shown beyond a reasonable doubt that a conspiracy existed between the parties. We are not undertaking to give a form of charge, but simply calling the court's attention to the matter. Where the testimony leaves in doubt the question of conspiracy in acting together in the commission of a crime, the charge should carefully guard the law applicable to such a state of case. The judgment is reversed, and the cause remanded.

VILLEREAL v. STATE.

(Court of Criminal Appeals of Texas. March 20, 1901.)

MURDER—ABSENT WITNESS—CONTINUANCE—ARRAIGNMENT—RECITAL IN JUDGMENT—APPEAL—CHALLENGES OVERRULED—EVIDENCE—COMPETENCY—MOTIVE—INSTRUCTIONS—CIRCUMSTANTIAL EVIDENCE—ISSUE NOT RAISED—THREATS—REASONABLE DOUBT—EXCULPATORY EVIDENCE.

1. Where an application for a continuance for the purpose of procuring a witness to prove an alibi was so indefinite as not even to manifest the opportunity of the absent witness to be able to testify as to the alibi, it was properly denied.

2. Where a judgment of conviction recites that defendant was properly arraigned, such recital is conclusive on appeal.

3. Where the court in a murder trial overruled some of defendant's challenges for cause,

thus forcing the use of peremptory challenges, and in consequence, other jurors were impaneled without defendant being allowed to challenge them, but the latter failed to show that he was forced to take an objectionable juror, its action is not cause for reversal.

4. Where deceased's wife was not married at her brother-in-law's house because the latter was opposed to her marriage to deceased, out of which rose a bitterness on the part of the brother-in-law towards deceased, evidence thereof was admissible in the prosecution of the brother-in-law for murder to show motive and ill feeling.

5. Where the court gave the usual charge as to circumstantial evidence, and a further charge, requested by defendant, on the same subject, there was no ground for the objection that no application of the law of circumstantial evidence to the case on trial was made.

6. Where the issue of manslaughter was not raised by the evidence, it was not error to omit to charge on that subject.

7. An instruction that the jury in deliberating on the case should not refer to any matter or issue not in evidence, nor separate from each other, nor talk with any one not of the jury, and that violation of the injunction would be punished severely by the court, was not improper as a threat calculated to mislead and prejudice the jury.

8. Where an instruction explains the defense of an alibi, and states that, if "the evidence" raised a reasonable doubt as to the presence of defendant at the place where the offense was committed at the time of its commission, the jury must find defendant not guilty, such instruction was not improper as requiring exculpatory evidence to raise a reasonable doubt.

Appeal from district court, Duval county; A. L. McLane, Judge.

Felix Villereal was convicted of murder, and he appeals. Affirmed.

Coopwood & Coopwood, for appellant. D. E. Simmons, Acting Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of murder in the second degree, and his punishment assessed at 20 years' confinement in the penitentiary.

Appellant insists the court erred in overruling his application for a continuance. We do not think the absent witnesses' testimony, as stated in the application, could or would have precluded the presence of appellant at the scene of the homicide, since the application is so vague and indefinite in its terms as not to make it certain. An application for continuance to prove an alibi should be so definite as to the statement of the facts as would manifest at least the opportunity of the witness to be able to testify as to the alibi. This does not appear in the application before us. *Pilot v. State*, 38 Tex. Cr. App. 515, 43 S. W. 112, 1024; *Underwood v. State*, 38 Tex. Cr. App. 193, 41 S. W. 618; *Blake v. State*, 38 Tex. Cr. App. 377, 43 S. W. 107; *Garrett v. State*, 37 Tex. Cr. App. 198, 38 S. W. 1017, 39 S. W. 108.

Appellant contends that he was placed upon trial without being arraigned. The judgment shows this contention to be without merit, as it recites he was properly arraigned.

Appellant contends the court erred in over-

ruling his challenge for cause to the juror S. Burchett, and compelling him to exhaust one of his peremptory challenges. The objection to the juror was that he had conscientious scruples as to the infliction of capital punishment for crime, which objection was overruled, the court holding that only the state was entitled to such challenge for cause; and "that thereafter defendant exhausted all of his peremptory challenges before the jury was completed, and other jurors were impaneled without his being allowed to challenge them." Two other bills present the same matter with reference to other jurors. But in neither instance does appellant show he was forced to take an objectionable juror. We have held that merely to say a juror objectionable to defendant was impaneled and sat upon the jury is not an exception sufficient to raise the question of the juror's status on appeal (*Hudson v. State*, 28 Tex. App. 323, 13 S. W. 388; *Ripley v. State*, 29 Tex. App. 37, 14 S. W. 448); and certainly where appellant urges no ground, and it is not insisted that the juror was even objectionable, it clearly would not be cause for reversal. Appellant showing no injury, we do not think the court erred in the matter complained of in the bill of exceptions.

Appellant objects to the state proving by his sister-in-law Dolores Garza (wife of deceased) why she did not get married at defendant's house. The court overruled his objection, and witness testified that the reason was defendant objected to her marrying deceased, and out of that marriage grew a bitterness on the part of defendant towards deceased. This was admissible on the question of intent, motive, animus, and ill feeling on the part of defendant towards deceased.

Appellant objects to the charge of the court because it makes no application of the law of circumstantial evidence to the case on trial, or any of its issues, and fails to instruct as to the consequence of failure on the part of the state to so prove. The court gave the usual charge on circumstantial evidence, and it was not necessary to give a further instruction than as there contained. However, the court gave the jury the following special charge, No. 6, asked by appellant: "That, to warrant a conviction on circumstantial evidence, each fact necessary to the conclusion sought to be established must be proven by competent evidence beyond a reasonable doubt; and all the facts necessary to such conclusion must be consistent with each other, and with the main fact sought to be proved; and the circumstances, taken together, must be of a conclusive nature, leading on the whole to a satisfactory conclusion, and producing in effect a reasonable and moral certainty that the accused, and no other person, committed the offense charged. The mere union of a limited number of independent circumstan-

ces, each of an imperfect and inconclusive character, will not justify a conviction. They must be such as to generate and justify full belief according to the standard rule of certainty. It is not sufficient that they coincide with and render probable the guilt of the accused, but they must exclude every other reasonable hypothesis. No other conclusion but that of the guilt of the accused must fairly and reasonably grow out of the evidence, but the facts must be absolutely incompatible with innocence, and incapable of explanation upon any other reasonable hypothesis than that of guilt."

The court did not err in failing to charge the law of manslaughter, since the issue is not raised by the evidence.

Appellant also objects to the addenda attached to the charge of the court on the ground that it is not the law of the case, but a threat to the jury, calculated to mislead and prejudice them against appellant's defense. That portion of the charge is as follows: "In deliberating upon this case you are instructed not to refer to or discuss any matter or issue not in evidence before you; neither shall you separate from each other, nor talk with any one not of your jury; and a violation of this injunction will be punished severely by the court." We heartily commend and indorse the clause just quoted, and, instead of being error, it is highly praiseworthy in trial courts to warn the jury, and insist that under no circumstances shall they consider any issue not in evidence before them. This has frequently been the cause of reversals, and it is certainly commendable in trial courts to endeavor to confine the deliberations of the jury to the law and evidence as adduced.

Appellant urges error in the following portion of the charge of the court: "Among other defenses set up by defendant is what is known in legal phraseology as an alibi; that is, that, if the offense was committed as alleged, then the defendant was at the time of the commission thereof at another and different place from that where such offense was committed, and therefore was not, and could not have been, the person who committed the same. Now, if the evidence raises in your minds a reasonable doubt as to the presence of the defendant at the place where the offense was committed at the time of the commission thereof, you will find the defendant not guilty." We think this charge is correct, or, at any rate, there is not such error in the same as is calculated to injure the rights of appellant. Appellant seems to insist that the charge requires the introduction of exculpatory evidence. We do not agree with this contention, but deem it sufficient to here repeat what was said in *Zwicker v. State*, 27 Tex. App. 560, 11 S. W. 634: "This charge does not require the introduction of exculpatory evidence, nor is it calculated to impress the jury that the guilt of accused is established beyond a rea-

ferred to in 9 Tex. App. [Smith v. State, 9 Tex. App. 150; Blocker v. State, Id. 279; Wallace v. State, Id. 299], place in the scales the guilt and innocence of the accused." For a full discussion of this matter, see the above-cited case. However, we insist that the trial judge follows the words of the statute, thus eliminating all possible cavil over the matter.

The evidence is circumstantial, but is of that nature leading, on the whole, to the satisfactory conclusion that appellant, and no one else, killed deceased. The jury have passed upon the sufficiency of the evidence, and we have carefully reviewed the record, and see no reason for disturbing their finding. The judgment is affirmed.

TELLIS v. STATE.

(Court of Criminal Appeals of Texas. March 20, 1901.)

PERJURY—INDICTMENT—GRAND JURY—AUTHORITY TO ADMINISTER OATH—EVIDENCE—MATERIALITY—INSTRUCTIONS—ADDRESS TO JURY—REQUEST TO EXPUNGE—VENIREMAN—DISQUALIFICATION—OPINION.

1. An indictment for perjury in testifying before a grand jury to an alibi in behalf of a person accused of crime, which does not specifically allege that the person in whose behalf the testimony was given had committed a crime which was being investigated by the grand jury, is not bad as failing to show that the alleged false testimony was material if it alleges facts which are sufficient basis for the conclusion of materiality.

2. Where an indictment for perjury sets out several statements which are in effect the same statement, the falsity of which is the gravamen of the offense charged, an instruction that the jury may convict the defendant if they find any of the statements false, while unnecessarily subdividing the issue, does not injure the defendant, and hence is not reversible error.

3. Improper remarks of an attorney in addressing the jury are not ground for reversal when the trial judge was not requested to instruct the jury to disregard the remark.

4. A venireman, who had formed no idea as to the guilt or innocence of the accused, who was indicted for perjury committed in testifying to an alibi on behalf of a person accused of murder, was not disqualified by reason of the fact that he had formed and expressed an opinion as to the guilt of the party in whose behalf the accused testified, when it further appeared that such opinion was not formed from hearing the evidence or talking with witnesses, and that he thought he could try the case at bar under the law and the evidence.

Davidson, P. J., dissenting.

Appeal from district court, El Paso county; A. M. Walthall, Judge.

Elizja Tellis was convicted of perjury, and she appeals. Affirmed.

D. E. Simmons, Acting Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of perjury, and her punishment assessed

which was in several counts, on the ground that the same stated no offense against the laws of this state, because it does not show or allege that E. Garcia committed any act of criminal offense while at said Café saloon, which was being investigated before the grand jury, wherefore the language alleged to have been used by appellant was immaterial, and not the subject of inquiry, so that perjury could be assigned thereon; and, further, that the indictment fails to allege that the testimony of defendant while a witness before the grand jury was material to the subject of inquiry before said grand jury, and the indictment fails to allege the foreman of the grand jury was authorized to administer oaths, and because the innuendoes adduced from defendant's statements cannot be legitimately deduced therefrom. An examination of the indictment does not support appellant's contention that there was a failure to allege that the foreman of the grand jury was authorized to administer oaths. As to the materiality of the alleged false testimony, we would observe it is competent to allege in terms the materiality thereof, or to allege the facts which show the materiality. See *Kahm v. State*, 30 Tex. App. 310, 17 S. W. 416; *Buller v. State*, 33 Tex. Cr. R. 551, 28 S. W. 465. In this indictment it seems that the pleader adopted both methods; that is, the gravamen of the charge is to the effect that the grand jury were investigating as to whether or not Garcia shot and killed O'Connor at the Café saloon, in El Paso, on the 1st of October, 1899, between the hours of 6 and 8 o'clock on said night, and that appellant, on behalf of said Garcia, was a witness on said occasion, and swore that said Garcia was not present at said Café saloon, but was at the house in the room of Felicita Tellis, about 400 yards distant from said Café saloon, during said time, and could not have been present at said Café saloon, at the time said O'Connor was shot. In other words, said witness testified to an alibi on behalf of said Garcia. Now, all the facts which go to show this alibi testimony are set up in detail, and in rather prolix form. Yet an examination of the record shows they are all here, and they are pleaded in such manner as to exhibit the materiality of the alleged false testimony, and upon the very issue in the case, as is required in *Buller's Case*, supra. And, moreover, it is distinctly alleged that the issue then being tried was a material one. We have examined the charge of the court on this same subject, which is objected to, and find it follows the indictment, and sets out the issues to be tried by the jury. True, it appears to subdivide the issues or assignments, and tells the jury, if they find any one of them false, to convict defendant; but, as we regard the matter, there was really

but one issue, and here the testimony as set out in the indictment was upon that issue, and her various statements as alleged were, in effect, but the same statement,—that is, that defendant was at Felicitas's room during the time when it was claimed he shot O'Connor at the Café saloon, some 400 yards distant. The court need not have treated these as distinct assignments, but we see no injury to appellant in that regard, inasmuch as they were all proven, and the falsity of each established evidently to the satisfaction of the jury. The court gave all of appellant's special charges that we think were required under the evidence, and there was no error in the refusal to give others requested.

A number of bills of exceptions were reserved to the remarks of the district attorney. We are not prepared to say that said remarks were improper, and certainly, in the absence of requested instructions to have the same expunged from the consideration of the jury, the same will not constitute cause for reversal.

On the impanelment of the jury, and after defendant had exhausted her 10 peremptory challenges, one Nick Carson was examined as to his qualifications to sit as a juror in the case. He stated that he had formed no opinion as to the guilt or innocence of the defendant. He was thereupon informed that the predicate for perjury in this case was based on the examination of the defendant before the grand jury of El Paso county on the 7th day of October, 1899, when they had under investigation whether one E. Garcia had, on the 1st of October, 1899, at the Café saloon, in the city of El Paso, Tex., shot and killed one Ed. O'Connor; and he was asked if he had formed or expressed any opinion as to the guilt or innocence of said Garcia; and the said Carson answered, "Yes"; that he had both formed and expressed an opinion as to the killing of said O'Connor by Garcia; that said opinion was fixed, and that he still had such opinion; that it remained unchanged, but that he could try this case under the law and the evidence; that the opinion he had formed was not formed from hearing the evidence or talking with the witnesses, but from newspaper reports. Thereupon he was challenged by appellant on the ground that he was disqualified as a juror to sit in this case. The challenge was overruled, and appellant excepted. The contention of appellant is that said Carson showed himself disqualified to sit as a juror if Garcia was being tried for the murder of O'Connor, and, inasmuch as appellant's testimony went to establish an alibi for Garcia, that this disqualified the juror to sit in appellant's case for perjury. Subdivision 13, art. 673, Code Cr. Proc., has been before this court a number of times for construction, and it has been held that the mere fact the juror had formed an opinion in the case, and still had such opinion, would not disqualify him.

Suit v. State, 30 Tex. App. 319, 17 S. W. 458; Shannon v. State, 34 Tex. Cr. R. 5, 28 S. W. 540; Obenchain v. State, 35 Tex. Cr. R. 490, 34 S. W. 278; Trotter v. State, 37 Tex. Cr. R. 468, 36 S. W. 278. We quote from Suit's Case, supra, as follows: "The mere fact that a juror has established in his mind a conclusion of the guilt or innocence of the party on trial is not a sufficient cause for disqualification. That conclusion, if entertained, must go further, and be of such a character as will influence him in finding his verdict." Unless the juror answer that the conclusion established will influence him in finding his verdict, he should be interrogated further; and, unless it is shown that his opinion, although established, was formed from original sources (as hearing or reading the evidence, or from talking with the witnesses), it will not disqualify him; that is, if his opinion is formed from rumor or hearsay, it is no disqualification, if, on his voir dire, he states that he can try the case fairly and impartially from the evidence alone, and the judge, from his examination, is satisfied of his impartiality. True, the juror Carson stated he had formed an opinion as to the guilt or innocence of O'Connor in the murder case, which involved the main issue in the case for perjury, then on trial. But it was shown that his opinion in said case was formed merely upon hearsay, and he stated he could try the case fairly and impartially on the evidence. Under the rule laid down by the decisions on the subject, we do not believe the juror was shown to have been disqualified to sit in the murder case. He was, therefore, in our opinion, qualified to sit as a juror in the perjury case then being tried. We have examined the record carefully, and, in our opinion, the issues were fairly submitted to the jury, and the evidence amply supports their verdict. The judgment is affirmed.

DAVIDSON, P. J. (dissenting). I believe the judgment should be reversed, because of the action of the court overruling appellant's challenge for cause to the juror Carson. Upon his voir dire the juror stated he had formed "no opinion as to the guilt or innocence of this defendant in this case." Thereupon, being informed that the predicate for perjury in this case was laid and based upon the examination of the defendant before the grand jury of El Paso county on the 7th of October, 1899, when they had under investigation whether Edelberte Garcia had, on the 1st day of October, 1899, at the Café saloon, in the city of El Paso, shot and killed Ed. O'Connor, he was asked if he had formed or expressed any opinion as to the guilt or innocence of said Edelberte Garcia, and the juror answered, "Yes"; that he had both formed and expressed an opinion as to the killing of Ed. O'Connor by E. Garcia; that said opinion was fixed, and that he still had such opinion; that it remained unchanged, but that he could try this case under the law and

the evidence; that the opinion he had formed was not from hearing the evidence, or talking with the witnesses, but from newspaper reports. Cause for challenge was urged for the reason that the juror had formed and expressed an opinion as to the subject-matter to be tried in this case. My Brethren say: "Under the rule laid down by the decisions on the subject, we do not believe the juror was shown to have been disqualified to sit in the murder case. He was, therefore, in our opinion, qualified to sit as a juror in the perjury case then being tried." This seems to concede that, if he had been disqualified as a juror in the murder case, then he would be disqualified to sit in this case. I believe, under our decisions, that, if the murder case had been upon trial, he would have been disqualified as juror, and, that being true, he would be disqualified in this case. It was necessary, under the indictment charging perjury for the state, to show appellant's testimony before the grand jury false wherein he testified to the alibi. Now, if the juror's statement is to be believed, he had a fixed opinion, which would remain unchanged, that Garcia, who did the shooting, was guilty. That being true, it would inevitably follow that the testimony of appellant as to the alibi would be false, so far as the juror was concerned. This was the issue upon which the perjury necessarily hung. When the juror went upon the jury with the conclusion in his mind fixed and established that Garcia was guilty of a homicide, the alibi in his mind was false; the state's case was correct, and appellant was a perjurer. I have understood, and still understand, except in the opinion of my Brethren in this case, that, wherever the conclusion as to the guilt of an accused, or one of the parties associated or connected with the crime, is fixed in the mind of the juror, he is necessarily, under the statute itself, disqualified. There is an unbroken line of decisions to this effect. The juror would clearly be disqualified in the murder case if Garcia was on trial. *Post v. State*, 10 Tex. App. 579; *Shannon v. State*, 34 Tex. Cr. R. 5, 28 S. W. 540; *Sessions v. State*, 37 Tex. Cr. R. 58, 38 S. W. 605; *Gilmore v. State*, 37 Tex. Cr. R. 81, 38 S. W. 787; *Obenchain v. State*, 35 Tex. Cr. R. 490, 34 S. W. 278. But this would be so independent of the statute. The constitution guarantees to the accused "a trial by an impartial jury." No act of the legislature can make an impartial juror of a partial one. Nor has the legislature undertaken to do so. They have provided that certain causes exist for challenge, but they have not undertaken, and, I apprehend, will not, to say that a partial juror is an impartial one. It is expressly enacted that a juror who has an established conclusion as to the guilt or innocence of an accused in his mind shall not be competent to sit in the case. If such conclusion is established, it matters not whence the reasons for such conclusion comes, or what produces it. There is a line

of cases which hold that, where a juror has formed an opinion from rumor and hearsay, which is not fixed and established, and which he can discard, and try the accused fairly and impartially, he is not disqualified (*White's Ann. Code Cr. Proc. § 747, subd. 4*); but that line of decisions has no application to the case in hand, because the juror here testifies positively that he has a fixed opinion, and that that opinion will remain unchanged. How the juror in this case can be impartial cannot readily be understood, and I do not believe appellant has been tried by an impartial jury. I therefore dissent.

STRINGFELLOW v. STATE.

(Court of Criminal Appeals of Texas. March 20, 1901.)

MURDER—WITNESSES—IMPEACHMENT—EVIDENCE—STENOGRAPHER'S NOTES—INSTRUCTIONS—MUTUAL COMBAT—NEW TRIAL—GROUNDS—JURORS—DISQUALIFICATION.

1. Where the stenographer who took the testimony on a former trial was sworn for the purpose of impeaching witnesses, but could not recollect what their testimony on the former trial was, but was willing to swear that he took the testimony correctly, and that his notes showed exactly what the witnesses testified, it was error to exclude the stenographic notes in contradiction of the witnesses.

2. Defendant and another were in a restaurant, discussing defendant's uncle, when deceased, who overheard some remark, became insulting on account of it. Friends interfered, and deceased was taken away, but shortly reappeared in front of the restaurant and told defendant that he could not come out there and repeat the remark. Defendant went out, and a quarrel ensued. Deceased finally pushed defendant back and struck him twice with a walking stick, when defendant grappled deceased, striking with a knife whenever opportunity offered. *Held*, that it was error to submit the issue of mutual combat, since the evidence did not raise such issue.

3. If a challenge to fight and an acceptance are with intent to engage in an ordinary personal encounter, without intent to kill, and one of the parties is killed, the offense is not greater than manslaughter; but, if the combat was entered into for the purpose of killing, it might be murder.

4. Where, on a motion for a new trial in a prosecution for murder, it appeared that one of the jurors (who had said on his voir dire that he was not related to deceased) and deceased had married first cousins, and that deceased's wife was dead, but had left two sons surviving, who were private prosecutors in the case, such juror was disqualified, since he was related to deceased and the prosecutors by affinity within the prohibited degree.

Henderson, J., dissenting.

Appeal from district court, Caldwell county; H. Teichmueller, Judge.

Earl Stringfellow was convicted of murder in the second degree, and appeals. *Reversed*.

A. B. Storey and W. M. Walton, for appellant. D. E. Simmons, Acting Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of murder in the second degree, and his

punishment assessed at eight years' confinement in the penitentiary.

The judgment should be reversed because the witness Pickel was not permitted to testify as shown by bill of exceptions. On a former trial Pickel took down the testimony as a sworn stenographer. On the trial which resulted in this conviction several of the witnesses materially changed their testimony. In order to contradict them, the predicate was laid as to their former testimony. Pickel was introduced for the purpose of impeachment. Being questioned with regard to the testimony of said witnesses, he was unable to reproduce their testimony from memory. He was permitted to refresh his memory from his stenographic notes, and stated that in taking down the testimony he did not charge his memory with it, his sole object and purpose being to get it correctly in his notes; that his mind was directed to that matter, and not to recollecting what the testimony was, and he could not, therefore, after reading the notes, be sufficiently definite in his recollection to reproduce said testimony. He testified, however, that he took the testimony correctly, and these notes showed exactly what the witnesses did testify, and to this he would swear. In other words, he was willing to swear, and would have sworn, if permitted, that the testimony taken by him was correctly taken, and exactly what the witnesses had stated. Under this predicate appellant proposed to introduce the stenographic notes in contradiction of said witnesses. This being refused, appellant excepted. While the question is not so presented, perhaps, as to require a reversal upon the proposition, for want of a sufficient bill, still the question is before us; and, as the case will be reversed upon other grounds, we deem it not improper to call the trial court's attention to the matter. As presented, this evidence should have been admitted. *Kimbrough's Case*, 28 Tex. App. 367, 13 S. W. 218; *Jones, Ev.*, for collation of authorities.

Exception was reserved to the action of the court submitting the issue of mutual combat. We are of opinion this issue was not suggested by the testimony. A brief statement of the substance of the evidence bearing immediately upon this question will show that appellant and a friend in a restaurant were discussing a Mr. Riley, an uncle of appellant. Some remark had been made about Mr. Riley that was distasteful to deceased, whose presence was unknown to appellant at the time the remark was made. Deceased immediately became insulting in language and conduct to appellant, on account of said remark, and matters looked as if there would be a personal encounter. Friends interfered. Appellant resumed his seat at the lunch counter, and deceased was carried away by a friend. He was gone a short time, when he reappeared in front of the restaurant. Appellant was still seated at the lunch counter. Deceased remarked to appellant that he would not or

could not come out there and repeat what he had previously stated. What the prior language was is left in considerable doubt and confusion, if in fact it was known to the witnesses. Appellant went to the sidewalk, and a quarrel ensued. Exactly what was said is left in serious confusion, though there was quite a crowd standing about. The state's theory was that, when deceased suggested to appellant to come upon the sidewalk, he (appellant) immediately drew a knife from his pocket, opened it as he approached deceased, and immediately began a furious assault upon him; that deceased was standing with his hands by his sides, having done nothing, nor offered any resistance. This is the substance of the state's case. Defendant's theory was that when he went upon the sidewalk words ensued, which he did not recollect; that deceased finally remarked that "Riley was a better man than appellant or his God-damn father," whereupon appellant replied that "he was a damn liar." Deceased then, with his left hand, struck or pushed appellant backward, so that he partially fell; and, as he straightened up, deceased struck him on the head one or more blows with a very heavy walking stick. The effect of one of the licks was to raise a knot on appellant's head, as the witnesses say, about the size of a hen's egg. The inference from the testimony, if not a direct statement, was that the deceased was so close to appellant that he could not strike him with the stick after pushing him back, and this was the reason for using his left hand in so doing; that, immediately after deceased struck appellant the second blow with the stick, appellant succeeded in opening his knife, and the death grapple ensued. The parties closed, and, as the witnesses term it, "were clinched and fighting"; appellant striking with the knife whenever and wherever the opportunity afforded. The physician testified that the wounds were not of such serious nature as necessarily would cause death.—In fact, that death was the result of the nervous shock, rather than the wounds. This evidence does not raise the issue of mutual combat. *Rosborough v. State*, 21 Tex. App. 672, 1 S. W. 459; *Kelly v. State*, 27 Tex. App. 562, 11 S. W. 627; *Waldon v. State*, 34 Tex. Cr. R. 92, 29 S. W. 273; *Maines v. State*, 35 Tex. Cr. R. 113, 31 S. W. 667; *Red v. State*, 39 Tex. Cr. R. 414, 46 S. W. 408; *Schauer v. State* (Tyler term, 1900) 60 S. W. 249. But suppose we are wrong in this position; then the exception of appellant was well taken, to the effect that, having charged upon mutual combat, the court should have gone further, and applied the rules of mutual combat to the facts in evidence. If this was a challenge and an acceptance to fight with fists or engage in an ordinary personal rencounter, without intending to kill, the offense could not be greater than manslaughter. If the combat was entered into for the purpose of killing, it might be murder, and the jury should have been informed in regard to this phase

of the law. The charge on mutual combat is a limitation upon the right of self-defense, and the charge as given left the jury to grope its way in darkness as to the attitude of appellant under this phase of the charge.

One of the grounds of the motion for new trial challenges the competency of Hanks, one of the jurors who tried the cause. It is made to appear, without contradiction, that Hanks and deceased married first cousins; that the wife of deceased died some years prior to the trial, leaving two sons as the issue of that marriage. These sons were private prosecutors in this case. Appellant was ignorant of these facts until after the conviction. The juror answered on his *voir dire* that he was not related to defendant or deceased by consanguinity or affinity within the prohibited degree. Except for the issue resultant of the marriage between deceased and his wife, the death of said wife would have terminated the relationship. Under the authorities, it seems that by reason of the issue the relationship is extended beyond the death of the spouse. Under the law, as it is understood in this state, Hanks and deceased, by reason of their wives being first cousins, were related by affinity. Page v. State, 22 Tex. App. 557, 3 S. W. 745; Powers v. State, 27 Tex. App. 700, 11 S. W. 646. See, also, Foot v. Morgan, 1 Hill, 654; Dearmond v. Dearmond, 10 Ind. 191; Kelly v. Neely, 12 Ark. 657, 56 Am. Dec. 289. The contention by the state that the relationship ceased on the death of the wife of the deceased would be well taken in the absence of issue of the marriage; but as applied to this case the insistence is incorrect, because of the birth and surviving of the children of the marriage. The proposition that the relationship exists by reason of the issue is supported by the weight of authority. *Jaques v. Commonwealth*, 10 Grat. 690; *Bigelow v. Sprague*, 140 Mass. 425, 5 N. E. 141; 1 Am. & Eng. Enc. Law (New Ed.) pp. 912, 913; 17 Am. & Eng. Enc. Law (New Ed.) p. 1125. Thus it will be seen that deceased, Monkhouse, was related to the juror Hanks within the prohibited degree. So the juror Hanks was also related to George and William Monkhouse, sons of deceased by the first wife. Not only so, but they were private prosecutors; and the grounds of challenge to the juror Hanks should have been sustained, and a new trial should have been granted on this account.

It is not necessary to discuss the application for continuance, as it may not arise upon another trial, and if it does it will come under different circumstances and in a different way. For the reasons indicated, the judgment is reversed and the cause remanded.

HENDERSON, J. (dissenting). While I agree with the presiding judge in the disposition of the case, yet I do not agree with him upon two propositions. The opinion authorizes the introduction of the notes of the stenographer taken at a former trial of the

case as evidence to corroborate a witness on the trial who had also testified in the former trial of the case. As I understand, this would place the notes of a stenographer on the same plane as examining trial evidence. No authority is cited, except *Kimbrough's Case*, 28 Tex. App. 367, 13 S. W. 218, and cases cited in *Jones, Ev.* *Kimbrough's Case* goes to the extent of holding the appeal bond taken before the magistrate and the complaint showed that the owner of the stolen property was named S. W. Dodd, and these proceedings were before the grand jury. This evidence was offered on behalf of defendant to show that by the use of reasonable diligence the name of the owner of the property could have been ascertained by the grand jury, and that therefore the prosecution could not be maintained against him for stealing the property of one Dodd, whose Christian name was to the grand jury unknown. It was merely held by the court in this case that the papers could be resorted to, at the instance of appellant, to show that the initials of Dodd could have been known to the grand jury, and that the papers in question furnished the grand jury with evidence to that effect. The court say the purpose of this evidence was to furnish the grand jury such information as came to the knowledge of the examining court. 1 Greenl. Ev. § 437, is referred to in support of the court's definition. I do not think that either the case cited or Mr. Greenleaf sustain the proposition here contended for. In connection with what is quoted in the opinion, I quote also the balance of the section. Mr. Greenleaf says: "Where the witness recollects having seen the writing before, and, though he has now no independent recollection of the facts mentioned in it, yet he remembers that at the time he saw it he knew the contents to be correct. In this case the writing itself must be produced in court, in order that the party may cross-examine,—not that such writing is thereby made evidence of itself, but that the other party may have the benefit of the witness refreshing his memory by every opportunity." So it appears that Mr. Greenleaf is only authority to the extent of holding that the paper could be introduced to refresh the witness' recollection. As stated before, if it be conceded that the examining trial papers could be used as evidence, it by no means follows that stenographer's notes can be used as evidence. Article 14, Code Cr. Proc., authorizes the use of examining trial evidence where the deposition is taken before an examining court or a jury of inquest, and reduced to writing, and certified according to law in cases where the defendant was present when such testimony was taken, and had the privilege of a cross-examination. And it also authorizes the use of depositions on behalf of defendant. Articles 797, 798, Code Cr. Proc. But there is no statute, civil or criminal, which authorizes the use of a stenographer's notes. Arti-

cles 1295, 1296, Rev. Civ. St., authorize the appointment of a stenographer or other competent person, for the purpose of preserving a statement of the evidence, on the application of either party. But this would seem to have application exclusively to civil cases, inasmuch as the succeeding article authorizes the compensation of the stenographer to be taxed up in the bill of costs. As far as I am advised, there is no provision making him an officer of the court, even in a civil case. In a criminal case it has been held that a stenographer's report of the testimony cannot constitute a statement of facts. *Butler v. State*, 33 Tex. Cr. R. 232, 26 S. W. 201; *Emmons v. State*, 34 Tex. Cr. R. '98, 29 S. W. 474. The references in the opinion to authorities cited in 2 Jones, Ev. § 346, as far as I have examined them, also fail to sustain the opinion. *Rounds v. State*, 57 Wis. 45, 14 N. W. 885; *People v. Chung Ah Chue*, 57 Cal. 567; *Lipscomb v. Lyon*, 19 Neb. 511, 27 N. W. 731. Each of these authorities, under conditions similar to those pervading our law on the subject, uphold the proposition that the notes of the stenographer cannot be used as original testimony in a case, but can only be referred to in order to refresh the witness' memory. And, I take it, there is no distinction between the use of such evidence to contradict a witness, and the use of it as original testimony for any other purpose. Until the legislature shall see fit to create a court stenographer and make his notes testimony in the case, I can see no difference between such stenographic notes and memorandum taken down by any other witness; and, until the legislature shall act in the matter, I am unwilling to judicially legislate on the subject, and raise such notes to the same plane as examining trial evidence.

I also do not agree with the view taken by the Presiding Judge that the action of the trial court in submitting the issue of mutual combat was error. Mutual combat, as I understand it, does not depend alone on a formal agreement to fight; but if there is testimony in the case tending to show that appellant voluntarily entered into the conflict and fought willingly, and not in his necessary or apparently necessary self-defense, under such circumstances the court is authorized to give a charge on mutual combat. It occurs to me that a reference to the following witnesses for the defendant presented the issue, and justified the court in giving a proper charge on the subject, to wit: *Paul Jolly* (Transcript, pp. 93, 94); *McDowell* (Id. p. 85); *Jackson* (Id. p. 98); *Earl Stringfellow* (Id. pp. 187, 188). I quote from *McDowell's* testimony as follows: "There was a good deal of talk back and forth,—word for word, you might say. Well, the final outcome of it was, Mr. Stringfellow said, 'Mr. Early is a God-damn son of a bitch, and anybody that says he isn't is one,

too,' or something of that kind. Anyhow, Mr. Monkhouse invited him out. Earl Stringfellow came out, walked right up close to Monkhouse, and repeated the language; and Mr. Monkhouse struck him on the head, as well as I could see." *Jackson* says: "I saw Stringfellow when he came out of the restaurant. He walked up to Mr. Monkhouse and asked him if he was taking up John Early's fight. I did not understand Monkhouse's reply. Whatever it was, Stringfellow replied to it that it was a lie, or, 'You are a liar.' Then Monkhouse hit him with his fist somewhere about the throat. The blow knocked Stringfellow down in a sitting position, a little bit sideways," etc. I do not quote from other portions of this testimony, which shows there had been a previous altercation between the parties in the restaurant where appellant was. Deceased. Monkhouse, left, and was gone a short time, and came back, and stood on the gallery where the fight occurred and the homicide was committed. Now, appellant, Stringfellow, in his testimony states that when he came back he stopped on the gallery and said, "Come out here, God damn you! and say what you said a while ago." And he gathered up a pack of cards he had in his hand and put them in his pocket, and went out onto the sidewalk. And again he says: "I went up close to him. I do not remember who spoke first after I got out there. I said something to him about taking up John Early's row. Mr. Monkhouse had said something before this, but I don't remember what it was. It was something about John Early being a good or a better man than me or my God-damn father. Mr. Monkhouse went on to say that he could whip anybody that didn't like John Early. I made some reply to this, though I don't remember the words, and he at once struck me on the neck," etc. On cross-examination this same witness says: "My reason for going out was, I suppose, that he dared me out there, and I just went out there like any fool boy would," and that the only reason he had for going out there was that deceased had dared him out there, that he knew of. Now, if these facts do not constitute mutual combat, then it occurs to me that nothing short of a formal agreement to fight, as a duel, would be mutual combat. Appellant's own evidence shows that, being dared, he went to meet his adversary, went close up to him, repeated what he had said before, called deceased a liar, and, when struck by deceased, engaged in the fight. This is appellant's own version. Of course, if we look to the evidence on the part of the state, there is no self-defense in the case; and, from that point of view, the charge on self-defense, coupled with mutual combat, would not injure appellant. I believe the court was justified in giving a proper charge on the subject of mutual combat.

BOYD et al. v. GHENT.

(Court of Civil Appeals of Texas. April 8, 1901.)

LIMITATION OF ACTIONS—PLEADING—NECESSITY—WAIVER—FORMER JUDGMENT—CONCLUSIVENESS.

1. Where limitations are not specially pleaded in the trial court as a bar, the question of limitations is waived, and cannot be raised on appeal.

2. Where a judgment formerly rendered in a divorce suit has fixed the status of certain property in controversy as community property, it is not error in a subsequent distinct action to refuse to submit to the jury the question of the property being the separate property of the wife.

Error from district court, Bell county; R. E. Brook, Special Judge.

Action by Mrs. A. F. Boyd and others against H. O. Ghent. From a judgment in favor of the defendant, plaintiffs bring error. Affirmed.

A. M. Monteith, for plaintiffs in error.
John B. Durrett and Winbourn Pearce, for defendant in error.

KEY, J. This is the third appeal in this case. See 43 S. W. 891; 53 S. W. 704. While the case was pending on the last appeal, the supreme court, answering a certified question submitted by this court, held that by the registration of his judgment Ghent acquired a lien upon all the land involved, superior to the claim of Mrs. Boyd, asserted under the judgment rendered in the divorce suit between her and her former husband. *Boyd v. Ghent* (Tex. Sup.) 57 S. W. 25. Upon the last trial the court below followed this ruling, and rendered judgment for Ghent foreclosing his lien against the entire tract of land. Nearly all the questions now submitted for decision are settled by rulings made on the former appeals. We do not think the plaintiffs in error are in a position to invoke limitation against the right of action asserted by Ghent. The statute requires limitation to be specially pleaded, and it was not done in this case, by demurrer or otherwise. The answer upon which they went to trial contained two demurrers, one denominated a general, and the other a special, demurrer; but in substance neither was anything more than a general demurrer. Limitation was not pleaded in bar of the plaintiffs' cause of action, and it must be held that the demurrers referred to did not present that question. Hence we hold that the question of limitation has been waived.

The judgment rendered in the divorce suit between Mrs. Boyd and her former husband fixed the status of the property in controversy as community property between them. That judgment is now conclusive, and no error was committed upon the trial of this case in refusing to submit to the jury the question of the property being Mrs. Boyd's separate property. Nor was error committed in not submitting the question of homestead. On the

undisputed facts, as heretofore held by this court, Mrs. Boyd had abandoned all homestead rights in the property.

We rule against the plaintiffs in error on all questions presented, and affirm the judgment of the district court. Except upon the issue of homestead, all the material evidence is documentary, and it seems to be set out with substantial accuracy in the brief filed by plaintiffs in error. Hence we deem it unnecessary to file conclusions of fact. Affirmed.

CASH v. FIRST NAT. BANK OF MCGREGOR et al.

(Court of Civil Appeals of Texas. April 8, 1901.)

LIENS—FARM LABORERS—CROP LIEN—EXTENT.

Sess. Laws 1897, p. 218, provides that a farm hand shall have a first lien, subject to the landlord's lien, on all the products of the farm, and shall make duplicate accounts, one to be presented to his employer within 30 days after the debt shall have accrued, and the other to be filed within the same time with the county clerk. Plaintiff was employed as a farm laborer from January 1st to September 1st, and on September 6th filed a laborer's lien on the crop, which was subsequently seized by defendant under a chattel mortgage. *Held*, that the contention that plaintiff was entitled to maintain a lien only for the last 30 days' labor cannot be sustained.

Appeal from McLennan county court; J. Walter Cocke, Special Judge.

Action by Thomas H. Cash against the First National Bank of McGregor and another. From a judgment denying plaintiff a laborer's lien for a part of his claim, he appeals. Modified.

John L. Dyer, for appellant. L. W. Campbell, for appellees.

FISHER, C. J. Appellant, as plaintiff in the court below, on March 6, 1900, brought suit against Warren Compton and the First National Bank of McGregor, Tex., alleging that the defendant Warren Compton employed him (plaintiff), and his brother, William F. Cash, as farm laborers to make a crop on the farm of defendant Warren Compton, situate five miles north of Crawford, in McLennan county, Tex., for the year 1899, and agreed to pay each of them \$20 per month for their labor from January 1, 1899, until September 1, 1899. The contract was a verbal one. The plaintiff averred that he and his said brother performed said contract period of service, and each earned for said labor \$160 for their eight months' labor; that said Compton advanced each of them the sum of \$25.42 during the time they worked, leaving a balance of \$134.58 due them on the completion of their contract, September 1, 1899. Plaintiff averred that he and his brother, as the result of their labor, cultivated 150 acres of corn for defendant Compton. Plaintiff averred that he and his brother each prepared, filed, and fixed a laborer's

lien on September 6, 1899, on all the corn of defendant Compton grown, raised, and produced by their labor upon his farms for the year 1899; this being done conformably with the act of the legislature of 1897. Plaintiff averred that William F. Cash, for value, transferred, assigned, and delivered his claim on December 28, 1899, to him. Plaintiff alleged that the defendant bank in the latter part of the year 1899 seized and converted all of said property, to wit, said corn upon which plaintiff and his brother, William F. Cash, had their said laborer's lien, said property being of the aggregate value of \$450, which seizure and conversion of said property by said defendant bank deprived plaintiff of his lien, so he could not reach said property, and rendered said bank liable for the value of said property upon which plaintiff and his brother had a prior lien. Plaintiff prayed for judgment against said Warren Compton, and that his lien be established upon said property, and for judgment also against said bank as a converter of said property, and for costs of suit. The defendant Warren Compton appeared, and answered by general denial. The defendant bank, by its first amended original answer, answered by general exception and by five special exceptions, and pleaded the general issue. All the exceptions, general and special, of the defendant bank, were overruled, save and except its special exception No. 2, which raised the question that the act of the legislature of 1897, giving and creating laborers' liens, did not give and create a laborer's lien for a longer period than one month; and hence plaintiff had only a lien for his and his brother's claim for August, 1899, amounting to \$40. The court having sustained this second exception, plaintiff reserved his exception to the ruling of the court. There was a trial had before the court without a jury, and judgment rendered in favor of plaintiff against the defendant Warren Compton for \$287.50, with interest from date at the rate of 6 per cent. per annum, and against the defendant bank for \$40, with 6 per cent. interest from September 9, 1899, and for costs, etc.

The contest here is between the appellant and the bank as to who has the superior lien on the proceeds of the crop raised on the farm of Warren Compton for the year 1899. The appellant was a laborer on the farm of Compton under a contract whereby he and his brother, whose claim he owns, were to work on the farm from January, 1899, to September, 1899, at \$20 per month; the whole sum to be payable in September. The bank contends that its mortgage lien executed by Compton is superior to the laborer's lien asserted by appellant under the act of the 25th legislature passed May 27, 1897, and found upon page 218 of the Session Laws of that year. Except for the last month for which the appellant and his brother performed services as laborers upon the farm, the trial court held that the lien of appellee on the

proceeds of the crop raised upon the farm was superior to that of appellant, and this ruling is the only question that it is necessary for us to pass upon. We cannot agree with the trial court in this construction of the statute. In our opinion, the statute is broad enough in its terms to include a contract of the nature asserted by appellant, and that it was not the purpose of the law to limit the application of the statute to contracts of service that should be performed within a month. For the reasons stated, the judgment of the court below will be affirmed as to Warren Compton, and is reversed, with instructions to the trial court to render judgment in favor of appellant against appellee, foreclosing his lien on the proceeds of the crop, and awarding a judgment in appellant's favor against the bank for the value of the crop converted by the bank, not to exceed the amount of appellant's judgment against Warren Compton. Affirmed in part, and reversed, with instructions, in part.

TEXAS SAVINGS-LOAN ASS'N v. BANKER et al.

(Court of Civil Appeals of Texas. April 3, 1901.)

JUDGMENT — CONSTRUCTION — AMBIGUITY — RECORD — ADMISSIBILITY — EXECUTORS AND ADMINISTRATORS — EXECUTION.

1. The records in a cause, including the pleadings, are admissible in evidence to aid the court in construing the judgment, if ambiguous.

2. A judgment in a suit brought for the sole purpose of fixing defendant's liability as executor and legatee under a will does not authorize the issuance of an execution for the sale of any property other than that received by defendant from the testator's estate.

Appeal from district court, Bell county; John M. Furman, Judge.

Action by the Texas Savings-Loan Association against B. C. Banker and others. From a judgment for defendants, plaintiff appeals. Affirmed.

J. B. Scarborough, for appellant. Banks & Cochran, for appellees.

KEY, J. This is an action of trespass to try title; the Texas Savings-Loan Association being plaintiff, and Mrs. B. C. Banker and A. J. Joyce being defendants. Both the defendants pleaded not guilty, and Joyce filed a cross action against Mrs. Banker to recover purchase money and foreclose a vendor's lien upon part of the property in controversy, which is two lots in the city of Temple, in Bell county. The court below rendered judgment in favor of both defendants against the plaintiff, and in favor of the defendant Joyce on his cross action against Mrs. Banker. The plaintiff alone has appealed.

The plaintiff deraigned title through execution sales made under executions issued from the district court of McLennan county

and a justice of the peace court of the same county. The court below held that the judgments did not authorize the issuance of executions against Mrs. Banker individually, and therefore that the sales made under the executions referred to were void. The portions of the judgments material to the question under consideration read as follows: "And it is ordered, adjudged, and decreed that the plaintiff, the Texas Savings-Loan Association, do have and recover of and from B. C. Banker, independent executor and devisee under the last will of Lydia Moone, the sum of \$3,065 (thirty hundred and sixty-five dollars), with interest at ten per cent. from this date." (First judgment.) "It is therefore ordered, adjudged, and decreed by the court that plaintiff, S. E. Shelton, have and recover of and from defendant, Mrs. B. C. Banker, in her capacity of independent executor of and legatee under the last will and testament of Lydia Moone, deceased, the sum of one hundred and fifty-nine and $\frac{9}{100}$ (\$159.30) dollars, and all costs expended by him herein." (Second judgment.) The latter judgment shows upon its face that it was not intended to fix liability against Mrs. Banker, except as executrix of and legatee under the will of Lydia Moone, and perhaps the same construction should be placed upon the other judgment. However, the trial court admitted in evidence the records, including the pleadings in the two cases; and these documents make it clear that both suits were actions against Mrs. Banker for the sole purpose of fixing liability against her as executrix of or legatee under the will of Mrs. Moone, and justified the court. If there was any ambiguity in the judgments, in the ruling referred to.

Appellant's objections to the admissibility of the records in the two suits referred to cannot avail to reverse the judgment. If the judgments were ambiguous, the evidence referred to was admissible to aid the court in construing them. If they were not ambiguous, as we are disposed to hold, they did not authorize the issuance of executions for the sale of any property belonging to Mrs. Banker, other than such as she received from the Moone estate; and the undisputed testimony shows that the property in controversy was not so acquired. As this ruling breaks down the plaintiff's title, it is unnecessary to determine the correctness of the holding by the trial court that one of the lots was the homestead of Mrs. Banker at the time of the execution sales referred to. Nor are we called upon to decide whether or not the court ruled correctly in rendering judgment for Joyce on his cross action. Mrs. Banker has not appealed, and is not complaining of the judgment in favor of Joyce; and as the plaintiff failed to establish any title to the land, and no moneyed judgment was rendered against it, except for costs, it cannot be heard to complain of the fact that Joyce obtained a judgment

against Mrs. Banker for purchase money due for one of the lots, and a foreclosure of the vendor's lien upon the lot. We adopt the conclusions of fact filed, and affirm the judgment rendered by the court below. Affirmed.

WALKER et al. v. DOWNS.

(Court of Civil Appeals of Texas. April 8, 1901.)

TRESPASS TO TRY TITLE—FAILURE TO RECORD DEED—DESCRIPTION IN DEED—REFERENCE TO OTHER DEED.

1. The right of a plaintiff having a superior title to recover in trespass to try title is not defeated, on the ground that he claims under an after-acquired title, because a deed in his chain of title was not acknowledged until after suit brought.

2. The right of a plaintiff having a superior title to recover in trespass to try title is not defeated by the fact that a deed in his chain of title refers to another deed for a description of the property conveyed, by giving the name of the parties and date of such deed, but misstates the page of the record on which it will be found.

Error from district court, McLennan county; Marshall Surratt, Judge.

Action of trespass to try title by J. R. Downs against Eugene Walker and others. From a judgment in favor of plaintiff, defendants bring error. Affirmed.

W. H. Lessing, for plaintiffs in error. Richard I. Munroe, for defendant in error.

KEY, J. From a judgment in favor of the plaintiff in the court below in an action of trespass to try title, the defendants have brought the case to this court by writ of error. The court below filed the following conclusions of fact and law:

"I find that the parties to the suit agreed that John Baade is the common source of title to the lot in controversy, being lot 9 in Torbett's addition to the city of Waco. John Baade in 1895 conveyed said lot to L. A. Donaldson, and, as a part of the purchase money, took eighty notes from [Donaldson], of \$12.50 each, and reserved in said deed an express vendor's lien on said lot to secure the purchase money. Becoming indebted to C. Mailander, as guardian, in the sum of seven hundred dollars, he indorsed these notes, or, rather, seventy of them, to said Mailander, as additional and collateral security; said note of seven hundred dollars being secured by deed of trust on lot 9 and other property. Baade became indebted to the plaintiff, and assigned and sold said notes in the hands of Mailander, of \$12.50 each, to him, and also the vendor's lien and superior title to said lot No. 9. Afterwards Mailander sued Baade and others on his note, and foreclosed the deed of trust given to secure the seven hundred dollar note. An order of sale issued on the judgment, and enough money was realized from the sale of

the other lots described in said trust deed, without selling lot nine, to pay off said seven hundred dollar note, interest, and costs, for which said 70 notes, of \$12.50 each, were put in Mailander's hands as additional and collateral security. On the day of said sale the plaintiff demanded of said Mailander possession of said notes, of \$12.50 each, and told him that they belonged to him, and that they had been sold to him by Baade; and Mailander refused to deliver them to him, claiming he intended to hold them, as Baade owed him other money. I find that the defendants George and Eugene Walker had notice of the rights of Downs, the plaintiff, as the owner of said seventy notes, of \$12.50 each, in the hands of Mailander, when Mailander made the deed to said lot 9 to said Eugene Walker.

"As a conclusion of law, I find that Downs became the owner of the notes, of \$12.50 each, and the superior title and vendor's lien on lot 9 under the conveyance and assignments from Baade, and that he became entitled to the possession of said notes as soon as the debt Baade owed Mailander, as guardian, became paid, which payment was made in full when the property was sold under the order of sale which issued out of the 54th district court of McLennan county, Texas, without selling lot 9; and, finally, that Downs is the owner of the lot in controversy, and entitled to judgment for the possession thereof and costs of suit."

We adopt and approve these conclusions, and find no merit in the several points relied upon by plaintiffs in error for a reversal. The contention that because a deed relied upon by the plaintiff in his chain of title was not acknowledged until after the suit was brought, although dated and in fact signed and delivered prior thereto, was an after-acquired title, cannot be sustained. As between the parties, acknowledgment was not essential to the validity of the deed, and therefore the contention that the instrument was not operative as a deed until after it was acknowledged cannot be upheld.

Nor can we sustain the proposition that the deed was void because it referred for description of the property conveyed to another deed, giving the names of the grantor and grantee and the date of such other deed, together with the volume of the county records upon which the same was recorded, but incorrectly stating the pages upon which the deed was recorded. The deed referred to was in fact recorded in the volume, but not on the pages named; but, if it had not been recorded at all, that fact would not render the deed under consideration void for uncertainty of description, as long as the other deed can be found. It was shown by undisputed testimony that the grantor in the other deed referred to had never executed any other deed to the grantee therein named; and this, in connection with the description given of the deed, leaves no room for doubt

as to the identity of the document referred to.

Though not specially commented upon in this opinion, we have considered all the questions presented in plaintiffs in error's brief, and decide against them all the points raised. Judgment affirmed.

TEXAS & P. RY. CO. v. ELLIOTT.

(Court of Civil Appeals of Texas. April 3. 1901.)

CARRIERS—INJURIES TO PASSENGER—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—AUTHORITY OF CONDUCTOR—INSTRUCTIONS.

1. Plaintiff boarded a regular passenger train, and paid his fare to a regular station, at which the train did not stop, under the rules of the company. Plaintiff was ignorant of such rules, and the conductor agreed to stop the train at or near the station for him to get off. At a bridge near the station the train slowed up to a speed of about four miles an hour, and plaintiff and the conductor went out on the platform, where the conductor repeatedly told him to get off, which he at first declined to do, because of scantlings piled on the ground. When he finally did attempt to get off, the train gave a sudden jerk, throwing him to the ground and injuring him. *Held*, that defendant was guilty of negligence causing the injuries.

2. Plaintiff was not guilty of contributory negligence.

3. It was not error to instruct that the conductor had authority to make a contract for the train to stop at a station, or where it did.

Appeal from district court, Bowie county: J. M. Talbot, Judge.

Action for injuries by C. D. Elliott against the Texas & Pacific Railway Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

W. T. Armistead, for appellant. F. M. Ball and Rollin W. Rodgers, for appellee.

KEY, J. This is a personal injury suit against the railway company, and from a verdict and judgment for \$1,000 in favor of the plaintiff the defendant has appealed. The evidence justifying, in support of the verdict we find that the defendant was guilty of negligence in the manner charged in the plaintiff's petition. The plaintiff was not guilty of contributory negligence, and by reason of the defendant's negligence he sustained personal injuries as charged, for which \$1,000, the amount awarded him by the verdict, is not unreasonable compensation. The plaintiff's testimony shows that he in good faith boarded a regular passenger train on appellant's road at Jefferson; that he paid to the conductor the fare demanded by the latter from Jefferson to Sulphur Station, a regular station upon appellant's road, but at which the train in question was not in the habit of stopping, and the rules of the railway company forbade its stopping at that station. However, these rules were unknown to the plaintiff, and the conductor agreed to stop the train at or near that station for the plaintiff and two other passen-

gers similarly situated to get off. According to the testimony submitted by the plaintiff, when the train reached a bridge near Sulphur Station, it slowed up to a speed of about four miles an hour. The plaintiff and the other two passengers referred to went out on the rear platform, followed by the conductor. The other two passengers alighted with safety from one side of the platform. The plaintiff was upon the other side, standing upon the lower step; and, according to his testimony, the conductor told him repeatedly to get off. At first he declined to do so, because there were some scantlings piled on the ground, but he finally attempted to get off, and about the time he did so the train gave a sudden jerk and threw him to the ground, by which fall he sustained the injuries complained of. The burden of appellant's contention is that, under the circumstances stated, the conductor had no authority to make a contract for the train to stop at Sulphur Station, or where it did, and the trial court erred in holding that he had such authority. We have no doubt whatever of the correctness of the ruling referred to. We find no merit in the appeal, and affirm the judgment. *Hull v. Railway Co.*, 66 Tex. 619, 2 S. W. 831; *Railway Co. v. Anderson*, 82 Tex. 520, 17 S. W. 1089; *Railroad Co. v. Frazer* (Kan. Sup.) 40 Pac. 924; *Randolph v. Railway Co.*, 18 Mo. App. 609. Judgment affirmed.

SCHNEIDER et al. v. SANDERS et al.

(Court of Civil Appeals of Texas. Jan. 19, 1901.)

HUSBAND AND WIFE—COMMUNITY PROPERTY — MORTGAGES — PARTNERSHIP — CHATTEL MORTGAGES — ASSIGNMENT — PAROL EVIDENCE—CONSIDERATION—TRESPASS TO TRY TITLE—INSTRUCTIONS—OMISSIONS—FAILURE TO REQUEST—EFFECT—APPEAL—FINDINGS—REVIEW—CONFLICTING EVIDENCE.

1. Where a bill of sale and a chattel mortgage of partnership property recited a certain consideration in money, it was not error to permit one of the partners, who had pleaded that such recital was a mistake, to testify that the purpose of such instruments was to pay the firm debts to the mortgagee, and enable the witness to regain a note given as collateral security therefor.

2. Where defendant executed a sham conveyance of a homestead which had been community property of himself and a former wife, in which their children had an interest, for the purpose of obtaining security for goods to be sold to a firm of which he was a member, in an action to foreclose the vendor's lien reserved in the security given for such land, in which the children intervened, it was not error to permit defendant's partner to testify that defendant told him that one of the plaintiffs asked witness to come over and talk about the firm's making an assignment, to which witness replied that, if defendants could not run the business, they might as well make an assignment; no objection having been made until after the witness had testified, and the evidence not being such as to materially affect the issue.

3. Where, in an action to foreclose a security given for partnership debt, it was contended that defendant was liable on an old debt of his partner to plaintiffs, on which there was

conflicting evidence, an instruction that if defendant's indebtedness to plaintiffs had been fully paid, and defendant was not so indebted at the time the security sued on was issued, interveners claiming title thereto were entitled to judgment, was not objectionable as misleading and not sufficiently comprehensive to include all of defendant's indebtedness to plaintiffs.

4. An objection that the court omitted to sufficiently charge on a particular point cannot be urged on appeal in the absence of any request to make the charge more specific, or to give a charge supplying the omission.

5. Where a father executed a sham conveyance of homestead community property, in which his children had an interest, in order to obtain security for goods furnished to a partnership, it was not error, in an action to foreclose the security, to instruct that if plaintiffs knew, before defendant became indebted, that the conveyance was a sham, they could not recover, without instructing that plaintiffs must have had notice that the property conveyed was the homestead of the grantor.

6. The interveners being entitled to judgment for their one-half interest in the land if the indebtedness of defendant to plaintiffs had been fully paid, it was proper to refuse plaintiffs' requested instruction that the jury should find for plaintiffs against them, since such charge would have withdrawn from the jury the issue as to whether or not such debt had been paid.

7. Where a note assigned as collateral security was executed September 23, 1890, payable in three years, and was not sued on until November 3, 1897, it was barred by the four-years statute of limitations.

8. Findings will not be reversed on appeal where the evidence is conflicting, and there is some evidence to support them.

Appeal from district court, Dallas county; Richard Morgan, Judge.

Trespass to try title by Schneider & Davis against F. W. Sanders and others. From a judgment in favor of defendants, plaintiffs appeal. Affirmed.

Perkins, Gilbert & Hall, for appellants. Kearby & Muse and Thompson & Thompson, for appellees.

BOOKHOUT, J. On August 15, 1892, appellants instituted this suit in the district court of Dallas county against F. W. Sanders in trespass to try title to recover two tracts of land, one containing 28¼ and the other 8½ acres, situated in Dallas county. On November 3, 1897, appellants filed an amended petition against F. W. Sanders, and made W. A. Rumbold a party to the suit. This petition set up two counts as ground for recovery. The first count was to recover the land, and in the second count it was alleged: "That on the 27th of December, 1890, F. W. Sanders and W. R. Barnes, doing business in the name of W. R. Barnes, were indebted to appellants in the sum of \$3,952.46. That as collateral security for said indebtedness appellants held the note of W. A. Rumbold, payable to F. W. Sanders, and by Sanders indorsed, in the sum of \$2,756.25, dated September 23, 1890, and payable three years after date, with 10 per cent. interest and 10 per cent. attorneys' fees, said note being secured by a vendor's lien on the land in controversy. That on December 27, 1890, in part payment of their indebtedness, San-

ders and Barnes turned over to appellants their stock of groceries, valued at \$1,500. That on the same day the said Barnes and Sanders transferred and assigned all their notes and book accounts to W. J. Townsend, authorizing him to collect the same, and out of said proceeds to pay their attorneys' fees in the transaction, and the balance to Schneider & Davis, appellants. That, said stock of merchandise and notes and accounts not being sufficient to extinguish the debt of Barnes and Sanders to appellants, appellants, still holding said vendor's lien note for \$2,756.25, on September 25, 1891, obtained from W. A. Rumbold a deed to the land in controversy in payment of said note. Appellants prayed for judgment for the land, and in the alternative for judgment on the \$2,756.25 note against Rumbold, as maker, and Sanders, as indorser, and for a foreclosure of the vendor's lien on the land." F. W. Sanders answered by exceptions, pleas of limitation, general denial, and not guilty, and among other defenses alleged: "That on the 23d day of September, 1890, the land in controversy was, and had been for many years prior thereto, his homestead, and was then, and had been for many years, and was still, used and occupied by himself and family for a home. That, desiring to go into the grocery business, and having no money, on September 23, 1890, he made a fictitious and pretended sale of his homestead to W. A. Rumbold, who paid no money for the land, but executed to him (Sanders) the \$2,756.25 note. That the transaction was not intended as a real sale. That Rumbold did not intend to pay the note; knew it was the homestead of Sanders, who remained in possession of the premises with his family, and is still in possession. That at this time Barnes owed Schneider & Davis about \$1,200 on open account, which was closed by Barnes' note, and that then Sanders deposited with appellants the Rumbold note as collateral for groceries to be furnished Barnes and Sanders. That appellants furnished Barnes and Sanders from that time up to about December 27, 1890, groceries, amounting to about \$3,300, upon which they had paid from time to time sums aggregating \$1,500, leaving the balance due appellants about \$1,800. That on December 27, 1890, legal proceedings being threatened by some of Barnes' old creditors, in payment of their entire indebtedness to appellants Barnes and Sanders turned over to Schneider & Davis their entire stock of groceries of the value of \$2,000, and assigned and delivered to W. J. Townsend, bookkeeper for appellants, all their notes and book accounts, aggregating about \$2,500. That appellants accepted the stock of merchandise and the assignment of the notes and accounts in full payment of the indebtedness of Barnes and Sanders, for which said \$2,756.25 note had been put up as collateral, and promised to deliver said note to Sanders, but failed to

do so, and afterwards, on the 25th day of September, 1891, procured Rumbold to make them a deed to the land. Sanders charged appellants with notice that the sale to Rumbold was fictitious, and that the land in controversy was his homestead, and occupied by him and his family as a home. Sanders also pleaded in his supplemental answer that the consideration of \$1,500 in the bill of sale and \$2,356.46 in the chattel mortgage were inserted through fraud, accident, and mistake, and were not the true consideration; that the true consideration for the execution of said instruments was the payment in full of all Barnes' and Sanders' debts to Schneider & Davis. Sanders asked for a cancellation of the Rumbold note, the deed to Rumbold, and from Rumbold to Schneider & Davis." On February 16, 1890, Hattie Herndon, formerly Hattie Sanders, and Harry Sanders filed their plea of intervention, alleging: "That the land in controversy was the community property of F. W. Sanders and their mother, Esther Ann Sanders, who died February 2, 1884, leaving F. W. Sanders and interveners in possession of said land; all of whom have resided on the land since that time, and are now residing on said land. They charged Rumbold and appellants with notice of the facts set out in their plea of intervention. They prayed for a cancellation of the deed from F. W. Sanders and wife, Lucy Sanders, to Rumbold, and of the deed from Rumbold to Schneider & Davis, and for judgment for a one-half undivided interest in the land. Rumbold made default. The case was tried before a jury on June 21, 1890, and resulted in a verdict in favor of appellees." Judgment was duly entered on the verdict, and plaintiffs have prosecuted an appeal to this court.

Conclusions of Fact.

In September, 1890, W. R. Barnes was engaged in the grocery business in Dallas. Appellee F. W. Sanders, desiring to go into the grocery business in Dallas, in the month of September, 1890, went to Schneider & Davis, wholesale grocers in the city of Dallas, and made known to a member of said firm his desire, and stated that all he had to put up as security for groceries was the land upon which he was then living. It was suggested to Sanders by one of the members of said firm that it would be better for him to go in with some one who understood the business, and suggested that he go in with Barnes. After negotiation between Sanders and Barnes it was agreed by them that they would form a partnership for the conducting of a grocery business. At that time Barnes was indebted to Schneider & Davis about \$1,200, which Barnes closed up by his note to the firm. Barnes then suggested that Sanders should execute a deed to W. A. Rumbold, who was conducting a butter and egg business in one part of the business house of Barnes, but who was not otherwise connect-

ed with Barnes, to the two tracts of land upon which he (Sanders) lived, aggregating 36½ acres, and take his (Rumbold's) note in payment thereof, which would be placed as collateral with Schneider & Davis for a line of credit for the new firm. F. W. Sanders, joined by his wife, did execute a deed to said W. A. Rumbold to said land; said deed reciting a cash consideration of \$900 and a note for \$2,758.25. This note was transferred by F. W. Sanders to Schneider & Davis to enable the firm of Barnes & Sanders to obtain a line of credit. Sanders was not to be responsible for the past indebtedness of Barnes to Schneider & Davis, nor was said note intended to secure said past indebtedness. At the time the deed was executed by Sanders and wife to Rumbold the property was the homestead of Sanders and wife. No consideration was paid by Rumbold other than the execution of the note above described, nor was it the intention that any should be paid. The transaction was fictitious as between them, Sanders' object being to use Rumbold's note as collateral security for a line of credit from the firm of Schneider & Davis. The firm of Barnes & Sanders became indebted to Schneider & Davis in the sum of about \$3,200, and in the latter part of December, 1890, Barnes & Sanders conveyed to Schneider & Davis their entire stock, and executed a chattel mortgage upon their notes and accounts to a trustee for the benefit of Schneider & Davis after paying an attorney's fee of \$300. The account of Barnes & Sanders to Schneider & Davis was fully paid off by the transfer of said stock and the execution of said trust deed. Schneider & Davis, at the time the note of Rumbold was transferred to them by Sanders, had notice of the fictitious character of the sale by F. W. Sanders and wife to W. A. Rumbold. At the time this deed was made, this property was the homestead of Sanders and wife, they being in possession at the time, occupying the same as their homestead, and same has continued to be occupied by them as their homestead. In September, 1891, W. A. Rumbold, at the request of Schneider & Davis, executed to them a deed to the land in controversy in consideration of his release from liability on his note. Other facts appear in the opinion.

Conclusions of Law.

Appellants' first assignment of error complains that the court erred in permitting the appellee F. W. Sanders to testify that the purpose of giving the bill of sale and chattel mortgage was to pay the debts of his firm to Schneider & Davis, and protect their property against Barnes' creditors, in order that Sanders might regain possession of the vendor's lien note signed by Rumbold, transferred by witness to appellants. The bill of sale to Schneider & Davis for the notes recited a consideration of \$1,500. The contention is that parol evidence was not admissible to prove

a different consideration than the one recited in the bill of sale, and that said testimony contradicted the terms of the bill of sale. This contention is not tenable. The defendant had pleaded that the consideration of \$1,500 was placed in the bill of sale by mistake. In this state the law is well settled that as between the parties parol evidence may be introduced to show the true consideration of a contract. *Taylor v. Merrill*, 64 Tex. 494; 2 Jones, Ev. § 476. The evidence admitted was not inconsistent with the consideration recited in the contract. It showed that, in addition to the recited consideration in the bill of sale, the transfer was made in payment of the entire indebtedness of Sanders to Schneider & Davis, and that Sanders was to have returned to him the note executed by Rumbold, which he had transferred to Schneider & Davis as collateral security.

The second assignment complains of the action of the court in permitting W. R. Barnes to testify "that Sanders told him (Barnes) that Alfred Davis, one of the plaintiffs, had told Sanders to come over and talk to Barnes about making an assignment; that he (Barnes) replied that if he (Sanders) could not run the business they might as well make a general assignment." The testimony was objected to as being hearsay, immaterial, and irrelevant. The bill of exception was allowed by the court with this explanation: "The objection was really not made until after the witness had testified, and when the objection was made I overruled it as the most expeditious mode of disposing of it, inasmuch as it did not seem to me at all material whether the testimony was in or out. The evidence showed that Barnes, Sanders, and Schneider & Davis all met subsequently at the office of Schneider & Davis, and there agreed to the execution of the bill of sale and chattel mortgage read in evidence; and this testimony of Barnes as to his connection with Sanders was merely an inducement showing how he came to be present at the subsequent meeting in the office of Schneider & Davis; and what was said between Barnes and Sanders, and objected to, as set out in the foregoing bill of exception, really did not affect any issue in the case." The objection not having been made until after the witness had testified and the testimony was in, and it further appearing that the evidence was of such a nature that it could not have affected any issue in the case, we conclude there was no error in the court's ruling. There was no motion to strike out the evidence.

The third assignment of error challenges the correctness of that portion of the court's charge in which the jury were told that: "If you find from the testimony before you that when the deed from W. A. Rumbold to plaintiffs, which had been introduced in evidence before you, was executed by said W. A. Rumbold, the indebtedness of the defendant F. W. Sanders to plaintiffs had been fully paid off, satisfied, and discharged, and that said

F. W. Sanders was not indebted to plaintiffs in any sum whatever, then you will find for the defendants and interveners." The evidence shows that previous to the time that F. W. Sanders and W. R. Barnes became partners Barnes had been conducting a grocery business, and was indebted to Schneider & Davis in the sum of about \$1,200. This was closed up by note executed by Barnes. Sanders had specially pleaded payment in full of all his indebtedness of every character to Schneider & Davis. It was contended by Schneider & Davis that Sanders was liable to them on the old debt of Barnes as well as the debts of Barnes & Sanders. Upon this issue there was evidence both ways. The jury, in the charge complained of, are told that "if Sanders was not indebted to plaintiffs in any sum whatever, then you will find for defendant and interveners." The jury could not have been misled by this charge. It was sufficiently comprehensive to include every character of indebtedness owing by Sanders to Schneider & Davis. Again, if the charge was not sufficiently specific, then we think that it was appellants' duty to ask a special charge covering the omission complained of in the court's charge. This they did not do, and cannot now be heard to complain.

Appellants' fourth assignment of error complains of that paragraph of the court's charge reading as follows: "Or if you find from the testimony before you that before the defendant F. W. Sanders became indebted to the plaintiffs, they, the plaintiffs, knew that said F. W. Sanders and W. A. Rumbold had agreed between them that the deed from said Sanders to said Rumbold for the land in controversy in this suit which has been testified about before you was not a bona fide conveyance of said land, but was merely a sham sale made for the purpose of enabling said F. W. Sanders to use as collateral security the note given by said Rumbold to said Sanders, and afterwards transferred by said Sanders to plaintiffs, which has been read in evidence before you, and which purports to have been given for a part of the purchase money agreed to have been paid for said land by said Rumbold, and which purports to be secured by a vendor's lien on said land, then you will find for defendant and interveners." The objection made to this charge is that it is "immaterial whether said sale was a pretense or not, unless the plaintiffs also had notice that the land in controversy was at the time of said pretended sale the homestead of said F. W. Sanders, for the reason there can be a pretended sale made for the purpose of apparently creating a vendor's lien, and it will make and create a valid lien upon real estate which is not the homestead, and because the same permits Sanders to obtain a permanent relief on account of his own fraud." The uncontradicted testimony shows that at the time Sanders and wife executed

the deed to Rumbold he was living on the land with his family, and that it was his homestead, and that he never surrendered the possession. The court, then, had the right to assume that the property was the homestead of Sanders at the time the deed was executed to Rumbold, and would have been authorized to have so instructed the jury. The property being the homestead of Sanders and wife, if the sale made by them to Rumbold was fictitious, and Schneider & Davis had notice of this fact at any time prior to the time of the transfer of the note to them, then they were not entitled to recover the land, or to foreclose the lien thereon as against the defendant Sanders and the interveners. There is no error in the charge complained of in the fourth assignment.

The fifth assignment of error complains of the action of the court in refusing the special charge asked by plaintiffs in which the court was requested to give a peremptory instruction to the jury to find a verdict for the plaintiffs as against the interveners. It is contended that there is no evidence tending to prove a case in favor of the interveners, in that there was no notice to plaintiffs of the claim of interveners. The uncontradicted evidence showed that the land in controversy was the community homestead and property of F. W. Sanders and Esther Ann Sanders, the father and mother of interveners; that Esther Ann Sanders died in 1885. After her death, F. W. Sanders married Lucy A. Sanders, and continued to reside upon the property in controversy. Upon the death of Esther Ann Sanders the interveners became entitled to a one-half interest, and were entitled to recover in this suit for such one-half interest, unless they are precluded from doing so by reason of appellants' claim. If the indebtedness of Sanders to Schneider & Davis had been fully paid, then the note executed by Rumbold and transferred by Sanders as collateral to secure his indebtedness to Schneider & Davis became the property of Sanders, and Schneider & Davis had no interest in or lawful claim to the note or land, in which event interveners were entitled to judgment for their one-half interest in the land. The charge requested by appellants, if given, would have withdrawn from the jury the issue as to whether or not said debt had been paid. This would have invaded the province of the jury. The special charge was properly refused.

The sixth and seventh assignments of error are grouped, and complain of the action of the court in refusing to give special charges Nos. 2 and 3 requested by them. We do not think there was any error in refusing these charges. The court's general charge covered the issues presented so far as said charges correctly state the law.

Appellants' eighth assignment of error complains of the action of the court in re-

fusing the following special charge requested by them: "If the jury find from the evidence that defendant F. W. Sanders placed the note given him by W. A. Rumbold with plaintiffs for the purpose of securing the indebtedness of W. R. Barnes to plaintiffs, and for securing plaintiffs for any goods sold the firm of W. R. Barnes, in which said Sanders became a partner, and that plaintiffs retained the same, and took a deed from said Rumbold to the land in controversy in satisfaction of said note, and that at the time they took said deed there was a balance due plaintiffs on the account for which they held said note as collateral security, and that they took said deed without the knowledge or consent of said F. W. Sanders, then, and in that event, defendant Sanders would be entitled to have said conveyance by said Rumbold to plaintiffs set aside, but plaintiffs would be entitled to a judgment against said Rumbold on said note, and to a foreclosure of a lien upon the land in controversy to satisfy the amount so due them. And if the jury so finds, the form of your verdict will be: 'We, the jury, find that the conveyances from Rumbold to plaintiffs should be set aside, and find for the plaintiffs against W. A. Rumbold, \$——, and the same is a vendor's lien on the land in controversy; and we find that the firm of W. R. Barnes is justly indebted to plaintiffs in the sum of \$—— (filling in the blank with the amount for which said defendant F. W. Sanders is liable.)'" There was no error in refusing this charge. Sanders had pleaded the statute of limitations of two and four years, and, further, that he was indorser upon the note executed by Rumbold, which had never been protested, and that 16 terms of court had passed after the maturity of the note before it was sued upon. The original debt was contracted prior to December, 1890. The appellants never declared on that debt. The note was executed September 23, 1890, and became due and payable three years thereafter. The note was not declared upon until November 3, 1897. It clearly appears that appellants' right to recover upon the note was barred by the statute of limitations. Again, if Schneider & Davis had notice of the fictitious character of the deed from Sanders and wife to Rumbold, they would not be entitled to foreclose a lien upon the property, it being the homestead of Sanders. If Sanders' debt had been paid, the note was Sanders', and appellant was not entitled to judgment, either as against Sanders or Rumbold. The evidence shows that when the deed was taken from Rumbold to appellants Rumbold's name on the note was canceled.

Appellants' ninth assignment complains of the verdict of the jury as being contrary to the law and evidence and against the weight of the evidence, and sets up with some particularity wherein it is claimed that said verdict is not supported by the evi-

dence. The record shows that upon all the issues submitted by the court's charge there was a conflict of evidence. The jury, by their verdict, have settled the conflict, and, as there is evidence in the record to support their findings, we do not feel authorized to set aside their verdict. Finding no reversible error in the record, the judgment is affirmed.

PAN HANDLE NAT. BANK v. SECURITY CO.

(Court of Civil Appeals of Texas. April 8, 1901.)

INSURANCE—MORTGAGE—INTEREST.

Where a mortgage provided that, on default in the interest, the debt should thereafter bear interest at 10 per cent., and the mortgaged premises were destroyed by fire, which rendered the mortgagor insolvent and unable to pay interest thereafter, a contention that the mortgagee was not entitled to be paid from insurance for its benefit 10 per cent. from the time of default was without merit.

Appeal from district court, Travis county; F. G. Morris, Judge.

Suit by the Security Company against the Pan Handle National Bank. From a decree in favor of plaintiff, defendant appeals. Affirmed.

Robt. E. Huff, for appellant. Ashby S. James, for appellee.

FISHER, C. J. The Security Company, appellee herein, held a first mortgage bond on the property of the Wichita Falls Milling Company, in the sum of \$7,000, and four notes, of \$225 each, dated September 1, 1894. This bond stipulated for 7 per cent. interest, payable semiannually on the 1st days of March and November of each year, with the further stipulation that, in the event of default in the payment of any interest coupon, the holder of said mortgage bond might elect to declare the entire debt due, and the same should thereafter bear interest at the rate of 10 per cent. per annum until paid, with 10 per cent. attorney's fees. To secure this bond, there was originally written \$10,000 of insurance for the benefit of the Security Company, as its interest might appear, but, after being written, three of the policies, each for \$1,000, were altered at the instance of the Pan Handle National Bank and the milling company, and changed so as to read in favor of the said bank as its interest might appear, and this was done without the knowledge or consent of the Security Company. When the fire occurred, the Pan Handle National Bank claimed these three altered policies, and the insurance companies all declined to pay any of the policies, and the Security Company was compelled to sue all the insurance companies, and to join the Pan Handle National Bank in the suits upon the three policies altered in favor of said bank. The milling company, by reason of the fire, became totally insolvent, and the

Security Company was compelled to mature its debt, and to bring this suit to foreclose its mortgage bond after maturity of the first coupon, having elected to mature the entire mortgage on the 12th day of March, after first coupon had matured on the 1st day of said month. The Pan Handle National Bank thereupon answered, insisting that the Security Company be first required to subject the fire insurance policies which had been written in its favor, but declining to recognize the right of the Security Company to the three policies which said bank had had altered without its consent. The other defendants answered, waiving citation, and entering their appearance in this cause. On the 8th day of December, 1896, plaintiff filed its first amended original petition, asking a foreclosure of its lien upon the \$7,000 bond, and also upon the four notes of \$225 each, admitting the credits which it had received as proceeds of the policies which it had been compelled to sue on, and which had not been contested by the Pan Handle National Bank, and claiming an equitable lien upon the proceeds of the other three insurance policies, which were contested by the Pan Handle National Bank, and were at that time still involved in suit. On the 4th day of September, 1900, the Security Company filed its second amended original petition, asking a foreclosure of its lien upon the property in controversy, allowing an additional credit on the date of its payment of \$2,150, being the proceeds of two of the policies in suit between itself and the Pan Handle National Bank, and which had been adjudged by the supreme court to belong to the Security Company, and asking that the Security Company be further entitled to the proceeds of the other policy still in the hands of the Pan Handle National Bank, under the agreement between itself and said bank, which was attached to said petition as an exhibit. On September 15, 1900, the Wichita Falls Milling Company filed its answer, admitting the allegations contained in the plaintiff's second amended original petition, and on the same day the defendants the Pan Handle Loan & Trust Company and John G. James filed their answer, admitting the allegations as against themselves. On the 17th day of September, 1900, after this cause had been continued from term to term, after filing of plaintiff's first amended original petition, on the 8th day of December, 1896, by agreement of all the parties, the Pan Handle National Bank filed its first amended original answer, excepting to so much of plaintiff's amended petition as set up the agreement made between itself and the Security Company and the Wichita Falls Milling Company, as to the proceeds of the policy sought to be subjected by plaintiff in this suit, on the grounds that the same was a setting up of a new cause of action as against the defendant bank. This exception was overruled by the court, and the defendant bank thereafter

pleaded the two and four years statute of limitation, but specially admitting the agreement attached to plaintiff's amended petition, but claiming that this agreement only extended as to which of said parties had the right to apply the insurance policy sued on to its indebtedness, admitting that the supreme court of Texas had held with the plaintiff, but claiming that the decree of the supreme court did not fix the amount of its interest, and that the policy in question was only payable to plaintiff as its interest might appear, and further claiming that the agreement between the milling company and plaintiff to pay 10 per cent. interest in case of default was only intended as penalty in case of willful default, and was not to be enforced in case of misfortune not caused by its own willful neglect; that plaintiff is not entitled to deprive defendant bank of proceeds of said policy by computing interest at the rate of 10 per cent. on this bond for a default occurring subsequent to the date of the fire; and alleging, further, that the plaintiff Security Company was only entitled to such part of the proceeds of said policy as it appeared to have an interest in by reason of valid indebtedness against the Wichita Falls Milling Company, to be paid out of said policy on December 7, 1894, the day when the fire occurred; and alleging that the interest of plaintiff on said date, after allowing all the credits, was less than \$60, which had been tendered to plaintiff. The jury was waived, and this cause was thereupon submitted to the court, and judgment rendered upon the first mortgage bond, interest, and attorney's fees, after allowing all the credits, according to the evidence, for \$1,263.80, this being the amount due on said \$7,000 mortgage bond, exclusive of the taxes, and including no part of the amount due on the four notes of \$225 each,—this amount being arrived at by calculating the interest on the mortgage bond at the rate of 10 per cent. per annum, and from the date that plaintiff elected to mature same up to the date of judgment, with 10 per cent. attorney's fees, after allowing credits for each partial payment made on said bond, according to the date thereof, as shown by the evidence; and further adjudging the Security Company to be entitled to the \$1,000 on deposit with the Pan Handle National Bank as the proceeds of the policy, to which it was entitled by reason of its having been written originally for the Security Company, and by virtue of the agreement attached to the plaintiff's amended petition and offered in evidence. Under the evidence as stated in the record, there is no dispute about the facts, and we find the facts to be as shown by the evidence of the plaintiff.

We do not find any error in the calculation of the trial court as to the amount due on the bond sued upon. The real contest in the case, so far as appellant is concerned, is as to who is entitled to the \$1,000 the pro-

ceeds of the insurance policy deposited with appellant. The facts found by the trial court show that this amount and more was due, and this, in connection with the agreement entered into between the parties, fixes the liability of the appellant for the amount of the policy. The trial court correctly calculated the interest at 10 per cent. from the time that the appellee elected to mature the entire indebtedness. The demurrers raising the question of limitation were correctly overruled, and, under the facts as stated in the record, the appellee's action, as against the bank, was not barred by limitation. We find no error in the record, and the judgment is affirmed. Affirmed.

BARNES v. COMMONWEALTH.¹

(Court of Appeals of Kentucky. March 28, 1901.)

CHANGE OF VENUE—HOMICIDE—INSTRUCTION AS TO SELF-DEFENSE—RIGHT OF JUDGE TO STRIKE JUROR FROM LIST—DYING DECLARATION.

1. Some discretion must be left to the trial court in acting upon an application for a change of venue, and, there being no abuse of discretion in refusing the application, there can be no reversal on that account.

2. Upon a trial for murder, it was not error to instruct the jury that they could acquit on the ground of self-defense only in the event they believed that defendant believed, and had reasonable grounds for believing, that he had no safe means of "averting" the danger, except by shooting deceased; the word "averting" not being equivalent to "escaping."

3. If the trial judge is informed, by what he deems credible evidence, that a juror, for any reason, is not qualified to try the case, it is proper for him to strike the juror's name from the list.

4. The statement of deceased that his wound would kill him, which was made in connection with a declaration by him as to the circumstances of the shooting, does not show such a sense of impending death as to make his declaration admissible as a dying declaration.

Appeal from circuit court, Nelson county. "To be officially reported."

Dan Barnes was convicted of the offense of murder, and he appeals. Reversed.

John S. Kelley and John D. Wickliffe, for appellant. Robt. J. Breckinridge, for the Commonwealth.

GUFFY, J. The appellant was indicted in the Nelson circuit court for the murder of W. B. Nicholls, and upon a trial of the charge he was found guilty of murder, and sentenced to the penitentiary for life, and, his motion for a new trial having been overruled, he prosecutes this appeal.

It appears from the testimony that appellant and deceased lived near together in Nelson county, and prior to the 20th of November, 1890, had been on friendly terms. On

the 20th of November, 1890, they met in Bardstown, in the store of one Losson. It so happened that some conversation occurred between them concerning the recent election, in which it is evident that some harsh words were used by the deceased, and there is evidence conducing to show that appellant either said or did something likely to irritate the deceased. The evidence also conduces to show that deceased and Losson were in friendly conversation in the store before appellant came in. After the trouble between appellant and deceased appellant left the store, and pretty soon thereafter deceased, in company with his friend, Smith, also left; and it is the contention of appellant that deceased and Smith followed him to several places in town, the theory of appellant being that they were seeking an opportunity to injure him or renew the difficulty. This, however, is denied by Smith, and it nowhere appears that any other words passed between them in town. It is claimed by appellant that deceased was heard to say, in substance, "We will get him as he goes home." The evidence shows that appellant obtained a pistol from a relative in town, and also bought three cartridges at a store. Some time in the afternoon appellant left for home, riding a mule, and not long afterwards deceased and Smith left, apparently for home, riding in a buggy, and some distance from town they overtook appellant, and shortly afterwards Barnes shot the deceased with a pistol, from which shooting deceased died next morning. As to what occurred when appellant was overtaken, the testimony of Smith and of appellant is quite contradictory. They are the only living persons who were present, or saw the difficulty which resulted in the death of deceased. We deem it entirely unnecessary to state either the evidence of Smith or appellant, for the reason that it was for the jury to weigh and determine the testimony. The appellant relied on 10 grounds for reversal.

At the May term, 1900, of said court, appellant moved for a change of venue, which was resisted by the commonwealth, and considerable amount of testimony was introduced for and against the motion. The court finally overruled the motion, and of that appellant complains. Some discretion as to change of venue must necessarily be exercised by the trial court, and in this instance we are not prepared to say that, under the evidence introduced, the trial court erred in overruling the motion.

It is earnestly contended for appellant that the court misinstructed the jury in giving instructions 1, 2, 3, and 5. Nos. 1, 2, and 3, it seems to us, are in the form generally given in such cases. No. 5 reads as follows: "If they believe from the evidence that at the time he shot W. B. Nicholls with a pistol, if he did shoot him, the defendant believed, and had reasonable grounds for believing, that he was then in immediate danger of

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

loss of life, or of receiving great bodily harm at the hands of said Nicholls, and believed, and had reasonable grounds for believing, he had no apparent and safe means of averting said danger except by shooting said Nicholls, he is excusable on the ground of self-defense, and they should find him not guilty." It is argued that the word "averting" should not have been inserted in the instruction; that it is equivalent to the word "escape" or "escaping," and that this court has heretofore decided that the word "escape" should not be used in such cases, for the reason that it is liable to be understood as requiring the defendant to flee, retreat, or run away. Mr. Webster defines "avert" as follows: "To turn aside or away; as, to avert the eye from an object; to ward off or prevent the occurrence or effects of; as, 'how can the danger be averted?' 'To avert his ire.'" It will thus be seen that the term used in the instruction could not fairly be understood as requiring the defendant to retreat or run away, and it is therefore unobjectionable; for it will be seen that, unless he had apparent and safe means of averting the danger, he was excusable for acting in his own self-defense. We are not of the opinion that the court erred in refusing the instructions asked by the defendant.

Appellant further complains of misconduct of the jury and of the commonwealth's attorney. It is contended that the jury were permitted to separate during the trial, and considerable evidence was introduced in support of that contention on the motion for a new trial. It is not necessary to discuss the evidence in that regard, as upon the next trial it must be presumed that nothing of the kind will occur, if, in fact, it occurred upon the trial under consideration; and the same may be said as to the complaint of misconduct of the commonwealth's attorney, which misconduct was vigorously denied by the prosecution.

It may be conceded that accepting the affidavit of Clark as to the qualification of Biven as a juror was out of the ordinary, but it must also be conceded that if the judge of the trial court is informed, by what he deems credible evidence, that a juror, for any reason, is not qualified to try the case then under consideration, it is no more than the duty of the judge to strike his name from the list.

We do not think the court erred in rejecting the testimony offered by the appellant, and the same may be said as to rejecting the testimony offered by the prosecution.

There is no necessity for discussing the question whether or not Blanford was a housekeeper, and therefore a competent juror.

B. S. Lasley was introduced by the prosecution, and was permitted to testify as to a conversation had with the deceased after the shooting, and of this the appellant complains. It is evident that the conversation was allowed to be detailed upon the idea that it was

the dying declaration of the deceased, and that the deceased was then in extremis so as to authorize it, and that he had abandoned all hope of life. The testimony of Lasley shows that he was acquainted with Nicholls, and that he saw him on the back porch of George Harned's, where he was taken shortly after the shooting. In response to a question by the prosecution, he said: "He was lying there like he was asleep, with his eyes closed. He opened his eyes, and noticed me, though. Well, he told me, 'That fellow done me up; shot me in the arm.' I told him to keep quiet; that the doctor would be there pretty soon; may be he was not hurt so bad; and he said he was shot in the side, 'What would kill me.' I got him to hush talking about it, and after awhile the doctor did come. When the doctor came, we pulled off his vest, and tore his underclothes, so he could get to the place, and he threw his hand over and said, 'As I told you, he has shot me in the side.' Well, I didn't let him talk any more than that, and, after the doctor got there and dressed his wounds, Mr. Harned wanted him to move away from there, and he asked the doctor if he would be able to take him away from there, and after awhile the doctor told him, if he had to be moved, he could take him away, and George Bealmear said he would go down to his brother Beck's, and get a cot and some bed clothes, and take him down to Mr. Beck's. He went down, and got a cot and some bedclothes, and put him on it, and carried him down. When we got down there, we put him in a room there, and he said to me there that it was all uncalled for." The latter part of that statement, however, was excluded from the jury. At this point the jury was withdrawn from the room, and during their absence the competency of certain evidence to be offered by the witness was considered, and, after the return of the jury, counsel for the prosecution said to witness, "Go ahead, and testify about the matters the court has instructed you you could testify about." The witness said: "I don't know that I could tell what he said to me, if I am not allowed to tell what the witness told me. Q. Tell the jury everything except what the court told you to leave out, Mr. Lasley. A. He told me that that shot in the side— Q. Just tell now what he said to you, and what took place when they met out there.—when he and Barnes came together out there on the road,—except leave out what the judge told you. A. He said when he started out of town in the afternoon he overtook Barnes on Buffalo Hill, and said the fuss was renewed: that Barnes rode ahead of him a few feet, and jumped off, and drew his pistol when he came back, and said, 'If trouble is what you are looking for, you can get it,' and threw it down; and he said, 'I never did believe he was going to shoot me.'"

The question under consideration has been so often passed upon by this court that a discussion of the law applicable thereto seems to

be unnecessary. We will, however, refer to a few cases. In *Vaughan v. Com.*, 86 Ky. 431, 6 S. W. 153, we quote from the syllabus: "In cases of homicide, the statements of the deceased as to the killing are not admissible in evidence as his dying declaration, unless it appears that they were made under a sense of impending death. Something more must appear than a mere belief upon the part of the deceased that he would ultimately die from his injuries. In this case the statement of the deceased that he believed he would have to die was nothing more than the expression of an opinion that the wound he had received would ultimately cause his death, and was not sufficient to make his statements as to the killing competent evidence." The most that could possibly be claimed in the case at bar would be that the deceased meant to express the opinion that the wound in his side would at some time cause his death, and, taking the peculiar expression as appearing in the bill of exceptions, we are hardly authorized to conclude that the deceased really expressed an opinion that the wound would cause his death. In *Baker v. Com.*, 50 S. W. 54, this court considered the question under discussion at considerable length, and quoted with apparent approval from *Rice on Criminal Evidence* (section 330), as follows: "This species of evidence is obviously liable to great abuse, and should be received with great caution, and only when a proper introduction entitles it to be received. The witness whose testimony is cast upon the record is beyond the reach of cross-examination; all opportunity for investigating the question of malice, enmity, positive identification, is lost forever; and the accused, whose tenure of life is hanging in the balance, has to contend with the additional disadvantage that a just indignation is aroused in the minds of the triors by the mere recital of a hideous crime. Evidence of this character is universally admitted, however, on the ground of necessity; and in order to prevent the entire frustration of justice, to impart competency to this evidence, it must clearly appear that the declarant was conscious of the imminency of death, believed himself to be beyond the probabilities of recovery, and this belief must be evident by some word or act of a conclusive and unmistakable character." It seems clear to us that the evidence of Lasley as to the statements of the deceased were incompetent. It does not at all appear that the deceased was so impressed with impending dissolution or so certain of speedy death as to render his statements competent evidence. It will hardly be questioned that the statements of deceased as detailed by the witnesses were material and highly prejudicial to the accused. The judgment is therefore reversed, and cause remanded, with directions to set aside the verdict and judgment and award appellant a new trial, and for proceedings consistent herewith.

POWERS v. COMMONWEALTH.¹

(Court of Appeals of Kentucky. March 28, 1901.)

CRIMINAL LAW—PARDON—JUDICIAL NOTICE—DE FACTO OFFICERS—CONTESTED ELECTION FOR GOVERNOR—FINALITY OF JUDGMENT OF LEGISLATURE—INDICTMENT—CONSPIRACY—DECLARATIONS OF CO-CONSPIRATORS—RIGHT OF WITNESS TO EXPLAIN CONTRADICTORY STATEMENTS—RIGHT TO PROVE WHOLE OF TRANSACTION—INSTRUCTIONS TO JURY—AMENDMENT OF INSTRUCTION DURING ARGUMENT—LIABILITY OF DEFENDANT FOR ACTS OF CO-CONSPIRATORS NOT CONTEMPLATED—PREJUDICIAL ERRORS—CORROBORATION OF ACCOMPLICES.

1. The production of a valid pardon of the offense whereof defendant is accused puts an end to the proceedings, no plea of pardon being necessary.

2. The court of appeals takes judicial notice of the official signature of any officer of the state, and is presumed to know judicially who is the chief executive of the state when that fact is called in question.

3. When two persons are present at the seat of government, each claiming to be governor de jure, and each assuming to perform the duties of the office, the one who is governor de jure is also governor de facto, especially as affecting the validity of a pardon; that being an act of the commonwealth's grace asserted against the commonwealth.

4. The judgment of the legislature, in a contest for the office of governor, was final and conclusive, and, the incumbent being adjudged not to be entitled, his powers immediately ceased, the judgment being self-executing; and therefore a pardon thereafter issued by him was void, though he retained possession of the executive building, archives, and records, the person adjudged to be entitled being also at the seat of government, assuming to perform the duties of the office, and being therefore governor, both de jure and de facto.

5. An indictment for the crime of being accessory before the fact to the murder of G., which notified defendant that he was charged with conspiracy to procure the murder of G., that he procured the murder, and that the murder was done by some one who was by him counseled and procured to do the act, is good, though a particular word or phrase of the indictment may be ambiguous or obscure; there being no doubt as to the charge intended.

6. Upon the trial of accused under such an indictment, it appearing that deceased was a state senator, who had been a candidate for governor, and was contesting before the legislature, then in session, the election of one who held the certificate of election, and was performing the duties of the office, and with whom it was charged that accused had conspired to procure the murder of deceased, it was not error to permit a witness to state a conversation with an unknown person who made threats of violence concerning the legislature, the witness testifying that he subsequently saw the unknown person in the uniform of a sergeant among the guards in charge of the capitol square, as considerable latitude must be allowed, where a conspiracy is charged, in the admission of testimony tending to show that acts apparently isolated have sprung from a common object.

7. It was error to permit a witness to testify as to a conversation between two unknown men, in no wise identified as members of any conspiracy, or connected in any manner with those alleged as co-conspirators with accused.

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

8. Testimony of a witness as to certain telegrams which tended to show that they were written and sent before the killing was admissible.

9. Testimony to the effect that an accomplice who had testified for the prosecution had said that some one—possibly meaning one of the counsel for prosecution—could take the \$100,000 which had been appropriated by the legislature for the conviction of the murderer or murderers, "and convict Jesus Christ and the twelve apostles," was properly rejected, as it did not authorize the inference that the accomplice had been bribed.

10. Upon the cross-examination of a witness with a view to his impeachment by contradiction, he should be permitted to explain the supposed contradictory statements which he made.

11. Declarations of one whom the evidence tended to connect with the conspiracy charged, to the effect that the killing of deceased had been determined upon, and pardons prepared for the perpetrators, were admissible.

12. There having been a meeting in front of the capitol several days before the killing, at which speeches were made and resolutions adopted, declarations of members of this meeting, indicating violent and improper intentions, were admissible, as part of the res gestæ, to show the existence of the conspiracy charged; but, the commonwealth having been permitted to prove part of what was done there, defendant was entitled to prove all that was done, and so should have been permitted to show the resolutions adopted.

13. The words, "if the jury believe from the evidence beyond a reasonable doubt," being used in the beginning of an instruction, need not be repeated, as they would naturally be understood as applying to every one of the ingredients detailed therein as constituting guilt of the offense charged.

14. Though accused was charged only as an accessory before the fact, the giving of an instruction authorizing the jury to find him guilty, "whether he was present at the shooting or wounding or not," was harmless error, as the jury could not have found him guilty as a principal, all the evidence showing that he was not present at the time of the shooting.

15. To an instruction directing the jury to find defendant guilty if they believed deceased was killed pursuant to defendant's "advice, counsel, or encouragement," the words, "and said killing was induced thereby," or their equivalent, should be added.

16. If, without any conspiracy, accused advised and counseled the killing of members of the legislature, and in pursuance of such advice and counsel, and induced thereby, the killing of deceased was done, the accused was guilty of murder; and the requirement that the jury should first believe there was a conspiracy to bring armed men to the capital for the purpose of doing an unlawful or criminal act before they could convict because of such counsel and advice is objectionable as tending to confuse the jury, whether or not it is reversible error.

17. It was not improper for the court to amend an instruction after four of the five arguments on each side had been made to the jury.

18. Where one of several persons who have conspired to do some other unlawful act commits a murder, his co-conspirators are not criminally responsible as accessories before the fact, unless the murder was committed in furtherance of the conspiracy, and was the necessary or probable result of its execution.

19. Where a body of armed men was brought to the state capital pursuant to a combination or conspiracy between defendants and others, and this was followed by the murder of a state senator who had been a candidate for governor, and was then contesting the election before the

legislature, upon the trial of defendant as an accessory before the fact to the murder it was prejudicial error to instruct the jury to find the defendant guilty if they believed he conspired with others to do some unlawful act, and that in pursuance of such conspiracy, or in furtherance thereof, some one of defendant's co-conspirators, or some person acting with them, did kill deceased, though the jury may believe that such was not the original purpose of the conspiracy; as there was evidence tending to show that the sole purpose of assembling the armed men was to intimidate the legislature, and, if such was the fact, defendant is not guilty, unless the killing of deceased was in furtherance of the conspiracy, or necessarily or probably would result from its execution, and therefore the error in failing to thus qualify the instruction was prejudicial.

20. An error in failing to submit to the jury a certain view of the case by an instruction given cannot be said to be harmless upon the ground that the testimony tending to support that view is not credible, the jurors being the sole judges of the weight of the evidence.

21. Where several accomplices had testified, it was prejudicial error to instruct the jury that they could not convict upon the uncorroborated testimony of "an accomplice," as the court should instead have used the words, "an accomplice or accomplices."

Paynter, C. J., and White and Hobson, JJ., dissenting.

Appeal from circuit court, Scott county.

"To be officially reported."

Caleb Powers was convicted of murder, and appeals. Reversed.

John Young Brown, W. C. Owens, R. C. Kinkead, Jas. C. Sims, Geo. Denny, and J. B. Finnell, for appellant. Robt. J. Breckinridge, R. B. Franklin, T. O. Campbell, and Jos. L. Meyer, for the Commonwealth.

DU RELLE, J. This appeal is from a judgment of conviction in the Scott circuit court, to which the case was transferred by change of venue from Franklin county, upon an indictment charging appellant as accessory before the fact to the murder of William Goebel. The indictment charges the murder to have been the result of conspiracy between appellant and others, and is as follows: "The grand jury of the county of Franklin, in the name and by the authority of the commonwealth of Kentucky, accuse Caleb Powers of the crime of being accessory before the fact to the willful murder of William Goebel, committed as follows, viz.: The said Caleb Powers, in the said county of Franklin, on the 30th day of January, A. D. 1900, and before the finding of this indictment, unlawfully, willfully, feloniously, and of his malice aforethought, and with intent to bring about the death and procure the murder of William Goebel, did conspire with W. H. Culton, F. W. Golden, Green Golden, John L. Powers, John Davis, Charles Finley, W. S. Taylor, Henry Youtsey, James Howard, Berry Howard, Harlan Whitaker, Richard Combs, and others to this grand jury unknown, and did counsel, advise, encourage, aid, and procure Henry Youtsey, James Howard, Berry Howard, Harlan Whitaker, Rich-

ard Combs, and other persons to this grand jury unknown, unlawfully, willfully, feloniously, and of their malice aforethought, to kill and murder William Goebel, which one of the last five above-named persons, or another person acting with them, but who is to this grand jury unknown, so as aforesaid then and there, thereunto by the said Caleb Powers before the fact counseled, advised, encouraged, aided, and procured, did, by shooting and wounding the said Goebel with a gun or pistol loaded with powder and other explosives and leaden and steel ball and other hard substances, and from which said shooting and wounding the said Goebel died on the third (3d) day of February, 1900, but which of said last above-mentioned persons, so as aforesaid, actually fired the shot that killed the said Goebel is to this grand jury unknown; against the peace and dignity of the commonwealth of Kentucky."

In the discussion of the questions involved, we shall state such facts only as are necessary to a correct understanding of the questions considered and decided, and those facts will be stated in connection with the questions to which they relate.

On the trial a pardon was produced, purporting to have been issued by W. S. Taylor, as governor of Kentucky, dated March 10, 1900. The production of this paper was accompanied by filing what is termed in the record a "plea of pardon." As we understand the law, no plea was necessary. The simple production of a valid pardon of the offense whereof appellant was charged would put an end to the proceedings, and render void any proceeding thereafter taken in the trial.

In order to decide the validity of the paper produced as a pardon, we must consider the situation at the time it was issued. This court takes judicial notice of the official signature of any officer of this state (Ky. St. § 1623), and is presumed to know judicially who is the executive of the state at any time the fact is called in question (*Deweese v. Colorado Co.*, 32 Tex. 570). See, also, 12 Am. & Eng. Enc. Law, p. 152, and notes. It is conceded by counsel upon both sides that the court can take judicial cognizance of the facts necessary to the decision of this question.

On January 30, 1900, William Goebel, a member of the Kentucky senate, was shot by an assassin in the state-house yard, in front of the capitol building, at Frankfort, and died some days later. This occurred during a period of political excitement and bitterness perhaps unexampled in the history of the commonwealth. William Goebel, William S. Taylor, and John Young Brown had been candidates for the office of governor of Kentucky at the preceding November election. The state board of election commissioners, elected under the act of March 11, 1898, examined and canvassed the returns of election, and issued a certificate

of election to W. S. Taylor. This gave a prima facie title to the office to Taylor, who accordingly was duly inaugurated as governor, took the oath of office, and took possession of the state building, and the archives and records appertaining to the office. This did not give him an absolute, indefeasible title to the office of governor, but his title was subject to be defeated by the determination of a contest for the office. *State v. Superior Court of Snohomish Co.*, 17 Wash. 12, 48 Pac. 741, 61 Am. St. Rep. 893. Until the certificate was set aside in some appropriate proceeding, he was entitled to retain possession and perform the duties of the office without interference. If the time should pass within which such proceeding might be instituted, that title became absolute and indefeasible. A contest was instituted by Goebel before the legislature, and was pending at the time of the murder, as were also contests before the state board of contest for the minor state offices, certificates of election to which had been issued to the candidates upon the same ticket with Taylor. After the shooting, the militia was called out by Taylor, and the legislature prevented from meeting in the state capitol, and at certain other places at which they attempted to hold meetings. The records of the legislature show, however, that a meeting was held, at which it was determined by the legislature that William Goebel, and not William S. Taylor, had been elected governor of Kentucky, and that J. C. W. Beckham, and not John Marshall, had been elected lieutenant governor. After Goebel's death, Taylor retained possession of the executive building, archives, and records, and continued to act as governor. Beckham opened an office in the Capital Hotel, a few blocks away from the capitol, which was called the "Governor's Office," and he also acted as governor. There were thus two persons present at the seat of government, each claiming to be governor de jure, and each assuming to perform the duties of the office. Only one of them could, by any possibility, be governor de jure, and only one of them could be governor de facto. *State v. Blossom*, 19 Nev. 312, 10 Pac. 430. The legal doctrine as to de facto officers rests upon the principle of protection to the interests of the public and third parties, and not upon the rights of rival claimants. The law validates the acts of de facto officers as to the public and third persons upon the ground that, though not officers de jure, they are in fact officers whose acts public policy requires should be considered valid. *Oliver v. City of Jersey City* (N. J. Err. & App.) 44 Atl. 709, 48 L. R. A. 412. So, when both are acting officially, that one who has the title de jure is both de jure and de facto officer. Especially must this be so when the act whose validity is questioned is not an act affecting the rights of third parties, but is an act of the commonwealth's grace as-

serted against the commonwealth. So the question is narrowed to an inquiry as to who was de jure governor on March 10, 1900. The legislative record shows that the general assembly determined the contest. By the Goebel election law of March 11, 1898 (Ky. St. § 1506a, subsec. 11), that decision was a judgment determining the title to the office. It was a self-executing judgment: "When a new election is ordered or the incumbent adjudged not to be entitled, his powers shall immediately cease, and if the office is not adjudged to another it shall be deemed to be vacant." If this judgment of the legislature was valid and final, it settles the question. In an opinion of this court, from which the writer of this opinion dissented emphatically, and in the views of which dissent Judge O'Rear concurs, in the case of *Taylor v. Beckham* (Ky.) 56 S. W. 177, 49 L. R. A. 258, it was said that the judgment of the legislature was final and conclusive. That decision settled the question finally, and the pardon must be adjudged invalid. The authorities upon this question are collated more fully in the opinion of Judge WHITE, who concurs upon this question.

The next question in logical order is as to the sufficiency of the indictment. It has been set out in full. It is objected that the acts constituting the offense are not stated in "ordinary and concise language," so as to enable one of "common understanding to know what is intended." We think the objection is not well taken. The indictment notifies the defendant that he is charged with conspiring to procure the murder of Goebel, that he procured the murder, and that the murder was done by some one who was by the defendant counseled and procured to do the act. In attempting to parse this indictment, there is at first blush some difficulty. The use of the word "which" in the clause, "which one of the last five above-named persons," etc., is somewhat ambiguous; but, on careful examination, it seems to be used as a relative pronoun, whose antecedent is found in the clause, "to kill and murder William Goebel." There is, however, no trouble as to the meaning, nor do we think a person of ordinary intelligence could be misled as to the nature of the charge. As said by the Massachusetts court in *Com. v. Call*, 21 Pick. 515: "The grammatical and critical objections, however ingenious and acute they may be, cannot prevail. The age has gone by when bad Latin, or even bad English, so it be sufficiently intelligible, can avail against an indictment, declaration, or plea. The passage objected to may be somewhat obscure, but, by a reference to the context, is capable of pretty certain interpretation." In our opinion, the indictment is sufficient.

In the grounds relied on in the motion for a new trial it is stated that the court overruled the motion of appellant, after the regular panel of the jury was exhausted, to

draw the remaining names necessary to complete the jury from the jury wheel. It is to be regretted that, in a case concerning which so much feeling existed, the simple and easy mode was not adopted which would have put beyond cavil the question of the accused having a trial by jury impartially selected. This will doubtless be done upon the succeeding trial.

We need not consider the debate between court and counsel, which is complained of in the argument, as it is not necessary to the decision of the case, and in the nature of things cannot, upon a subsequent trial, occur as it did in the trial now under review.

Complaint is made that the witness Watts was permitted to state a conversation with an unknown person, who made threats of violence concerning the legislature. It was afterwards shown by the witness, however, that he subsequently saw the unknown person, in the uniform of a sergeant, among the guards in charge of the capitol square. On the trial of offenses committed in furtherance of conspiracies, there must be considerable latitude left to the discretion of the trial court in the admission of testimony of circumstances tending to show that acts apparently isolated have sprung from a common object. As said by Judge King in *Com. v. McClean*, 2 Pars. Eq. Cas. 368: "The adequacy of the evidence, in prosecutions for a criminal conspiracy, to prove the existence of such a conspiracy, like other questions of the weight of evidence, is a question for the jury." This testimony seems to have been admissible to go to the jury for what it was worth, in support of the theory of the commonwealth as to the nature of the conspiracy charged. The rule as to the admission of evidence in such cases is nowhere better stated than in Carson's edition of *Wright on Criminal Conspiracy* (page 218). Says Mr. Carson: "The concise, yet comprehensive, statement of Mr. Archbold may be accepted as a correct epitome: 'Wherever the writings or words of any of the parties charged with, or implicated in, a conspiracy can be considered in the nature of an act done in furtherance of the common design, they are admissible in evidence, not only as against the party himself, but as proof of an act from which, *inter alia*, the jury may infer the conspiracy itself.' Wherever the writings or words of such a party amount to an admission merely of his own guilt, and cannot be deemed an act done in furtherance of the common design, in that case they can be received in evidence merely as against the party, and not as evidence of the conspiracy, and in strictness ought not to be offered in evidence until after the conspiracy had been proved *alunde*; but wherever the writings or words of such a party, not being in the nature of an act done in furtherance of the common design, merely tend to implicate others, and not to accuse himself, they ought not to be

received in evidence for any purpose." Tested by this rule, the language testified to by the witness McDonald, as to a conversation between two unknown men, in no wise identified as members of any conspiracy, or connected in any manner with those alleged as the co-conspirators with appellant, is clearly incompetent.

The testimony of the witness Sinclair as to telegrams was competent. As suggested by counsel for the commonwealth, if true it would tend to show the telegrams were written and sent before the killing.

The trial court refused to allow the witness J. C. Owens to testify as to a conversation with the accomplice—witness Wharton Golden. The question sought to bring out the fact that Golden had said that some one—possibly meaning one of the counsel for the prosecution—"could take that hundred thousand dollars and convict Jesus Christ and the twelve apostles." Evidently this conversation was asked for on the theory that it tended to show the witness was not impartial, and that he had an interest in the result of the case. If it did so, it was not collateral or irrelevant to the issue, and Golden having been asked in regard to it, and his answer being adverse, the defense would have the right to contradict him by other testimony for the purpose of discrediting him. Steph. Dig. Ev. art. 180; 1 Greenl. Ev. 446; Schuster v. State, 80 Wis. 107, 49 N. W. 30; 3 Best, Ev. 221. But we are unable to see that the statement sought to be proved against Golden indicates any interest. At the most, it could indicate only that, in his opinion, witnesses could be obtained by bribery. No inference that he himself had been bribed can be drawn from the language, without violent exercise of the imagination. In our opinion, it was collateral to the issue and was properly excluded.

Some of the witnesses for the defense, upon cross-examination with a view to impeachment by contradiction, were not permitted to explain the statements they made. We are of opinion that this view of the rule is too narrow. In 3 Best, Ev. § 229, what we regard as the correct rule is thus stated as to the requirement that the witness' attention shall be called to the supposed contradiction: "The rule which prescribes this condition rests on the principle of justice to the witness. The tendency of the evidence was to impeach his veracity, and common justice demands that before his credit is attacked he should have an opportunity to declare whether he made such statements to the person indicated, and to explain what he said, and what he intended and meant in saying it."

The court refused to instruct the jury that the statements of the witnesses Reed and Hazlewood as to a conversation with the witness Sparks should be considered as affecting only the interest and credibility of Sparks. These statements to which Reed

and Hazlewood testified were to the effect that the killing of Goebel had been determined upon, and pardons prepared for the perpetrators. Assuming that there was evidence to connect Sparks with the conspiracy charged, these declarations, if admissible, were evidence in chief. But we do not think they were competent at all as against appellant. They were not part of the *res gestæ*, or such as tended to promote the common object. The rule is thus stated in Mr. Carson's edition of Wright on Criminal Conspiracies: "But if the acts and declarations of a conspirator with the accused are made in his absence, they are not admissible against him to prove either the body of the crime or the existence of the alleged conspiracy, unless they either so accompany the execution of the common criminal intent as to become part of the *res gestæ*, or in themselves tend to promote the common criminal object. The acts and declarations of a conspirator, to be admissible in evidence to charge his fellows, must have been concomitant with the principal act, and so connected with it as to constitute a part of the *res gestæ*." The cases of Clawson v. State, 14 Ohio St. 234, and State v. Larkin, 49 N. H. 39, fully support Mr. Carson's text, as does also the third instruction given by the court on its own motion in Spies v. People, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320: "The acts of each defendant should be considered with the same care and scrutiny as if he alone were on trial. If a conspiracy having violence and murder as its object is fully proved, then the acts and declarations of each conspirator in furtherance of the conspiracy are the acts and declarations of each one of the conspirators; but the declarations of any conspirator before or after May 4th, which are merely narrative as to what has been or would be done, and not made to aid in carrying into effect the object of the conspiracy, are only evidence against the one who makes them." We cannot conceive how these statements, which were merely narrative of what had been or would be done, could be held to be made in aid of the object of the conspiracy charged. What is here said as to the testimony of Reed and Hazlewood expresses the views only of Judges BURNAM, O'REAR, and the writer of this opinion; the majority of the court being of opinion that the evidence is competent.

On January 25, 1900, as shown by testimony for the commonwealth, there was a meeting in front of the capitol, at which speeches were made and resolutions adopted. Testimony was introduced by the commonwealth of actions and statements of certain persons who were apparently members of this assemblage, indicating violent and improper intentions. This evidence, we think, was proper, under the circumstances. But the defense was not permitted to show what the resolutions were which were adopt-

ed. The declarations of the members of this meeting were admitted, and were admissible, on the ground that they were acts part of the *res gestæ*, and were themselves evidence to go to the jury to show the existence of the conspiracy charged. If the statements of persons in the crowd were admissible, the defense had a right to all the statements of the crowd that could be shown, because they occurred at the same time and place, and in the same connection. If the commonwealth proved part of what was done there, the defense might prove all that was done; if the commonwealth showed violent language to have been used, the defense had the right to show that peaceable language was also used; and, if the acts or expressions of individual members of the meeting are shown for the purpose of showing an evil intent in all, surely the official utterance of the body might be shown for what it was worth, to rebut the inference that the views of the individuals were the views of the entire body. In 1 Roberson, Ky. Cr. Law, p. 149, § 107, the rule is stated: "The acts and declarations of the defendant and his associates may be received in evidence as well in his favor as against him, when they are a part of the *res gestæ*, or a conversation offered by the prosecution, but not statements at other times,"—referring to *Cornelius v. Com.*, 15 B. Mon. 539. The introduction of the commonwealth's testimony made the testimony for the defense admissible.

By the exceptions to the admission and rejection of testimony many other questions of evidence are presented which are not referred to in the briefs, but we think the principles which should govern their decision have been sufficiently stated in this opinion, and in the opinion in *Howard v. Com.* (this day decided) 61 S. W. 756.

We shall next consider the instructions of the court. There seems to be no objection to the first instruction. The second is objected to for the reason that there is no repetition of the phrase, "if the jury believe from the evidence beyond a reasonable doubt." This phrase, however, at the beginning of the instruction, clearly applies to every one of the ingredients detailed therein as constituting guilt of the offense charged. It not only applies grammatically, but, we think, could not be otherwise understood by a person of average intelligence.

It is objected to the third instruction that it permits the jury to find appellant guilty "whether he was present at the time of the shooting or wounding or not," and that the jury were thereby permitted to find a verdict of guilty upon the theory that he was present, notwithstanding he is charged only as accessory before the fact, and, if present, would not be an accessory, but a principal, in either the first or second degree. This objection is not tenable, for there is no testimony tending in the slightest degree to show that appellant

was present at the time of the shooting. On the contrary, all the testimony shows he was elsewhere. It could, therefore, under no supposition, have prejudiced him. This part of the instruction would have been more directly applicable to the case presented if, instead of the phrase quoted, the court had used language similar to that used in the fifth instruction, "although he was not present at the time of the shooting or wounding."

The fourth instruction is also objected to. It is as follows: "If the jury believe from the evidence beyond a reasonable doubt that the defendant, Caleb Powers, conspired with W. H. Culton, F. W. Golden, Green Golden, John L. Powers, John Davis, James Howard, Berry Howard, Charles Finley, W. S. Taylor, Harlan Whitaker, Richard Combs, Henry Youtsey, or either or any of them, or other person or persons unknown to the jury acting with them, to bring a number of armed men to Frankfort, for the purpose of doing an unlawful or criminal act, in the pursuance of such conspiracy defendant did advise, counsel, or encourage the killing of members of the legislature, said William Goebel being a member thereof, and said Goebel was killed in pursuance of such advice, counsel, or encouragement, then the defendant is guilty of murder, whether the person who perpetrated the act which resulted in the death of William Goebel be identified or not; and, if the killing of said William Goebel was committed in pursuance of such advice, counsel, or encouragement, and was induced and brought about thereby, it does not matter what change, if any, was made by the conspirators, if any was made, as to their original designs or intentions, or the manner of accomplishing the unlawful purpose of the conspiracy." This instruction seems open to the objection that, after the words, "and said Goebel was killed in pursuance of such advice, counsel, or encouragement," there should be added the words, "and said killing was induced thereby," or an equivalent expression. It is also objected that it assumes the fact to exist that Goebel was a member of the legislature, when that was a matter to be proven.

A further objection to this instruction is that the recital of a conspiracy to bring armed men to Frankfort, for the purpose of doing an unlawful or criminal act, is unnecessary to the instruction, and it might tend to confuse the jury. If, without any conspiracy, appellant advised and counseled the killing of members of the legislature, and in pursuance of such advice and counsel, and induced thereby, the killing of Goebel was done, he was guilty of murder, without any reference to the question whether he engaged in a conspiracy to do, or to procure the doing of, some other unlawful act. But it is not necessary to consider whether these objections amount to reversible error.

The objections to the fifth and sixth instructions do not seem to us to be valid.

The seventh instruction is as follows:

"The court instructs the jury that if they believe from the evidence beyond a reasonable doubt that the defendant Caleb Powers conspired with W. H. Culton, F. W. Golden, Green Golden, John L. Powers, John Davis, Charles Finley, W. S. Taylor, Henry Youtsey, James Howard, Berry Howard, Harlan Whitaker, Richard Combs, or any one or more of them, or with some other person or persons unknown to the jury, acting with them, or either of them, to do some unlawful act, and that in pursuance of such conspiracy, or in furtherance thereof, the said Henry Youtsey, James Howard, Berry Howard, Harlan Whitaker, Richard Combs, or some one of them, or some other person unknown to the jury acting with them, or with those who conspired with the defendant, if any such conspiracy there was, to do an unlawful act, did shoot and kill William Goebel, the defendant is guilty, although the jury may believe from the evidence that the original purpose was not to procure or bring about the death of William Goebel, but was for some other unlawful and criminal purpose." After the instruction had been given, and after four of the five speeches upon each side had been made to the jury, this instruction was amended as follows: "The words 'some unlawful act,' as used in this instruction, mean some act to alarm, to excite terror, or the infliction of bodily harm." We do not regard the amendment of the instruction as improper on account of the time at which it was done. If the court erred in the instruction given, it was, we think, its right and its duty to so amend it as correctly to state the law. Abundant time remained for the discussion to the jury of the amendment, and the trial court would doubtless have further extended it upon that account if requested.

In considering the other objections to this instruction, it is necessary to examine the doctrine of the responsibility of one conspirator for the acts of his co-conspirators in furtherance of the common design, although not specifically intended by him. This doctrine, in its application to the varying facts of individual cases, is founded upon several distinct and well-recognized legal principles, not, however, always distinguished by the earlier writers; and, first, there is the common-law doctrine which transfers the evil intent of a person attempting one kind of crime to the unexpected results produced by his acts. If a man in the commission of a wrongful act, were it only a civil trespass, committed another wrong unmeant by him, he was punishable. So, if he attempted to kill one individual, and by accident killed another, whether by striking, shooting, giving poison, or in any other way, as his intent was murder, and slaying was accomplished, he was guilty of murder. So, also, if, in the attempt to commit one variety of crime, an entirely different crime was accidentally accomplished, the malice of the intended crime was imputed to the act done, in all cases

where general evil intent was a constituent of the committed act. In the application of this doctrine, a distinction was made resting upon the grade of the intended offense. If the crime intended was a felony, as at common law practically all felonies were punishable with death, either with or without benefit of clergy, the felonious intent of the intended crime was imputed to the committed act, and, if it were homicide, made it murder; for it was considered immaterial whether a man was hanged for one felony or another. If he succeeded in his original felonious design, his intent was sufficiently evil to justify hanging. If he, by misadventure, accomplished another offense requiring general malevolence, the evil intent of the intended act, being sufficient to justify the death penalty, was imputed to the act committed. His intent, if successful, was worthy of death; the deed he did was worthy of death, if it had that intent; and so it was considered by the judges as making no difference whether the committed act was the one intended. On the other hand, if the intended act was not felonious, a resultant homicide was not murder, but manslaughter. So we find that unlawfully, but not feloniously, to shoot at the poultry of another, and thereby accidentally to kill a human being, was manslaughter; but as larceny was, at common law, a felony, if the shooting were done with intent to steal the poultry, the homicide was murder. But as with advancing civilization the savage cruelty of the ancient English common law, under which some hundreds of offenses were punished with death, became softened by statutory amendment, this doctrine, even in Great Britain, became modified. The reason for its existence, that it made no difference to the prisoner or the judges for what reason the death penalty, or its practical equivalent, was inflicted, having failed, the doctrine itself ceased to be applied with its ancient rigor; and in *Reg. v. Faulkner*, 19 Eng. Rep. 578, we find a case in which a sailor, who, in attempting to steal rum, accidentally set fire to the spirits, and thereby burned the ship, was held not guilty of arson. An interesting discussion of this doctrine is found in 1 Bish. New Cr. Law, c. 21.

With the adoption of the English common law in the various jurisdictions in this country, and its modification by statute, there came the question whether this doctrine applied to statutory felonies which were not felonies at common law. In some of the jurisdictions it was held without qualification that it did. It may be remarked that, in many of the earlier cases, the attempted offense was abortion; and it may be that the moral turpitude of this offense, not at common law a felony, had effect in determining the question. It was held in a Maine case (*Smith v. State*, 33 Me. 48, 54 Am. Dec. 607), and the same doctrine was announced in a number of cases, that the grade of the com-

mitted offense depended upon the graduation of the attempted offense by the statute, and not upon the common-law classification. This is also justified upon the ground that, such an attempt being done without lawful purpose and dangerous to life, malice is imputed. But in that case it was held that procuring a miscarriage resulting in death, was manslaughter only, as such procuring was a misdemeanor. This doctrine was emphatically stated by Chancellor Walworth, delivering the opinion of the New York court in *People v. Enoch*, 13 Wend. 159, 27 Am. Dec. 197, holding "that as often as the legislature creates new felonies, or raises offenses which were only misdemeanors at the common law to the grade of felony, a new class of murders is created by the application of this principle to the case of killing of a human being by a person who is engaged in the perpetration of a newly-created felony. So, on the other hand, when the legislature abolishes an offense which at the common law was a felony, or reduces it to the grade of a misdemeanor only, the case of an unlawful killing, by a person engaged in the act which was before a felony, will no longer be considered to be murder, but manslaughter merely."

This doctrine, manifestly, should have no application in a jurisdiction where, as in Kentucky, every offense punishable by confinement in the penitentiary, no matter for how short a term, has, by one sweeping enactment, been raised to the grade of felony (Ky. St. § 1127), except it be qualified by the limitation foreshadowed by Mr. Bishop (1 Bish. New Cr. Law, § 336), "by requiring the act towards the proposed crime to have a natural tendency to produce the unintended result." This limitation has been indicated in a number of cases of attempted crime which resulted in the commission of a wrong not intended. It has, as we shall see, been applied with striking unanimity in the modern cases of conspiracy. We take it there can be no question of its application in this state. To illustrate: Under our statute, the removal of a corner stone is punishable by a short term in the penitentiary, and is therefore a felony. If, in attempting this offense, death were to result to one conspirator by his fellows accidentally dropping the stone upon him, no Christian court would hesitate to apply this limitation.

This doctrine of imputed malice was a part of the common law as to conspiracy (1 Bish. New Cr. Law, § 633), though, as said by Mr. Bishop, "the books furnish little judicial reasoning on the question." So, also, was the doctrine that "a sane man must be presumed to contemplate and intend the necessary, natural, and probable consequences of his own acts. 3 Greenl. Ev. §§ 13, 14; *Rex v. Farrington*, Russ. & R. 207; *Com. v. Webster*, 5 Cush. 305, 52 Am. Dec. 711." 3 Best, Ev. § 238. Underlying the whole law of conspiracy is the doctrine of agency.

As said by Mr. Bishop (1 Bish. New Cr. Law, § 631): "Since in law an act through an agent is the same as in person, one who procures another to do a criminal thing incurs the same guilt as though he did it himself. Nor is his guilt the less if the agent proceeds equally from his own desires or on his own account." It is on these principles that it is said in Whart. Cr. Law, § 220: "All those who assemble themselves together, with an intent to commit a wrongful act, the execution whereof makes probable in the nature of things a crime not specifically designed, but incidental to that which was the object of the confederacy, are responsible for such incidental crime." This is a correct application of the principle, for the reason that "there is a general presumption in criminal matters that a person intends whatever is the natural and probable consequences of his own action." 1 Phil. Ev. 632. Besides the various groups of facts which, in the older books, are held to constitute murder under one or the other of these principles, we find classed with them a number of cases where the responsibility is really that of principal in the second degree, under the law as now administered; that is, the responsibility of one "who is present, lending his countenance, encouragement, or other mental aid, while another does the act," and who, by the ancient law, was accessory at the fact. 1 Bish. New Cr. Law, § 648. They are thus grouped because the responsibility was the same, whether the homicide was committed in the attempt to commit a felony, and was therefore murder under the doctrine of imputed malice: whether it was done by the defendant by himself or his agent, or "happened in the execution of an unlawful design, which, if not a felony, is of so desperate a character that it must ordinarily be attended with great hazard to life; and a fortiori, if death be one of the events within the obvious expectation of the conspirators" (*Post. Crown Law*, 261; *U. S. v. Ross*, 1 Gall. 624, 27 Fed. Cas. 899, Fed. Cas. No. 16,196), in which case malice was imputed from the dangerous nature of the act engaged to be done; or whether it occurred with the defendant standing by and ready to help, if necessary, in which case he was accessory at the fact by the ancient law, and aider and abettor and principal in the second degree under the present practice. Illustrating this grouping of crimes, we find it stated in 1 Hale. P. C. 441 (quoting from Mr. Dalton, p. 241): "Note, also, that if divers persons come in one company to do any unlawful thing, as to kill, rob, or beat a man, or to commit a riot, or to do any other trespass, and one of them in doing thereof kill a man, this shall be adjudged murder in them all that are present of that party abetting him and consenting to the act, or ready to aid him, although they did but look on." And in 1 East, P. C. 257, it is said: "Where divers

persons resolve generally to resist all opposers in the commission of any breach of the peace, and to execute it with violence, or in such a manner as naturally tends to raise tumults and affrays, as by committing a violent disseisin with great numbers, or going to beat a man, or rob a park, or standing in opposition to the sheriff's posse, they must, at their peril, abide the event of their actions." As we have indicated with regard to unintended results of intended wrongful acts done by the offender in person, the common-law doctrine of imputed felonious intent has been modified. With much greater uniformity has this doctrine been disregarded in cases of conspiracy, so that for many years the test of guilt in such cases has in no wise depended upon the doctrine of imputed felonious malice, but either upon the doctrine of aider and abettor, or upon the doctrine that the act for which the accused is to be held responsible must be, either expressly or by implication, within the scope of his agency, and upon the legal presumption that he intends the necessary or probable consequences of his acts, whether done by himself or through the agency of another. In every case his will must contribute to the thing actually done. This change has taken place in strict accord with the principles of growth which are a part of the common-law system. The ancient doctrine in one of its applications depended upon the existence in the accused "of a depraved, wicked, and malignant spirit," which would justify the death penalty if he succeeded in his undertaking. That spirit was supposed to exist whenever the act attempted was a felony. But such a doctrine, manifestly, can have no application to a class of offenses the commission of which does not, and cannot, indicate such a spirit. And when, in many of the states of this country, we made the question of felony depend upon the place in which a brief imprisonment might be passed, and acts were made statutory felonies which by the ancient law were not offenses at all, and were then not even considered to be morally wrong, the doctrine that felonious malice could be imputed, so as to transform incidental homicide into murder, passed away forever. The reason of the rule passing, the rule passed also; and, in place of looking to the gradation of the attempted wrong under the statutory classification, we look to that on which the ancient classification was founded,—“the depraved, wicked, and malignant spirit” which the offender actually had in his heart, or which we impute to him because we suppose him to have intended the necessary or probable consequences of that which he actually did or tried to do. This is upon the wise, just, and humane principle which has enabled the common law to adapt itself to the changing necessities of human society, and has made it, as Burke said, “an edifice having the principles of growth with-

in itself.” The law, as declared to-day, is in exact accord with what has been said. It is so stated in the text-books and the cases.

In 1 Roberson, Ky. Cr. Law, pp. 133, 134, § 101, it is said: “No responsibility attaches, however, for acts not contemplated, and which are not within the purpose of the conspiracy, or the natural consequence of executing that purpose; and the question is for the jury whether the act done was in furtherance of the common purpose, or independent of it, and without any previous concert.”

In the article on “Conspiracy,” by Mr. Archibald R. Watson (6 Am. & Eng. Enc. Law [2d Ed.] 870), the doctrine as to the responsibility of a conspirator for acts of co-conspirator is thus stated: “When individuals associate themselves in an unlawful enterprise, any act done in pursuance of the conspiracy by one of the conspirators is, in legal contemplation, the act of all. And this mutual co-equal responsibility of each conspirator for the acts of his associates, done pursuant to, and in furtherance of, the common design, extends, as well, to such results as are the natural or probable consequences of such acts, even though such consequences were not specifically intended as part of the original plan. This doctrine, however, holding each conspirator liable for the acts of his associates, as well as for the consequences of such acts, is subject to the restriction indicated in the statement of the rule, namely, that it is only for such acts as are naturally or necessarily done pursuant to and in furtherance of the conspiracy, and for the natural or necessary consequences of such acts, that a co-conspirator is responsible. And it is for the jury to determine whether an act done by a member of a conspiracy is done in furtherance of the common design, as well as what are the natural and necessary consequences of such acts.”

In *Martin v. State*, 80 Ala. 115, 8 South. 23, 18 Am. St. Rep. 91, a case of murder, it was said: “When two or more persons enter upon an unlawful enterprise, with a common purpose to aid, assist, advise, and encourage each other in whatever may grow out of the enterprise upon which they enter, each is responsible, civilly and criminally, for everything which may consequently and proximately result from such unlawful purpose, whether specifically contemplated or not, and whether actually perpetrated by all, or less than all, of the conspirators. * * * ‘It should be observed, however, that, while the parties are responsible for consequent acts growing out of the general design, they are not for independent acts growing out of the particular malice of individuals.’ 1 Whart. Cr. Law, § 307. And this is the general doctrine on the subject. *Smith v. State*, 52 Ala. 407; *Jordan v. State*, 79 Ala. 9; *Williams v. State*, 81 Ala. 1, 1 South. 179, 60

Am. Rep. 133; *Amos v. State*, 83 Ala. 1, 3 South. 749, 3 Am. St. Rep. 682; 1 Bish. New Cr. Law, § 849."

In *Gibson v. State*, 89 Ala. 121, 8 South. 98, 18 Am. St. Rep. 100, an indictment for murder, the law was thus stated by Judge Somerville: "There was evidence tending to show a conspiracy on the part of the defendants to attack the deceased,—circumstances from which the jury were authorized to infer a common design, at least, to assault and beat him. Each would therefore be criminally responsible for the acts of the other in prosecution of the design for which they combined, i. e. for everything done by the confederates which follows incidentally in the execution of the common design, as one of its probable and natural consequences, even though it was not intended as a part of the original design or common plan. The law on this subject is fully discussed in *Williams v. State*, 81 Ala. 1, 1 South. 179, 60 Am. Rep. 133, and in *Martin v. State*, 89 Ala. 115, 8 South. 23."

In *Evans v. State*, 109 Ala. 22, 19 South. 535, there seems to have been some evidence from which the jury might have inferred a combination to do an unlawful act, and the court said: "If several conspire to do an unlawful act, and death happens in the prosecution of the common object, they are all alike guilty of the homicide. Each is responsible for everything done, which follows incidentally in the execution of the common purpose, as one of its probable and natural consequences, even though it was not intended, or within the reasonable contemplation of the parties, as a part of the original design. *Williams v. State*, 81 Ala. 1, 1 South. 179; *Gibson v. State*, 89 Ala. 122, 8 South. 98; *Martin v. State*, 89 Ala. 115, 8 South. 23; *Tanner v. State*, 92 Ala. 1, 9 South. 613; *Jolly v. State*, 94 Ala. 19, 10 South. 606. The thirtieth charge was a proper one, and should have been given." The thirtieth charge referred to was as follows: "(30) The court charges the jury that if they believe from the evidence that Boman, Crawford, and Evans went to the house of Alice Palmer on the night the killing is said to have been done, and an offense was committed by one of them from causes having no connection with the common object for which they went there, the responsibility for such offense rests solely on the actual perpetrator of the crime, and the jury cannot find the defendant guilty simply because he happened to be present at the time the offense was committed."

Bowers v. State, 24 Tex. App. 548, 7 S. W. 247, 5 Am. St. Rep. 901, was a case of mayhem, the maiming being done in the course of the execution of a conspiracy to whip. Said the court: "Upon the subject of the responsibility of a conspirator for the acts of his co-conspirators, the rule, as we deduct from the authorities, is that each conspirator is responsible for everything done by his

confederates which follows incidentally in the execution of the common design, as one of its probable and natural consequences, even though it was not intended as a part of the original design or common plan. In other words, the act must be the ordinary and probable effect of the wrongful act specifically agreed on, so that the connection between them may be reasonably apparent, and not a fresh and independent product of the mind of one of the confederates outside of, or foreign to, the common design. 1 Whart. Cr. Law (9th Ed.) §§ 214-220, 397; 1 Bish. Cr. Law (7th Ed.) §§ 640, 641; *Lamb v. People*, 96 Ill. 73; *Ruloff v. People*, 45 N. Y. 213; *Thompson v. State*, 25 Ala. 41; *Frank v. State*, 27 Ala. 37; *Williams v. State*, 83 Ala. 16, 3 South. 616; *Kirby v. State*, 23 Tex. App. 13, 5 S. W. 165. * * * In the recent and celebrated case of *Spies v. People*, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320, the court said: 'Whether or not the act done by a member of a conspiracy naturally flowed from, and was done in furtherance of, the common design, are questions of fact for the jury.' We are of the opinion that the court erred in not submitting the question above stated to the jury, accompanied by proper instructions explaining the rules of the law hereinbefore announced."

Com. v. Campbell, 7 Allen, 541, 83 Am. Dec. 705, was an indictment for murder, the homicide occurring during a riot growing out of the enforcement of a draft of men for the army. An instruction was asked that, whether the deceased was killed by a shot from within or without the armory, all the parties unlawfully engaged in the homicide were at common law guilty, at least, of manslaughter. It was said by Bigelow, C. J.: "There can be no doubt of the general rule of law, that a person engaged in the commission of an unlawful act is legally responsible for all the consequences which may naturally or necessarily flow from it, and that, if he combines and confederates with others to accomplish an illegal purpose, he is liable criminaliter for the acts of each and all who participate with him in the execution of the unlawful design. * * * These citations, to which many others of a similar tenor might be added, show that the rule of criminal responsibility for the acts of others is subject to the reasonable limitation that the particular act of one of a party, for which his associates and confederates are to be held liable, must be shown to have been done for the furtherance or in prosecution of the common object and design for which they combine together. Without such limitation, a person might be held responsible for acts which were not the natural or necessary consequences of the enterprise or undertaking in which he was engaged, and which he could not, either in fact or in law, be deemed to have contemplated or intended. No person can be held guilty of homicide unless the act is either actually or

constructively his, and it cannot be his act, in either sense, unless committed by his own hand, or by some one acting in concert with him, or in furtherance of a common object or purpose. * * * The real distinction is between acts which a man does either actually or constructively, by himself or his agents or confederates, and those which were done by others acting, not in concert with him or to effect a common object, but without his knowledge or assent, either expressed or implied. For the former, the law holds him strictly responsible, and for all their necessary and natural consequences, which he is rightfully deemed to have contemplated and intended; for the latter, he is not liable, because they are not done by himself, or by those with whom he associated, and no design to commit them, or intent to bring about the results which flow from them, can be reasonably imputed to him."

The case of *Spies v. People*, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, 8 Am. St. Rep. 477, which is the celebrated case of the Chicago anarchists, was much criticised at the time the decision was rendered as extending the doctrine of criminal responsibility for acts of co-conspirators beyond reasonable limits. Much of this criticism seems to have arisen from the fact that, in the opinion of the court of last resort, those instructions only were stated and discussed of which complaint was made by the accused, and little, if any, notice taken of the counter instructions given on the motion of the defendants, or by the court on its own motion, which limited, qualified, and explained the instructions asked by the prosecution. Under the Illinois practice, it seems to be the custom to give instructions asked by the prosecution, and to give counter qualifying or limiting instructions asked by the defense, and for the court to add such general instructions as it deems necessary. The instructions in this case are given at length in *Sack. Instruct. Juries* (2d Ed.) 707 et seq., and an examination of them shows that, with respect to the acts shown in that case, they fully give the limitation which we think should have been either given in the seventh instruction now under consideration, or embodied in a separate instruction, namely, that the accused was not guilty of murder unless the killing was the necessary or probable consequence of the act conspired to be done. Seemingly actuated by a desire to err, if at all, upon the safe side in a case which had excited such deep feeling, the court in that case gave instructions that if a reasonable doubt was raised in the minds of the jury "by the ingenuity of counsel, upon any hypothesis reasonably consistent with the evidence, that doubt is decisive in favor of the prisoner's acquittal"; that a verdict of not guilty meant only that the guilt had "not been demonstrated in the precise, specific, and narrow forms prescribed by law"; that they were not to convict upon mere suspicion; that the burden was on the prosecution, and that the presumption of innocence was not a mere

form. In instruction 36 the jury were told: "It will not do to guess away the lives or liberty of the people, nor is it proper that the jury should guess that the person who threw the bomb which killed Degan was instigated to do the act by the procurement of the defendants, or any of them. That fact must be established beyond all reasonable doubt in the minds of the jury, and it will not do to say that, because the defendants may have advised violence, therefore, when violence came, it was the result of such advice. There must be a direct connection established, by credible testimony, between the advice and the consummation of the crime, to the satisfaction of the jury beyond a reasonable doubt." And in instruction 37 it was said: "Therefore the jury must be satisfied, beyond all reasonable doubt, that the person throwing said bomb was acting as the result of the teaching or encouragement of the defendants, or some of them, before the defendants can be held liable therefor, and this you must find from the evidence." Several other instructions were given upon this line, notably instructions 35 and 36.

There seems to be no material or substantial difference of opinion among the members of this court as to the propriety of such a limitation as we have indicated. The difference is upon the question whether the failure to give to the jury such a limitation of the doctrine was prejudicial error. To consider this question, we must refer to the contentions on behalf of the commonwealth and the accused, as shown by the evidence. On behalf of the commonwealth, the evidence was directed to showing that there existed a bloody-minded conspiracy, having for its object the killing of various members of the legislature, and especially the killing of Goebel; that the accused, who held a certificate of election as secretary of state, and whose office was in contest, was a party to this conspiracy, with full knowledge of its atrocious object, and in pursuance and furtherance thereof was instrumental in bringing armed men to the state capital to assist in its execution. On the other hand, the evidence for the defense was directed to establishing the fact that the men who were brought to Frankfort were brought for the purpose of peacefully assembling to petition the legislature, in the exercise of the privileges guaranteed to them as citizens in the bill of rights, and that such of them as bore arms bore them openly, and solely for the purpose of self-protection. Between these two extremes of object in the proof there was room for many varieties of purpose which might be ascribed to the assemblage, and there was some evidence to support almost any of the theories which might thus be constructed. There was evidence to support the theory that the assemblage was for the purpose of impressing the minds of the members of the legislature by the physical presence of a large number of men. This might be regard-

ed as a species of intimidation, and need not imply the intent to do actual violence. And this view was submitted by the court to the jury, though without the necessary limitation as to its effect; for by the amendment the jury were instructed that the purpose was unlawful if it was "to alarm, to excite terror, or the infliction of bodily harm." There was undoubtedly evidence to support the theory that there was a combination; that the purpose of the assemblage was to alarm, and to do nothing else. Whether that evidence was to be believed or not was a question solely for the jury, under proper instructions. The accused had the right to have the jury pass upon the question whether that was the sole object of the assemblage, and upon the further question whether the killing of Goebel necessarily or probably would result from such an assemblage. It will not do to say that because the judges would have disregarded such evidence had they been jurors at the trial it is not prejudicial, for the jurors are the sole judges of the weight of the evidence, and to hold otherwise would be for the court to assume to perform those functions which from time immemorial have been regarded as within the sacred province of the jury.

It was said by Judge Lewis in *Bowlin v. Com.*, 94 Ky. 395, 22 S. W. 543: "In fact, it is not the province of the lower court, any more than of this, to weigh evidence for the purpose of determining whether a person on trial for his life is entitled to an instruction as to manslaughter. But, if there is any evidence tending to show the homicide is of the degree of manslaughter, the accused is entitled to an instruction upon that hypothesis." See, also, *Bush v. Com.*, 78 Ky. 269; *Buckner v. Com.*, 14 Rush, 606; *Brown v. Com.*, Id. 396.

In *Gibson v. State*, 89 Ala. 121, 8 South. 98, 18 Am. St. Rep. 101, it was said: "The testimony of the defendants themselves tended to support every phase of the instruction requested. It mattered not that this testimony may have sprung from parties deeply interested, and have been contradicted by many disinterested witnesses, so as to be entitled to but little weight in the estimation of the trial judge. It was for the jury, and not the court, to pass on the credibility of the witnesses and the sufficiency of the evidence. Every prisoner at the bar is entitled to have charges given which, without being misleading, correctly state the law of his case, and are supported by any evidence, however weak, insufficient, or doubtful in credibility. The charge under consideration was a correct enunciation of the law, and, being supported by the evidence, its refusal must operate to reverse the judgment of conviction. *McDaniel v. State*, 76 Ala. 1."

We are clearly of opinion that the instruction as given was not only erroneous, but highly prejudicial. This instruction should be qualified by requiring the jury to believe

that the murder was committed in furtherance of the conspiracy, and was the necessary or probable result of the execution of the conspiracy.

The eighth instruction is as follows: "The jury cannot convict the defendant upon the testimony of an accomplice unless such testimony be corroborated by other evidence tending to connect the defendant with the commission of the offense, and the corroboration is not sufficient if it merely shows that the offense was committed and the circumstances thereof." It is objected to this instruction that it permits the jury to find guilt from the unsupported testimony of more than one accomplice, and instruction No. 2 was asked by the defense in these words: "The evidence of an accomplice in this case is not sufficient to convict unless the same is corroborated by other evidence tending to show the commission of the offense, and connecting the defendant therewith, and the evidence of one accomplice or co-conspirator does not and cannot corroborate another accomplice or co-conspirator." The instruction asked and refused may not be strictly accurate in form, for it may be said that while one accomplice by his testimony does, or at least may, corroborate another, nevertheless the idea is accurate that they do not corroborate each other for the purpose of conviction, in the absence of other testimony. The jury should have been told that they could not convict the defendant upon the testimony of an accomplice or accomplices, unless such testimony be corroborated by other evidence tending to connect the defendant with the commission of the offense, and the corroboration is not sufficient if it merely shows that the offense was committed and the circumstances thereof. In 2 *Roberson, Ky. Cr. Law*, p. 1076, it is said: "If two or more accomplices are produced as witnesses, they are not deemed to corroborate each other." In *U. S. v. Logan* (C. C.) 45 Fed. 372, it was held that a conviction for a conspiracy cannot be had on the uncorroborated testimony of a co-conspirator, nor can conspirators corroborate each other. See, also, 1 *Greenl. Ev.* § 381, and *Smith v. Com. (Ky.)* 17 S. W. 182. This doctrine is distinctly recognized in *Blackburn v. Com.*, 12 Bush, 181. It is agreed that this was erroneous, but there is variance of opinion as to whether it was prejudicial. Unless we can assume to invade the province of the jury, and weigh the evidence, this instruction was necessarily prejudicial, or, at least, may have been so. The most material testimony upon the question whether the conspiracy was to murder was that of confessed accomplices, and if the jury, in the exercise of their prerogative, disbelieved the other evidence upon this question, they might have reached a different conclusion had they been told that they could not convict upon the uncorroborated testimony of accomplices. Our views upon this question are sufficiently stat-

ed in considering the prejudicial character of the seventh instruction.

For the reasons given, the judgment is reversed, and cause remanded, with directions to award appellant a new trial, and for further proceedings consistent herewith.

WHITE, J. (dissenting). Not agreeing with the views of the majority of the court on all the questions presented, we feel that the importance of the questions justifies us in this separate and dissenting opinion. Appellant, Caleb Powers, was indicted in the Franklin circuit court charged with the crime of being accessory before the fact to the willful murder of William Goebel. On change of venue, the prosecution was taken to Scott county, and there tried; the result being conviction, the punishment being confinement in the penitentiary for life. Appellant's motion for new trial being denied, he appeals.

The indictment reads, after the caption: "The grand jury of the county of Franklin, in the name and by the authority of the commonwealth of Kentucky, accuse Caleb Powers of the crime of being accessory before the fact to the willful murder of William Goebel, committed as follows, viz.: The said Caleb Powers, in the said county of Franklin, on the 30th day of January, A. D. 1900, and before the finding of this indictment, unlawfully, willfully, feloniously, and of his malice aforethought, and with intent to bring about the death and procure the murder of William Goebel, did conspire with W. H. Culton, F. W. Golden, Green Golden, Jno. L. Powers, John Davis, Charles Finley, W. S. Taylor, Henry Youtsey, James Howard, Berry Howard, Harlan Whitaker, Richard Combs, and other persons to this grand jury unknown, and did counsel, advise, encourage, aid, and procure Henry Youtsey, James Howard, Berry Howard, Harlan Whitaker, Richard Combs, and others to this grand jury unknown, unlawfully, willfully, feloniously, and of their malice aforethought, to kill and murder William Goebel, which one of the last five above-named persons, or another person acting with them, but who is to this grand jury unknown, so as aforesaid, then and there, thereunto by the said Caleb Powers before the fact counseled, advised, encouraged, aided, and procured, did, by shooting and wounding the said Goebel, with a gun or pistol loaded with powder and other explosives, and leaden and steel ball and other hard substances, and from which said shooting and wounding the said Goebel died on the 3d day of February, 1900, but which of said last above mentioned persons, so as aforesaid, actually fired the shot that killed the said Goebel, is to this grand jury unknown; against the peace and dignity of the commonwealth of Kentucky. Robt. B. Franklin, Commonwealth's Atty., 14th Cir. Ct. Dist."

Upon arraignment, appellant filed a special

plea, producing a paper purporting to be a pardon issued by W. S. Taylor, governor, dated March 10, 1900, and asked to be discharged from custody. The court refused to discharge appellant, thereby refusing to recognize the paper purporting to be a pardon as valid. Appellant then demurred to the indictment, which was overruled by the court, and that action is assigned as error. Appellant, after his special plea of pardon and his demurrer were both overruled, pleaded not guilty, and trial was had, with the result as stated.

The question of the sufficiency of the indictment, going to the very foundation of the prosecution, should be first considered; for, if the objection be good, the other questions are not necessary to a consideration of the case. The charge laid in the indictment is that appellant is guilty of being accessory before the fact to the willful murder of William Goebel. The accusing part is that appellant did conspire with Culton and others named, and other persons unknown, and did counsel, advise, encourage, aid and procure Youtsey and others named, and others to the grand jury unknown, unlawfully, willfully, feloniously, and of their malice aforethought to kill and murder William Goebel, with the further charge that it was unknown what person actually did the killing. The indictment then says these acts were done, "so as aforesaid, then and there thereunto by the said Caleb Powers, before the fact counseled, advised, encouraged, aided, and procured, did by shooting," etc., kill William Goebel.

Two objections are presented to the indictment and urged as fatal. One objection is that it is not charged in terms that the killing was done in pursuance to and in furtherance of the conspiracy charged to have been entered into. The other objection is that the principal (the one who actually fired the fatal shot) is not named, but the charge is that Youtsey, etc., or another person to the grand jury unknown, did the killing. The court is agreed that neither of these objections is tenable, and is agreed that the indictment is sufficient. While the indictment does not contain the words usually found, "in pursuance to, and in furtherance of, the conspiracy," yet it does say that appellant, Powers, did counsel, encourage, aid, and procure Youtsey, etc., willfully, feloniously, and of their malice aforesight, to kill and murder William Goebel, and then charges, "so as aforesaid then and there thereunto by the said Caleb Powers, before the fact, counseled, advised, encouraged, aided and procured, did, by shooting," etc., kill William Goebel. This charge is direct and certain that appellant is accused of counseling, aiding, encouraging, and procuring Youtsey, etc., to commit a willful murder, and that, having been so counseled, advised, aided, and procured, they, or one of them, did commit the murder. Instead of using the words so often used, "in pursuance

to, and in furtherance of," the conspiracy, the indictment charges how it was done, so that appellant would be charged as accessory before the fact if he counseled, aided, or procured the murder to be done, and the conspiracy charged failed in the proof; that is, as to the other than the actual principal.

As to the other proposition, that the principal must be named before the accessory before the fact could be convicted, the court is agreed that this point is likewise without merit. This precise question was presented in the New York court of appeals in *People v. Mather*, 4 Wend. 220, on an appeal by the prosecution. In a very exhaustive opinion, reviewing all the common-law authorities, the court held the indictment good. Again, in the case of *U. S. v. Babcock*, 3 Dill. 623, Fed. Cas. No. 14,487, the court held such an indictment valid. In *U. S. v. Goldberg*, 7 Biss. 175, Fed. Cas. No. 15,223, the indictment charged a conspiracy with certain named persons, "and other persons," the word "unknown" being omitted, yet the court held the indictment good. In the *Anarchist Case* (*Spies v. People*) 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, this question was again presented, and, after an exhaustive review of all authorities, the court concluded the indictment was valid. This last case went to the supreme court on application for a writ of habeas corpus, and the indictment was held to charge a crime, and writ denied. These cases ought to settle the question beyond controversy. We are all agreed that the indictment is sufficient, and the demurrer thereto was properly overruled.

Counsel for appellant seriously and ably present the question that the pardon issued March 10, 1900, by W. S. Taylor to appellant, is valid and binding on the state, and that upon its production the appellant should have been discharged. The position of counsel on that point is that on the 10th day of March, 1900, W. S. Taylor was de facto governor of the state, and so continued until the decision of the supreme court of the United States rendered May 21, 1900 (*Taylor v. Beckham*, 20 Sup. Ct. 890, 1009, 44 L. Ed. 1187), and that until Taylor surrendered the office, or was ousted after the mandate of the supreme court was issued, he was a de facto officer, and his acts are binding. It is said that the judgment of the circuit court and of this court was superseded, and that as a consequence J. C. W. Beckham acquired no more rights under the judgment in that case than before it was rendered; that as Taylor had been awarded the certificate of election, and had been inaugurated as governor, he held till he was ousted by due process of law, or vacated. It is also suggested that the court will take judicial notice of the official public acts, as well as the signature of the chief executive; that the court must judicially know who is the governor at any given time. We take it to be well settled that there cannot be two de facto officers for the same office, to be filled by only one person, at the same time. If, on

March 10, 1900, Taylor was de facto governor, then on the same day Beckham was not, and vice versa. Counsel for appellant cites in support of his position the case of *State v. Superior Court of Snohomish County*, 17 Wash. 16, 48 Pac. 742, and quotes as follows: "One in possession of an office by virtue of a certificate of election issued by the proper officer, and regular on its face, is entitled to retain possession and perform the duties of the office, without interference, until such certificate is set aside in some appropriate procedure." A case in 82 Mich. 235, 46 N. W. 381, 9 L. R. A. 408 (*Hallgren v. Campbell*), is also cited, where the court said: "There could not be two incumbents of this office." The case of *Hamlin v. Kassafer*, 15 Or. 456, 15 Pac. 778, is also cited. The court there said: "An 'office' is defined to be a right to exercise the public functions and employments, and to take the fees and emoluments, belonging to it, and Chief Justice Marshall says: 'He who performs the duties of that office is an officer.' From the inherent nature of an office, no less than from reasons of public policy, there cannot be two persons in possession of it at the same time." The definition of Lord Ellenborough in *Rex v. Bedford Level Corp.*, 6 East, 368, is cited by counsel to support the contention that Taylor was de facto governor, March 10, 1900. This definition is: "An 'officer de facto' is one who has the reputation of being the officer he assumes to be, and yet is not a good officer in point of law." The definition of Judge Cooley, in his work on *Constitutional Limitations*, is also cited. It reads: "An 'officer de facto' is one who, by color of right, is in possession of an office, and for the time being performs its duties, with public acquiescence though having no right in fact." There are many other citations to the same effect.

We do not propose to take issue with any of the authorities cited, for they seem to us to state the law clearly and correctly. The question is in the application. The court judicially knows that on the 31st day of January, 1900, the general assembly, in pursuance to the power given it under our constitution, decided the contest over the office of governor in favor of the contestant, William Goebel. The court knows judicially that on that day William Goebel was inaugurated as governor; that he afterwards died, and J. C. W. Beckham became, by virtue of the law, he being lieutenant governor, the acting governor from the 3d day of February, 1900. The court further knows that it was decided by this court, and its decision was sustained by the supreme court of the United States, that the courts had no jurisdiction in the matter; that the decision of the contest before the general assembly was final and conclusive, from which there was no appeal. While W. S. Taylor executed a supersedeas bond to supersede the judgment of the circuit court and of this court, he did not and could not supersede the judgment and decision of the general assembly on the question as to

whether he or William Goebel had been legally and duly elected governor in November, 1899. The appropriate procedure provided by law to set aside the certificate of election issued to W. S. Taylor is a contest before the general assembly, and when the contest was decided by that body, and the successful party took the required oaths, he became the governor. There is no writ provided, nor is one required, to induct a successful contestant into office, or remove an unsuccessful one from office. The judgment of a motion in the contest proceeding is self-executing. This judgment was not appealable, and therefore could not be suspended, arrested, or superseded. Even if the decision of contest had been appealable to any tribunal, it is well settled by authority that a supersedeas or writ of error will not prevent the successful party in the contest from assuming the duties of the office. *State v. Woodson*, 128 Mo. 497, 31 S. W. 105; *People v. Stephenson*, 98 Mich. 218, 57 N. W. 115; *Jayne v. Drorbaugh*, 63 Iowa, 711, 7 N. W. 433; *State v. Chase*, 41 Ind. 356; *Elliott*, App. Proc. § 392, and cases cited.

Stress is laid by the adjudicated cases on the color of right or title to the office, and not on the claim. In the case of *Williams v. Boynton*, 147 N. Y. 426, 42 N. E. 184, the court of appeals said of the rule as to de facto officers: "It applies for the protection of third persons, or the public who have acquired rights upon the faith of an appearance of authority. It does not apply where the official action is challenged at the outset, and before any person has been or can be misled by it. * * * His color of title was wholly destroyed by a public judicial decision, and he became a mere usurper and intruder, whose act was challenged at the moment it was done." In the case of *Oliver v. City of Jersey City* (from N. J. Court of Errors and Appeals) 44 Atl. 709, cited by appellant as 48 L. R. A. 412, the court, speaking of the acts of a de facto officer, said: "But this legal protection is not afforded where the defects in the title to the office are notorious, and such as to make those relying on his acts chargeable with such knowledge. What, then, may be considered notice sufficient to warn third persons and the public? The expiration of the term of an officer, and the appointment or election and qualification of his successor, the resignation of a public officer, the abolishment of the office itself by the act of the legislature, the refusal of the board and legislative body of which the officer is a member to recognize him, and the judgment of a court against the title of the office, are such facts as third persons and the public are, as a general rule, required to take notice of."

The decision of the contest by the general assembly was a judgment of the only court constituted by law to determine a contest over the office of governor, and of that decision the appellant is presumed to have had

actual notice, and the public generally must take notice. The color of title that Taylor had by reason of the certificate of election and his inauguration was wholly destroyed by the judgment of the general assembly when the contest was decided against him, and thereafter, in the language of the court of appeals of New York, "he became a mere usurper and intruder, whose act was challenged at the moment it was done." The supreme court of Rhode Island, in the case of *Murphy v. Moies*, 25 Atl. 977, said: "Thus, it appears that reputation and acquiescence are controlling elements in determining the validity of official acts, as those of an officer de facto." Tested by this rule, it is clear that Taylor's acts on the 10th day of March, 1900, were not those of a de facto officer. His acts were not accepted by the lawmaking branch of the government. Prior to that day, and on that day, the senate had repeatedly ratified and confirmed the appointment of various and sundry officers appointed by Governor Beckham, and both branches of the legislature had recognized Beckham as governor by presenting bills for his approval and signature, and he had in fact approved three of such. There was no acquiescence in the acts of Taylor on the 10th day of March, 1900. The rule that acts of a de facto officer are binding on the public and third persons cannot apply where the defects in the title of the assumed officer are notorious, and the persons dealing with him have notice of the facts. *Mechem*, Pub. Off. 328, and cases cited.

In this case, the appellant, being secretary of state when the contest was decided by the general assembly, must be conclusively presumed to have had knowledge of the defects in the title of Taylor, or rather that he thereafter had no title to the office. We think it clear, upon the plainest principles, that where a person has knowledge that one who assumes to be a public officer has, by a judgment of a competent tribunal, been adjudged not to have title to the office, such person cannot claim that the acts of such intruder and usurper are those of a de facto officer.

During the progress of the trial, many objections to the admission of testimony and many exceptions to the exclusion of testimony were made. Likewise objections and exceptions to instructions given and refused appear in the record, and, in order to an intelligent understanding of the case and the parts we propose to discuss here, we deem a short statement of the material facts the evidence tends to prove to be necessary.

These facts are that William Goebel was a member of the senate, and was also a contestant for the office of governor against W. S. Taylor, contestee, the case being heard before a joint committee, as provided by law. On the morning of January 30, 1900, after all the testimony in the contest case had been heard, while on his way to the session

of the senate, and just in front of the state house, the contestant, William Goebel, was shot down, from which he died in a few days thereafter. The proof further tended to show, with reasonable clearness, that the shot was fired from a window in the private office of appellant, Caleb Powers, who was then secretary of state. (It had been agreed that the testimony heard before the committee on contest for governor should be heard and used on the trial of the contest over the office of secretary of state by C. B. Hill against appellant.) At the time of the shooting, the window was raised a few inches, and the blinds down. On that morning, just prior to the shooting, appellant Powers, together with his brother, John L. Powers, Walter Day, and F. W. Golden, had taken the train for Louisville. It is shown that on January 19, 1900, the militia company of Frankfort was secretly assembled, the members out of town were brought in, and board engaged for them in the city near the arsenal. This company was stationed at the arsenal, and given orders to be at all times in readiness to move on orders. They were drilled daily on up till the 30th, but in secret inside the arsenal. There were 44 men in the company. It is also shown that about this time, probably 18th, a meeting was held, in which appellant was an active participant, if not the moving spirit, for the purpose of arranging to bring a large body of armed men from the eastern section of the state to Frankfort for the purpose, as appellant himself states it, of influencing the legislative action by their presence. These men were, as arranged in that meeting, to be brought from Bell, Harlan, Clay, Laurel, Whitley, Pulaski, Rockcastle, Metcalfe, and other counties. They were all to be brought over the Louisville & Nashville Railroad, and it seems, as first contemplated, were not to have tickets or passes, but were to climb on the train and come. To arrange for these men, and to have the requisite number come (there was about 1,500 contemplated), messengers were sent out to the various counties, and appellant provided these men with money to bring the men to the railroad stations. At this meeting to arrange for these men it was recognized that the undertaking was a serious one, appellant himself cautioning the persons present to secrecy, as they might all be indicted for conspiracy. To further arrange for these parties to come, the appellant, Powers, sent telegrams to parties in the eastern end of the state, to meet him on important business at London, Ky. Appellant had a conference there with some parties, and made further arrangements about the men coming on January 25th. There was a third conference, at Barbourville, relative to the same matter, by appellant with other parties, Charles Finley, F. W. Golden, and John L. Powers being present. It was then determined that the men should have tickets and should come as pas-

sengers. In the town of Barbourville there were two companies of militia. John L. Powers was the captain of one company, and J. F. Hawn the captain of the other. While at Barbourville, January 22, 1900, appellant addressed to Adj. Gen. Collier a letter, as follows: "My Dear Sir: There are two of the companies in this end of the state that refuse to go unless they are called out regularly. The London company, under Capt. E. Parker, and the Williamsburg company, under Capt. Watkins, of Williamsburg, are the ones. We must have these men and guns. We are undertaking a serious matter, and win we must. Send some one to London and Williamsburg with such orders as will have these two companies join us Wednesday night. Don't fail. If you will see to it, wire me to-morrow. Golden is improving. Capt. Hawn, of one of the companies here, refuses to deliver up the keys to the armory. Give him such orders as will give us the key. Wire me, and also write me. We will be there Thursday morning with twelve hundred men or more. Arrange board and lodging. Very sincerely, Caleb Powers." Capt. Hawn, of the Barbourville company, had been asked to give the key to the armory to his lieutenant, after he himself had refused to bring his military company to Frankfort with the large crowd to come on the 25th, Thursday, and to permit the members to bring their arms, ammunition, and uniform along. All of this Capt. Hawn had declined before this letter was written by appellant. Before the large crowd was to come, appellant ordered printed badges on white ribbon, bearing the picture and autograph signature of W. S. Taylor, contestee for governor, which were distributed to the men on the train, and worn on their coat lapels.

On the morning of January 25, 1900, between 1,000 and 1,200 armed men were brought to Frankfort, according to this pre-arranged plan. They filled the regular passenger train, and had an extra train following. Powers himself came on one train with part of the men. As part of this large body, there were several companies of state militia, with their officers, in citizens' clothing, but their uniform underneath, and with their arms and equipments. When this large body arrived in Frankfort, they were marched from the train to the building where the adjutant general keeps his office, and their guns were checked and stacked in the office of commissioner of agriculture, which is next door to the adjutant general's office. Checks had been provided. The men kept their pistols, for the most part, but their guns, army rifles, shotguns, and such like were checked. The men were then fed from provisions that had been brought from Louisville. These men were assembled, and speeches made to them, and some resolutions adopted. On the night of the 25th, the same day they came, a large part of the men were sent home, but

about 200, maybe more, picked men, were kept and remained in Frankfort, with general headquarters at the commissioner of agriculture office, up till after the shooting. They slept in the state buildings, and cooked and eat on the public grounds. It is shown that these men, from the 25th, the day they came, up till the very day of the shooting, were each day seen in crowds in front of the capitol building, and on the walks leading from the front gate, and on around the buildings.

On the morning that William Goebel was shot, although these men were here in the city, none were to be seen on the walks or public grounds. It is shown that within a short time of the shooting, variously estimated from 10 to 30 minutes, the company of militia stationed at the arsenal were at the capitol grounds, and took possession thereof, and excluded the civil authorities. It is also shown that there were probably as many as 25 persons on the first floor in the executive building, from whence the shot came, at the moment it was fired; there were several persons in the secretary's public office, adjoining the one from whence the shot came. The governor himself, W. S. Taylor, who is accused with appellant, was within 50 feet of the assassin when the shot was fired, and heard the shot. The capitol policeman, John Davis, who is also accused, was in the public office of the secretary of state, and heard the shot. The appointees of the governor, Todd, private secretary, and Stone, stenographer, together with appointees of appellant in the office of secretary of state, Davidson, Hemphill, and Matthews, and the colored porter, were also in the adjoining room to the private office. It was also proven that Youtsey, who is charged as one of the principals, bought smokeless powder and steel ball cartridges of the size and caliber of the one shown to have killed William Goebel, and that immediately after the shooting Youtsey ran down the steps into the basement of the executive building, through the barber shop that was then there, and out and around the building, and into it again from the other side, very much excited. The top of the stairway down which Youtsey ran is within a few feet of the door into the private office of appellant. It is shown that appellant locked that door upon starting for Louisville, but that John L. Powers had the day before given Youtsey a key, and there were but two known. It also appears that, before the 30th, Youtsey had described how Goebel could be shot from the private office from the window,—the identical plan afterwards carried out. In describing this plan, Youtsey said it was the slickest scheme yet to settle the contest. Just before the shooting Youtsey called and stationed a body of men in the hall near the door of the private office, and near the head of the stair, down to the basement, telling them something was going to happen. Besides all these circum-

stances proven, there was direct evidence of two or three admitted conspirators, showing that a conspiracy was formed and its objects.

Without contradiction, even by appellant himself, it is shown that he was the leading spirit in organizing and bringing this large body of men to Frankfort, and in keeping them here, as he says, to influence the legislature by their presence, and to resist by force of arms the legally constituted authorities in any attempt to oust Taylor or himself from office. Frequently before the shooting appellant expressed himself as being in favor of war rather than surrender the offices claimed. After the assassination, appellant wrote to a friend in Eastern Kentucky, in substance: "The disorganization of the Democratic party is due to me more than to any other person." It is also shown that appellant said that, if necessary, he would kill William Goebel to prevent him being governor, and again he said that with Goebel dead there was no other person who could hold the Democratic party together. Youtsey was seen in appellant's private office at the window, with a gun, and this appellant knew and saw, and was in the room with Youtsey alone, and had a conversation with him on Friday or Saturday before the killing on Tuesday, yet this conversation is not detailed by appellant, nor is its substance or subject stated. There were many other facts and circumstances proven on the trial, all tending to show that there was a conspiracy formed by appellant with others, known and unknown, for the purpose of preventing Goebel being declared governor, and to use such force as might be deemed necessary to that end.

During the trial the prosecution introduced and had sworn Pat McDonald, who testified that on Saturday before Tuesday, January 30th, when Goebel was shot, two men came from upstairs, where the general assembly was in session, and had just decided the contested seat of Van Meter against Berry, by which decision Berry, a political adherent and supposed friend of Taylor, had been unseated, and Van Meter, a political adherent and supposed friend of Goebel, had been given the seat; and these two men went rapidly towards the front door of the capitol building, and one said: "Come on. Come on, boys; get your guns; it is time to begin the killing." Witness could not name these two men, nor did he describe them so as to be identified. However, witness did say they went out and around to the office of the commissioner of agriculture, where the guns had been checked on Thursday before, and where was general headquarters of the 200 or more men kept here, out of the large crowd of Thursday. The opinion of the court holds the evidence to be incompetent because the parties were not identified, nor was it pretended that appellant was present and heard the statement. We are of opinion that the evidence was competent. Proof had been introduced that

tended to show that a part of the plan of the conspiracy was to raise a disturbance in the legislative hall over the Van Meter-Berry contest, and in the fight that followed the men left over from Thursday, who wore Taylor badges and were to be stationed in the gallery and lobby of the legislative hall, were to kill Democratic members of the legislature, so that on a joint vote Taylor could be declared the governor in the contest proceeding. We have said above there were some 200 men retained here from Thursday, and there was proof tending to show that this was a part of the plan and purpose of keeping them. Their headquarters were in the very room where these two men, whom McDonald heard and saw, went. Their guns were deposited there. The very matter had come up about which the disturbance was to be raised, and the result had been adverse to Taylor. These men are shown by McDonald not to have been citizens of Frankfort, for he lived here. We think it was sufficiently shown that these men belonged to the large number kept here, and this testimony also tended to corroborate the other testimony of the conspiracy and of the plan to kill members of the legislature. The time, the place, the circumstances, and the fact that they proposed then to do the thing that was contemplated, and they went to headquarters, so to speak, for their guns, we think sufficiently show that these two were acting in conjunction with others who are shown to have known of, and were detailed to execute, the plan of assassination in the legislative hall, to permit the proof to go to the jury. We agree with the court that this was important testimony, and we think it was properly admitted.

The appellant offered to read to the jury what purported to be the resolutions adopted at the meeting in front of the capitol on January 25th, by the large body of men, and the court refused to permit it to be read as evidence for any purpose, and the majority opinion holds this to be error. We cannot assent to this proposition. We do not think these resolutions were competent evidence for any purpose. There was no attempt on the part of the prosecution to prove any action on the part of the body assembled, nor of anything said by any speaker that addressed the body. Indeed, it was not proven by the prosecution that a meeting was held at all, except as an incident to fix a time and place of a certain conversation had between two persons, Noaks and John L. Powers. Noaks details the conversation this way: "While I was leaning against the pillar, John L. Powers came to me, and tapped me on the shoulder, and said, 'Bob, keep close into the building;' and I said, 'What is the matter?' and he said, 'Some of our men are upstairs, and when Goebel and some of the rest of them fellows come in there we are going to do the work for them.'" The witness said the conversation took place in front of the capitol building, while the meeting was going on. The witness did not

attempt to detail anything that was done at the meeting. On the contrary, the witness gave this as a private conversation between himself and John L. Powers, an alleged co-conspirator with appellant. We do not understand upon what principle of law or rule of evidence that this would entitle appellant to prove what the public meeting did, nor what any one of the thousand persons engaged therein said or did. Appellant was entitled to the whole of the conversation between Noaks and John L. Powers, and this the court permitted; but the rule would not extend to the admission of what was or may have been said in private conversation by others there present while the meeting was in progress. We do not understand that the statements of John L. Powers, *supra*, were admitted because of the time and place they were spoken, but because it had been shown allunde that John L. Powers acted with appellant in bringing the large crowd to Frankfort, and knew and understood the full object in thus bringing them. Indeed, John L. Powers at that time is shown to have had his military company here, with their uniforms, arms, and equipments, and was a leader in command, and, it might be said, spoke as one with authority. This evidence would have been admissible if spoken at any other time and place, and because Powers spoke to Noaks the words of caution or warning to be on the alert at the time the meeting was in progress did not and could not render admissible evidence of the public proceedings of the meeting, as neither was a part of the other, nor explanatory thereof, and, in fact, had no connection the one with the other, save that of time and place. There was proof also of statements made by more persons in the crowd, but the whole of these declarations was admitted, and such proof did not warrant evidence of other statements made at a different time, even by the same parties and at the same place.

There is a yet stronger reason why this testimony was properly excluded. The whole testimony tends to show that the plans and purposes, as well as the fact, of their coming, was kept secret from the public. Cipher telegrams were sent, and messages were signed by initial instead of the full name, and such like acts, to keep the matter secret. Secrecy was enjoined by appellant on all. "It was a serious business they were undertaking," to use an expression of appellant; and no rule of evidence would permit this armed body to prove for themselves, to establish their innocence, the fact that they held a public meeting on the capitol steps, and there passed resolutions declaring their peaceful mission and intentions, when, at the same time, they had arms and ammunition ready at hand in abundance, as well as smaller arms on their person. The law will not permit such proof as a person's own declarations of innocence to show that he is not guilty. Would any person suppose that this

and intimidating the members of the general assembly, "or," if necessary, to use Powers' words, "kill Goebel to prevent him being governor"? We say, if this was their purpose, would any person expect them to publicly so declare by resolution? If their purpose was a peaceable one, as the resolutions must of necessity declare, to be of benefit to appellant, why were all these warlike preparations made? Why these arms, ammunition, and soldier equipment brought? We think this testimony properly excluded.

It is also maintained that instruction 12 asked by appellant should have been given, to the effect that the evidence of A. R. Reed, J. B. Watkins, Zepakeal Seats, and N. C. Hazlewood could only be considered by the jury for the purpose of discrediting the witness Sparks, and not as substantive testimony against appellant. It is held by four members of the court that this testimony might have been considered as substantive evidence on the merits of the case if it had been given in chief, as there was testimony tending to show that Sparks was one of the conspirators, and, if this was true, his declarations were competent against appellant. It was on this ground the court below refused to give the instruction; but it is said that, although this testimony would have been competent on the merits if admitted in chief, it could only be considered for the purpose of discrediting Sparks, as it was not introduced in chief, but as a part of the state's rebuttal testimony. There might be force in this position, if it appeared that appellant was in any wise prejudiced by the failure of the state to introduce this testimony at the proper point; but where he was not misled, and has had full opportunity to introduce all the testimony on the subject that he desired, there seems little force in the objection. The trial court has a discretion to admit evidence in rebuttal which should have been admitted in chief, when, under the circumstances, it may appear right to do so, especially in a case involving a great multitude of facts like this; and this court never interferes with the exercise of a discretion of this character, unless palpably abused. The trial court did, however, give the jury instruction 6, which is as follows: "If the jury believe from the evidence beyond a reasonable doubt that a conspiracy was formed between the defendant and W. H. Culton, F. W. Golden, Green Golden, John L. Powers, John Davis, Charles Finley, W. S. Taylor, Henry Youtsey, James Howard, Berry Howard, Harlan Whitaker, Richard Combs, or either or any of them, or with others to the jury unknown acting in concert with them, or either of them, to kill William Goebel, then, after the formation of said conspiracy, if any, every act and declaration of each of the conspirators, done

in furtherance of the conspiracy." Under this instruction, no statement of Sparks could be considered by the jury, unless he was one of the conspirators, and not then, unless it was made in furtherance of the common design. This was more favorable to the accused than the rule usually laid down by the authorities. "When the fact of a conspiracy has been proved or established by reasonable inference, the acts and declarations of one conspirator in furtherance of, or made with reference to, the common design, are admissible in evidence against his associates." 6 Am. & Eng. Enc. Law (2d Ed.) 866. In the notes to the above, a large number of cases are collected. Under the instructions of the court as given, the testimony as to the declarations of Sparks could not be considered by the jury at all, unless it was shown beyond a reasonable doubt that Sparks was one of the conspirators, and the statements were made in furtherance of the conspiracy. We are therefore unable to see that the appellant has any ground of complaint in this matter.

It is also maintained that the court erred in giving to the jury instructions 4, 7, and 8; but it is difficult to perceive how either of these instructions furnishes any ground for a reversal of the judgment.

First. As to instruction No. 4: The idea the court aimed to present to the jury by this instruction was that if appellant conspired with others to bring a number of armed men to Frankfort for the purpose of intimidating the legislature in its action on the contest before it, and in pursuance of said conspiracy advised the killing of members of the legislature, and Goebel was killed by those in conspiracy or acting with them, in pursuance of said advice, appellant was guilty of murder. If the phraseology of the instruction is changed as indicated in the opinion, it would read as follows: "(4) If the jury believe from the evidence, beyond a reasonable doubt, that the defendant, Caleb Powers, conspired with * * *, or either or any of them, or other person or persons unknown to the jury, acting with them, to bring a number of armed men to Frankfort for the purpose of doing an unlawful or criminal act, and in pursuance of such conspiracy defendant did advise, counsel, or encourage the killing of members of the legislature, and that said William Goebel was a member of the legislature, and was killed in pursuance of such advice, counsel, or encouragement, and that said killing was induced or brought about thereby, then the defendant is guilty of murder, whether the person who perpetrated the act which resulted in the death of William Goebel be identified or not, and it does not matter what change, if any, was made by the conspirators as to their original design, or the manner of ac-

completing the unlawful purpose of the conspiracy." If the instruction is put in this shape, the sense will be in no wise materially different from that given by the court below and quoted in the majority opinion. It undoubtedly expresses a sound principle of law; for if appellant, and those acting in concert with him, brought the armed men to Frankfort for an unlawful and criminal purpose, and he, in furtherance of the conspiracy, advised the killing by them of the members of the legislature, and thus brought about the killing of Goebel, he was certainly guilty of murder, although a change was made in the plan or the manner of executing it. We are unable to see that there was any error in this matter. The words, "unlawful act," are defined in instruction No. 7, which will next be considered.

Second. As to instruction No. 7: In 1 Roberson, Ky. Cr. Law, § 100, the author, illustrating the rule that "a conspiracy to commit a crime may be consummated, and the conspirators become guilty thereof, although the plan is not executed in exact accordance with the original conception," well states the result of the authorities as follows: "So, if several persons conspire to invade a man's household, and go there armed with deadly weapons, for the purpose of attacking and beating him, and in furtherance of this common design one of them gets into a difficulty with him and kills him, the others being present or near at hand, the latter are guilty of murder, although they did not intend to kill. Where persons combine together for a general unlawful purpose, as 'to resist all opposers in the commission of a breach of the peace,' and for that purpose assemble together and arm themselves, thus intending to resist the lawfully constituted authorities of the country, they are all answerable for anything done in the execution of it, and it is no defense that the parties had no well-defined or particular mischief in view as the result of their combination. If persons illegally concur in doing an act, they are guilty of a conspiracy, although they were not previously acquainted with each other. And the time when one entered into a conspiracy does not make any difference as to his responsibility for acts done to carry out the common purpose, the rule being that those who join in a conspiracy previously formed, and assist in its execution, become a party to all acts done by other parties, before or afterwards, in furtherance of the original design. The addition of new parties, subsequent to the formation of the conspiracy, does not destroy its identity, but it continues as the same conspiracy." In Peden v. State, 61 Miss. 203, several persons conspired to take the deceased from his house and whip him. In executing this purpose, one of them struck him a fatal blow with a spade, from which he died. All were held guilty of murder, whether they entertained a purpose to kill him or not. The same rule

was announced in State v. Shelledy, 8 Clarke. 476; Miller v. State, 25 Wis. 384; and Williams v. State, 81 Ala. 1, 1 South. 179. In 1 Hale, P. C. 441, the law is thus stated: "If divers persons come in one company to do an unlawful thing, as to kill, rob, or beat a man, or to commit a riot, or to do any other trespass, and one of them in doing thereof kill a man, this shall be adjudged murder in them all that are present of that party, abetting him and consenting to the act, or ready to aid him, although they did but look on." The same principle applies to those who set on foot and procure the unlawful undertaking, though absent from the scene when the deed is done. Spies v. People, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898; 3 Am. St. Rep. 320, and note. Thus, in Brennan v. People, 15 Ill. 512, several persons were indicted for murder. Instructions were asked to the effect that the jury should acquit certain of the prisoners unless they actually participated in the killing of the deceased, or the killing was done pursuant to a common design to take his life on the part of the prisoners and those doing the act. The court said: "Such is not the law. The prisoners may be guilty of murder, although they neither took part in the killing, nor assented to any arrangement having for its object the death of Story. It is sufficient that they combined with those committing the deed to do an unlawful act, such as to beat or rob Story, and that he was killed in the attempt to execute the common purpose. If several persons conspire to do an unlawful act, and death happens in the prosecution of the common object, all are alike guilty of the homicide." The rule is thus clearly stated in 6 Am. & Eng. Enc. Law (2d Ed.) p. 870: "When individuals associate themselves in an unlawful enterprise, any act done in pursuance of the conspiracy by one of the conspirators is, in legal contemplation, the act of all." And in a note this is added: "It is immaterial, as affecting the question of co-equal responsibility on the part of conspirators for the acts of each other, that one or more were not actually present at the consummation of the preconcerted design." At common law. If the object of the conspiracy be the commission of a felony, and a homicide is committed in carrying its design into execution, the killing is murder; and the authorities concur that if the unlawful act designed is dangerous, and probably requiring the use of force or violence, which may result in the taking of life, all the conspirators are criminally liable for whatever any of them may do in furtherance of the common design, whether they are present or not. 1 Bish. New Cr. Law, §§ 638a, 638; Lamb v. People, 96 Ill. 73; U. S. v. Lancaster (C. C.) 44 Fed. 896, 10 L. R. A. 333; Boyd v. U. S., 142 U. S. 450, 12 Sup. Ct. 292, 35 L. Ed. 1077; U. S. v. Ross, 1 Gall. 624, Fed. Cas. No. 18,196; People v. Brown, 59 Cal. 351; Reeves v. Territory (Okla.) 61 Pac. 328.

Section 1241a, Ky. St., contains, among others, the following provision: "(1) If any two or more persons shall confederate or band themselves together for the purpose of intimidating, alarming, disturbing, or injuring any person or persons, * * * they or either of them shall be deemed guilty of a felony, and upon conviction shall be confined in the penitentiary not less than one nor more than five years." It will thus be seen that it is made a felony for two or more persons to confederate themselves together for the purpose of intimidating or alarming another. Following the authorities we have cited and the foregoing statute, the court gave the jury instruction No. 7, in these words: "The court instructs the jury that if they believe from the evidence, beyond a reasonable doubt, that the defendant, Caleb Powers, conspired with W. H. Culton, F. W. Golden, Green Golden, John L. Powers, John Davis, Charles Finley, W. S. Taylor, Henry Youtsey, James Howard, Berry Howard, Harlan Whitaker, Richard Combs, or any one or more of them, or with some other person or persons unknown to the jury, acting with them or either of them, to do some unlawful act, and that in pursuance of such conspiracy, or in furtherance thereof, the said Henry Youtsey, James Howard, Berry Howard, Harlan Whitaker, Richard Combs, or some one of them, or some other person unknown to the jury, acting with them, or with those who conspired with the defendant, if any such conspiracy there was, to do the unlawful act, did shoot and kill William Goebel, the defendant is guilty, although the jury may believe from the evidence that the original purpose was not to procure or bring about the death of William Goebel, but was for some other unlawful and criminal purpose. The words 'unlawful act,' as used in this instruction, mean some act to alarm, to excite terror, or the infliction of bodily harm." Not a few authorities hold that if the conspiracy involves the commission of a felony, and a homicide is committed by any of the conspirators collaterally to the main design, and not in pursuance of it, all are guilty of murder. It will be observed that the court did not so instruct the jury, but that by the instruction quoted above they were plainly told that the homicide must have been committed in pursuance of the conspiracy or in furtherance of it. The instruction was intended to present to the jury this phase of the case shown by the evidence: While the legislature had before it the election contest, appellant and a number of others entered into a conspiracy to bring to Frankfort a large body of armed men, some of them feudists, and others known for their dangerous character, for the purpose of intimidating the legislature in the discharge of its official duties, and pursuant to this conspiracy they got together about 1,000 men, and brought them to Frankfort. This body

reached Frankfort on January 25th. Most of them were sent home that evening, but about 200 picked men were retained, and were still at Frankfort, armed, collected about the state house, and crowding the lobbies from day to day, until the deceased was killed, on January 30th. On January 25th, a number of these men undertook to force their way into the hall of the house of representatives, and a catastrophe was then narrowly averted by the prudence of the speaker. A conspiracy of such a character was of necessity dangerous to life, and subversive of the foundations of the state government. No one realized the gravity of the undertaking better than appellant, for, in his letter written while getting his men together, he said, as quoted above: "We must have these men and guns. We are undertaking a serious matter, and win we must." His friend, the banker, John A. Black, says: "He said he wanted an armed mob, * * * and that it would likely have an influence over the legislature." As we understand the court, the instruction is held erroneous for the reason that it does not submit to the jury the question whether the homicide was the natural result of the conspiracy, or such a thing as might be ordinarily expected to happen. It is not necessary that the death of the deceased should have been contemplated as the probable result of the conspiracy. If the conspiracy was such that the conspirators must naturally have contemplated that it would result in violence, or that the infliction of personal harm upon others might reasonably be anticipated in its execution, then all are responsible for the homicide. On the facts of the case, it would have been both idle and improper to have submitted to the jury whether the death of the deceased was a result reasonably to be anticipated by those entering the conspiracy; for the character of the conspiracy was such as necessarily involved a show of force, and deeds of violence were plainly within its probable consequences. It is wholly immaterial whether the death of the deceased was anticipated, or the death of any other person in particular. Such a crime against good government cannot be tolerated among a law-loving people, and those who undertake to stop the ordinary processes of the law by intimidation and force must be held responsible for all the consequences of what is done in furtherance of the design. The court might properly have instructed the jury, in plain words, that if there was a conspiracy to bring a band of armed men to Frankfort for the purpose of intimidating the legislature in the discharge of its official duties, and the men were so brought to Frankfort, and the deceased was killed in furtherance of this conspiracy, or in pursuance of it, by any one of these men or of those in the conspiracy, appellant, if a party to the conspiracy, was guilty of murder. The instruction he gave is

more favorable to the appellant than the one indicated; for the reason that it states to the jury the general rule of law, without directing their attention to the particular facts of the case. The court, no doubt, put his instruction in this form for the benefit of the appellant, and to conform to a line of decisions by this court condemning instructions giving prominence to certain facts. The instruction appears to us to be not only unobjectionable in point of law, but to be more favorable to the appellant than the law required.

Third. As to instruction No. 8: Section 241 of the Criminal Code of Practice provides: "A conviction cannot be had upon the testimony of an accomplice, unless corroborated by other evidence tending to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows that the offense was committed, and the circumstances thereof." Following the words of the statute, the trial court gave instruction No. 8, which is as follows: "The jury cannot convict the defendant upon the testimony of an accomplice, unless such testimony be corroborated by other evidence tending to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows that the offense was committed, and the circumstances thereof." It is maintained that the instruction is misleading, as there were several accomplices who testified on the trial, and under it the jury may have understood they were warranted in convicting on the testimony of one accomplice when supported by another, and that thus appellant might be convicted on the testimony of accomplices without other corroborating evidence. The statute clearly does not allow this; for this would be but a conviction "upon the testimony of an accomplice." The words, "unless corroborated by other evidence," clearly refer to other evidence than the testimony of an accomplice. The instruction is in the words of the statute, and conveys the same meaning, although the sense might have been made plainer by adding an "s" to the word "accomplice," and omitting the word "an," so as to make the clause read: "The jury cannot convict the defendant upon the testimony of accomplices, unless," etc.

The testimony of the accomplices as to the vital facts was corroborated by other evidence, and by circumstances established beyond question. It is clearly shown that appellant was not only a party to, but a leading spirit in, the conspiracy to bring to Frankfort and keep here the band of men, supplied with arms and ammunition. Such things are not done vainly or without a purpose. No jury of intelligence could believe that such an armament could be organized and brought to the seat of government but for the purpose of intimidation. Whether they might not also infer, from the fact that

so many of the state militia were brought along dressed in citizens' clothes, that the purpose was to use this militia as state troops to protect them from arrest, or to hold their own against the civil authorities, we need not determine. In any view of the facts, the enterprise was a felony, producing a condition of anarchy at the state government, and the peace and good name of the state require that the majesty of the law should be upheld in such a manner that it will not be repeated. It, of necessity, contemplated such a state of things that violence, if not bloodshed, would follow in its wake, and, where a homicide was committed in furtherance of it, appellant, who was its director, was clearly guilty of murder.

To reverse the judgment of conviction on the facts which are either admitted, or so clearly established as to be beyond controversy, is not only to delay justice, but to give no force to the statute providing that such judgments may only be reversed when, on the whole record, the court is satisfied the substantial rights of the accused have been prejudiced. We therefore dissent from the opinion of the court.

PAYNTER, C. J., and HOBSON, J., concur in this dissent.

HOWARD v. COMMONWEALTH.¹

(Court of Appeals of Kentucky. March 28, 1901.)

INDICTMENT—AIDERS AND ABETTORS—FAILURE TO DISCLOSE ACTUAL PERPETRATOR—ACCOMPLICES—INSTRUCTION AS TO CORROBORATION—DECLARATIONS OF CO-DEFENDANTS AS EVIDENCE—CROSS-EXAMINATION OF ACCUSED AS TO OTHER OFFENSES—MISCONDUCT OF COUNSEL IN ARGUMENT—REVERSIBLE ERRORS.

1. Under Cr. Code Prac. § 126, authorizing an averment in the alternative as to the different modes and means by which the offense charged may have been committed, an indictment for murder, which charges that one of the several defendants named therein, or some person acting with them, whose name is unknown to the grand jury, fired the shot, and that the other defendants were present, aiding and abetting the shooting, but that which one fired the shot and which aided and abetted the shooting is unknown to the grand jury, is good.

2. Under such an indictment it was proper to instruct the jury that they might convict if they believed the defendant on trial fired the shot, or if they believed that one of the other defendants fired the shot, and that he was acting with them, or any one of them, and did aid and abet such shooting.

3. There can be no conviction upon the testimony of accomplices alone, however many there may be, and therefore, where two accomplices testified, an instruction telling the jury that they could not convict upon the uncorroborated testimony of "an accomplice" was erroneous, in that it failed to present the idea that one accomplice cannot corroborate another for the purpose of conviction.

4. On the trial of one of several defendants jointly indicted, the declarations of a co-de-

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

defendant, made in the absence of the defendant on trial, in furtherance of the common purpose, is admissible when a prima facie case of conspiracy has been made out, though there be in the indictment no express averment of a conspiracy; but a defendant's guilt as principal or accessory can be finally established only by evidence of his own acts.

5. The testimony of a witness for defendant on cross-examination as to an altercation had by him with one of the witnesses for the commonwealth on a train, was admissible to show the feelings of the witness.

6. Upon a trial for murder, defendant, testifying for himself, was privileged from answering questions asked him on cross-examination as to another murder with which he was charged.

7. It was error to permit a witness to testify that he heard T. say to defendant, "I want to compliment you on what you did in Frankfort," that being the place where the killing occurred, and that defendant "just nodded and passed on," there being no claim that T. had any connection with the homicide.

8. Where the regular commonwealth's attorney took no part in the prosecution because of his sickness, it was prejudicial error to permit the commonwealth's attorney pro tem. to say to the jury in his closing argument that he was commissioned by the regular commonwealth's attorney to say to them "that he thinks the defendant guilty, and hopes the jury will hang him higher than Haman."

9. Under Cr. Code Prac. § 281, the decision of the trial court upon the motion for new trial is not subject to exception.

Paynter, O. J., and Hobson and White, JJ., dissenting in part.

Appeal from circuit court, Franklin county.
"To be officially reported."

James Howard was convicted of murder, and appeals. Reversed.

W. C. Owens, J. B. Finnell, and Carlo Little, for appellant. Robt. J. Breckinridge, B. G. Williams, and T. C. Campbell, for the Commonwealth.

BURNAM, J. The appellant, James Howard, was jointly indicted with Henry Youtsey, Berry Howard, Harlan Whitaker, and Richard Combs for the murder of William Goebel, and was, upon separate trial, found guilty of murder, and judgment was rendered in pursuance of the verdict. The indictment charges, viz.: "That the said Henry Youtsey, James Howard, Berry Howard, Harlan Whitaker, Richard Combs, and others then and there acting with them, but who are to this grand jury unknown, in the county of Franklin, on the 30th day of January, 1900, and before the finding of this indictment, unlawfully, willfully, feloniously, of their malice aforethought, and with intent to kill, did kill and murder William Goebel, by shooting and wounding him with a gun or pistol loaded with powder or other explosives, and lead and steel ball and other hard substances, and from which said shooting and wounding the said Goebel died on the 3d day of February, 1900; and the indictment does further charge that one of the above-named defendants, or another person then and there acting with them, but whose name is to this grand jury unknown, did so

as aforesaid then and there kill and murder said Goebel, and the other of said defendants did then and there counsel, advise, assist, aid, and abet same; but which so actually fired the shot, and which so actually counseled, aided, advised, and abetted therein, is to this grand jury unknown."

Appellant complains of the indictment because it charges him with being the principal, and at the same time of being the alder and abettor of the four other persons named therein, and of another person then and there acting with them, but who is to the grand jury unknown, in the commission of a crime which was the result of a single act, the firing of a single shot; and to support this contention we are referred to the cases of *Com. v. Patrick*, 80 Ky. 605; *Mulligan v. Com.*, 84 Ky. 230, 1 S. W. 417. In the Patrick Case the offense charged in the indictment was that Amos and Wiley Patrick shot at and wounded Joseph Dyer with a pistol, and that each of them was present, and aided and encouraged the other to commit the offense. In that case the demurrer to the indictment was sustained upon the ground that the punishment imposed by the statute was upon the person alone who actually committed the act constituting the offense, and that there was no provision in the statute for the punishment of an alder and abettor; and that, as it was a purely statutory offense, an indictment did not lie for aiding and abetting therein, the aiding and abetting being a minor offense, punishable only as a misdemeanor. In the Mulligan Case there was no question as to the sufficiency of the indictment, but the question was one of variance. The indictment was against Mulligan alone, and charged him as the actual perpetrator of the crime, and the court held that proof that he was only an alder and abettor constituted a variance. When the court said that the indictment must disclose the name of the principal, it did not mean that there could be no indictment if the name of the actual perpetrator of the crime was unknown. The case adjudged was that proof that the defendant aided and abetted the commission of the felony will not support an indictment charging him as the actual perpetrator of the crime, unless the actual perpetrator is joined with him. In this case the indictment charges that one of the defendants fired the shot, and that the others were present, aiding and abetting, and that the grand jury does not know which one fired the shot. This is in effect an averment in the alternative as to the different modes and the different means by which the offense may have been committed, as authorized by section 126 of the Criminal Code. That the actual perpetrator of a criminal act and one present aiding and abetting him may be jointly indicted in the alternative, one as the principal, and the other as the alder and abettor, and that either may be convicted as principal or as alder and abettor, has been frequently held by this

court. See *Benge v. Com.*, 92 Ky. 1, 17 S. W. 146; *Travis v. Com.*, 96 Ky. 77, 27 S. W. 863; *Howard v. Com.*, 96 Ky. 19, 27 S. W. 854; *Jackson v. Com.*, 100 Ky. 239, 38 S. W. 422. To say that one who is known to have been present aiding and abetting a murder cannot be punished because the person who fired the shot is not known would, in a large degree, destroy the efficacy of the law for the punishment of crime. Bishop, in his *New Criminal Law* (section 495), says, viz.: "A grand jury should not indict a man unless reasonably informed of his guilt; but the jurors may know it sufficiently while ignorant of an identifying circumstance such as ought ordinarily to appear in the allegation. Then they may state the main facts, adding that this circumstance is unknown to them, and the indictment will be good. Thus, if they are ignorant of identifying names, the allegation may be in this form; that is, the indictment, instead of saying what they are, may state that they are to them unknown." We are, therefore, of the opinion that the indictment comes up to the requirements of section 124 of the Criminal Code.

The next ground of complaint is that the instructions given by the court to the jury do not fairly and correctly state the law of the case. Only three instructions were given, and only two of them are complained of upon this appeal. The basis of appellant's objections to the first instruction are the same as those which are urged against the validity of the indictment itself. It, in effect, tells the jury that if they believe from the evidence, beyond a reasonable doubt, that the defendant willfully and maliciously shot the deceased with the intent to kill him, and from which shooting he afterwards died; or if they believe from the evidence, beyond a reasonable doubt, that either of the other defendants named in the indictment willfully and maliciously shot the deceased, and from which shooting he soon thereafter died; and they believe from the evidence, beyond a reasonable doubt, that this defendant was then and there acting with them, or any one of them, and did then and there counsel, aid, and abet such shooting,—they should find him guilty. This instruction has been frequently approved by this court in cases similar to that on trial, and is a fair and clear statement of the law. The next instruction complained of is as follows: "The defendant cannot be convicted upon the testimony of an accomplice, unless such testimony is corroborated by other evidence tending to connect the defendant with the offense; and such corroboration is not sufficient if it merely proves the commission of the offense, and the circumstances thereof." This instruction is substantially in the language of section 241 of the Criminal Code, and in cases where only one accomplice was introduced by the commonwealth would be a sufficient compliance with the Code; but in this case the commonwealth introduced as witnesses

two persons who had been previously indicted as accessories before the fact to the murder of the deceased, and it complained that the instruction is erroneous and misleading because it fails to tell the jury that the testimony of one accomplice or accessory before the fact cannot be used to corroborate the testimony of the other for the purpose of convicting the defendant. The rule as to the corroboration of accomplices is stated in *Rosc. Cr. Ev.* 122, as follows: "There should be some fact deposed to independently altogether of the evidence of the accomplice, which, taken by itself, leads to the inference not only that a crime has been committed, but that the prisoner is implicated in it." *Russ. Crimes*, 902, says that, viz.: "It is not sufficient to corroborate an accomplice as to the facts of the case in general, but that he must be corroborated as to some material fact or facts which go to prove that the person was connected with the crime." The degree of evidence which shall be deemed sufficient to corroborate the testimony of an accomplice is a matter for the jury; but there must be some fact deposed to independently altogether of the evidence of an accomplice, whether one or a dozen is introduced by the commonwealth, which, taken by itself, fairly tends to connect the defendant with the commission of the crime, so that his conviction will not rest entirely upon the evidence of accomplices (see *People v. Platt*, 4 N. Y. Cr. R. 53; 3 *Rice*, *Ev.* p. 511, and authorities there cited); and this instruction is erroneous because it fails to present this idea.

We will next consider the claim of appellant that numerous errors to his prejudice were committed in the admission of incompetent testimony. As most of the objections to the testimony are based upon the same general rule of evidence, with a view to brevity we will consider a number of them together. First, it is claimed that, as there was no charge of a conspiracy in the indictment, it was error to allow numerous witnesses to prove the condition of the state-house yard on the morning of the 30th of January, the day on which deceased was shot, as compared with the five or six preceding days, with reference to the number of people therein; and also that the witness *Culton* was permitted to testify as to conversations had with *Youtsey* on the 12th and 13th of January, in which *Youtsey* detailed a plan to him for shooting the deceased from the office of the secretary of state, and the manner in which it could be done, and how the perpetrator could escape through the basement of the building; and also as to conversations in which *Youtsey* talked to him about smokeless powder, etc.; and that the witness *Golden* was permitted to testify that *John Powers* gave to *Youtsey* a key to the office of the secretary of state on the morning of the 30th day of January; and that the witness *Ricketts* was permitted to

testify as to conversations had with Youtsey as to the killing of the deceased several days previous to the 30th of January, and also as to his conduct on the morning of the 30th in conducting men from the agricultural to the executive building, and stationing them at the foot of the stair steps, and as to directions given them by him; and to the testimony of McDonald as to the effect that he had seen Berry Howard and Culton in conversation near the capitol building just prior to the shooting; and the testimony of the witness Day as to talks with Youtsey. Of course, the testimony of neither of these witnesses has any bearing upon the guilt or innocence of the defendant, Howard, unless the commonwealth, by other testimony, establishes a guilty connection between the defendant and Youtsey, and shows to the satisfaction of the jury either that he fired the fatal shot, or was present and aided and encouraged Youtsey or another to do so. The testimony in this case is altogether circumstantial, and, as was said in the case of *Obrien v. Com.*, 80 Ky. 362, 12 S. W. 471: "Necessarily, where the proof of a crime can only be shown by proof of circumstances, the evidence should be allowed to take a wide range; otherwise, the guilty would often go unpunished. It is true that there must be some connection between the fact to be proven and the circumstances offered in support of it, yet any fact which is necessary to explain another, or which offers a particular opportunity for the transaction which is in issue, or shows facilities or motives for the commission of the crime, may be proven." And on the trial of one of several defendants jointly indicted for an offense the declaration of a co-defendant, made in the absence of the defendant on trial, in furtherance of the common purpose, is admissible when a *prima facie* case of conspiracy has been made out. To authorize the admission of such evidence, an express averment in the indictment of the fact of a conspiracy is not necessary. See *Golms v. State*, 46 Ohio St. 457, 21 N. E. 476. "But, to make the declaration competent, it must have been in furtherance of the prosecution of the common object, or constituted a part of the res gestæ of some act done for that purpose." See *Tayl. Ev.* p. 542, § 530. Mr. Archibald, in his work on *Criminal Practice and Pleading* (volume 2, p. 1069), gives a very concise, yet comprehensive, statement of the law. He says, viz.: "Wherever the writings or words of any of the parties charged with or implicated in a conspiracy can be considered in the nature of an act done in the furtherance of the common design, they are admissible in evidence against not only the party himself, but as proof of an act from which, *inter alia*, the jury may infer the conspiracy itself. But wherever the writings or words of such a party, not being in the nature of an act done in furtherance of the common design, merely tends to implicate others, and not the

accused himself, they ought not to be received in evidence for any purpose." And this doctrine is approved in *Wright, Cr. Consp.* p. 217, and in *Clawson v. State*, 14 Ohio St. 234, and *State v. Larkin*, 49 N. H. 39. It seems to us that these declarations of Youtsey come within the rule laid down in these authorities, and are competent evidence to go to the jury. But it must not be forgotten that the defendant's guilt as principal or accessory can only be finally established by evidence of his own acts. See *Wright, Cr. Consp.* 60, 71; *Steph. Dig. Cr. Law*, art. 39. And the testimony of B. P. White on cross-examination as to an altercation had by him with one of the witnesses for the commonwealth on the train was competent to show the feelings of the witness, and the same may be said of the objections to the cross-examination of the witness Parker.

Upon the cross-examination of the defendant by an attorney for the commonwealth he was asked the following questions, and was forced to answer them, over his objections: "Q. What was the offense charged against you for which these gentlemen were defending you? A. I have told you that. Q. Tell us now. A. It was for the murder—for the killing—of George Baker. I was charged with the killing of him. Q. Was he not an old man, with his hands up, and begging you for God's sake to spare his life?" Further along in the cross-examination the same counsel asked the witness "if he did not, from a window in the house of Beverly White, with the curtains drawn, in the town of Manchester, shoot Tom Baker, in the presence of his wife and infant children?" to which the defendant answered that he did not. He was then asked whether he was present when this was done, and where he was, and as to who had been indicted for the killing of Tom Baker. No exceptions were taken to these questions with reference to the killing of Tom Baker, and they would not be considered upon this appeal except for the fact that the court has concluded that the judgment must be reversed on other grounds, and a new trial had. The witness was privileged from answering these questions, not only because it was an attempt to impeach his testimony by proof of particular acts which had no connection with the offense for which he was being tried, but also because, if he answered in the affirmative, he would have subjected himself to prosecution for other offenses having no connection with that for which he was being tried. In a long line of decisions this court has uniformly held questions of this character incompetent. In *Sodusky v. McGee*, 5 J. J. Marsh. 622, John Chowning, a witness for the appellee, having sworn to facts which occurred in the encounter between McGee and the appellants, was asked by their counsel "if he was not engaged at the time or shortly before the commencement of the encounter, some distance off, playing cards with a

negro fellow." In passing upon the competency of this question Chief Justice Robertson said: "A witness should not be compelled to prove his own general character, nor should he be required to prove any special fact reflecting upon his character, unless it be pertinent to the issue, independent of its tendency to affect his character. His character could not be assailed by other witnesses by proof of particular facts, and certainly it would be improper to compel him to prove facts relating to his character which others would not be permitted to prove. But, if the fact itself be pertinent and legitimate, it is at least very questionable on principle, as well as authority, whether a witness, as a matter of course, would be excused from answering questions relating to it merely because they might in some degree tend to subject him to reproach not infamy, or might tend to reflect upon his character some degree of disparagement. See Starkie, Ev. 137-139, 144. Anciently a witness might be compelled to answer questions which reflected infamy upon him (Peake, 129, 130); but this doctrine has been overruled by modern cases. See State Tr. 748; Starkie, 153; People v. Herrick, 13 Johns. 82. How far the tendency of a question to disparage a witness without rendering him infamous may entitle him to be excused from answering it has not, so far as we know, been settled by authority." The cases of Cole v. Wilson, 18 B. Mon. 214, and Pence v. Dozler, 7 Bush, 133, are to this effect. And in discussing the question in Saylor v. Com., 97 Ky. 190, 30 S. W. 390, the court said, through Judge Paynter: "It is a rule that a witness is not bound to answer any question which would tend to subject him to punishment, presentment, or infamy. Under the bill of rights he cannot be compelled to give evidence against himself, but when he becomes a witness for himself in a criminal prosecution he waives that right so far as the charge under investigation is concerned. But the fact that he does so waive it does not give the commonwealth the right to compel him to admit the commission of other offenses which would subject him to punishment, presentment, or infamy; for, if this were done, it would be in utter disregard of the bill of rights, and in many cases deter persons accused of offenses from going on the stand as witnesses for themselves, as a forced confession of another offense might subject to greater punishment than the charge under investigation." In Leslie v. Com. (Ky.) 42 S. W. 1095, it was held that it was prejudicial to the rights of the accused, who was on trial for murder, to ask him upon cross-examination if he had not been arrested for discharging firearms in a certain town, and for carrying concealed weapons. The court said: "This question should only be admissible to show appellant's guilt of particular acts, and therefore is within the inhibition of section 597

of the Civil Code." So, in Lewis v. Com. (Ky.) 42 S. W. 1127, the court held that it was error prejudicial to the substantial rights of the defendant to have asked the clerk of the Bourbon circuit court if there was not an indictment against a witness who testified for the defendant charging her with being accessory to the murder for which the defendant was being tried. The court, through Judge White, said: "This was error prejudicial to the substantial rights of the defendant, and was an attempt to impeach a witness by showing that she had been indicted as accessory to the crime of the murder of Amelia Lewis. Witnesses cannot be impeached by proof of particular acts or offenses that they might have been guilty of, but the inquiry must be confined to the general character, and not to the particular acts charged against the witness. It is evident that the testimony was introduced for the purpose of impeaching or weakening the testimony of the witness, and, we have no doubt, influenced the jury in considering her testimony." In Baker v. Com. (Ky.) 50 S. W. 54, appellant was on trial for the murder of W. L. White. Upon cross-examination the commonwealth was permitted, against the objection of the defendant, to prove by him that he was under indictment for house-burning, and also to ask him whether he had been indicted for anything else. This was held prejudicial error. In the very recent case of Pennington v. Com. (Ky.) 51 S. W. 818, in which the defendant was convicted of murder, and sentenced to the penitentiary for life, on the trial appellant was asked as to other indictment against him. The court, in an opinion by Judge Hazelrigg, held that "under section 597 of the Civil Code a witness could not be impeached by evidence of wrongful acts except in the manner pointed out, and that the evidence quoted was incompetent, and, from its nature, prejudicial." And in the case of Ashcraft v. Com., 60 S. W. 931, decided at this term of the court, it was unanimously held by this court that it was reversible error to ask the defendant on cross-examination as to other indictments against him than that on which he was being tried. In discussing the question as to when a witness may refuse to answer, Greenl. Ev. (14th Ed.) § 454, says: "On this point there has been a great diversity of opinion, and the law remains still not perfectly settled by authorities. But the conflict of opinion may be somewhat reconciled by a distinction which has been very properly made between the cases where the question is not strictly relevant, but is collateral, and is asked under the latitude of cross-examination. In the former case there seems to be great absurdity in excluding the testimony of a witness merely because it will tend to degrade himself, when others have a direct interest in that testimony, and it is essential to the establishment of their rights of property, liberty, or even life, or to

the course of public justice. Upon such a rule, one who has been convicted for an offense, when called as a witness against an accomplice, would be excused from testifying to any transactions in which he had participated with the accused, and thus the guilty might escape. And accordingly the better opinion seems to be that, where the transaction to which the witness is interrogated forms any part of the issue to be tried, the witness will be obliged to give the evidence, however strongly it may reflect on his character." Id. § 456: "It is, however, generally conceded that, where the answer which the witness may give will not directly and certainly show infamy, but will tend to disgrace him, he may be compelled to answer. When it does not, there seems to be no good reason why the witness should be privileged from answering a question touching upon his situation, employment, and associates, if they be of his own choice,—as, for example, in what family he resides, what is his ordinary occupation, and whether he is intimately acquainted with or conversant with certain persons, and the like; for, however these may tend to disgrace him, his position is of his own selection." And it is the general rule elsewhere. In the very able and well-considered opinion in the case of *People v. Brown*, 72 N. Y. 571, the court said: "I am of the opinion that the cross-examination of persons who are witnesses in their own behalf when on trial for criminal offenses should, in general, be limited to matters pertinent to the issue, or such as may be proved by other witnesses. I believe such a rule necessary to prevent a conviction for offenses by proof that the accused might have been guilty of others. Such a result can only be avoided practically by an observance of this rule." The court therefore erred in requiring the defendant to answer the questions.

The commonwealth was also permitted, over the objection of the defendant, to prove by the witness Weaver that he heard Judge Tinsley say to the defendant: "Jim, I am glad to see you. I want to compliment you on what you did in Frankfort. I learned about you through my son,"—and that the defendant did not open his mouth, but just nodded, and passed on. There is no claim that Howard made any response to this remark, nor is there any claim that Judge Tinsley, who is one of the circuit judges of the state, had any connection whatever with the homicide of which the defendant is accused; and, while the testimony is emphatically denied by Judge Tinsley, it was wholly illegal, and incompetent for any purpose, and should have been excluded.

Another ground of complaint is misconduct of the attorneys for the prosecution in course of the trial. It is especially complained that the commonwealth's attorney pro tempore, in his closing argument to the jury, used these words: "I am commissioned

by Robert Franklin to say to the jury that he is in thorough accord and sympathy with the prosecution, and that he thinks the defendant guilty, and hopes the jury will hang him higher than Haman." It appears that Robert Franklin, the regular commonwealth's attorney, did not participate in the prosecution of the accused because of sickness, and that his place was supplied by the appointment of the pro tempore attorney who used the language complained of. Mr. Franklin was not a witness in this case, and, if he had been, he would not have been permitted to have expressed an opinion of the guilt or innocence of the accused; and his opinions on that subject, whatever they may have been, were wholly irrelevant and incompetent; and the facts that he occupied a high official position, that he was prevented by sickness from the discharge of the duties imposed upon him by law in connection with the prosecution, undoubtedly gave to this message, communicated to the jury by his substitute in his closing address, undue weight, and was, under the circumstances, very prejudicial to the rights of the defendant. And it is a well-established rule that it is error sufficient to reverse a judgment for the court to suffer counsel, against the objection of the defendant, to state facts not in the evidence or pertinent to the issue, and the evidence of which would have been ruled out. See 2 Enc. Pl. & Prac. p. 727; *Kennedy v. Com.*, 77 Ky. 360.

One of the grounds relied on in the motion for a new trial made in the court below is that the court erred to the prejudice of the accused in refusing to sustain his motion to fill up the jury box by persons whose names were drawn from the jury wheel, instead of directing the sheriff to summon a special venire after the original panel of jurors had been exhausted. This motion was supplemented by the affidavits of quite a number of persons, who stated, in substance, that four of the jury who tried the defendant had formed and expressed the opinion that he was guilty before they were accepted on the panel; and that this information was not communicated to the defendant until after the termination of the trial. While all of the statements contained in these affidavits are denied by the accused jurors, and may have no just foundation, yet the fact that so many persons could be found to make affidavits so circumstantial in their detail of facts on this point illustrates the great importance, in a case of this character, of using every precaution to secure discreet and impartial citizens to act as jurors. Under section 281 of the Criminal Code, the decision of the trial court upon the motion for a new trial is not subject to exceptions, and consequently it will be unnecessary for us to further consider this question.

Numerous other errors are complained of, but, as they are not likely to occur again, are not considered in this opinion. But, for

error pointed out and discussed, the judgment of the trial court is reversed, and the case remanded for a new trial consistent with this opinion.

HOBSON, J. Judge WHITE and I concur in the opinion of the court in the reversal of the judgment in this case on the ground that the particulars of the shooting of Baker by appellant should not have been admitted in evidence, and that, as the record stands, the statement of the attorney for the state in his closing speech set out in the opinion was peculiarly prejudicial. Appellant cannot be convicted in this case because he may have committed another crime of like character; and proof that he had done so, or even such an impression, might seriously prejudice him before the jury, who might consider that such proof showed he was the character of person who would commit such a deed as that charged herein. Appellant is also entitled to be tried by the jury under the law and the evidence, and nothing could be more damaging to him than for the jury to get the impression that public sentiment was to the effect that he was guilty, and ought to be hung. We also concur in the opinion of the court that the evidence as to the statement of Judge Tinsley to the appellant should not have been admitted, and that the instruction as to the testimony of an accomplice should have used the word "accomplices," instead of the words "an accomplice." But, under the facts of the case, we do not see that appellant was seriously prejudiced by either of these two matters. We do not concur in that part of the opinion which undertakes to lay down the proper limits of cross-examination, and see no reason for discarding the settled practice in this state, supported by a number of decisions of this court, to follow the dictum of a New York judge announcing a rule that is not followed in that state, and is contrary to the great weight of modern authority. We therefore dissent from that part of the opinion. The Chief Justice also concurs with us on this point.

PAYNTER, C. J. (concurring in result). Two things are as certainly established by the evidence in this case as it is possible to establish anything by human testimony. One is that William Goebel was assassinated while peaceably passing through the state-house grounds to discharge his duties as a member of the Kentucky senate; the other that the assassin fired the fatal shot from a window in the private office of Caleb Powers, the secretary of state. Under the indictment, and under the well-established rules of practice in this state, James Howard could have been found guilty of murder if the proof showed that he either fired the fatal shot, or aided and abetted another in doing so. So the jury was authorized to find him guilty of murder if the evidence war-

ranted it in reaching the conclusion that he was the principal or an aider and abettor. The indictment charges that the appellant, James Howard, Henry Youtsey, and others were guilty of the offense. If the testimony showed that Youtsey fired the shot, and the appellant, Howard, was present, aiding and abetting, he was guilty; if it showed that the appellant, Howard, fired the shot, and Youtsey was present, aiding and abetting, he was guilty. Then any testimony which conduces to show either of them to be a principal or an aider and abettor was competent. For the purpose of considering the questions which I will discuss it is necessary to briefly state some of the evidence offered conducing to show the guilt of the parties. In doing so I will briefly call attention to some of the testimony against Youtsey and the appellant Howard. William Goebel, then a senator, but afterwards declared governor by the legislature, was shot at about 11:15 a. m. on January 30, 1900. The evidence introduced by the appellant, Howard, conduces to prove that he left his home (Manchester, Ky.) on the morning of the 28th of January, 1900, and rode to London, Ky., arriving there at about 2 o'clock in the afternoon. He remained there during the night, and the next morning went to Winchester, Ky., from which place he came to Frankfort, arriving at 10:17 a. m., about one hour before the assassination. The accused claims that he did not go to the state-house square until in the afternoon on the day of his arrival; that upon his arrival he went to the Board of Trade Hotel, and remained there a short time, walked towards the state-house grounds, met a stranger by the name of Robinson, and engaged him in conversation, and returned with him to the Board of Trade Hotel, where he was at the time the fatal shot was fired, and where he remained until some time in the afternoon, when he went to the state house. His defense is an alibi. He claims that he was notified by John G. White, of Winchester, to come to Frankfort with the view of obtaining a pardon for the killing of George Baker, for which offense he stood indicted. Ed Parker lives at London, Ky., and was on his bond in the case wherein he was indicted for the killing of Baker, and also one of his attorneys. He testified that Howard passed his office, while in London, on his trip to Frankfort, but did not stop to see him; and also that J. G. White had written to him before that time to do certain things to aid Howard in procuring a pardon, and that he had not done the things which White requested him to do. He also testified that he did not speak to Howard while in London, or endeavor to have an interview with him. I will add here that Howard says he thinks he talked to Parker in regard to the matter; but, if he did not talk to him then, he did not advise either of his attorneys of his purpose to come to Frankfort to get a pardon, or ask their aid in the matter. John Rick-

etts testified that he was in the agricultural office on the day before the assassination, and was in conversation with Youtsey as to the contest that was then pending before the legislature for the office of governor, wherein William Goebel was contestant and W. S. Taylor contestee, and Youtsey said: "The way to settle it was to put Goebel out of the way, and that he had \$100 of his own money to have it done, and he thought there were ten or eleven others that wanted it done as much as he did; and he thought it could be done from the executive building, and the man who did it escape through the basement." He also testified that 15 or 20 minutes before the shooting Youtsey rushed into the agricultural building, and said for some of them to come with him; that he, together with others, went to the executive building, and Youtsey stationed them at the foot of the stairway on the inside of the building, and told them that something was going to happen, and for them to stand there, that there would be a man come down among them, and for them to scatter off together; that the witness realized something was going to happen, and left the men standing at that place, and left the building. It also appears that the stairway where the men were stationed was near the door leading into the private office of the secretary of state from the hallway. It is proven by Lewis Smith, who knew Youtsey well, that immediately after the shooting he (Youtsey) ran down the stairway which leads to the basement from a point near a door in the secretary of state's office; that he went on through the basement. It is proven by Ed Thompson, Jr., that shortly thereafter Youtsey was seen to enter the executive building from the Lewis street entrance. It is proven by Walter Day that some days before the assassination Youtsey told him that, if he could get \$300, he could settle the contest. W. H. Culton testified that some time before the assassination he saw Youtsey with a box of cartridges in his hand; that he told him he had a scheme by which he thought he could kill Goebel, and showed him a cartridge, and said he thought it would be the thing to do it with; that he had a key to the secretary of state's office; that he could get in whenever he wanted to; that he had examined a window in that office, and that he could be killed from that window, and no one would know anything about it; that he could pull the blind down a certain distance, fire the shot, and get out through the basement; and said that he had smokeless cartridges that fired steel balls, and opened a box and showed them. The window blinds in the private office of the secretary of state were discovered to be down immediately after the shot was fired. Wharton Golden testified that he, John, and Caleb Powers left for Louisville in the morning of the day of the assassination, and that John Powers, a brother of Caleb Powers, had given Youtsey a key to a door in the secretary

of state's office. Some of the testimony tending to establish the guilt of Howard is as follows: W. H. Culton testified that during the evening of the day of the assassination he met Jim Howard in the agricultural office, and, after greeting him, he said to Howard he was glad to see him, and asked him when he came, and he laughed, and said, "I have been here a week," and Culton said, "I have never seen you." He again laughed, and said, "I know that." Afterwards they were in the secretary of state's office together, and Culton says while they were standing there Howard pulled out some cartridges in his hand, and said, "These are 45 pistol cartridges," and then put them back, and pulled out another cartridge, and said, "That is a Winchester cartridge, a Winchester 45, and shoots smokeless powder." He asked him what he meant by it, and he said nothing. Witness further testified that Howard said "Goebel would die, but said, if there had been something or other on the cartridge, he would have died immediately,—something of that kind,—but said he would die anyhow." He also testified that Howard told him that he had been at the Capital Hotel, where Goebel was carried after he was shot, and in speaking of Goebel he said, "Damn him, he will die anyhow." The witness also testified that Howard pointed to the tree, and said: "'Some guys didn't understand,' but, he said, 'Do you see that tree? If you want to make a dead shot at a moving object, take a sight on that tree, and when the object passes by you will make a dead shot every time.'" This latter statement is important, as the body of the deceased, at the time the shot was fired, was in line with a hackberry tree viewed from the windows in the office of the secretary of state. The witness also testified that Howard said, "He had always heard Jack Chinn was considered a brave man, but you ought to have seen that son of a b— run when that shot was fired out there;" whereupon the witness asked him how he knew, and Howard replied, "Don't ask me any fool questions." Jack Chinn was with Goebel when he was shot. Wharton Golden testified that on the morning of the 31st of January, 1900, he had a conversation with Jim Howard in regard to Jack Chinn, in which Howard said, "I understand Jack Chinn is a great race horse starter, but he never started a horse that could run as fast as he can;" whereupon Golden asked him how he knew, and Howard replied, "I ought to know; he was with Goebel." He also testified that on the same morning Howard expressed a desire to join the military company of which John Powers was captain. John Powers agreed to it, and said for Howard to get some blankets, but Caleb Powers advised them not "to take Jim into the company." James S. Stubblefield was deputy assessor of Clay county under Howard, and some two or three days before Howard left for Frankfort he had a conversation with

him, in which he said: "Jim, I believe I will write down and get Gov. Taylor to give me a captain's place to get up a company here, and take a number of men down there to fight. Jim said, 'You can't fight; you can't stand up;' and said, 'I am attending to that. I am getting letters every once and a while from Taylor, and I will attend to that.'" He testified that on Howard's return from Frankfort he came to his house one night to get the witness' son to take a horse to London. During the time he was there witness remarked to him that: "You have had a patch of fun at Frankfort," and he said "Yes, we have had hell, and cleaned up the patch." Witness then said, "Jim, what do you mean by cleaning up the patch?" He said, "You know whenever I look through the sights of my pistol or gun I always get meat or money,—one; and, by God! this time I have got both." Witness testified that he had a subsequent conversation with Howard, and gives it as follows: "Jim, I have been studying about the conversation we had the other night. Do you mean to say you killed Goebel?" He said: "By God! I mean just what I said." I said then: "Jim, you ought not to talk so much. You will get yourself in trouble." He said: "By God! my friends won't go back on me, and, if they want me, let them come and get me. By God! five hundred men can't take me out of this town." Robert Allen testified that he had a conversation with Howard in regard to the assassination of Goebel, in which Howard said, "I know the identical man that did it, and thank the God above for it." Afterwards Howard came to this witness, and wanted to explain the previous conversation which they had had, and said that he meant to say that he knew who had indicted him, and he thanked the God above for it. This explanation seems to have been made from the fact that some one who was present when he had the first conversation had suggested that he ought not to have said what he did to the witness. John L. Jones was introduced as a witness, who testified that on the morning after the shooting of Goebel Jim Howard came to where he was cooking breakfast, and attracted his attention by giving him a slap on the back, and in the conversation the witness told him there was nothing in the shooting of Goebel, and he replied there was,— "that he was shot by a damned dead shot." The witness testified that after the death of Goebel he had another conversation with Howard, in which he said, "Didn't I tell you he was shot by a dead shot?" and further said that "whenever he shot he shot to kill." C. T. Jones, son of John L. Jones, testified that Howard said to him, in response to a suggestion that Goebel was not shot, "Yes, he was, and he was shot a deadner." James F. Dalley, Charles Howard, and R. O. Armstrong testified that a few minutes after the shooting Jim Howard and some other men stood on the steps of the executive building

(some of whom had guns in their hands) for the purpose of preventing any one from entering that building. Dalley, Howard, and Armstrong recognized the defendant, Howard, as being one of the men standing on the steps at the time stated. E. T. Lillard, Jr., testified to the similarity in the appearance of the defendant, Howard, and one of the men whom he had seen on the steps of the executive building; that the man he had taken to be Jim Howard was a man with a cast in one of his eyes, but it did not appear so marked at the time he testified as on the day he saw him on the steps. Bowman Gaines and Ben Rake testified that shortly after the shooting they saw a man jump over the fence back of the executive building into Clinton street, and go down that street; that they recognized the defendant, Howard, as being the man whom they had seen. These witnesses all testified that he had a dark or brown stubby mustache at that time.

The defendant did not offer any witnesses who said they were present at the time Dalley and others testified that the defendant, Howard, was on the steps of the executive building. This testimony is sought to be impeached by the testimony of two witnesses who say that Howard was in the office of the Board of Trade Hotel when the shot was fired, and also by the testimony of some of Howard's acquaintances, to the effect that he had not been wearing a mustache for some time before he came to Frankfort. The testimony of these witnesses that Howard had not been wearing a mustache may be substantially true, and still the jury may not have concluded that it impeached the testimony of the witnesses offered by the commonwealth to show that he was at the executive building at the time of the shooting. It may have been inferred by the jury that a few days' growth of beard gave him the appearance of having a short, stubby mustache at the time the witnesses for the commonwealth claimed to have seen him on the steps of the executive building. One witness for the commonwealth testified that on the night following the shooting he saw the accused, Howard, and he had the appearance of having been freshly shaved. The commonwealth introduced two or three witnesses, who testified that neither Howard nor his alibi witnesses were in the office of the Board of Trade Hotel at the time the shot was fired. The jury might have reasonably concluded that the evidence offered to establish the alibi was completely destroyed by the evidence of the commonwealth. The jury had the right to draw any reasonable inference that could have been drawn from the statement which Howard made that "he remained away from the state house until late in the afternoon on the day of the shooting. The jury may have regarded the statement as being discredited from the fact that Howard had reason to believe he had friends at the state house, and naturally would have

gone there on that account, and also in regard to the business which he claims brought him to Frankfort. The jury may have attached some importance to the fact that Caleb Powers objected to him joining John L. Powers' company on the morning after the assassination. It is claimed that the testimony of John L. Jones is not worthy of credit, because he had been in the penitentiary on two occasions for manslaughter, and that he had been looking up testimony for the prosecution on promise that he would be paid for his services. It is claimed that Stubblefield's testimony was impeached by proof of bad character, and by proof that he had made statements inconsistent with those made upon the witness stand. Stubblefield had been a school teacher, deputy sheriff, and deputy county assessor under the accused, Howard. He states the circumstances under which he disclosed the statements which he claims Howard made to him. He went to Cincinnati, and it was reported in Clay county that he was making statements showing Howard's connection with the killing of Goebel. At this Howard's friends became incensed, and the witness was advised to leave the county, or he would be killed. After this he says he concluded to tell what Howard stated to him, but says he had not done so previous to that time. His own testimony shows that he did not condemn Howard for killing Goebel, if he did it, but, on the contrary, at the time of the conversation and afterwards, would have protected him, if possible, from prosecution therefor. Jones and Stubblefield are the kind of men to whom one might suppose Howard would give his confidence if he had killed Goebel. He never would have made such an admission to a man in his neighborhood who abhorred murder, and believed that murderers should be punished. The jury that tried Howard would not have subjected itself to the charge of faulty reasoning if it had concluded that Jones and Stubblefield were not first-class citizens, but were the kind of men that Howard would have naturally selected for the purpose of imparting the fact that he had killed Goebel.

I have called attention to the leading facts of the case with the view of showing that an error slightly prejudicial to the defendant would not justify a reversal of this case, because the Code of Practice, which confers jurisdiction upon this court to review the action of the lower court in criminal cases, gives the court the power to determine from all the facts in the case whether the substantial rights of the accused have been prejudiced by the action of the lower court. On the examination in chief, the accused, Howard, desired to show the purpose for which he came to Frankfort, and to do so the following questions were propounded by his attorney, and the following answers were made: "Q. When were you here again? A. I came here on the 30th January. Q. Is there an in-

dictment pending against you? A. Yes, sir; I am indicted in Clay county. Q. For what? A. For killing George Baker. * * * Q. What did you come down here on the 30th for? A. I came here to try to get a pardon. Q. For what? A. For the killing of George Baker." On cross-examination the witness was asked: "Q. Was not he an old man, unarmed, with his hands up, begging you for God's sake to spare his life? A. I could not say whether he was unarmed or begging. I do not remember very much about him." It is insisted that this question was an improper one, and the answer thereto was prejudicial to the defendant. For the purposes of what I will say with reference thereto, I will concede that it was an improper question; but whether it was prejudicial or not, in view of the facts developed in the record, is entirely a different question. The accused testified that he was indicted in the Clay circuit court; that he came to Frankfort to get a pardon for "the killing of Baker." It will be observed that Howard testified that he had killed Baker; that he was indicted for it; that his plea was "emotional insanity." He did not claim that he had killed Baker in self-defense, but that he had done so when he was insane. On cross-examination of two or three witnesses by Howard's attorney the witnesses were made to state substantially that the accused had killed Baker. The jury had before them testimony that he had killed Baker, that he was indicted for it, that he had no defense except emotional insanity, and that he had applied to Gov. Taylor for a pardon for the killing of Baker; thus calling the jury's attention to the fact that he was unwilling to be tried by a jury of his peers on the charge of killing Baker. Now, with all these facts before the jury, together with the facts that I have recited above, I do not think the answer which he made to the objectionable question prejudiced him in the mind of the jury. The answer was not an acknowledgment that he had killed Baker under the circumstance indicated by the question, for he said he could not remember very much about Baker, which answer is consistent with his plea of emotional insanity.

It is urged that the testimony of one W. D. Weaver, late superintendent of schools, in relation to what Judge Tinsley said to the accused, Howard, is incompetent and prejudicial. He testified in regard to Howard's return from Frankfort, and what took place in the court house at London. He said Howard came in, shook hands with some present, passed on to Judge Tinsley, and the judge said, "Good morning, Jim," reaching his hand, and he said, "I am glad to see you," and they greeted each other. The judge said, "Jim, I want to compliment you on what you did in Frankfort." Following the foregoing statement the witness was asked, "What did Jim Howard do?" He answered, "He nodded his head, and passed on. Howard did not open his mouth." From the testimony of Weaver,

Judge Tinsley did not mention anything which Howard had done at Frankfort. He simply said he heard of him through his son, who was a member of a military company at Frankfort. The employment of the word "compliment" would indicate that Tinsley desired to commend him for some act. If Howard had accommodated the son of Judge Tinsley while at Frankfort, he never would have thanked him by saying that he desired to compliment him for what he had done. There is nothing proven in this record to show that Howard did anything at Frankfort worthy of mention unless the testimony tends to connect him with the assassination of Goebel. It is true, the witness says that Howard said nothing, simply nodded his head. The nod did not indicate that he was adverse to receiving words of compliment from Judge Tinsley, but, on the contrary, it would imply that he was willing to accept the compliment which the judge gave him for what he did at Frankfort. It is but just to Judge Tinsley to say that he denies he used the language imputed to him by the witness Weaver; but, in my opinion, the jury should be allowed to determine what, if any, weight should be given to this testimony. If Howard had failed to nod his head, then I would say that the testimony was incompetent.

While I think the instruction on the subject of the effect to be given the testimony of accomplices could have been somewhat improved by a little change in its phraseology, yet, for the reasons which are given in the dissenting opinion this day delivered in the case of *Powers v. Com.*, 61 S. W. 735, I do not think it was misleading to the jury.

There is another question in the case that has given me some concern, and that is the objectionable remarks made by Mr. Williams, in his closing argument to the jury, with reference to the opinion of the commonwealth's attorney, Mr. Franklin, as to the guilt of the accused, and the penalty which should be inflicted upon him. Whatever the opinion of the court may be, or my individual opinion, as to the guilt of the accused, he is entitled to have a fair trial, and, as I cannot determine with reasonable certainty as to what might have been the effect of the remarks on the mind of the jury, I do not dissent from the conclusion of the court that the defendant is entitled to a new trial.

STACKER v. LOUISVILLE & N. R. CO.

(Supreme Court of Tennessee. Feb. 16, 1901.)

RAILROADS—NEGLIGENCE—CHILDREN—TURN-TABLES—EVIDENCE—APPEAL—EXCEPTION—ASSIGNMENTS OF ERROR.

1. Where, on appeal, the pages of the record on which testimony rejected by the trial court and exceptions to the rejections are to be found are not given, assignments of error on such rulings cannot be considered.

2. Assignments of error on the court's refusal to allow witnesses to answer cannot be consid-

ered where it does not appear what the witnesses would have stated.

3. Where no exceptions were taken to the admission of testimony, assignments of error based on such admission cannot be considered.

4. Refusal of an instruction is immaterial where the court correctly charged on the feature of the case to which the instruction related.

5. A boy of 12 was injured by his foot being caught in a railroad turntable, and he testified that he was called by an employé of the road to the turntable to assist in revolving it, and he was corroborated by two boys who were with him. Three or four employés testified that the boys were not called, and that, if they were there, they were so concealed as not to be seen. There was evidence the boys had often been warned by employés to keep away from the turntable. *Held*, that a verdict for defendant was supported by the evidence.

Appeal from circuit court, Montgomery county; W. M. Brandon, Special Judge.

Action by George Stacker against the Louisville & Nashville Railroad Company. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

Fort & Scales, for appellant. Luch & Savage, for respondent.

WILKES, J. This is an action for damages for personal injuries. It was brought by an infant, through his next friend. There was a trial before a jury in the court below, and verdict and judgment for the defendant, and plaintiff has appealed and assigned errors.

The second, third, fourth, and fifth assignments are to the refusal of the court to allow a certain line of testimony, to show the habit and custom of the defendant, and the general conduct of the employés of the road towards children, and their conduct towards plaintiff on previous occasions. The pages of the record where this evidence is to be found, and exceptions made to the ruling of the court thereon, are not given, so that the assignment does not comply with the rules. Looking to the record, however, we find several instances where such evidence was given and disallowed, but in none of the instances does it appear what the witness would have stated if allowed to answer the questions. It is true that counsel, in making his exceptions, said that he expected the witness to state further facts, but whether the witness would have met these expectations of counsel does not appear. These assignments, therefore, for both reasons stated, cannot be considered. But, in addition, it appears that plaintiff, George Stacker, was allowed to prove that he had been often called upon to help turn the engine by the employés of the road, so that this testimony, though incompetent, did get into the record.

It is said that the court erred in allowing third persons to state what the boy's mother said to him soon after he was hurt,—to the effect that she had warned him to keep away from the turntable, and that he was hard-headed. The pages where this testimony is to be found are not given, but in examining the record we find that two or more wit-

nesses were asked as to the statements made by the mother; but no exceptions were made to the question or answer, so far as we can see from the record, and for these reasons this assignment is not well made.

It is said the court erred in not charging the jury that a minor is only chargeable with negligence to a degree equal to his capacity for discerning danger. It does not appear that the trial judge was asked to charge this language. He did charge upon the feature of the case presented by this request, and, as we think, correctly, and there is no error in this assignment.

It is said there is no evidence to support the verdict. The plaintiff was a boy about 12 years of age. His foot was caught at a turntable and slightly injured. His version is that he was called by the employes of the road to come to the turntable and assist in pushing the engine around. In this he is corroborated by two other boys about his age, and who, it appears, were with him. On the contrary, three of the company's employes, who were present and handling the engine, state that they did not see the boys there; that they were not called or invited to come to the turntable, and, if they were there, they were so concealed as not to be seen. It appears from the proof that these and other boys had often been warned away from this turntable by employes of the road, and told that it was dangerous; and the evidence tends to show that they kept themselves out of sight of the employes on this occasion, and were not seen until the accident occurred. There were two theories of the case presented to the jury,—one, that the boys were invited or told to come to the engine, and help to push it, by the railroad employes, and plaintiff was hurt while so doing; and the other is that the boys were often warned to stay away from the turntable, and were present on this occasion without the knowledge of the railroad employes. Both theories were supported by some evidence. The jury has given credit to that of the road, and there is evidence to sustain it; and the judgment of the court below is affirmed, with costs.

PAYNE v. PAYNE.

(Supreme Court of Tennessee. March 9, 1901.)

DIVORCE—DEFENDANT'S PROPERTY—ATTACHMENT—ACTION—DISMISSAL—ATTORNEY'S FEES—LIEN—PETITION—MAINTENANCE.

Plaintiff filed a bill for divorce, and defendant's property was attached by order of the chancellor. Subsequently plaintiff dismissed the action, and her attorneys filed a motion to be allowed a lien on the attached property for their fees, which was denied, and six months after the dismissal the attorneys filed a petition in the divorce suit setting up a lien on the attached property. *Held*, that there could be no recovery under such a petition, but an original bill must be filed.

Appeal from chancery court, Trousdale county; J. S. Gribble, Chancellor.

Action by Maggie Payne against Richard B. Payne for a divorce. From a decree of the court of chancery appeals reversing an order refusing a petition by plaintiff's attorneys for a lien for their fees on property attached in the divorce proceedings, defendant and the attorneys both appeal. Reversed.

Dismukes & Foust and McMurray & McMurray, for complainant. James T. Miller, for defendant.

WILKES, J. This is an attempt to have declared and enforced an attorney's lien upon the complainant's right of action in a suit for divorce and alimony. The attorneys assume to come into the original divorce case by a petition to have their right to a lien declared under the provisions of Acts 1899, c. 243. The original bill sought divorce upon the ground of adultery, and attached certain real and personal property belonging to the husband. In the fiat of the chancellor granting the attachment he directed that the exempt personal property attached should be turned over to the wife, to be used and controlled by her for the support and maintenance of herself and her children, until the further orders of the court. In addition to this, personal property (land) of the value of \$4,000 was attached as the property of the husband, and some other personal property was seized besides that which was exempt; the whole amounting to about \$1,000. The property was attached under the fiat of the chancellor on the 7th of December, 1899. On the 13th of that month the complainant, by written order before the clerk, directed the suit to be dismissed and withdrawn. When court convened, and on the 16th of January, 1900, complainant, by different attorneys, procured an order for the withdrawal of the exhibits to her original bill. The attorneys originally representing her then applied to the court to be made parties, and allowed to resist her application to dismiss the suit, claiming a lien on the property attached for their reasonable fees. The chancellor dismissed the divorce proceeding, and held that the attorneys who filed the original bill were not entitled to any lien. A bill of exceptions was taken by the attorneys, and they prayed an appeal, which the chancellor denied them. About six months thereafter the original attorneys filed a petition in which they alleged the filing of the bill and the subsequent steps taken in the case, and asked for a reference to ascertain their fees, and to have the same declared a lien upon the attached property, and that it be sold to pay whatever amount they might be adjudged entitled to receive. This petition was filed against the husband and wife, and was answered by the husband, who set up the fact that the suit of the wife for divorce was dismissed by her, and he denied that the attorneys acquired any lien upon the attach-

ed property. Upon the case as thus presented the chancellor dismissed the petition, with costs, and the petitioners appealed. In the court of chancery appeals the case was treated as though the exempt property ordered by the chancellor to be turned over to the wife was alone involved, and after an elaborate discussion that court was of opinion that the petitioners had a lien upon the property, not under the act of 1899, but upon the theory that the property had been attached and impounded by the attorneys, and could not be released to their prejudice, basing their holdings upon the rulings of this court in *Pleasants v. Kortrecht*, 5 Helsk. 694, *Hunt v. McClanahan*, 1 Helsk. 503, and *Covington v. Bass*, 88 Tenn. 496, 12 S. W. 1033. That court was of opinion, however, that this would not prevent the wife from dismissing her suit, if she saw proper so to do, over the protest of the attorneys, as to the divorce. That court, was, however, of opinion it could grant petitioners no relief, since they had not attached or impounded the property upon which they claimed and sought to enforce their lien, and it remanded the case to the court below that an amended petition might be filed attaching the property, if it was still in the possession of the husband or wife, so that the court would have the jurisdiction and power to enforce the lien. Both parties have appealed to this court.

This court is of opinion that, in the shape we find this record, the petitioners can have no relief. Whether the chancellor should have granted them an appeal when they first attempted to assert their lien by motion and it was refused, we are not called upon to decide, as it is not now involved. But the petition in this case was not filed until six months after the case itself had been dismissed, and the costs adjudged, by a decree final in its form and effect. In order to have obtained relief, if entitled to it at all,—which we do not by any means concede,—it would have been necessary to file an original bill, and impounded or in some way seized upon the property upon which the lien was claimed. It could not be done by a petition in a case already dismissed, and when there was no seizure of the property, even by assent of the chancellor below. We are of opinion, therefore, that the court of chancery appeals is in error, and that no relief can be granted the petitioners in this proceeding in any event. The decree of that court is reversed, and the cause dismissed. The petitioners will pay costs of appeal.

NICHOLS v. CECIL

(Supreme Court of Tennessee. Feb. 16, 1901.)
CONTRACT—BREACH—ACTIONS—FINDINGS—
SUFFICIENCY—PLEADING—ANSWER—AP-
PEAL—PRESUMPTIONS—REVERSAL.

1. Where an action is brought for breach of a contract alleged in the bill, and the answer ad-

mits the contract, but alleges additional conditions, which are denied, the answer is not a pleading by way of confession and avoidance, which will dispense with proof of the contract as alleged in the bill.

2. Where the terms of a contract for the sale of grain are not admitted in the pleading in an action for its breach by the delivery of grain of an inferior quality, and the evidence is not in the record, and there is no finding as to the terms of the contract, a finding that the complainant accepted the grain as per contract is not a finding as to the nature of the contract which will warrant a recovery for a defect in quality after discovery, on the theory that the contract contains a warranty which is not terminated by the acceptance of the grain.

3. Where there is no finding by the jury, in a suit for breach of a contract, as to the terms thereof, and the evidence is not in the record, it will not be presumed that the evidence was sufficient to warrant the chancellor in finding the terms of the contract, since questions not determined by the jury are triable de novo on appeal.

4. Where the evidence is not in the record on appeal, the appellate court will presume that it was sufficient to support the findings of the jury.

5. Where the jury makes no findings as to the nature of a contract, and the evidence is not in the record, findings that there has been a breach thereof are not sufficient to support a judgment for plaintiff.

Appeal from chancery court, Maury county; A. J. Abernathy, Chancellor.

Suit by S. B. Nichols against Lloyd Cecil to recover damages for a breach of a warranty. A decision of the court of chancery appeals reversing a decree in favor of the complainant was affirmed on appeal. On rehearing, reversed and remanded.

W. B. Gordon and G. T. Hughes, for appellant. E. H. Hatcher and Figures & Padgett, for appellee.

McALISTER, J. The object of this bill is to recover damages for the alleged breach of a warranty in the sale of wheat. The bill alleges that about August 25, 1897, complainant and defendant entered into a contract, whereby it was agreed that defendant would sell and deliver at once, free on board cars at Ashwood, Tenn., 6,000 bushels of No. 2 wheat, and upon delivery thereof complainant should pay defendant the sum of one dollar per bushel for such wheat; the defendant warranting that said wheat should be No. 2 wheat. Soon after the contract was made, defendant notified complainant that he had delivered the wheat on board the cars at Ashwood, whereupon complainant paid defendant for the entire quantity, about 6,000 bushels, according to contract, relying upon the defendant's statement and warranty that said wheat was No. 2 wheat, which is the highest grade known to the trade. Complainant did not examine and inspect said wheat so delivered at Ashwood, nor did he see it at all, but relied upon the warranty. It is then alleged that complainant shipped 2,730 bushels of this wheat to a purchaser at Nashville, representing it to be No. 2 wheat; but the wheat was rejected, and graded only as No. 4 wheat. Complainant thereupon gave defendant notice

that the wheat was not up to the warranty, and was held subject to his order; but defendant refused to receive the wheat, or refund the money, whereupon complainant sold it at a loss of \$543.70, and to recover this amount brings this bill. Defendant, in his answer, admits he sold the wheat to complainant as No. 2 wheat, and that the same was to be delivered f. o. b. the cars at Ashwood, Tenn. Defendant further avers that he did say to complainant that he would make the wheat delivered at Ashwood No. 2 wheat if the same was not up to grade when delivered. Defendant avers that his agreement with complainant was that it should be made No. 2 wheat at the place of delivery and acceptance, namely, at Ashwood; but he did not undertake, nor would he have contracted with complainant, that said wheat would grade No. 2 wheat at the Liberty Mills, in Nashville, or any other market, in view of the uncertainty and fluctuations of the market at that time. Defendant further avers that he delivered the wheat at Ashwood according to contract; that it was No. 2 wheat, and, if it was not up to grade, it was complainant's duty to inspect and reject it; and that, having accepted it, he could not ship it to another market, and, it being rejected, then throw it back upon defendant. There is a general denial of all the allegations of the bill not specifically denied. Complainant filed an amended bill, in which he alleged that he purchased this wheat of defendant for speculation, to be shipped to Nashville and other markets, and that this fact was well known to defendant. Defendant answered the amended bill, stating that he supposed complainant did buy this wheat for speculation, and that he would ship the wheat away from Ashwood for sale. But defendant repeats that under the contract the wheat was to be received, inspected, accepted, or rejected at Ashwood, the place of delivery; and if the wheat, upon inspection at Ashwood, had not come up to the grade of No. 2 wheat, defendant could at little expense have caused said wheat to be refanned, etc. This is a condensed statement of the case as made in the pleadings. Defendant demanded a jury, to whom formal issues were submitted under the direction of the chancellor, together with the evidence produced on the trial. The material issues submitted, together with the findings of the jury, are, viz.: "First. Was any portion of the wheat delivered by the defendant to complainant at Ashwood, under his contract, inferior to No. 2 wheat? Answer. There was. Second. How much wheat was inferior to No. 2? Answer. 2,691 bushels." "Ninth. Did not complainant receive and accept the wheat at Ashwood, the place of delivery? Answer. Yes, as per contract. Tenth. What amount of damage did complainant sustain by reason of the delivery of inferior wheat to him by defendant? Answer. Three hundred and twenty-two dollars and ninety-two

cents." The chancellor, upon the verdict of the jury, pronounced a decree in favor of complainant for \$322.92. Defendant appealed. The court of chancery appeals reversed the decree of the chancellor, and dismissed the bill. Complainant appealed to this court, and has assigned errors. At the last term of this court the decree of the court of chancery appeals dismissing the bill was affirmed. A rehearing, however, was granted, and the case has been reargued at the present term.

It is to be remarked, in the first place, that none of the evidence heard by the chancellor was preserved by bill of exceptions, but only the pleadings, the findings of the jury, and the decree of the chancellor are embodied therein. The cardinal and fundamental question arising upon the record is, what was the contract between the parties? The court of chancery appeals correctly states that "It becomes apparent that none of the charges of the bill can be taken as true unless admitted in the answer, or sustained by the findings of the jury; and it is equally true that no affirmative statement in the answer which it would be necessary for the defendant to prove can be taken as true unless sustained by one of the findings of the jury." But that court undertakes from the pleadings to find the contract between the parties, concluding, viz.: "We therefore find [from the pleadings] that the parties agreed that wheat to the amount of five thousand five hundred bushels, which should be No. 2 wheat, was to be sold and delivered by the defendant to the complainant f. o. b. cars at Ashwood, Maury county, for which defendant was to be paid one dollar per bushel. To this extent," says that court, "the parties are agreed, but no further, on this phase of the case." This court is of opinion that the contract between these parties cannot be determined from the pleadings, for the following reasons: The bill alleges that defendant sold complainant No. 2 wheat, to be delivered on board the cars at Ashwood, warranting that it should be No. 2 wheat, the highest grade on the market. It is further alleged that at the time said contract was made the defendant said that, if it was not No. 2 wheat, he would make it No. 2 wheat. Respondent admits that he sold to complainant said wheat as No. 2 wheat, and that the same was to be delivered by him at Ashwood, f. o. b. cars. "And respondent further says that he did say to the complainant that he would make the wheat delivered by him at Ashwood No. 2 wheat if the same was not No. 2 when delivered; or, in other words, his agreement was that, if any of the wheat sold by him, which was to be delivered by him and received by complainant at Ashwood, was not No. 2 wheat, he agreed that it should be made No. 2 at the place of delivery and acceptance." It will be observed that both complainant and defendant agreed that Ashwood was the place of delivery, and that the wheat was warranted to be No. 2 wheat. It is also agreed that the wheat was accepted

by complainant at Ashwood, and the purchase price paid in full. But at this point defendant, in his answer, introduces a new term, which he avers was a part of the contract, namely, that the wheat was to be accepted or rejected at the place of delivery, to wit, Ashwood. The answer admits the contract alleged in the bill, but avers that it contained other and additional terms or provisions, which are not therein stated, but which are material and fundamental. Counsel for complainant, in support of the contention that the contract alleged in the bill is admitted by the answer, cites *Gib. Suit Ch. § 460, p. 415, viz*: "When the answer sets up matter in avoidance, it is not evidence for the defendant, because he is not a witness, except in so far as he is required to answer. When, therefore, he sets forth in his answer matter in avoidance, or other matter not referred to in the bill, to that extent his answer is not responsive, and therefore not a deposition, but a mere pleading. Hence matters in avoidance set up in an answer must be proved by the defendant, and, if he fails to prove them, the complainant will be entitled to a decree." It is insisted, however, by counsel for defendant, that when complainant states in his bill a contract in certain terms, and the defendant, in his answer, admits the existence of those terms, but alleges that the contract contained other terms and conditions not mentioned in the bill, this is a denial of the contract alleged, and is not a defense by way of confession and avoidance, which admits the contract as charged, but seeks to avoid it by extraneous matter. We are constrained to hold this contention sound, and that the matter in defense is not in confession and avoidance. Every pleading by way of confession and avoidance in reference to its subject-matter goes either in discharge of the cause of action or in justification or excuse, which denies that there ever was any. 1 *Chit. Pl.* (16th Am. Ed.) 551. A plea in discharge is one which admits that the plaintiff had a cause of action, and tends to show that it was discharged by some subsequent or collateral matter. *Tidd, Prac.* (4th Am. Ed.) 642-645. An illustration of the plea in discharge would be that before action the defendant had satisfied and discharged the plaintiff's claim by payment. A plea in justification or excuse admits the facts alleged by the plaintiff, but in effect denies that the plaintiff had at any time a good cause of action, either because the conduct of the defendant is justified in law under some legal right, or because he is excused from liability in the particular case through some act or conduct of the plaintiff. This is also called an avoidance in law. *Id.* 641; 4 *Enc. Pl. & Prac.* p. 606. It will be observed that under the plea of confession and avoidance, whether the matter relied on is in discharge of the original cause of action or a justification for nonperformance, the matter pleaded is subsequent or collateral to the main undertaking. Therefore it is obvious

that the averment in this answer of additional terms and stipulations as part of the original contract is not, under any rule of pleading, matter in confession and avoidance, but is the averment of a new and substantive contract. The answer in this case is responsive to the bill, and hence complainant is not entitled to use the admissions of the defendant's answer to charge him without giving him at the same time the benefit of the matters of discharge with which the admissions are coupled. *Beech v. Haynes*, 1 *Tenn. Ch.* 569. We cannot, therefore, upon the pleadings, determine the contract between the parties.

The next inquiry is whether the contract is established by the findings of the jury. No issue was submitted to the jury on the terms of the contract, and hence there is no finding upon this subject. The most vital question in the case was thus wholly ignored, and other issues propounded and answered, which are not determinative of the litigation. The court of chancery appeals was of opinion that the ninth issue and finding were conclusive of the case in favor of the defendant. That issue was as follows: "Did not complainant receive and accept the wheat at Ashwood, the place of delivery? Answer. Yes, as per contract." Counsel for the respective parties differ widely in their interpretation of this finding of the jury. On behalf of defendant it is insisted that this answer and finding of the jury is conclusive of the question that there was no warranty of the wheat beyond its acceptance at Ashwood, while, on the other hand, complainant's counsel maintain that it means nothing more than that the wheat was accepted and paid for under the warranty. While we must presume there was ample evidence to sustain the finding of the jury, the question still remains whether the verdict of the jury supports the contention of complainant or defendant. We have no means of determining this question in the absence of proof of the contract. This court cannot presume there was sufficient evidence before the chancellor to warrant him in finding the contract, for the reason that that question, not having been found by the jury, would be triable de novo in this court, and the record contains no evidence establishing the contract. As to all issues submitted to the jury this court would presume, in the absence of a bill of exceptions preserving the evidence, that the findings of the jury were well sustained. But this court cannot correctly interpret the findings of the jury without being advised as to the contract. This is the beginning corner of any investigation of the rights of the parties, and, no matter what else appears, if there is no contract shown or found by the jury, this court cannot undertake to pronounce a decree for breach of contract. This case has been presented to this court by counsel as if the contract were in some way shown; but its terms are not even agreed on in argument. In this anomalous state of the record the court thinks it would be inequi-

table to pronounce a decree in favor of either party, but that the cause should be remanded, in order that proper issues may be formulated and submitted to the jury for the ascertainment of the contract. The costs of the appeal will be equally divided.

LOUISVILLE & N. R. CO. v. JACKSON.

(Supreme Court of Tennessee, Feb. 16, 1901.)

MASTER AND SERVANT—RAILROADS—ACCIDENT IN COUPLING CARS—FELLOW SERVANTS—CONDUCTOR—STATION AGENT—NEGLECT—CARE OF SIDE TRACKS.

1. The conductor of a freight train, who also assists in switching cars at stations, is not a fellow servant of a station agent, so as to be prevented from recovering for injuries caused by the negligence of the agent in leaving a "pinch bar" lying on the track.

2. Plaintiff was conductor of defendant's freight train, and while coupling cars slipped on an iron bar lying between the rails, and had his foot crushed by the wheels. It was a rule of the company that this bar should not be left on the track, and it was the station agent's duty to see that the switches and tracks were kept in safe condition. The bar was used to move cars when they were being loaded while there was no engine at the station, and had been used for that purpose, to the agent's knowledge, before the arrival of the train, and since he had inspected the tracks. *Held* sufficient to support a verdict for the plaintiff on the ground that the station agent was negligent.

Appeal from circuit court, Dickson county; A. H. Munford, Judge.

Action by Milton Jackson against the Louisville & Nashville Railroad Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

H. & J. Leech, H. J. Bowers, and Frank Slemmons, for appellant. Leech & Savage, for appellee.

WILKES, J. This is an action for damages for personal injuries. There was a trial before the court and jury, and a verdict and judgment for \$1,900.00, and the railroad has appealed and assigned errors.

The case, as presented by the plaintiff in his declaration, is that he was a conductor of a freight train on the road of the defendant company, and that on reaching Slayden station it became necessary to take into the train a car at that station. Not having a full crew of train hands because of the desire of the company to operate the road as economically as possible, it was necessary for him to sometimes do the work of a brakeman. On this occasion he had only two brakemen, and while he was coupling and uncoupling some cars, and when he was between them for this purpose, he stepped on a pinch bar, or round piece of iron, that had been negligently left on the track between the rails. This caused his foot to turn, and threw him between the moving cars, which ran over his foot, and crushed it so as to require its amputation. This pinch bar was used to move cars on the side

track at the station when there was no engine there for the purpose. The allegation was that it was the duty of the station agent to keep the tracks clear on the station grounds, and that he failed to perform this duty, but negligently left it where it caused the accident. The contention is that this plaintiff and the station agent were not fellow servants, but were engaged in distinct and separate departments. It appeared from the proof that the conductor was required to do not only the duties appertaining to his place, but also some of those which are ordinarily done by brakemen, and this because of a scarcity of train hands. One of the rules of the company was that station agents should have charge of, and be responsible for, the company's books, papers, buildings, sidings, and grounds at their respective stations, and should be responsible for the property intrusted by the company in the transaction of its business to them, and should inspect the station buildings and grounds daily, and see that they are in proper condition for the accommodation of passengers and the reception of freight, etc. This rule, the plaintiff insists, put upon the agent at that station the duty to see that this iron bar, which was used to move cars on the tracks in the depot yard in the absence of an engine, was kept off the tracks when not in use, and the nonperformance of that duty was negligence upon his part, which, having caused the plaintiff's injury, the master (in this case the defendant company) is liable. The basic idea of the plaintiff's pleading, and which was accepted by the court, as manifested in its charge and refusals to charge, was that the plaintiff and the station agent were not "fellow servants, but were in distinct, separate, and different departments of service; had no association in their employment; plaintiff having no relation to or connection with said agent save to go to the station, and take therefrom such cars as he might order, and to do such switching or moving of cars in the yard as he might order done." The court charged the jury as follows: "The rule that an employé cannot recover for injuries caused by the negligence of a fellow servant applies where the parties are engaged in one common work in the same department of employment; but where the employment is for separate and distinct purposes, although employed by the same person or railroad company, they would not, in the contemplation of law, be fellow-servants. As an illustration: If one person is employed to operate and run a train of cars, and the other to look after the company's property at a station, keep the yards and tracks clear of obstructions, and receive and forward freight, these positions would not be the same of character and class of responsibilities as would render them fellow servants to that extent that the one assumes the ordinary risk of the negligence of the other,"

—and declined to charge several requests, which, in different form, presented the theory that the plaintiff and station agent should be treated as fellow servants, so that the master would not be liable to either for the negligence of the other; and this presents the only real matter of controversy in this case. We are cited to quite a number of cases from the United States, which can be of little service to us in this case, as the decisions of these courts are not in accord with our own upon the general doctrine of fellow servants and employes in different departments. Such are the cases of *Railroad Co. v. Peterson*, 162 U. S. 346, 16 Sup. Ct. 943, 40 L. Ed. 944; *Railroad Co. v. Conroy*, 175 U. S. 323, 20 Sup. Ct. 85, 44 L. Ed. 181; *Randall v. Railroad Co.*, 109 U. S. 478, 3 Sup. Ct. 322, 27 L. Ed. 1003; *Toner v. Railway Co.*, 69 Wis. 188, 31 N. W. 104, 33 N. W. 433; *Hodgkins v. Railroad Co.*, 119 Mass. 419. We are also cited to the case of *Railroad Co. v. Gurley*, 12 Lea, 46. It was this: Gurley was an engineer on the road, pulling a train from Knoxville to Chattanooga, and in his run had to pass Cleveland. The rules of the company required the yard master at Cleveland to inspect the switches 10 minutes before the arrival of each train. On this occasion the yard master had not inspected the switches for two hours before the arrival of Gurley's train, and one of them—a split switch—had gotten disarranged, so that when Gurley's train arrived it was thrown on a side track, where it came into collision with some cars, and thus caused the injuries to the engineer from which he died. The court held, on this state of facts, that the yard master and Gurley, for the purpose of bringing the train safely into the station, were fellow servants. Page 56. The trial judge charged the jury that the engineer and yard master were fellow servants, and no exception was made to the charge; but it does not appear that the decision of this case rested upon that question or feature in the case. We are also cited to the case of *Railroad Co. v. Rush*, 15 Lea, 145. In that case the train to whose crew Rush belonged arrived at a station in the nighttime, and had to wait for a passenger train to pass. Rush was sent out on the railroad in the direction from which the passenger train was to come for the purpose of signaling to the engineer that he might know a freight train was waiting for him to pass. He put his lamp down on the track, sat down on the end of the cross-ties, and went to sleep. The incoming engineer, it being dark, ran against him, and injured him, and Rush sued the company. The court said: "For another reason the statute ought not to apply. We have held, and his honor, the trial judge, charged the jury in this case, that an employé of a railroad company, as between him and his employer, undertakes to run all the ordinary risks of the service, and this includes the risk of inju-

ries from the negligence of his fellow servants. *Railway Co. v. Handman*, 13 Lea, 423. Our decisions, as shown by the citations in that case, are that several servants, although of different grades, when employed in a common service,—as an engineer and fireman on a locomotive, or foreman of a job and a common laborer working on a job, an engineer and assistant fireman,—are fellow servants. And in *Railroad Co. v. Wheless*, 10 Lea, 741, it was held that the engineer is not the superior; but the fellow servant, of the brakeman, as members of the crew of a railroad train. And in *Railroad Co. v. Gurley*, 12 Lea, 46, it was taken for granted that the engineer of a passenger train and the yard master of a depot, whose duty it was to turn the switch by which the train was to take the proper rails to reach its stopping place at the depot, were fellow servants to that end. Precisely for the same reason the engineer of such a train and the servant employed to swing a danger signal to guide the action of the engineer in coming into the depot are fellow servants." The argument is: If the yard master in the *Gurley* case and the engineer pulling a train are fellow servants for the purpose of bringing the train safely into the depot yard, and if the brakeman of a freight train sent out to signal an incoming passenger train and the engineer on the latter are fellow servants, why are the station agent in this case, who oversees the yard and tracks, and the conductor coming into the yard with his train after freight, not fellow servants? We are of opinion that the conductor and station agent cannot be considered fellow servants. Their departments are entirely distinct and separate. The duty of one—the conductor—pertains to the physical moving of trains, and in this case also the coupling and uncoupling of cars when necessary. The station agent's duties did not extend to this, but only to the care of the station buildings and grounds, and the transmission to the conductor of such orders as might be sent over the wires for the movement of trains. While, in a certain sense, both were concerned in the moving of trains, the duty of the one was confined to the physical exertion and personal oversight necessary to move the train, while the other's duties pertained alone to the transmission of any orders or directions that may have been intended for the guidance of the conductor; but the agent was not to execute such orders, or aid in executing them. But in transmitting these orders he was really acting as telegraph operator, and this court has held that such operator is not a fellow servant with the conductor. *Railroad Co. v. De Armond*, 86 Tenn. 73, 5 S. W. 600.

The court was requested to charge as follows: "If you find from the evidence in the case that plaintiff was in the employ of the defendant as conductor, and that a part of his duties was to couple and uncouple cars.

and to assist in such duties, and that while so employed, and while coupling cars at Slayden, he slipped and fell on a pinch bar lying between the rails of the side track; and you further find that said bar was the property of the railroad company left in charge of the station agent at Slayden, whose duty it was to look after the depot, grounds, and tracks; and you further find that this pinch bar was used by parties loading cars on the side tracks, and for pushing cars to convenient places for loading, and that some parties, not known, left this bar on the side track between the rails, and that just before the arrival of the train on which plaintiff was a conductor the station agent inspected the track, and there were no apparent defects or obstructions on the track,—then the defendant is not liable.” The court gave this charge, with the addition of the following: “But if you find, on the other hand, that the defendant’s agent knew that persons were loading and unloading cars at this station before the arrival of the train, and that this company’s agents did not investigate to see if the track was clear of obstructions, then the company would be liable.” The defendant company now assigns error on this action of the court; that the request should not have been qualified; and in the same connection it is said there is no evidence to support the verdict. It will be seen that the question presented by this request is independent of the question of fellow servant, and the point made is that the duty of the master is not absolute, but relative only, and that only reasonable care could be exacted of the station agent, and that reasonable care was exercised in this instance. It is a matter of doubt as to who left this bar on the track. The station agent, Batson, says that the bar was used by persons having cars to load for the purpose of pushing them along the track; that he gave instructions that it must be kept off the track; and he had never seen it on the tracks but two or three times, and then he laid it off, or had it done; that he examined the yards in the morning, just before the train came in, and saw nothing on the tracks,—neither the bar nor any other obstruction. Nelson, the agent of Batson, says: “I was clerking in Mr. Batson’s store, and assisted as depot agent at the time of the accident. Was at the station that day. I had had the crowbar that morning, using it in moving some cars about two hours before the train arrived. I left it on the track when I got done with it; perhaps on the rail; am not certain. The accident occurred about a hundred and fifty yards north of where I left the crowbar. Other people may have used the bar that morning. There were others working there loading staves.” Further on this witness says that he let the Hays boys have the pinch bar that morning to use in moving cars, but does not know whether it was before or after he used it.

It clearly appears from other evidence that it was afterwards. The instructions of the court, applied to the facts of the case, made it incumbent on the agent to see whether shippers who had been moving the cars in the yards had left the bar on the track or removed it, and the question is, was this too great a degree of diligence to be required of the master? We think that it was not error in the court to give the additional instruction. The agent must have expected these shippers to use the bar, and he might reasonably presume they would leave it where they used it, and it is not shown that the agent gave any caution against leaving it. It was a very dangerous thing to have, especially if left on the rail, and would in all probability have derailed any car that struck it. It was not so dangerous left between the rails, and yet even there it was not free from danger, as is shown by the result in this case. It is described as a short iron bar, and would not appear to be dangerous if merely left upon the ground, no more so than a round pebble or any other small impediment over which a man might stumble, or his foot slip or turn. But the evidence of the agent himself shows that it was forbidden to be left on the tracks, so that it was evidently regarded by the company as an impediment dangerous to be left upon it. We think that, treating it in this light, as a thing dangerous to be left on the track, the company had not exercised that care that was required of it. The agent had, it is true, examined the track on the morning of the accident; but after that the Hays boys had been engaged in moving cars, and the agent should have examined to see whether they had left the bar exposed on the track. We think, upon the evidence of the station agent himself, that he did not exercise that care that was necessary, and required of him, and that he knew that it was his duty to observe. We therefore see no reversible error in the record, and the judgment of the court below is affirmed, with costs.

MAURY NAT. BANK v. McADAMS et al.
(Supreme Court of Tennessee. Feb. 2, 1901.)
CREDITORS’ BILL—BURDEN OF PROOF—CHANCERY APPEALS—FINDINGS—REVIEW.

1. Where a judgment creditor filed a bill to reach notes belonging to his debtor, which was amended to make a transferee of the notes a party, alleging that they were transferred to such person subsequent to the filing of the original bill to hinder and defraud complainant in the collection of its judgment, and defendants denied such averments, the burden of proof was on complainant.

2. Findings of the court of chancery appeals on questions of fact will not be reviewed by the supreme court on appeal.

Appeal from chancery court, Marshall county; Walter S. Bearden, Chancellor.

Bill by the Maury National Bank against

one McAdams and others. From a decree of the court of chancery appeals affirming a decree dismissing the bill, complainant appeals. Affirmed.

Geo. T. Hughes and W. W. Walker, for appellant. Marshall & Armstrong, for appellee.

BEARD, J. The complainant is a judgment creditor of the defendant McAdams, with a return of nulla bona upon the execution issued from this judgment. The original bill was filed to reach certain promissory notes alleged to be the property of the judgment debtor. He and the makers of these notes were made defendants to the bill. All the defendants answered. McAdams, in his answer, stated he was at one time the owner of the several notes described, but alleged that before the filing of the bill he had sold and transferred them to one Davis. In their answer his co-defendants admitted their liability in whole or in part as claimed by the complainant, but averred on information that Davis was claiming ownership by a transfer prior in time to the institution of this suit. Thereupon complainant filed an amended bill, in which it is alleged that "one Davis * * * is making claim to the said notes * * * which belong to said * * * McAdams, and were held by him at the time of the filing of the original bill." Complainant then averred "that, if the said notes were transferred to the said * * * Davis by the said * * * McAdams, it was soon after the filing of complainant's bill; that the transfer was a device of the parties for the purpose of hindering, delaying, and defrauding complainant in the collection of its judgment." McAdams and Davis answered this amended bill, and denied that the transfer was made after the filing of the original bill. They also denied that the transfer was a fraudulent device, as charged by complainant, but, on the contrary, alleged that it was made in good faith, and for value. The chancellor dismissed the bills of complainant save in one particular, not now in question, and the court of chancery appeals has affirmed that decree.

The present appeal involves a question of chancery practice, arising upon the issue made by the bill as amended and the answer thereto. The court of chancery appeals held that upon this issue the burden rested upon complainant to maintain the averments of its bill that go to impeach the title of Davis to the notes in controversy, and that the necessary result of its failure to carry this burden was a decree of dismissal, as already stated. It is now insisted that there was error in this holding. It is conceded by complainant that the general rule is that where one comes into chancery he must make good by evidence the averments of his bill on which he seeks recovery, and that where he calls in question a transaction for fraud he

cannot content himself with the suggestion that the defendant has failed to show bona fides, but he is bound to furnish satisfactory evidence of the fraud alleged. But it is contended that it is otherwise in a case like the present; that, complainant having brought Davis in by process in the nature of garnishment proceeding, an issue is made between complainant, a garnishing creditor, and Davis, the claimant of the property sought to be reached; and as such claimant on this issue the burden is on him to make good his title. In other words, to use the words of the brief of counsel for complainant, "Davis must recover on the strength of his title." The argument of the counsel is that the attitude of Davis in the case is that of an intervener or an interpleader, who comes to assert a prior and superior right to property levied upon by writs of attachment or execution issued against another, in which case he is bound to establish his claim by affirmative testimony; and that such is the rule though he be brought in involuntarily by one who seeks to impeach his title. This argument rests for authority on sections 674-676, 2 Shinn, Attachm., and the case cited in support of the text. But an examination of these sections makes it clear that the author is dealing with the statutory practice of intervention or interpleading of a claimant of property seized by attachment or execution, and not with a rule of equity practice. The cases relied upon in support of the text, where pertinent at all, arise under statutory or Code provisions. Each of these cases involve a question of practice under such provisions. All announce that, when a claimant comes in by interplea or intervention, setting up title to such property, the sole issue between him and the execution or attachment creditor is the superiority of the former's claim; that the burden of proof is on him, and he must recover on the strength of his title. No one lays down a rule of general equity practice, and they furnish no authority for the contention in the present case. This amended bill is the ordinary bill of a creditor who seeks to subject property of his debtor, which it is averred the latter and a third party are covinously undertaking to withdraw from the satisfaction of a just claim. It alleges, in substance, that the property was not transferred when the original bill was filed, or, if so, it was done fraudulently, and that in either contingency the complainant has the right to reach and appropriate it. Both these averments are denied by the answer. These denials, under a well-established rule of chancery practice, already mentioned, put the complainant to the proof. The defendants could await evidence on the issues thus made; the complainant could not. The burden was on the latter, though it involved the necessity of furnishing proof of the negative contained in the first of its alternative allegations. 1 King, Dig. p. 410.

Having failed to do this, his suit necessarily failed. As to the facts developed in evidence, we are concluded by the finding of the court of chancery appeals. This is equally true as to the inferences of fact made by that court from the facts found. We might agree with the complainant's counsel as to the evidential effect of the possession and claim of ownership of the notes in controversy by McAdams just prior to the filing of the original bill, and his conceded fraudulent purpose in disposing of these notes, coupled with the fact that the alleged fraudulent transferee has failed to testify. But this would be to no useful end. The finding of the court that there is "no evidence in the record to connect Davis with McAdams' fraud" is conclusive of the case. The decree of that court is therefore affirmed.

HAYNES et al. v. SECOND NAT. BANK OF LEBANON.

(Supreme Court of Tennessee. Feb. 9, 1901.)

INJUNCTION—RESTRAINING SUIT AT LAW—BOND—JUDGMENT.

Where a bill to enjoin a suit at law on a note is dismissed, and the injunction is dissolved on demurrer, and all defenses made against the note are adjudicated on the demurrer, a judgment against the complainant is properly entered on his injunction bond for the amount of the note, interest, and costs, though a confession of a judgment at law was not required in the fiat of the chancellor who ordered the injunction.

Appeal from chancery court, Wilson county; Walter S. Bearden, Chancellor.

Bill by John A. Haynes and another against the Second National Bank of Lebanon. From a decree in favor of defendant, complainants appealed. Modified by the court of chancery appeals, and the bank appeals. Judgment of trial court affirmed.

Cantrell & McMillan, for appellant. Tarver & Golladay, for respondents.

McALISTER, J. Complainants, John A. and John C. Haynes, filed this bill to restrain the Second National Bank of Lebanon from the prosecution of a suit before a justice of the peace for the collection of two notes, alleging usury in the discount of said notes, and alleging further that large amounts of usury had been charged complainants by said bank in other transactions, and seeking to set off said usury against the notes in suit. An amended and supplemental bill was filed, but it is not necessary now to state its allegations. A demurrer was then interposed by the defendant to both the original and amended bills, assigning for cause: First, that the usurious transactions alleged were barred by the statute of limitations of two years; second, that the measure of damages prescribed by congress for knowingly collecting usurious interest is double the excess over the legal rate of interest to be col-

lected in an action to recover the penalty, and that said penalty cannot be interposed as a defense or set-off against an action brought by the bank for the collection of the notes. The chancellor, upon argument, sustained the demurrer, and dismissed the bill. But the court, on motion of the defendant bank, pronounced a judgment against the complainants on said notes upon the ground that complainants' bill enjoined the bank against the prosecution of the suit on said notes before the justice of the peace. On appeal the court of chancery appeals affirmed the decree of the chancellor in dismissing the bill, but reversed his action in pronouncing judgment on the notes. The Second National Bank alone appealed, and has assigned as error the decree of the court of chancery appeals in refusing it a judgment on the notes.

This assignment of error is well taken. When complainants' bill was dismissed by the chancellor on the hearing of the demurrer, the bank was entitled to a judgment on the injunction bond against the complainants for the principal of the debt, interest, and costs, and against the sureties thereon for interest and costs. *Horton v. Cope*, 6 Lea, 155. There was a breach of the bond the moment the injunction was dissolved and the bill dismissed. It is insisted, however, that the chancellor who ordered the injunction should in his fiat have required a confession of judgment at law, and, since there was no such requirement, complainants are now entitled to reopen their defense at law. It would have been in accord with the established practice for the chancellor to have required a confession of judgment as a condition of granting the injunction. *Chadwell v. Jordan*, 2 Tenn. Ch. 635; *Perkins v. Woodfolk*, 8 Baxt. 414-416. Says Mr. Gibson, viz.: "A court of equity should not ordinarily grant an injunction to stay proceedings at law before judgment unless the party applying for the injunction will confess judgment in the suit at law, such judgment to be dealt with as the court granting the injunction may order. It is inequitable to allow the defendant at law to litigate the same matter in both courts, and, unless he is required to close the legal contest by confessing judgment in the suit at law, he may, after a long litigation in chancery, dismiss his bill, and then renew his defense in the court of law." *Gib. Suits Ch. § 796*, note 4. This injustice is illustrated in the present case. The injunction herein was issued November 17, 1896, and during the intervening years the bank has been restrained from prosecuting its action at law. The injunction is now dissolved, and the insistence of complainants is that, because a confession of judgment was not required in the fiat of the chancellor ordering the injunction, the bank must be remitted to the prosecution of its original action at law. This contention is not sound. There was nothing to be liti-

gated at law. The only defense sought to be interposed to the notes was in the nature of a set-off for usury charged in that and other transactions with the bank. The chancellor held on the demurrer that the claim of usury could not be set off, but must be litigated in a suit to recover the penalty, as prescribed by the act of congress. Moreover, the chancellor held that the claim for usury was barred by the statute of limitations. These questions were adjudicated by the chancellor on the demurrer, and his holdings appealed from. It is obvious that these questions cannot be reopened in the suit at law, and, since no other question was made in complainants' bill against the notes, we are unable to perceive any reason for renewing the litigation. The decree of the court of chancery appeals is reversed, and judgment will be entered here against complainants on the injunction bond for the amount of the notes, interest, and costs.

RODES et al. v. BOYERS et al.

(Supreme Court of Tennessee. Feb. 16, 1901.)
ADMINISTRATORS—APPOINTMENT—PRIORITY—
HEIRS—CREDITORS—APPLICATION—LACHES.

Under Shannon's Code, § 3939, providing that administration shall be granted to the widow in the first instance, if she applies, and, second, to the next of kin, and, third, to the largest creditor, it was error to revoke an appointment made at the instance of a creditor and to appoint an heir, where the widow or heirs had made no application for five years after the deceased's death, and gave no reason for the delay.

Appeal from circuit court, Sumner county; Lytton Taylor, Special Judge.

Action by Thomas Boyers and others against C. E. Rodes, administrator, and another. From a judgment in plaintiffs' favor, defendants appeal. Reversed.

C. E. Rodes and J. J. Turner, for appellants. J. W. Blackmore and Dismukes & Dismukes, for appellees.

WILKES, J. This is a contest over the right of priority to administer upon an estate. Thomas Boyers, Sr., died intestate in April, 1895, leaving a widow, son, and daughter. He was indebted at the time of his death to J. J. Turner, by judgment, for \$1,478.25, and this seems to have been his only debt. He left but little estate. No year's allowance, homestead, or dower was assigned, and no administrator was appointed until January, 1900, when C. E. Rodes was, at the instance of J. J. Turner, the creditor, appointed and qualified. Thereupon the son, daughter, and her husband filed a petition in the county court to remove Rodes, and to have the son, Thomas Boyers, Jr., appointed in his stead; the widow having died in the meantime. The petition stated that there was but little personal estate, and that the administration

had been imprudently granted and illegally issued to Rodes, and that, while Turner was a creditor, Rodes was not. Thereupon J. J. Turner made application and was joined with Rodes, and gave bond, and took out letters. Upon hearing in the county court the letters granted to Rodes and Turner were revoked and canceled, and Thomas Boyers, Jr., was appointed in their stead. Rodes and Turner appealed to the circuit court. In the meantime Turner had filed a bill in chancery to sell certain lots belonging to the estate for satisfaction of his debts. On hearing in the circuit court the action of the county court was affirmed, and Rodes and Turner have appealed to this court, and assigned error.

The only question before us is, should the county court have revoked the letters granted to Rodes and Turner, and appointed Boyers in their place? The statute (Shannon's Code, § 3939) provides that administration shall be granted to the widow in the first instance, if she applies; second, to the next of kin; and, third, to the largest creditor. Neither the widow nor next of kin made any application to administer for about five years after the death of the intestate, and no excuse or reason is given for the delay. In the case of *Wilson v. Hoss*, 3 Humph. 142, Hoss, who was neither a creditor nor next of kin, was appointed administrator, and the court held that his appointment was prima facie evidence of the right to administer, and the letters should not be revoked or recalled without evidence that he was not entitled, and that another was so entitled. It was held in the case of *Varnell v. Loague*, 9 Lea, 161, that the next of kin had the right, as against a public administrator, to administer within six months from the death of intestate; but, if letters were granted to the public administrator within the six months, they would not be void, but might be revoked at the instance of the next of kin within the six months. In *Pritch. Wills*, § 545, it is said: "The statute does not expressly limit the time which shall be allowed persons entitled to preference in granting an administration to assert such preference by making application, but other statutes provide for committing administration to a public administrator, and for the appointment of an administrator in chancery after six months from the death of an intestate; this, in effect, limiting the time within which a superior right to administer shall be asserted to six months, as against an appointment made after that time, unless the delay is satisfactorily accounted for." Without fixing six months as an invariable rule, we think that it is a safe and reasonable one. In any event, the right of priority cannot continue indefinitely, and without limit; and we think it is waived by failure to assert it within five years, as in this case, without giving some good reason for the delay. We are, therefore, of opinion there is error in

the action of the county and circuit courts in holding the appointment of Boyers to be good, and in removing Rodas and Turner as administrators, and the judgment of said courts is reversed, and the letters of Boyers are canceled, and the right of Rodas and Turner to continue in the administration is declared. The petitioners will pay the costs of the proceeding.

NASHVILLE ST. RY. v. GORE.

(Supreme Court of Tennessee. Jan. 15, 1901.)

VERDICT—JOINT DEFENDANTS—SETTING ASIDE AS TO ONE.

Where it was established that one of two joint defendants was not liable in an action for tort, and there was a verdict for plaintiff, it was not error to set aside the verdict as to the defendant not liable, and permit it to stand against the other, on the ground that the verdict was indivisible.

Appeal from circuit court, Davidson county; J. W. Bonner, Judge.

Action by James Gore, as administrator of the estate of M. D. Gore, deceased, against the Nashville Street Railway and another. From a judgment in favor of plaintiff against defendant the Nashville Street Railway, it appeals. Affirmed.

R. F. Jackson and J. M. Anderson, for appellant. Washington & Allen, for respondent.

McALISTER, J. Plaintiff, as administrator of M. D. Gore, recovered a verdict and judgment for the sum of \$2,500 against the Nashville Railway and the Nashville Street Railway, jointly, for the negligent killing of plaintiff's intestate. A new trial was awarded the Nashville Railway, but the verdict was permitted to stand against the Nashville Street Railway. The latter appealed, and the only error assigned in this court is that the verdict rendered by the jury, being a joint verdict against both defendants, and having been set aside by the court as to the Nashville Railway, could not stand as to the Nashville Street Railway, or, in other words, that the verdict of the jury was an entirety, and should have been set aside as a whole. The evidence on the trial below fully established the special defense of the Nashville Railway, to the effect that at the date of the accident resulting in the death of plaintiff's intestate that company did not own the road, or operate the car inflicting the injury, but that said road was owned and managed by the Nashville Street Railway. Hence the circuit judge set aside the verdict so far as it affected the Nashville Railway, but permitted it to stand against the other defendant. Counsel cite 1 Black, Judgm. § 211, in which the author says: "In general, the authorities agree that the judgment cannot be affirmed as to one defendant and reversed as to another, but must be reversed as an entirety; and, conversely, if in

favor of the defendants, invalidity as to one will invalidate it as to all. A judgment jointly entered in favor of several defendants, whether in an action upon contract or for tort, cannot be affirmed as to one and reversed as to another. Such a judgment is an entirety, and must stand or fall together." It is true, this rule was recognized and applied by this court in the case of Draper v. State, 1 Head, 262. It was said in that case that a judgment cannot be divided. If it is correct against one party, but erroneous as to others, it cannot be affirmed as to him and set aside as to the others. There must be a general reversal. But the court refused to follow this rule in the case of Bently v. Hurxthal, 3 Head, 378. "This rule," said the court, "that a judgment is an entire thing, and, therefore, if void as to one party cannot be allowed to stand as to any of the other parties, is a purely technical one. A judgment may be correct in all respects as to one party, and altogether erroneous or void as to another joint party; and in such case there is no sufficient reason why the party rightfully charged should be discharged, merely on the ground that another party was wrongfully made liable by the same judgment." The last case was followed in Smith v. Foster, 3 Cold. 147; Webbs v. State, 4 Gold. 204; Cox v. Crumley, 5 Lea, 530-535. This is now the well-established practice both in this court and in the inferior courts. It was the duty of the circuit judge to set aside the verdict as to the Nashville Railway, since there was no evidence to support it. Nor can this action be made the basis of any complaint on the part of the Nashville Street Railway, which corporation was shown to be liable for the accident. Affirmed.

VAUGHAN et al. v. GARNER.

BLACK v. SAME.

(Supreme Court of Tennessee. Dec. 15, 1900.)

GARNISHMENT—MONEY PAID UNDER CONTRACT.

Defendant contracted to buy a mortgage debt from the garnishee at its face value, agreeing to pay a part in cash, and the balance at another time. He paid a part only of the cash agreed, and wished to rescind the contract; but the garnishee refused, and sold the land under the mortgage, which, after applying the cash payment as a credit, was insufficient to pay the mortgage debt. Held, that the garnishee had a right to hold the money paid by defendant as a payment on the cash installment, and enforce the mortgage for the balance, which being insufficient, there was nothing in his hands belonging to defendant which could be subjected to garnishment by creditors of defendant.

Appeals from circuit court, Franklin county; Floyd Estill, Judge.

Actions by Vaughan & Fuller and Warner Black against W. L. Garner and Allen Garner, garnishee. From judgments in favor

of plaintiffs, the garnishee appeals. Reversed.

Arthur Crownover, for plaintiffs. W. H. Brannan and H. M. Templeton, for defendant.

WILKES, J. These are separate garnishment proceedings, for convenience heard together in the court below and in this court. The proceedings were instituted before a justice of the peace. On appeal to the circuit court there were judgments against the garnishees. They have appealed to this court and assigned errors. The substance of the assignment is that it was error to render judgment on the answer of the garnishee. The answer, so far as material, sets out the following facts: Allen Garner, the garnishee, held a trust deed upon a tract of land to secure a debt of \$997.93. This trust deed was executed by the father and mother of W. L. Garner. W. L. Garner made a verbal contract with Allen Garner to buy this mortgage debt for its face value, expecting when he became the owner of the debt that his father and mother would make him a deed to the land to satisfy the same. He agreed to pay Allen Garner \$300 in cash,—\$100 on 25th December, 1899, and the balance at the end of the year, when the land was to become his. He only paid \$190 of the \$300 cash payment agreed to be made, and failed to pay the remainder of the \$110 at that time. He then desired to rescind the trade, but Allen Garner refused to do so, and declined to pay him back the \$190, but insisted on his right to foreclose the mortgage and sell the land for the remainder of the mortgage debt unpaid, and he did make sale of the land under the trust deed. At this sale the land failed to bring the mortgage debt, interest, and costs, by the sum of \$22.50, after applying the \$190 as a credit. Plaintiffs, being judgment creditors of W. L. Garner, attempted to appropriate this \$190 to their debts, upon the theory that, the trade for the mortgage debt having fallen through, it was in fact and law the property of W. L. Garner, the defendant. The trial judge was of opinion that this was the correct status of the case. In this we think the learned trial judge was in error. While the answer is not as full and explicit as it should be, we think the proper meaning of it is that W. L. Garner bought the mortgage debt, and it was to become his when it was paid for according to the contract with Allen Garner. In the meantime, and until it was paid for, it was to stand good to Allen Garner, and be held by him as security for the balance due on the contract. He therefore had the right to exhaust the land by enforcing the mortgage or trust deed, in order to pay the balance after applying the \$190 paid upon the cash installment. In other words, we think that he had a right to hold this \$190 as a payment on the cash installment, and enforce his deed of trust for the

balance. The proceeds arising from an enforcement of the deed of trust and sale of the land not being sufficient, after applying the \$190, to satisfy the remainder of the debt, there was nothing in the hands of Allen Garner belonging to W. L. Garner that could be subjected to garnishment by the creditors of W. L. Garner, and the garnishment proceedings must fail. It results that the judgment of the trial judge is reversed, and the suits dismissed, at the costs of the plaintiffs.

STATE ex rel. BURKHALTER et al. v. BANKS et al.

(Supreme Court of Tennessee. Jan. 19, 1901.)

SCHOOLS AND SCHOOL DISTRICTS—SCHOOL OFFICERS—ELECTIONS.

1. Acts 1899, c. 218, § 1, requiring the election of school directors in May, instead of August, but providing that it shall not apply to any county where school and civil districts are co-extensive, does not authorize the election of directors in May in a school district which is co-extensive with a civil district.

2. Shannon's Ann. Code, § 1427, authorizing the payment of costs of a suit commenced in good faith by a school director out of the money belonging to the school district in case of his defeat, does not authorize the payment of costs by the district incurred in a suit brought to determine the right of the plaintiff to the office of school director, in which he is defeated.

Appeal from chancery court, Davidson county; H. H. Cook, Chancellor.

Suit by the state, on the relation of J. C. Burkhalter and others, against D. F. Banks and others. From a decree of the court of chancery appeals in favor of defendants, relators appeal. Bill dismissed.

J. A. Cartwright and J. H. Acklen, for appellants. J. S. Pilcher, for appellees.

WILKES, J. This suit involves the proper construction of chapter 218 of the Acts of 1899. The rights of the relators to the office of school directors of the Twenty-Third civil district of Davidson county depend upon this construction; and the constitutionality of the act has also been brought in question, both in the court below and in the court of chancery appeals. The act is in the words and figures following:

"An act to provide for the election of school directors in the various school districts in the state of Tennessee where the school districts are not co-extensive with the civil districts.

"Section 1. Be it enacted by the general assembly of the state of Tennessee, that it shall be the duty of the commissioners or other officers of election in the various counties of this state to open and hold elections in the various school districts in this state on the fourth Saturday in May, 1900, and biennially thereafter, for the purpose of electing three school directors for each school district: provided, that this act shall not apply to any county in this state where school districts and

civil districts are co-extensive, or may hereafter be made so: provided, that this act shall not apply to incorporated towns which have a school system of their own: provided, that this act shall also include districts composed of portions of different counties.

"Sec. 2. Be it further enacted, that said election shall be held and governed by and under the laws now governing general elections, except that these elections shall be held at the school houses in the various school districts, or such other places as said election officers shall direct, and that the polls shall be opened at 1 p. m. and shall be closed at 5 p. m. and that the officers holding said election shall not receive any compensation therefor.

"Sec. 3. Be it further enacted, that this act take effect from and after its passage, the public welfare requiring it."

The chancellor held the act to be constitutional, but his decree was reversed by the court of chancery appeals, which pronounced the act unconstitutional, and the relators have appealed to this court, and assigned errors.

The substance of the holding of the court of chancery appeals is that the act is obnoxious to section 17, art. 2, of the constitution, in that it embraces more than one subject, and that subject is not definitely expressed in the title; and also obnoxious to section 5, art. 7, in that it provides for an election of civil officers at a different date from the first Thursday in August; that school directors are civil officers in the sense of that section, and that their terms are fixed by that provision of the constitution. It appears that Cato Burkhalter and Cato, Jr., were elected school directors for the Twenty-Third school district of Davidson county on the fourth Saturday in May, 1900, and the effect of the holding of the court of chancery appeals is that their election was void, and their contracts and acts as directors are illegal and void, and it is assigned as error that this view or holding of the court of chancery appeals is erroneous. Davidson county is divided into 25 civil districts and 20 school districts. Fourteen of the school districts are co-extensive with the civil districts, and 10 of the remaining civil districts embrace the remaining 15 school districts, and the school districts are so divided that they do not correspond with the civil districts; but the Twenty-Third civil district is co-extensive in territorial limits with the Twenty-Third school district. Banks, Walton, and Andrews claim to be the legal school directors of the district, authorized to perform the duties of the same under an election held in August of a previous year. The court of chancery appeals was of opinion that the title of the act provides for the election of school directors in the various (meaning all) school districts in the state when the school districts are not co-extensive with the civil districts, and the body of the act provides for opening and holding elections in all

the school districts in the state on the fourth Saturday in May, 1900, and biennially thereafter, with a provision which excepts counties where school and civil districts are co-extensive, or may thereafter be made so. The court of chancery appeals was of opinion that this provision applies to counties alone where each civil district is a school district, and where all the school and civil districts are co-extensive, and does not and cannot apply to any other. That court says the act, if valid, applies to all school districts,—those co-extensive and those not co-extensive with civil districts,—and hence the subject of the act should be so construed as to apply to all school districts in the state not co-extensive with the civil districts of the county where said school districts are located, and not to apply to any school district in the state where such a school district is co-extensive with the civil district of the county in which such school district is located. The court says this would lead to the anomalous and perplexing necessity of electing part of the school directors in May and part in August; a result which that court says has led to great confusion, dissension, bickering, bitterness, strife, and litigation among and between school directors, teachers, pupils, and patrons of the public schools, to the great detriment of the school system and of the general public. That court further held that school directors were civil officers, in the meaning of section 5, art. 7, of the constitution, and the time for their election is therefore fixed by the constitution for the first Thursday in August, and the time for election cannot be fixed for a different date by legislative enactment.

We are of opinion the court of chancery appeals has not properly construed the language of the act in its application to school districts. It is true, the act is unhappily worded, and may bear the construction placed upon it by the court of chancery appeals, but, looking to its origin and purpose, as well as its language, and the object intended to be accomplished and evils to be remedied by it, another construction can and should be adopted to carry out the purposes of the legislature; and, when this construction is placed upon the body of the act, there is no want of harmony between the title and body of the act, and there is no dealing with double subjects in either. The occasion for the act, and the manner in which it was intended to apply, and the evil sought to be remedied are plainly and tersely set out in an opinion given to the state superintendent of public instruction on the 2d of February, 1900, by the attorney general of the state, as follows: "Knoxville, February 2, 1900. Hon. M. O. Fitzpatrick, Nashville, Tennessee—Dear Sir: Replying to your letter of recent date, requesting my opinion upon certain matters relating to the election of district school directors. Prior to chapter 218, Acts 1899, it seems that all elections of school directors were had at the

regular August election, and at the regular voting places in the several districts. This system operated satisfactorily in all cases where the school district was co-extensive with the civil district, but was obviously very unsatisfactory where the school districts and the civil districts were not co-extensive. In the latter case it usually happened at a regular election that the voters of a school district could not all attend and vote at the regular voting place. The civil district being composed of portions of two or more school districts, the voters were scattered, and much confusion prevailed as to the election of school directors. To obviate this difficulty seems to have been the object of the act of 1899. That act leaves the former law in force requiring the election of school directors at a regular voting place, and at the regular election in August, in all cases where the school districts and civil districts are co-extensive, and in all incorporated towns having a school system of their own. In this regard the law has not been changed by the act of 1899; but under the act of 1899, where the school district or school districts in any county are not co-extensive with the civil districts, or where a school district includes parts of civil districts situated in different counties, the election for the district school directors is required to be had on the fourth Saturday in May, 1900, and biennially thereafter. The act fixes the place of holding the election in such cases, not at the required polling places, but at the school houses in the various districts, or at such other places as the election commissioners may select. I am of the opinion that the act applies to any school district in any county which is not co-extensive with the civil district, although there may be other school districts in that county which do correspond with the civil districts. School directors elected under the act of 1899 are required to enter upon their duties within thirty days of their election, just as those elected under former acts are required to do. Yours, very truly, G. W. Pickle, Attorney General." It is stated that this construction of the act has been conceded to be correct, and followed in all the counties and schools districts in the state except in Davidson county. Whether this be true or not, we are satisfied it is the correct view and construction of the act. The only ambiguity that arises is in the use of the word "county" in the proviso, and the position in which it is placed; but we are convinced that the true meaning of the act is as if it read: "Provided, that this act shall not apply in any school district in any county of the state when the school district is co-extensive with the civil district," etc. In other words, the act deals with school districts as entities, and intended to leave school districts which were co-extensive with the civil districts as to the election of directors as they were before the passage of the act; that is, such

election must be held in August, as heretofore, but in all school districts in such county of the state which have different limits from the civil districts the election in such districts alone should be in May. This being the correct construction of the law, it is apparent the relators have no title to the offices claimed by them, and stand in no attitude to test the constitutionality of the act, or to maintain this action for possession of the offices. In other words, the election for directors of the Twenty-Third civil district of Davidson county should have been held in August, and not in May, inasmuch as the Twenty-Third school and civil districts are co-extensive, and the act in controversy does not apply to that district. This disposes of the case, and prevents our passing upon the question whether the act is obnoxious to the fifth section of article 7 of the constitution,—a result which we regret, inasmuch as it is important to the public and school interests that the question be decided. But our opinion upon that feature of the case would be a dictum, no matter how thoroughly considered it might be, as there are no parties before us who can properly raise the question. The bill must be dismissed, at the costs of the relators, the court being of opinion this controversy is not provided for by section 1427, Shannon's Compilation, providing for payment of costs out of the school fund of the district.

STATE ex rel. ROBERTS v. HART.

(Supreme Court of Tennessee. Jan. 19, 1901.)

SCHOOLS AND SCHOOL DISTRICTS—SCHOOL OFFICERS—RIGHT TO ACT—DE FACTO OFFICERS—COLLATERAL ATTACK—VALIDITY OF ORDER.

1. Where the election of school directors in a school district was premature and illegal, as held in May instead of August, a warrant drawn in July by the old directors, whose term of office does not expire until September 1st, is valid.

2. The payment of an order given by a board of school directors regularly elected and exercising the functions of their office cannot be defeated on the ground that certain members are not eligible to the office, or have forfeited their right thereto by removing from the county, since they are de facto officers, whose acts cannot be attacked in a collateral proceeding.

Appeal from chancery court, Davidson county; H. H. Cook, Chancellor.

Mandamus by the state, on the relation of Nolle Roberts, against Len K. Hart, trustee, to compel the payment of a school warrant. From a decree of the court of chancery appeals directing a mandamus to issue, defendant appeals. Affirmed.

J. A. Cartwright and Jas. H. Acklen, for appellant. Jas. S. Pilcher and B. M. Binkley, for appellee.

WILKES, J. This case, upon argument, was treated as presenting the same questions involved in the case of *State v. Banks*,

61 S. W. 778, and the two cases were heard together. We are of opinion they do not involve the same questions, though each case is somewhat dependent on the other. The court has already held in the first-named case that the election of school directors for the Twenty-Third civil and school district of Davidson county was improperly and illegally held in May, and should, under the statutes, have been held in August, and that the persons chosen in May were not legally elected, and were not entitled to act as directors of that district. The present case is an application for mandamus to compel the trustee of Davidson county to pay a warrant drawn upon the trustee in favor of the relator for \$15, by Banks, Walton, and Andrews, who claimed to be the legal directors for that district. They were elected in August, 1898, and in July, 1900, contracted with the relator to do certain repairs on the school building in that district, and on July 14, 1900, issued him the warrant in question in payment for his services. The contention is that, the directors Banks, Walton, and Andrews having been elected in August, 1898, their term of office would not, in any event, terminate until September 1, 1900, and not then unless their successors were legally elected and qualified. Their contention is, as we think, correct, if we consider the election of their successors in May as void; and they were qualified and authorized to act, all other questions being out of the way. It is said, however, that Andrews is an alien, and incapable of holding the office, and that Banks had moved out of the district, and thereby vacated his office. It is a well-established rule of law that, if a person exercise the functions of a public office under color of right, and with the acquiescence of the public, he will be deemed an officer de facto, and his acts will protect third persons, even though he was not eligible to the office, or had legally forfeited it by removing from the county (Mechem, Pub. Off. § 320; Throop, Pub. Off. §§ 631-636); and the acts of such an officer cannot be impeached collaterally, nor his title inquired into, except in quo warranto proceedings instituted for that purpose (Mechem, Pub. Off. § 343; Throop, Pub. Off. §§ 631, 632). Banks and Andrews were exercising the functions of the office under a previous valid election. Both were recognized as such officers by the county superintendent of public schools, who, under the law, had the power to fill vacancies until the regular election. Here we have the unanimous action of the entire board—one (Walton) being without question de jure a director, and the other two (Banks and Andrews) de facto officers—in a matter involving the rights of a third person. No question is made about the justice or correctness of amount of the relator's demand, and the court is of opinion it should be paid, and the decree of the court of chancery appeals directing a mandamus to issue is affirmed.

STATE v. HOSKINS.

(Supreme Court of Tennessee. Feb. 9, 1901.)
LANDLORD AND TENANT—CROP—LANDLORD'S LIEN — STATUTE — CONSTITUTIONALITY — TITLE—SUBJECTS — WAIVER — CRIMINAL INTENT.

1. Acts 1897, c. 114, authorizing the imprisonment of a defendant convicted of selling property on which a landlord's lien existed in case defendant failed to pay the fine imposed, is not unconstitutional as authorizing an imprisonment for debt.

2. Acts 1897, c. 114, in regard to liens of landlords and furnishers, is not in violation of Const. art. 2, § 17, declaring that no bill shall embrace more than one subject, which shall be expressed in its title, because applying to only landlords and furnishers.

3. Acts 1897, c. 114, imposes a fine on one who sells property subject to a landlord's lien with intention of depriving the landlord of the debt for which the lien existed. *Held*, that where a landlord, by accepting personal security, led the defendant to believe that the lien was waived, a conviction of defendant for selling the property will be reversed for want of criminal intent.

Appeal from circuit court, Rutherford county; Fount Smithson, Special Judge.

J. T. Hoskins was convicted of selling corn on which a landlord's lien existed, and he appeals. Reversed.

Whittaker & Lytle, for appellant. Edgar Smith and S. S. House, for the State.

WILKES, J. The defendant was indicted in the circuit court of Rutherford county. There are two counts in the indictment; one for selling and disposing of corn upon which there was a landlord's lien for rent, and the other count charging that it was a furnisher's lien. Both counts charged that the sale was made for the purpose of depriving the owner of the debt of the crop and its proceeds. The indictment is predicated upon Act 1897, c. 114. There was a motion to quash, which was overruled. There was also a plea in abatement, which does not appear to have been acted upon, and must, therefore, be treated as abandoned. There was a plea of not guilty, and a general verdict. The judgment of the court is that for the offense of selling the corn which was under lien—not specifying whether landlord's or furnisher's—the defendant be fined \$25. There was a motion for new trial and in arrest of judgment, and defendant appealed.

It is said the act of 1897 (chapter 114) is unconstitutional because it authorizes imprisonment for debt. This, we think, is not well taken. The imprisonment authorized by the act is for failing to pay the fine imposed for a violation of the law and unlawfully selling the crop, and is no more imprisonment for debt than any imprisonment authorized for failure to pay a fine imposed for the commission of any other misdemeanor.

It is said, in the next place, that it is unconstitutional because in contravention of section 17, art. 2, Const., which provides that

no bill shall become a law which embraces more than one subject, to be expressed in the title. The contention is that the act embraces two distinct and separate subjects,—landlords' liens and furnishers' liens. We think this criticism not well made. The general subject of the act is the sale and disposition of crops upon which there are liens, either of landlords or furnishers, with the purpose of depriving the owner of the indebtedness for which the lien exists of the same or its proceeds, and to punish the same. This is not two subjects, but two subdivisions of the same general subject.

Quite a number of errors are assigned. It is not necessary that we should notice them. We are not satisfied with the conviction. We are of opinion that the landlord waived his lien upon this crop sold by the defendant, and that he either expressly agreed that the tenant might sell the same, and use the proceeds, or led him to believe that, in view of the personal security he had taken for the rent, the lien was not a matter of any concern or importance to him, and was waived. This being so, there is an absence of criminal intent on the part of the defendant in selling the crop and using and consuming a part of the proceeds. We therefore reverse the judgment of the court below, and remand the cause for a new trial.

WATTERSON v. MAYOR, ETC., OF CITY OF NASHVILLE.

(Supreme Court of Tennessee. Feb. 2, 1901.)
MUNICIPAL CORPORATIONS—BUILDING CONTRACT—EXTRA WORK—CITY CHARTER—REQUIREMENTS—OBSERVANCE—NECESSITY.

Nashville City Charter, § 43, provides that orders for alterations in the prosecution of any work can be made only by order of the board of public works, and that the order shall be of no effect until the price to be paid for the same shall have been agreed on in writing, and signed by the contractor, and approved by the board; and that the total cost of the work, with the addition of the price so agreed on, shall not exceed the original estimate. Section 44 declares that no contractor shall be allowed anything for extra work caused by any alteration, unless an order is made and signed as provided in the preceding section. Plaintiff contracted in writing with the board of public works for the construction of a city hall, and was ordered to make certain changes not included in the original contract, and notified the board in writing that he would demand extra compensation for such changes. *Held*, that no action can be maintained in any form to charge the city for the work so performed, since the defendant's charter expressly prohibited the allowance of anything on a contract which did not conform to the provisions of the charter.

Error to circuit court, Davidson county; J. W. Bonner, Judge.

Action by Thomas Watterson against the mayor and city council of Nashville. From a judgment in favor of defendant, plaintiff brings error. Affirmed.

Barthell & Keeble, for plaintiff in error.
Price & McConnico, for defendant in error.

BEARD, J. This case is one of implied assumpsit, coming by appeal in the nature of a writ of error from the judgment of the circuit court sustaining a demurrer to plaintiff's declaration. The averments of the declaration, in substance, are that plaintiff in error had made a written contract with the defendant, through the board of public works and affairs, its duly-authorized agent, to do the carpenter work in the new city hall, and that while doing this work according to plans and specifications, made a part of his contract, he was ordered to make certain changes and modifications, not included in the original plans and contract, which involved the use of more costly material and much increased expense to plaintiff in error; that on receiving this order he gave written notice to the board of public works and affairs that he would demand extra compensation for this extra work, and that thereupon he proceeded to do the work upon the assurance of the board, through its president, that it would be paid for "when the contract was completed." It is also averred that, though ordering these changes and modifications, and upon the completion of the work accepting, and still retaining, the benefits of it, the defendant declined to pay therefor, to the damage of plaintiff \$2,500. The ground of the demurrer held fatal to the declaration was that it failed to aver a compliance with certain statutory or charter requirements essential to a valid contract for extra work, lacking which, it was insisted that, in the face of the prohibitions of the statute or charter, this action of implied assumpsit could not be maintained. The charter provisions relied upon by the demurrant, and which by the trial judge were held sufficient to defeat plaintiff's action, are as follows:

"Sec. 43. When, in the opinion of the board, it shall become necessary in the prosecution of any work to make alterations or modifications in the specification or plans of a contract, such alteration or modification shall only be made by order of the board, and such order shall be of no effect until the price to be paid for the same shall have been agreed upon in writing and signed by the contractor and approved by the board. The total cost of the work, with the addition of the price so agreed upon, shall not exceed the original estimate.

"Sec. 44. No contractor shall be allowed anything for extra work caused by an alteration or modification, unless an order is made or an agreement signed, as provided in the preceding section, nor shall he in any case be allowed more for such alteration than the price fixed by the agreement."

Acts 1883, p. 155.

It will be seen that the constituent elements alleged by the demurrer to be vital to a contract for alterations and modifications in some work in progress, and which the declaration in the case fails to aver existed in

plaintiff's contract, are that the price to be paid for such extra work must be agreed upon in writing, and signed by the contractor, and approved by the board; and that the total cost of the work, including that of the extra work, shall not exceed the original estimate. Wanting these elements, it is insisted by the demurrant that the contract is void, and the city is expressly prohibited from allowing the contractor anything for the extra work done under it. We think there can be no doubt that these statutory elements are essential to the making of a lawful contract for extra work, and that, lacking in them, the contract is void; and that, in the face of the inhibitory terms of the charter provisions, no action can be maintained in any form to recover from the city the value of such work. We have had occasion several times to consider questions cognate to the one involved in this case, and it has been distinctly held that contracts made in violation of a prohibitory statute cannot be enforced. Among the cases so holding are *Stevenson v. Ewing*, 87 Tenn. 46, 9 S. W. 230, and *Lumber Co. v. Thomas*, 92 Tenn. 589, 22 S. W. 743. The first of these was an action brought by an unlicensed real-estate broker to recover commissions for negotiating a sale of real estate. The statute then in force declared the occupation of a real-estate broker to be a taxable privilege, and provided that it should "not be pursued without license." The statute was successfully interposed as a defense. This court said: "Here is an express prohibition of all unlicensed persons to act as real-estate brokers, and, consequently, a prohibition, by necessary inference, of all contracts which such persons shall make for compensation to themselves for so acting. It is familiar law, both in England and America, that a contract prohibited either expressly or impliedly by statute is illegal, and cannot be enforced." To this proposition many authorities are cited. The case of *Lumber Co. v. Thomas*, supra, was that of a foreign corporation dealing through an agent located in Memphis, and supplying lumber for the construction of a house in that city, seeking relief to the extent of the value of the material so furnished. This corporation had failed to comply with the requirements of chapter 122 of the Acts of 1891 until after a considerable part of this lumber had been supplied. As to that portion of the account which accrued after the act took effect and prior to the registration of its charter, the court said: "All contracts made and all business transacted by it in Shelby county between these dates were illegal, and no rights of property or of action could arise out of the same. It follows that such company can have no remedy growing out of any transaction between these dates in Shelby county, and can recover upon no contract, express or implied, entered into between these dates, and is not entitled to

retake or recover any material or lumber furnished within these dates." This last case would seem to be as conclusive against the right to recover on an implied assumption resting upon the acceptance and appropriation of the fruits of a prohibited contract as upon the express contract under which these fruits or benefits were conferred, because the case showed that at the time this court was repelling the complainant corporation the defendants, Thomas and wife, were in the enjoyment of the property into which its material had been worked.

But it is said we are precluded from applying this principle to the present case because of utterances made and conclusions announced in other and later cases determined by the court. We will briefly examine these cases. In *Gaslight Co. v. City of Memphis*, 93 Tenn. 612, 30 S. W. 25, the claim was for a balance due complainant on an account for illuminating gas furnished the city for the years from 1879 to 1884, inclusive. There were written contracts covering the years 1879 and 1880 and 1881. If there were contracts in writing for the years 1882, 1883, and 1884, they were not found. Yet it did appear that the gas was furnished for these years according to bids, and upon the same terms, as in the former years. By the terms of the written contracts the city was to pay the company for the gas consumed from a fund to be derived from a tax levy of 10 cents on each \$100 worth of property within the city, and the gas company was to look alone to this fund for compensation. This tax levy was made each of the several years, realizing an amount sufficient to discharge the claim of the company. The fund being otherwise appropriated, suit was brought on a balance claimed to be due. The city ineffectually interposed the statute of limitations against so much of this claim as was more than six years old, the court holding that the fund so collected was impressed with an express trust against which the statute did not run. In addition, the city insisted that in no event could the company recover for the gas consumed in these years for which no written contracts were produced. This defense was made in regard to a clause of its charter which provided that all its contracts should be in writing, and signed by the commissioners consenting thereto, and recorded in a well-bound book open at all times for public inspection. This defense was also overruled, and it was held that, having used the gas, the city was liable upon a quantum meruit. We adhere to the principle upon which this holding was made, but we are unable to discover in it any support for the contention of the plaintiff in error in the present case. To contract for gas was within the scope of the power of the city, and the charter provided certain formalities in the making of that contract which it was the duty of its agents to observe. While this duty was imposed, "the statute does not necessarily imply that a fail-

ure in conformity would vitiate the contract, and especially does it lack all intimation that such nonconformity on the part of these agents should deprive the contractor of all right of recovery for his work, time, or material furnished under such contract, and afterwards accepted by the city. In such case nonobservance of the statutory requirements might well be taken as a mere irregularity, so that, when the city levied and collected taxes to discharge the contract, and also accepted the benefits of it, the other party to the contract might well invoke the general law, which imposes the obligation 'to do justice,' and which binds all persons, whether natural or artificial." *Land Co. v. Jellico*, 103 Tenn. 320, 52 S. W. 995, was a suit to recover for moneys expended in improving a street in the town of Jellico under a contract authorized at a special meeting of a municipal board, and the defense was that this meeting was held in the absence of one or two of its number, occasioned by the lack of notice to them that it would be held. The court recognized the general rule that notice to each member of such meeting was essential to the validity of an act done at it, yet, inasmuch as the town had the right to improve its streets, and also to make a contract for its improvement, and was enjoying the benefits of the work done under this contract, it was held liable upon the ground of an implied.

Thus it will be seen that these cases, while applying the rule of an implied promise from advantages received, and thus giving relief when the innocent party could not have obtained it upon the express contract invalid for irregularity, give no color to the contention that this rule can be availed of in a contract expressly prohibited by the statute. But it is insisted that this contention is sustained by the great weight of authority outside of this state. The most of the cases cited by the counsel are to the proposition that, where a municipal contract has been made, lacking in some technical or formal regularity, not jurisdictional in character, under which the other party has in good faith done work or furnished material, the benefit of which has been appropriated by the municipality, justice will be done by raising an implied assumpsit in favor of the party doing the work or furnishing the material. Four cases are pressed upon us as holding that such relief may be given even when the contract is prohibited by statute. We will now briefly consider these cases. In *Argenti v. City of San Francisco*, 16 Cal. 258, a recovery was sought for work done on certain streets of San Francisco. The opinion of the court was delivered by Cope, J., and concurred in by Field, J.; the third member of the court, Baldwin, J., apparently not participating in the disposition of the case. One of the defenses was that the city charter forbade the creation of any indebtedness which, with all former debts, should exceed in the aggregate the sum of \$50,000 over and above the annual revenue of the city, and that

in violation of this charter provision the contract was made under which the work was done. The court held the provision to be directory because of the indefiniteness of the standard furnished by the statute, but, further, if in error in this, then that the city, having received the work contracted for, would not be permitted to enjoy it without paying for it; citing many authorities in support of this last proposition. In answer to a petition to rehear the cause, Field, J., delivered an opinion, in which, after adhering to the judgment reached by the court theretofore, he withdrew his assent to the doctrine of an assumpsit implied from mere use, and placed his adherence upon the ground that the contracts made were valid and enforceable. Judge Field said: "I place my concurrence in the judgment heretofore rendered * * * upon the validity of the contracts with the city. * * * I have been thus explicit because I do not consider that, independent of such contracts, any liability would attach to the city for the improvement of the streets. A municipal corporation can only act in the case and in the mode provided by its charter, and for street improvements of a local nature express contracts, authorized by ordinance, are necessary to create a liability. The doctrine of liability as upon implied contracts has no application to cases of this character." *Nelson v. Mayor, etc.*, 63 N. Y. 535, was an action brought to recover a large balance due on a contract to furnish "sewer drain pipes," etc. A motion for a nonsuit was entertained upon two grounds, one being that the plaintiff had failed to show that an appropriation had been previously made, covering the expenses contemplated by the contract. By the charter of New York it was provided "that no expense should be incurred by any of the departments * * * unless an appropriation should have been made covering such expense." In meeting a particular argument of the plaintiff below resting upon another clause in the statute bearing on the subject of controversy, the court said: "The difficulty in the way of this argument is that if, when the contract was made, there was no previous appropriation covering the expense, it fell within the prohibition, and was illegal and void. * * * It does not follow, however, that, though the contract be void, the plaintiff would be entirely without remedy. If, as is alleged, the city has obtained his property without authority, but * * * received the avails of it, it would seem that, independently of the express contract, an implied obligation would arise to make compensation." This, however, was obiter, for the case was at last rested by the court upon a later act, the necessary effect of which, it was held, was to legitimate this contract. The court said: "The city admits that it has received and used the material furnished by him [the plaintiff]. The legislature has provided the means of payment, and by so doing has taken the case out of the general provision requiring

a previous appropriation; and, unless some substantial defense can be shown to the claim, we see no reason why it should not be paid in accordance with the intention of the legislature." So, on this ground alone, was the case reversed, and sent back for a new trial. The case of *Manufacturing Co. v. Allentown*, 153 Pa. 320, 26 Atl. 646, announced the proposition—that councils of a municipality may adopt an act done for the benefit of the city by one of the municipal officers, and assume the debt so contracted, when the only objection to it is that the officer was without authority at the time of entering into the contract. These cases, when analyzed, we think fall as authority for the contention of plaintiff in error. But it may, and possibly must, be conceded that the case of *City of Cincinnati v. Cameron*, 33 Ohio St. 336, does support it. The opinion of the court delivered in that case indicates much research, and presents the issue insisted on here with much ability. But as against it are the holdings of many courts of the highest respectability. In *Murphy v. City of Louisville*, 9 Bush, 191, the court said: "If the alleged contract is made otherwise than as required by ordinance, it is not binding; and, if not obligatory as a contract, the law creates no implied promise to pay." In *McDonald v. City of New York*, 68 N. Y. 25, the court, speaking through Folger, J., said: "How can it be said that a municipality is liable upon an implied provision when the very statute which contains its corporate life and gives it its powers prescribes the mode of exercising them, and says that it shall not, and hence cannot, become liable save by express promise? Can a promise be implied which the statute of frauds says must be in writing to be valid? How do the cases differ?" And in *Zottman v. City of San Francisco*, 20 Cal. 96, the court, repudiating the doctrine of liability by implication announced by Cope, J., in *Argenti v. City of San Francisco*, supra, said, through Field, J.: "The law never implies an agreement against its own restrictions and prohibitions, or, as it is expressed in the New York case (*Brady v. Mayor, etc.*, 16 How. Prac. 432), 'The law never implies an obligation to do that which it forbids the party to agree to do.'" See, also, *Stuart v. City of Cambridge*, 125 Mass. 102; *Boston Electric Co. v. City of Cambridge*, 163 Mass. 64, 39 N. E. 787; *Dickinson v. City of Poughkeepsie*, 75 N. Y. 65; *McBrien v. City of Grand Rapids*, 56 Mich. 95, 22 N. W. 206; *Schumm v. Seymour*, 24 N. J. Eq. 143; *Addis v. City of Pittsburgh*, 85 Pa. 379; *Beach, Pub. Corp.* 252; 1 Dill. Mun. Corp. § 461; *Tied. Mun. Corp.* § 164.

We are satisfied the rule thus announced is sound; that statutory requirements, such as are found in the charter provisions in question, are jurisdictional in character, a compliance with which is essential to the integrity of a contract for extra work, and that a contract made in disregard to them is void

beyond the power of subsequent ratification. To use the language of Chief Justice Nicholson in *City of Memphis v. Memphis Gayoso Gas Co.*, 9 Heisk. 581, "It may be laid down that when a corporation, or an agent thereof, does an act or makes a promise that is forbidden by its charter, or is not authorized thereby, either expressly or by fair implication, the act or promise is a nullity, and cannot be binding by a subsequent ratification." The application of this rule will work hardship in particular cases, but this is better than that wise safeguards contrived by the legislature to protect the public against improvidence and fraud should be broken down by the courts. It is not requiring too much that parties dealing with municipal agents should inform themselves of the extent of their authority, as well as of the essentials of a valid contract. In other cases, "ignorantia juris neminem excusat," and there is no reason why it should be otherwise when a party enters into dealings with a public corporation. The judgment of the lower court is affirmed.

STATE v. MAYOR, ETC., OF TOWN OF McMINNVILLE.

(Supreme Court of Tennessee. Jan. 5, 1901.)

MUNICIPAL CORPORATIONS—STATE PRIVILEGE TAXES—RECOVERY—STATUTE—TITLE—SUBJECTS—CONSTITUTIONALITY.

Act April 22, 1899, is entitled "An act to limit the time in which suits may be brought against municipal corporations to recover state or county privilege tax on litigation in cases tried before a mayor's, recorder's, or any police court of such corporation, and to authorize the dismissal of such suits pending," and provides that no suit shall be brought against any municipal corporation to recover such tax on litigation prior to July 15, 1895, when such privilege tax has not been specifically taxed in the bill of costs, and makes it the duty of any court in which such suit is pending to dismiss the case when the statute is pleaded, and that the act shall apply to any suit now pending or hereafter to be brought. *Held*, that the act is not unconstitutional as embracing subjects not expressed in its title.

Appeal from chancery court, Warren county; Walter S. Bearden, Chancellor.

Action by the state of Tennessee against the mayor and aldermen of the town of McMinnville. From a decree of the court of chancery appeals reversing a judgment in favor of defendants, they appeal. Reversed.

Lind & Hoodenpyle, for appellants. G. W. Pickle, Atty. Gen., and I. W. Smith, for the State.

WILKES, J. The object and purpose of the bill in this cause is to recover state taxes on litigation tried before the courts of the town of McMinnville for offenses committed against the laws of that municipality. It is averred that in a large number of cases tried before the court of that municipal corporation from May, 1881, to July 25, 1895, the officers trying such cases failed to tax

up and collect a state tax upon the suits in causes when the defendant was convicted, and when fine and costs were assessed and collected, out of which such state tax could and should have been paid. There was a demurrer to the bill, and the only question presented by the record as it comes to this court is the constitutionality of the act of April 22, 1896, the object and purpose of which was to relieve against and release such taxes. The chancellor was of opinion that the act was constitutional, and, inasmuch as such holding had the effect to deprive the state of revenue to which it would have been entitled under a contrary holding, the state appealed. In the court of chancery appeals the chancellor's decree was reversed, and the act was held to be unconstitutional. The title of the act is as follows: "An act to limit the time in which suits may be brought against any municipal corporation to recover the state or county privilege tax on litigation: in cases tried before a mayor or recorder's court, or any police court, of such corporation, and to authorize the dismissal of such suits now pending." The act itself is as follows:

"Section 1. Be it enacted by the general assembly of the state of Tennessee, that no suit shall be brought against any municipal corporation to recover the state or county privilege tax on litigation in cases tried before the mayor's, recorder's, or any police court of such corporation, prior to July 25th, 1896, when such privilege tax has not been specifically taxed in the bill of costs, and a sufficient amount of money has not been paid to satisfy the fine and costs other than the privilege tax in such cases.

"Sec. 2. Be it further enacted, that it shall be the duty of any court, in which such suit is pending, when this statute is pleaded, and where the truth of the plea is made to appear to the satisfaction of the court, to dismiss the cause, and this act shall apply to any suit now pending, or hereafter to be brought; and that this act shall take effect from and after its passage, the public welfare requiring it."

Acts 1896, c. 274.

The court of chancery appeals held, in substance, that two subjects are stated in the caption or title, one being a limitation of time in which suits might be brought, and another the dismissal of suits then pending; that, passing from the title to the body of the act, section 1 presents a third subject, to wit, a prohibition against bringing any new suit for such taxes; that in section 2 the same duplex nature of subjects appears, to wit, the dismissal of suits then pending and the dismissal of suits thereafter to be brought. The court of chancery appeals was

also of opinion the term "such suit," used in section 2 of the act, is ambiguous, and may refer to either of the classes of suits theretofore mentioned in the title and in section 1 of the act. It is further said by that court that the cases specified in the sections of the act cannot be treated as subheads or subclasses covered by the general language of the title or caption.

We are of opinion the court of chancery appeals is in error in its view of the act, and that the chancellor was correct. We think that the title and body of the act embraces only one general subject, which is expressed in the title, and the details and means by which the purpose is to be effected are left to the provisions of the act, and that neither the title nor acts embrace distinct and incongruous subjects. The act is intended to cover a period of time from 1881 to July 25, 1896, when such litigation tax was in force, and to release and relinquish all claim of the state against such municipalities as had in the designated cases failed to assess and pay over to the state a tax imposed by statute in such cases through the oversight or omission of the municipal authorities to assess such tax. In furtherance of this general object, the act provides for the dismissal of suits then pending for such tax, and prohibits the bringing of any other suits for the same purpose. The term "such suits," as used in the act, refers to any suits pending or to be brought for the general purpose indicated, to wit, the collection of such tax. It is, perhaps, true that the act, both in its title and body, might be framed more plainly, and the harmony between the two made more apparent; but the obvious purpose of the act is that after its passage all suits of the character and for the purpose mentioned should be discontinued and dismissed, and no others should be instituted for the same purpose. These provisions are not inconsistent. A statute with one general subject may embrace subdivisions, provisos, and exceptions pertinent to that subject, and so many of them as may be grouped without incongruity. *State v. Schlitz Brewing Co.*, 104 Tenn. 720, 59 S. W. 1033; *State v. Brown*, 103 Tenn. 455, 53 S. W. 727; *Story, Const. Lim.* side page 144; *State v. Yardley*, 95 Tenn. 546, 32 S. W. 481, 34 L. R. A. 656; *Cannon v. Mathes*, 8 Heisk. 519; *Garvin v. State*, 13 Lea, 166. We think the case falls within the rule laid down in *State v. Yardley*, 95 Tenn. 546, 32 S. W. 481, 34 L. R. A. 656, and *State v. Schlitz Brewing Co.*, 104 Tenn. 720, 59 S. W. 1033, and that the reasoning and holding in those cases is applicable and controlling in this. The decree of the court of chancery appeals is reversed, and the bill dismissed.

PALATINE INS. CO. v. MORTON-SCOTT-ROBERTSON CO.

(Supreme Court of Tennessee. March 9, 1901.)

INSURANCE — CONDITION PRECEDENT — APPRAISAL — DEMAND — SALVAGE GOODS — SALE — EXPENSES.

1. A compliance with a clause in a fire policy that the amount of loss shall be ascertained by appraisers in case of disagreement is a condition precedent to a right of action on the policy, when the policy contains a general provision that no suit to recover any loss shall be maintained until after a full compliance by the assured with all its requirements.

2. A joint demand for an appraisal by several insurance companies, whose policies differ, is not within the terms of the policy of one of them, providing for an appraisal of loss by two persons, one to be selected by the insured and the other by the company, who, in case of disagreement, are to call in a third.

3. A demand for the appraisal of salvage goods alone is not authorized by a policy providing that the amount of the loss shall be ascertained by appraisers in case of disagreement, and the insured is justified in declining it.

4. The sale of salvage goods by the insured will not justify one of several fire insurance companies in its refusal to proceed with an appraisal of the loss, when such sale is made with the knowledge and consent of a board of adjusters representing all the companies, and the amount sold is so small that a sufficient amount is still on hand to enable the company to exercise its option under the policy to take its pro rata share of the salvage.

5. Salvage goods carried with a new stock, and sold by the insured as opportunity offered, should be charged with their proper proportion of the expenses of the business; and an instruction to that effect, which leaves it for the jury to determine what will be a proper proportion, is not objectionable.

Appeal from circuit court, Davidson county; John W. Childress, Judge.

Suit by the Morton-Scott-Robertson Company against the Palatine Insurance Company. From a judgment for plaintiff, defendant appeals. Affirmed.

J. J. Vertrees and Pillow & Tyne, for appellant. Lellyett & Barr and John A. Pitts, for appellee.

McALISTER, J. This is a suit upon a policy of fire insurance. Verdict and judgment were in favor of plaintiff for the sum of \$1,064.32, amount of the policy and interest. The company appealed, and among other assignments of error it is urged that there is no evidence to support the verdict. The policy in suit insured the plaintiffs against direct loss or damage by fire to their stock of carpets, furniture, etc., contained in their storehouse on Union street, in the city of Nashville. The aggregate insurance on their stock was \$81,000, covered by 23 policies, issued by 17 different companies. The concurrent insurance was authorized by the several policies, and no question is made in respect of additional insurance. Companies representing \$15,000 of this insurance settled and adjusted their liability without suit. The fire occurred on December 9, 1898, and there is evidence tending to show that the

loss sustained was largely in excess of the entire insurance. The value of the stock at the time of the fire is shown by the following table, to wit:

(1) Inventory June 1, 1898.....	\$29,523 40
(2) Goods purchased between June 1 and Dec. 9, 1898.....	80,458 00
(3) Goods sold, charged, and not delivered	473 00
(4) Goods held in trust for others..	85 00
(5) Appreciation by advance in prices	4,465 49

Total \$65,085 58

The gross sales from June 1 to December 9, 1898.....	\$34,892 54
These goods cost the sum.....	23,147 00
Total value at time of fire.....	<u>41,888 58</u>

These items are sustained by ample evidence to have warranted the jury in finding them correct. It is objected that the item of appreciation of stock, amounting to \$4,465.49, was not included in the statement of loss submitted by the company to the insurance agents on Monday succeeding the fire. That is explained, however, by the fact that the first statement was made up hurriedly, and this item was overlooked. It was stated and claimed at the first interview between the plaintiff and the insurance adjusters, and steadily insisted on throughout the negotiations that followed. It is supported by material evidence, and must be held to have been established by the verdict of the jury.

The proof shows that on Monday, December 12th, succeeding the fire, adjusters representing the various insurance companies interested met at Nashville, and entered into an organization, electing a chairman and secretary. This board adopted the following resolutions, to wit: "First. All matters of difference, a majority, as represented by the insurance companies present, shall rule. Second. That stock in basement and grade floor shall be removed, and then, if the committee deems advisable, shall be disposed of." This board, it appears, continued in session from day to day until the 22d of December, when they entered into an agreement by resolution "that there should be no independent action, but that they all should communicate and confer with each other." It appears that on Tuesday succeeding the fire there was a conference between the adjusters and representatives of plaintiff, and a discussion ensued as to what disposition should be made of the salvage or damaged goods saved from the fire. A committee was appointed to consider this question, and, after visiting the premises, and inspecting the condition of the damaged goods, the committee recommended that the salvage in the basement and on the grade floor be offered for sale to the highest bidder. An advertisement was accordingly made in the public prints, but no acceptable bid was received. It appears that about this time the adjusters concluded to demand an ap-

praisement of the saved goods, and such an appraisal was proposed to the representatives of the insured. The insured insisted that the first step in an appraisal was to ascertain the value of the entire stock of goods at the time the fire occurred, and that at the same time they could find out the value of the goods saved, and thus settle the whole matter. The adjusters, however, declined this proposition, insisting upon an appraisal of the salvage alone. The insured insisted that it was ready and willing for an appraisal, provided it settled anything. The adjusters had before them all the policies, books, papers, and invoices of the insured, including a statement of the loss. They inspected the wreck, and saw the salvage, but they made no estimate of its value, nor a statement of the value of the stock at the time of the fire, nor any estimate of loss, nor did they agree to the correctness of any item in plaintiff's statement of loss. The adjusters simply demanded an appraisal of the salvage, but not an appraisal of the entire loss. It further appears that on December 16th the several adjusters made a joint demand for appraisal as follows, to wit: "A difference having arisen in the amount of the damage done upon stock of goods by reason of a fire which occurred on the 9th December, 1898, we now demand that the amount of these damages be submitted to arbitration, as provided for in the section of the policies under which you make your claims." This demand was signed jointly by all the special agents and adjusters representing the companies interested. The plaintiff understood this letter to be a joint demand for an appraisal of the salvage alone; hence, in its reply, after referring to the fact that its statement of loss had not been seriously controverted by the agents, stated: "You now demand of us an appraisal of the salvage, and propose to leave the question as to cash value of the stock a matter for consideration after the appraisal has been made. To this we are unwilling to assent." The letter continued: "A committee was appointed by you to examine the premises. That committee reported that it would be advisable to offer for sale the salvage in the basement and on the first floor. To this we gave our assent. We are not averse to an appraisal, but object to an appraisal of the salvage, and afterwards another appraisal as to value of stock." In view of what had been transpiring in the negotiations of the board and the insured for a settlement, the joint demand was understood by the plaintiffs as a demand for the appraisal of the salvage alone. Plaintiffs, in their reply, so informed the adjusters, and the latter did not correct this impression. They made no reply to the insured's letter. However, the oral negotiations and conferences continued until December 22d, when further effect at a settlement was suspended. There is evidence

tending to show that in the meantime a representative of the insured met Col. Young, chairman of the board of adjusters, and asked him if there was going to be any trouble about the salvage, and the latter responded: "Go ahead, and handle the salvage. You have a perfect right to do it. Go ahead." Thereupon plaintiff rented Amusement Hall, and about the 8th of January began to move therein the damaged stock saved from the first floor and basement of the store. These goods were cleaned and renovated, and, after being thoroughly advertised in the public prints, were sold at public auction for \$1,250. Private sales amounting to \$300 or \$400 had theretofore been made. It should be remarked that the goods on the second and third floors of the store were not removed, but were reserved for private sale at some future time when the business of the firm should be resumed. Thus matters rested until January 16, 1899, when the special agents and adjusters made separate and distinct written demands for an appraisal. This was done, in all likelihood, to remedy any legal objection that might be made to the joint demand for an appraisal which they united in making December 16th ult. On the 20th of January the plaintiff transmitted to the home office of the defendant company formal proofs of loss resulting from said fire. The defendant company replied January 31, 1899, acknowledged receipt, and concluded its letter as follows: "We renew our previous demand for an appraisal of the value of the goods saved from the fire, and the damage done to them, in order that compliance with the terms of the contract between you and the company may be had; differences having arisen between us concerning the amount of your loss." Thus it will be seen that as late as January 31st this defendant company is only insisting upon an appraisal of the salvage. It renews the previous demand on this subject. The plaintiff, on 21st of February, wrote to defendant company, acknowledging receipt of letter of January 31st, furnishing an inventory of saved goods, with an estimate of their value. This letter, after dealing with certain matters at issue, states, viz.: "In conclusion we beg to submit that the right of the Palatine Ins. Co. to demand an appraisal has, in our judgment, been waived; but we are still ready to agree to an appraisal, and consent that it be had according to the terms of the policy. You may therefore come forward, and at once enter into a final arrangement with us for an appraisal." The defendant company replied to this letter, in which they stated that the fact that a part of the salvage had been disposed of would present a serious obstruction in the way of an appraisal, and inquired whether it was true that the salvage had been disposed of. There is evidence tending to show that the defendant company had been apprised of this fact for almost

six weeks, and yet express surprise at the statement of this fact in the plaintiff's letter. On March 3, 1899, plaintiff replied that full evidence of the value of the salvage sold had been preserved, and that more than four-fifths of the salvage (in a greatly improved condition) was still in the building, ready to be viewed by the appraisers, concluding, viz.: "Therefore we again express our assent to appraisal, and trust it will be no longer delayed by you." Defendant company replied to plaintiff's letter on the 7th of March, stating that it would not enter into a "fragmentary appraisal," after plaintiff had sold and disposed of a part of the salvage. This letter closed the correspondence, and thereupon plaintiff brought this suit.

The principal ground relied on by defendant company to defeat the collection of the policy is that the assured refused to submit to an appraisal or arbitration as provided by the insurance contract, and that this was a condition precedent to any right of action on the policy, or liability against the defendant. The provisions of the policy necessary to be noticed in order to an intelligent understanding of the controversy are the following: "This company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value, with proper deduction for depreciation, however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality. Said ascertainment or estimate shall be made by the insured, or, if they differ, then by appraisers as hereinafter provided; and, the amount of loss or damage having been thus determined, the sum for which this company shall be liable in pursuance of this policy shall be payable sixty days after due notice, ascertainment, estimate, and satisfactory proofs of the loss have been received by this company in accordance with the terms of this policy. It shall be optional, however, with this company to take all or any part of the articles at such ascertained or appraised value, and also to repair, rebuild, or replace the property lost or damaged with other of like kind and quality, within a reasonable time, on giving notice, within thirty days after the receipt of the proof herein required, of its intention so to do. But there can be no abandonment of this company of the property described." The "hereinafter provided" of this original and leading clause reads as follows: "In the event of disagreement as to the amount of the loss, the same shall, as above provided, be ascertained by two competent and disinterested appraisers; the insured and this company each selecting one, and the two so chosen shall elect a competent and disinterested umpire. The appraisers together

shall then estimate and appraise the loss, stating separately sound value and damage, and, failing to agree, shall submit their differences to the umpire; and award in writing of any two shall determine the amount of such loss. The parties thereto shall pay the appraiser respectively selected by them, and shall bear equally the expenses of the appraisal and umpire. This company shall not be held to have waived any of the provisions or conditions of this policy, or any forfeiture thereof, by any requirement, act, or proceeding on its part relating to the appraisal or any examination herein provided for, and the loss shall not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers, when appraisal has been required. [Lines 86 to 95 of the Policy.] No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months after the fire." It was assumed by the trial judge in his charge to the jury that the stipulation of the policy in respect of appraisal was a condition precedent to any right of action on the policy. This proposition is seriously controverted in this court by counsel for the insured, his contention being that such stipulation is a mere collateral and independent condition, a breach of which will not work a forfeiture of the policy, because not so expressly provided therein. It is insisted on behalf of the company that the general clause following the enumeration of the terms and conditions of the policy, constitutes appraisal a condition precedent. The general clause at the foot of the policy is, viz.: "No suit or action on this policy for the recovery of any claim shall be sustained in any court of law or equity until after full compliance by the insured with all the foregoing requirements," etc. It is argued that the policy provides that ascertainment or estimate shall be made by both parties, and, if they differ as to their respective estimates, then they can have recourse to appraisal "as hereinafter provided"; and that it is hereinafter provided that appraisal is dependent—First, upon the event of disagreement; and, second, upon the fact of it being required by the company. In other words, that it is a condition optional with the company, and does not establish a forfeiture for a failure to observe its conditions. It is then argued that, in order for a failure to arbitrate to operate against the insured, the necessity for an award must be expressly made a condition precedent in the policy; citing *Read v. Insurance Co.*, 103 Iowa, 307, 72 N. W. 685; *Reed v. Insurance Co.*, 138 Mass. 572; *Clement v. Insurance Co.*, 141 Mass. 298, 5 N. E. 847.

In *Insurance Co. v. Alvord*, 9 C. C. A. 623, 61 Fed. 755, it was held that, in order to make such award a condition precedent to the right of maintaining suit, it must be so expressed in the policy, unless necessarily implied from its terms. A mere provision in the policy that the amount to be paid in case of disagreement shall be submitted to arbitration does not prevent the insured from maintaining an action, unless the policy further provides that no action shall be maintained until afterwards. Such agreement to submit to arbitration is regarded as a collateral and independent agreement, a breach of which, while it will support a separate action, cannot be pleaded in bar to an action on the principal contract. "There is nothing in the terms of the policy," said the court, "which expressly or by implication forbids the insured from bringing suit until after the amount of the loss had been submitted to arbitration, and an award had been made; and therefore we must consider the provisions in the policy relating to this object as constituting a collateral and independent condition, and not one which was precedent to maintaining an action." In looking to this case it will be seen that the clause in the policy on the subject of arbitration or appraisal is identical with the provisions of defendant's policy on the same subject, but it does not appear from the opinion that the policy contained the general clause which is found in the present policy, to wit, "No suit or action shall be brought until after full compliance by the insured with all the foregoing requirements," etc. In *Hamilton v. Insurance Co.*, 136 U. S. 242, 10 Sup. Ct. 945, 34 L. Ed. 419, it was held that a condition in a policy of fire insurance that any differences arising between the parties as to the amount of loss or damage of the property insured shall be submitted at the written request of either party to the appraisal of competent and impartial persons, whose award shall be conclusive as to the amount of loss or damage only, and shall not determine the question of the liability of the insurance company, etc., and that until such appraisal and award no loss shall be payable or action maintainable, is valid. Said Mr. Justice Gray, who delivered the opinion of the court, "The appraisal, when requested in writing by either party, is distinctly made a condition precedent to the payment of any loss and to the maintenance of any action." The question again arises in *Hamilton v. Insurance Co.*, 137 U. S. 370, 11 Sup. Ct. 133, 34 L. Ed. 708. Mr. Justice Gray again delivered the opinion of the court, and said: "This case resembles in some aspects that of *Hamilton v. Insurance Co.*, 136 U. S. 242, 10 Sup. Ct. 945, 34 L. Ed. 419, but it is essentially different in this important and controlling element; that there was no provision of the policy postponing the right to sue until after an award. If the contract provides that no action upon

it shall be maintained until after such award, then, as was adjudged in *Hamilton v. Insurance Co.*, above cited, and in many cases therein referred to, the award is a condition precedent to the right of action. But when no such condition is expressed in the contract, or necessarily to be implied from its terms, it is equally well settled that the agreement for submitting the amount to arbitration is collateral and independent, and that a breach of this agreement, while it will support a separate action, cannot be pleaded in bar to an action on the principal contract."

It is conceded that in the policy before us there is no express provision postponing suit until after appraisal or award, but it is assumed that the general clause of the policy is equally as efficacious, namely, "No suit or action shall be brought until after full compliance by the insured with all the foregoing requirements," referring to all the terms and conditions of the policy. In addition to this, the policy provides that "the loss shall not be payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of loss have been received by the company, including award, by appraisers, when appraisal has been required." It is not necessary, as decided in numerous cases, to constitute a condition precedent, that there should be express language prohibiting suit until an award is made. It is sufficient if, construing the entire contract, such intention is necessarily implied. In *Insurance Co. v. Hamilton*, 8 C. C. A. 114, 59 Fed. 258, the court said, viz.: "In some of the leading cases where it was held that the terms of the contract established a condition precedent there was no express provision that an action should not lie before the award was made. A condition necessarily implied from the terms of the contract is treated as equivalent to an express agreement that no action shall be brought until the award is obtained. It is always a question of construction. Whatever the language may be, if the intention of the parties is sufficiently apparent, effect will be given it." In *Mosness v. Insurance Co.*, 50 Minn. 341, 52 N. W. 982, "the policy provided for the appointment of appraisers in the event of the disagreement between the company and the assured as to the amount of the loss, and also provided that no action could be brought until after full compliance by the assured with all the foregoing requirements." It was held that "arbitration and award was a condition precedent to recover on the policy." Said the court: "Construing together, as they must be construed, the various provisions found in the present policy in reference to an appraisal and award, they constitute a condition precedent to plaintiff's right of action when circumstances transpired to which the language was applicable; that is, when the insurer and insured disagreed on the amount of the loss." We

think, upon a fair construction of the policy now in suit, compliance with the appraisal clause must be regarded as a condition precedent to the maintenance of the suit.

The second assignment is that the court erred in charging as follows: "It is proper here for the court to instruct you that until January 16, 1899, there had been no legal demand by the defendant upon the plaintiff for an appraisal in accordance with the terms and conditions of the policy,—that is, of an appraisal of the loss or damage; theretofore the efforts having been made either verbally, or by joint demand with the other companies carrying this insurance, neither of which was valid and binding." The criticism made upon this charge is twofold: First, that the court should have instructed the jury what constituted a legal demand, and let the jury determine, from the facts and law as charged by the court, whether or not legal demand for appraisal had been made; second, that, as the policy itself does not require a written demand for an appraisal, a verbal demand would have been sufficient. We do not concur with counsel in construing this charge to mean that a verbal demand for an appraisal of the whole loss would not be sufficient under the policy. The context of the charge shows that the trial judge had reference to the demand for an appraisal of the salvage. The court had just instructed the jury that such a demand was not authorized by the policy. The demand for an appraisal of the salvage was, in fact, a verbal demand, but, in the opinion of the court, was not valid, whether verbal or written. It was to this demand the court had reference when he said that the verbal demand made was not valid and binding upon the plaintiff. The court did not say that a verbal demand for an appraisal of the whole loss would be insufficient. The record shows that the only demand for an appraisal made by the defendant company prior to January 16, 1899, was the joint demand which it made in connection with the other companies on December 16, 1898. Eleven agents, representing as many different companies, joined in the demand upon the plaintiff that the amount of its damages be appraised as provided for in the section of the policies under which the loss was claimed. This was not a legal demand. Says Mr. Joyce, in his work on Insurance (section 3245) viz.: "A joint demand for an appraisal by several insurance companies is not within the terms of a policy issued by one of the companies providing for an appraisal by two persons, one to be selected by the company and the other by the insured, who, in case of disagreement, are to call in a third. There should be a separate demand,"—citing *Insurance Co. v. Hamilton*, 8 C. C. A. 114, 59 Fed. 258; *Hamilton v. Insurance Co.*, 9 C. C. A. 530, 61 Fed. 395; *Harrison v. Insurance Co.* (C. C.) 67 Fed. 585. In *Insurance Co. v. Hamilton*, 8 C. C.

A. 114, 59 Fed. 258, it appeared that the agents of 12 insurance companies interested in its loss joined in a demand upon the insured that the question of the value of and the loss upon the atock be submitted to competent and disinterested persons chosen as provided for in the several policies of insurance under which claim is made, etc. Said the court: "That was not a demand for an appraisal by the insurance companies, such as its policy gave it the right to make. It [the company] did not acquire its rights in any respect from the policies of other companies, and it had no legal concern with their disputes, or the mode to be adopted for their settlement, and had no obligation to champion their cause, or to mix its controversy with theirs; and the insured was not bound to accept such proposition for determining the value and damage as was demanded by the company, this among them." As opposed to this view, counsel for the insurance company cites *Wicking v. Insurance Co.*, 118 Mich. 647, 77 N. W. 275. But in that case it appeared that the policies were all alike,—a standard form of policy prescribed by the laws of Michigan,—differing only in the names of the companies. The court held that all the companies could, therefore, join in the arbitration to determine the value of the loss without mixing separate controversies. Moreover, it appeared in that case that the insured consented, and joined the insurance companies in the arbitration, and an award was actually made, which he sought to impeach upon the ground that the submission to arbitration was not under the policy, but outside of it, and must stand on the ground of a common-law arbitration.

It does not appear from this record that the arbitration clauses of the other policies were similar to that of the policy now in suit, and we cannot indulge such a presumption in the absence of proof. We must, therefore, hold, under the general rule, that this joint demand for an appraisal was illegal, and imposed upon the assured no duty to enter upon an appraisal or arbitration. So that we concur with the trial judge in his instruction to the jury that there was no legal demand by defendant company for an appraisal until January 16, 1899, when it made a separate demand. We are also of opinion that any demand for the exclusive appraisal of the salvage was not warranted by the policy. The appraisal or arbitration clause provides that, in the event of disagreement as to the amount of the loss, it shall be ascertained by two competent and disinterested appraisers. The appraisers shall estimate the loss, stating separately sound value and damage, etc. It was never contemplated that either party should have the right to demand separate and successive appraisals of different kinds of demands entering into the amount of the loss. The object of appraisal is to fix the loss in the aggregate, and this result cannot, of

course, be reached by ascertaining the value of one or more constituent elements of the loss. We are, therefore, of opinion that the insured was well warranted by the terms of the policy in declining the demand of the company for an appraisal of the salvage alone. Of course, we do not hold that the parties could not, by consent, agree on a partial appraisal. It appears that on the 16th of January, 1899, the defendant company addressed a letter to the plaintiff, stating that, "A difference having arisen in the amount of the damage done to your stock of goods by reason of the fire, we now demand on the part of this company the amount of these said damages be submitted to appraisal as provided for in the section of the policy of the Palatine Ins. Co., London, Limited, under which you make your claim." This communication, it will be observed, contains a separate demand for a general appraisal, and was such a demand as the company was authorized to make under the appraisal clause of its policy. The insured did not at once answer this demand, but transmitted to the company, through its attorney, formal proofs of loss. Some correspondence then followed respecting the proofs of loss, and on February 21st the insured agreed to have an appraisal according to the terms of the policy. Defendant company then declined to enter into an appraisal upon the ground that the insured had sold and disposed of part of the salvage. There is proof tending to show that the insured at that time still had on hand four-fifths of the salvage, and had disposed of the remaining one-fifth with the knowledge and implied acquiescence of the defendant company, its agents or adjusters, or at least with the knowledge of the board of adjusters, who were acting in concert and combination. In this connection counsel for defendant company requested the court to charge, viz.: "If you find from the evidence that, after a period of controversy, in which the parties were unable to agree, they differed in good faith as to the amount of the loss, and that the defendant, in writing, made a separate demand for an appraisal of the loss in accordance with the terms of the policy, and that the plaintiff thereafter, in writing, consented and agreed to an appraisal of the loss in accordance with the terms of the policy, this agreement was a waiver of the right on the part of the plaintiff to insist upon any previous waivers of the defendant. And if you find the facts to be as above stated, and that in the meantime the plaintiff had, without the defendant's consent, sold and disposed of a material part of the salvage goods without informing the defendant thereof in its letter assenting and agreeing to an appraisal, or in any other form, the court instructs you that the defendant company had the right to refuse to proceed further with the appraisal called for, and the plaintiff cannot recover in this action." Error is also assigned upon the refusal of the trial judge to give the follow-

ing instructions to the jury, namely: "The right of the defendant to take its pro rata of the salvage goods at the valuation fixed by the appraisers when an appraisal had been demanded and had is a valuable right assured to it by the policy or contract, and if, therefore, you find the parties differed in good faith as to the loss, and the defendant demanded, in writing, an appraisal according to the terms of the policy,—the demand being a separate demand,—and that the plaintiff replied thereto, assenting and agreeing to an appraisal, the plaintiff thereby waived its previous right to object to such demand, and bound itself to enter upon such appraisal as the policy contemplates and provides for. And if you find that plaintiff had disposed of a material part of the salvage goods without the consent of the defendant, either before or after such demand, so that the same could no longer be appraised or valued, the court instructs you that such disposition justified the defendant in its refusal to proceed with the appraisal, and precludes the plaintiff from recovering in this action." Now, we think the instructions asked were properly refused, for the following reasons: First. The proof tended to show that the salvage was sold with the knowledge and acquiescence of the board of adjusters, whose action was binding upon the defendant company. That board determined by resolution that the salvage in the basement and on the first floor should be sold, and advertised for bids, but could get no reasonable offer. Afterwards Col. Young, chairman of the board of adjusters, told a representative of the plaintiff to go ahead, and dispose of the salvage. Second. The amount disposed of by plaintiff was but a small proportion of the salvage, not exceeding, probably, one-seventh in value; and a sufficient amount was still on hand to have enabled the defendant company to have exercised its option under the policy to take its pro rata of the salvage. As already stated, there was \$31,000 of insurance upon the property, of which \$15,000 had been settled before this suit was brought. The adjusting companies settled upon a basis of \$28,000 as covering the entire loss; the insured to keep the salvage. It was after this partial settlement with the other companies that the insured sold about one-seventh of the salvage, preserving a detailed statement of the articles, their value, etc. The total sum realized on the salvage claimed to have been improperly sold did not exceed \$1,500, which left unsold and still on hand about \$10,000 of salvage. Now, upon these facts the circuit judge instructed the jury, viz.: "The court instructs you upon this point that the defendant was only interested in said option [that is, the right to take the salvage upon the appraisal] in proportion as the policy issued by it bore to the total number of policies and amounts involved,—that is, as one thousand was to thirty-one thousand; and if you should find from the proof that the demand of the defendant, made January 16th, for an ap-

praisal, was assented to by the plaintiff, who offered to proceed with the same, and that the defendant refused to proceed therewith in conformity with his demand by reason of the fact of the sale and disposal of part of the damaged goods, and that the amount of said damaged goods was only a small proportion of the total amount of such goods, and that, notwithstanding said sale by the plaintiff, if there should have been enough of said damaged goods left to be valued and appraised out of which the defendant could have exercised its option as stipulated above, and if the amount sold by plaintiff could still have been ascertained and appraised notwithstanding said sale,—then, and in that event, the court instructs you that the defendant cannot rely upon that defense," etc. We are of opinion that the charge given fully covered this aspect of the case, and that the instructions asked by counsel for defendant company were properly refused.

The next assignment of error is based upon the court's charge in reference to the apportionment of the salvage expense. The business of the plaintiff was resumed about April 15th after the fire, and the bulk of the salvage goods were carried with the new stock, and sold off as opportunity offered. The court charged the jury that it was the duty of the plaintiff to have sold the salvage goods to the best advantage, realizing therefrom as much as possible; that on doing this plaintiff was entitled to any reasonable cost and expense in preparing these goods for sale and disposal, and that this expense would include any house rent, clerk hire, taxes, or other legitimate expenses incurred therein; and that, if the same (salvage) was kept in the store of the plaintiff in conducting their regular business, if it was handled, cared for, and sold by the same clerks and force, that said damaged goods should be charged with their proper proportion of the expenses of the same. The objection to the charge is that the salvage is charged with a proper share of the expenses of plaintiff's entire business after the fire. It is insisted that the sale of the salvage was a mere incident to the general business, and that only such expenses should be allowed plaintiff as were incurred because of an account of the salvage. The court, it will be perceived, left it to the jury to say, in view of all the facts, what would be a proper proportion of the expenses with which the salvage goods should be charged. In *German Bank v. Haller*, 103 Tenn. 73, 52 S. W. 288, the trustee had put new goods with the trust stock, and expenses—such as store rent, salaries, and incidentals—were incurred for both stocks, and the question as to proportioning that expense arose; the trustee insisting that in trust stock should bear it all. This court said: "We know of no good reason why a trustee engaged in executing a trust and selling goods thereunder may not engage in a separate and distinct business, which does not interfere with or detract from his

duties and services in regard to the former. It may be a circumstance which may be looked to in determining what his compensation should be for the execution of his trust if it interferes with it, but it is not an item which would swell the assets of the trust. But, while this is true, it is also, as we think, plain that the expense is incurred about both businesses jointly. It should be borne by each in the proper proportion, and the entire burden should not be borne by the trust goods to the exoneration of the other stock. The items in this case for advertising, salaries and incidentals, and store rent were incurred for both stocks, amounting to \$5,257.64, and should have been borne in some proper proportion by each." *Id.*, 103 Tenn. 84, 52 S. W. 290. We understand the court in this instruction to have submitted to the jury the question as to the proper proportion of the expense of the salvage goods to be determined in view of all the facts surrounding its sale, and we find in this instruction no reversible error. Affirmed.

SCHOOL DIST. NO. 49, FAULKNER COUNTY, v. ADAMS.

(Supreme Court of Arkansas. March 16, 1901.)

SCHOOLS AND SCHOOL DISTRICTS—BOARD MEETING—NOTICE—CONTRACT WITH TEACHER.

Where two members of a school board went to the home of the third member between daylight and sunrise in the morning, and held a meeting of the board of which no notice had been given, and which such third member protested against and declined to participate in, a contract with a teacher, authorized at such meeting, and signed by such two members, is not binding on the district, and cannot be recovered on refusal of the district to accept the services.

Appeal from circuit court, Faulkner county; George M. Chapline, Judge.

Suit by R. F. Adams against school district No. 49, Faulkner county. From a judgment in favor of plaintiff, defendant appeals. Reversed.

This is a suit by the plaintiff, R. F. Adams, against school district No. 49, Faulkner county, to recover three months' wages as teacher, at \$25 per month. To sustain his suit, plaintiff introduced as evidence his contract with said district. He also testified that he held a certificate to teach in the public schools. He says he went on the 4th of July to teach the school, and Reeves and Firestone, two of the directors, refused to let him in the house because Miss Harris was teaching. He says the contract was signed on the 23d of May, but some time before that Kuykendall and Wilsop had spoken to him about the school, and he told them he would teach the school, and on the 23d of May they brought the contract signed by Kuykendall and Wilson, which was in accordance with their previous agree-

ment, and he executed it early in the morning. He was always ready and willing to comply with contract. T. S. Wilson, a witness for plaintiff, testified that on the third Saturday in May, 1898, William Firestone was elected school director for district 49, to take the place of A. F. Kuykendall, whose time expired, and on Monday morning next he and Kuykendall, in accordance with an agreement previously made between him and Kuykendall, went to J. J. R. Reeves' house. Kuykendall got there before witness. Reeves and Kuykendall were at Reeves' barn when witness got there. Witness says they told Reeves they came to have a school meeting and elect a teacher. Reeves said he would have nothing to do with it, and refused to act with them. Witness suggested R. F. Adams be elected as teacher, and Kuykendall agreed to it. We had the contract already made out, and he and I signed it, and Reeves said he would have nothing to do with it. We had not given Reeves any notice of this meeting. Witness and Kuykendall had the Adams "contract in our hands for several days before that. We had promised him the school." Witness sent his children to Miss Emma Harris. Witness had been elected director at a special school meeting some time before that. "Don't know whether any notice of such election had been given or not. We kept no record nor minutes of the meeting at which time we made the contract." A. F. Kuykendall, for plaintiff, testified the same, in substance, as Wilson, and the plaintiff here closed his testimony. J. J. R. Reeves, sworn as a witness for defendant, says: "I was a director of school district No. 49, Faulkner county. My term expired May, 1899. At the election, 1898, Wm. Firestone was elected in place of A. F. Kuykendall, director. On Sunday, I said to T. S. Wilson, who was acting as director, to come over at 2 o'clock next day to the school house, and 'let's have a meeting, as Wm. Firestone would be sworn in as a director.' And on Monday morning, between daylight and sun up, Kuykendall came to my house, and said he wanted some potato slips, and he and I walked out to my barn, and in a very few minutes T. S. Wilson came up to the barn. Then one of them said, 'Let's have a school meeting;' and I said I would have nothing to do with it. One of them said, 'I move that Adams be elected for teacher,' and the other agreed to it; and they asked me to sign the contract which they seemed to have had prepared. I refused, and I went off, and Wilson said to me, 'You can go on with your meeting this evening as you please; I will not be there;' and they left. Some time that forenoon Wm. Firestone was sworn in as a director, and at 2 o'clock p. m. we had a meeting, and selected Miss Emma Harris to teach a three-months school, which she taught, and for which she was paid by the district." Mr. T. S. Wilson was elected school director of dis-

trict No. 49 some few months before this, not at a regular school meeting, but at a special election. There were no written notices of said election put up in the district, nor was there any notice of such election by the directors, or either of them, at any time. Nevertheless he acted as such director after this election. At this point the court announced that he would hold that it made no difference, for the purpose of this case, how T. S. Wilson was elected; if he was acting as a director, and recognized as such, that would be sufficient to bind the directors; to which ruling of the court and announcement defendant's counsel excepted at the time. "We gave no written notice to Mr. Wilson, the other director, of the meeting we had at 2 o'clock, and Mr. Wilson was not present at that meeting. Mr. Firestone was qualified after Mr. Kuykendall and Mr. Wilson were at my house, on the 23d of May, in the morning. I took no part in the meeting at my barn as aforesaid, on the morning of May 23d, and had no written or verbal notice of an intended meeting until Wilson and Kuykendall came up in the manner stated. I neither voluntarily participated nor met with them."

G. W. Bruce, for appellant. Sam Frauenthal, for appellee.

HUGHES, J. It was competent for two of the three school directors, being a majority of the board of directors, if all were present and participating in the meeting, or had had written notice of the time, place, and purpose of the meeting, as required by law, to make a legal contract to employ a teacher, by which the school district would be bound; but without such notice, or the voluntary presence of all the members of the board, no legal contract could be made. Where a party, a member of the board, had no notice of the time, place, and purpose of the meeting, and two members of the board went to his residence, and while he was present for some other purpose, and not for the purpose of a meeting of the board of school directors, and protested against their action as a board, as in this case, the two could make no legal contract to bind the district. "The corporate authority must be exercised by the proper body." This was a called meeting, and notice was indispensable, unless waived by the presence of all the directors and their participation, to the legality of its action to bind the district. At a regular meeting for the transaction of ordinary business, the time and place for which is fixed by law, all must take notice of the meeting, and if a majority act at such meeting, and one be absent and not participating, the action, within the scope of the powers of the board, will bind the school district. This question was fully considered in *Burns v. Thompson*, 64 Ark. 489, 43 S. W. 499, and this case is within the ruling in that, to which we adhere.

The judgment is reversed, and the cause is remanded for a new trial.

BATTLE, J., did not participate.

JONES et al. v. BROWNLEE.

(Supreme Court of Missouri, Division No. 2.

March 26, 1901.)

**LIBEL—RELEVANT ALLEGATION IN PLEADING
—PRIVILEGE.**

1. An allegation, though false, by the defendant in a cross complaint in a divorce proceeding, that her husband had been cohabiting with the plaintiff, was an absolutely privileged statement, for which libel will not lie, since it was made in the due course of legal proceedings in a court of competent jurisdiction, and relevant to the issues therein.

2. Where the defendant in libel did not plead justification or the truth of the libelous words pleaded in a cross complaint in divorce, but averred that she made the libelous allegation on reasonable grounds, a failure to prove the averments of the answer will not deprive her of the absolute privileged character of the allegation.

Appeal from circuit court, Knox county.

Action by Ella Jones and husband against Annie E. Brownlee. From a judgment in favor of the defendant, the plaintiffs appeal. Affirmed.

This is an action for libel alleged to have been made by respondent, Mrs. Brownlee, in an answer and cross bill filed by her in a suit brought by her husband, E. C. Brownlee, against her for divorce, in the circuit court of Knox county, in this state. The alleged libel consists in the following averment in the answer and cross bill of defendant in said divorce proceeding: "And for further cause of divorce defendant says and charges it to be a fact that since the marriage aforesaid the plaintiff (meaning the said E. C. Brownlee) has been guilty of consorting and cohabiting with other women, including Mrs. Ella Jones." The petition avers that said charge was wantonly, willfully, and maliciously made by defendant without any evidence to sustain it, and when defendant well knew of her own knowledge that she had no evidence to sustain it; that said charge was false and untrue, and was not made in good faith with any intention of attempting to sustain it by proof; that defendant, knowing she could not sustain said answer by proofs, subsequently withdrew the same, and let judgment go for her husband without contesting the same; that said libelous words were not privileged, and plaintiff was injured and damaged in her reputation as a wife and mother in the sum of \$2,500 actual damages and \$2,500 for exemplary and vindictive damages. Defendant, in her answer, admits that she was formerly the wife of E. C. Brownlee; that he sued her for divorce, and in her answer she used the words charged and quoted in plaintiff's petition. She denied all the other allegations. Defendant further answered

that she made the said allegation of consorting and cohabitation in the divorce suit to which she was a party in a court of competent jurisdiction; that it stated a statutory cause of divorce, and was pertinent and relevant to the issues in said divorce suit, and was, therefore, a privileged communication, and as such is a full defense to this action. She further answered that said statement was made in her answer in a suit against her by her husband for divorce in a court of competent jurisdiction; that she was compelled to and did employ counsel to take charge of and conduct her defense; that she fully and frankly stated to her said counsel all the facts within her knowledge, and all the facts which, with reasonable diligence, she could learn, as to the guilt or innocence of plaintiff of the said accusation; that all her communications in that regard were made in good faith to her said counsel, with a view to obtain their advice, and her said attorneys advised her that said accusation should be made in her said answer in said divorce suit; that at the time she had reason to believe and did believe she could sustain said allegation by evidence on the trial of said suit, and that said allegation was true; that said allegation was pertinent to the issues in said suit, and was made in full expectation at the time that she would go to trial upon it; that, pending said suit, she filed a motion for alimony, which motion was overruled, but while said motion was pending her husband filed a bill in equity to set aside a conveyance he had made to her to property of the value of \$2,000, claiming that in filing her said motion she had violated the agreement upon which he had deeded the same to her, and, fearing she might lose said equity suit and said land, and being perplexed, and to obtain the dismissal of said suit, she agreed to and did withdraw her answer, and made no further appearance in said suit. The reply charged that said answer was not filed in good faith, and constituted no defense, and was not a privileged communication. The case was tried to a jury under the theory that the alleged libel was a qualified privileged communication, and defendant liable if express malice was shown in making said accusation against plaintiff. On behalf of plaintiff the evidence tended strongly to show that the charge was false, and that she was innocent; that Dr. Brownlee, the husband of defendant, was a dentist at Edina, Mo., that plaintiff was married to her co-plaintiff in Kansas City, where her parents lived at the time; that several years later her father purchased a farm near Edina, and plaintiff and her child, a little girl, were in the habit of spending the summer months on the farm with her parents; that she employed Dr. Brownlee to treat her teeth, and became acquainted with his wife, the defendant, and they were good friends; that plaintiff and her husband afterwards moved to St.

Louis, where her husband was engaged as salesman in a large mercantile house; that plaintiff continued to visit her parents in the summer, and her husband would come up and spend his vacation. The evidence of plaintiff, Dr. Brownlee, and plaintiff's father and mother fully substantiated her innocence of any improper conduct with Dr. Brownlee. Defendant did not justify, but introduced evidence of information she received from other persons upon which she based her allegations in the answer. She testified that she had no malice towards plaintiff, and she and her attorneys testified that she disclosed all the information she had when she filed her answer. This evidence was largely hearsay, and very inconclusive. Many exceptions were saved to the admission and rejection of evidence and to the giving and refusal of instructions.

C. D. Stewart and O. D. Jones, for appellants. L. F. Cottey, G. R. Balthrope, and F. H. McCullough, for respondent.

GANTT, J. (after stating the facts). This cause was tried in the circuit court on the theory that the alleged libelous allegation in defendant's answer and cross bill to her husband's suit against her for divorce was a qualified or conditionally privileged communication, and not absolutely privileged. The finding was for defendant, and counsel for defendant now urge that, if the communication was in fact absolutely privileged, then the judgment must be affirmed, even if error occurred in other respects. Some of the questions presented by this appeal have not been decided by this court. The general proposition was involved in *Hyde v. McCabe*, 100 Mo. 412, 13 S. W. 875, but the majority of the court held in that case that the libelous matter contained in an affidavit in opposition to another affidavit made as a basis for a rule requiring security for costs was not sufficiently relevant or pertinent to afford the affiant a privilege. As said in that case, there are occasions on which written or spoken words otherwise libelous and defamatory are not actionable as a libel. The rule is founded upon reasons of public policy. At common law it was broadly ruled that no action for libel could be maintained for any defamatory matter contained in a pleading in a court of civil jurisdiction. Thus, *Town. Sland. & L.* (4th Ed.) § 221, lays it down that: "In a civil action, whatever the complainant may allege in his pleading as or in connection with his grounds of complaint can never give a right of action for libel. The immunity thus enjoyed by a party complaining extends also to a party defending. Whatever one may allege in his pleading by way of defense to the charge brought against him or by way of countercharge, counterclaim, or set-off can never give a right of action." In *Seaman v. Nethercliff*, 1 C. P. Div. 540, Lord Coleridge, C. J., said:

"Now, a long course of authorities, of which perhaps the best known, as the most remarkable, is the case of *Astley v. Younge*, 2 Burrows, 807, has decided that no action of slander can be brought for any statement made by the parties either in the pleadings or during the conduct of the case. The law is also stated very clearly by Lord Eldon in *Johnson v. Evans*, 3 Esp. 32. It is so stated also—not, indeed, with absolute certainty—in a note to the well-known case of *Hodgson v. Scarlett*, 1 Barn. & Ald. 232, the author of which note, we learn from Baron Alderson in *Gibbs v. Pike*, 9 Mees. & W. 358, to have been Mr. Justice Holroyd himself. But I conceive the law on this point to be now quite certain, although most men of any experience in the profession must have seen many instances in which judicial proceedings have been made by parties to them to serve ends of private malignity." While the English courts so hold, the American courts quite generally modify the rule to this extent: of holding that the pleading must be in a court having jurisdiction of the subject-matter, and the defamatory words must be pertinent or relevant to the matter in hand, or, as sometimes said, must not be irrelevant to the subject-matter of the action or suit before the court. It may, we think, be safely asserted that, according to the English decisions, the parties to a civil suit are not liable to an action for libel, however libelous and malicious the language may be, whether in reference to the opposite parties or to strangers. *Lawson v. Hicks*, 38 Ala. 279, was an action of libel brought by a plaintiff against the defendant for defamatory language in a cross interrogatory propounded to a witness in a former suit between the parties. It was held there were two classes of privileged communications; one absolutely privileged, the other conditionally. The first affords absolute immunity from suit; the other removes the presumption of malice which follows from slanderous words, and requires proof of express malice. Among absolute privileged communications are words spoken or written in the due course of legal proceedings which are relevant and pertinent to the issues therein. From the report of *Hyde v. McCabe*, 100 Mo. 412, 13 S. W. 875, we think such was the conclusion reached by this court in that case, but, as the court held the libelous words were irrelevant and gratuitous libels, an action could be maintained on them if shown to have been falsely and maliciously uttered or written. In the determination of the relevancy or irrelevancy of the defamatory words which are the basis of this action, we must necessarily keep in view that they were part of a pleading filed by defendant in an action brought by her husband against her in the circuit court of Knox county to obtain a divorce from her. That court had jurisdiction of that class of cases and over the parties to that suit. If, as alleged in that answer, the defendant's

husband was guilty of consorting and cohabiting with other women, it would not only have defeated his suit for divorce, but, if defendant was herself without fault, it would have justified the court, under our laws, in awarding her a divorce from plaintiff. The defamatory words, then, constituted a charge which the court was authorized to consider in rendering its judgment, and was, therefore, pertinent. In *Hawley v. Wolverton*, 5 Paige, 522, the chancellor, in passing upon the relevancy of a statement in the bill, said: "And where any allegation or statement contained in the bill may affect the decision of the cause if admitted by the defendant or established by proof, it is relevant, and cannot be excepted to as impertinent. In *Ruohs v. Backer*, 6 Helsk. 395, a young lady, a third person, was charged to be a common prostitute, and the court held the allegation was relevant. And in a most luminous and exhaustive discussion of this whole subject in *Johnson v. Brown*, 13 W. Va. 71, it was ruled that whether, in such a case, libelous matters, if contained in the pleadings in a cause, are or are not pertinent to the cause, is a question of law which ought to be decided by the court, and not a question of fact to be submitted to a jury,—citing with approval *State v. Williams*, 30 Mo. 365; and that such a course does not invade the province of a jury to find a particular publication is or is not a libel, but is simply performing the duty which devolves upon a court to determine all pure questions of law in any and all cases. In *Sullivan v. Commission Co.*, 152 Mo. 268, 53 S. W. 912, 47 L. R. A. 859, it was ruled that whether or not words used in a letter were privileged was a question of law for the court. In *State v. Williams*, 30 Mo. 365, it was held error to submit to a jury whether certain words were material in a prosecution for perjury. And it is generally held that on demurrer it is the province of the court in the first instance to determine whether a cause of action is based upon an absolutely privileged communication. *Forbes v. Johnson*, 11 B. Mon. 48; *Strauss v. Meyer*, 48 Ill. 385; *Garr v. Selden*, 4 N. Y. 91.

The petition having alleged the pendency of the divorce case between plaintiff's husband and herself in a court of competent jurisdiction, and having shown on its face that her answer was a pleading in that civil case, and it appearing to us that, tested by the rules of law, the said answer, whether true or false, or whether definite enough in its averments, was relevant to the issues in that case, in our opinion it was a privileged communication, for which an action for libel cannot be maintained, unless the fact that plaintiff was not a party to said divorce suit takes her case out of the principles already announced. At common law, we think, it was established that the fact that a third party was scandalized would not change the principle of public policy upon which the priv-

ilege is founded. In *Henderson v. Broomhead*, 4 Hurl. & N. 568, it was held that an action of libel would not lie against a party who, in the course of a civil cause, made an affidavit in support of a summons taken out in said cause which was scandalous, false, and malicious, though the person scandalized and who complained was not a party to said cause; all the judges concurring. And to the same effect, *Johnson v. Brown*, 13 W. Va. 136. With the exception of *Ruohs v. Backer*, 6 Helsk. 395, we have not been able to find any case, either in England or the United States, which holds that an absolutely privileged communication made in a pleading in a cause ceases to be such when written or spoken as to one not a party to the suit. We think, with Judge Green in *Johnson v. Brown*, 13 W. Va. 71, that such a distinction cannot be made without disregarding the public policy upon which the whole rule depends. There are so many cases in which the rights and character of persons who are not parties to a suit become collaterally the subject of inquiry, and the right to make such inquiry so unquestionable, that no good reason for making the exception can be given so long as the rule itself is maintained. To the argument made in all these cases that no person should be privileged to do injury to another, Lord Penzance, in *Dawkins v. Lord Rokeby*, L. R. 7 H. L. 744, answered: "This mode of stating the question assumes the untruth and assumes the malice. If, by any process of demonstration free from the defects of human judgment, the untruth and malice could be set above and beyond all question or doubt, there might be ground for contending that the law should give damages to the injured man. Whether the statements were in fact untrue, and whether they were dictated by malice, are, and always will be, open questions, upon which opinions will differ, and which can only be resolved by the exercise of human judgment. And the real question is whether it is proper on grounds of public policy to remit such questions to the judgment of a jury. The reasons against doing so are simple and obvious. A witness may be utterly free from malice, and may yet, in the eyes of a jury, be open to that imputation; or, again, the witness may be cleared by the jury of the imputation, and may yet have to encounter the expenses and distress of a harassing litigation. With such possibilities hanging over his head, a witness cannot be expected to speak with that free and open mind which the administration of justice requires. These considerations have long since led to the legal doctrine that a witness in the courts of law is free from any action, and I fail to perceive any reason why the same considerations should not be applied to an inquiry like the present." Holding, as we do, that the same policy should govern when reference is made to third party in a relevant and pertinent

pleading as to the parties themselves, we see no reason why we should not hold that the communication which is made the basis of this suit is absolutely privileged. According to the great weight of authority, it appears to us to be clearly within that class. This being so, the defendant was not liable, even though her charge was false; and, as the verdict was in her favor, it ought not to be disturbed. With this view of the law on the fundamental question in the case, it is deemed unnecessary to examine and determine each exception saved in the circuit court. The question was not whether plaintiff was guilty of the misconduct charged in defendant's answer, but whether, however false it may have been, it was privileged. We have held that it was, and, however grievous it may appear to plaintiff that she has no remedy for the aspersion cast upon her, such is the law, according to our best judgment. The defendant did not plead justification, or the truth of the libelous words, and only offered evidence to show she made the allegation upon what appeared to her at the time as reasonable grounds for so doing. Conceding all she proved, it did not establish the truth of said allegation; but this failure to maintain the averments of her answer did not deprive her of absolute privilege which the law secures to her. It results that the judgment of the circuit court must be and is affirmed upon this ground alone. All concur.

GREEN v. HIGHAM.

(Supreme Court of Missouri, Division No. 2.
March 26, 1901.)

CONTRACTS—STOCK—POOLS—CONSIDERATION—TIME—DURATION—SALES.

1. Defendant, after selling plaintiff's brother 260 shares of certain stock, afterwards sold plaintiff 140 shares; and the three executed an agreement to pool 600 shares, all benefits to be shared equally, including any sales, and also declaring that defendant would divert to such pool any proceeds and royalties received by him from shares held by him in a certain other company. *Held*, that the defendant's gain from the sale to the others, and the fact that the brothers were brokers, and might more easily sell 600 shares than a smaller number, was a sufficient consideration for defendant's agreement.

2. An agreement by parties to form a pool of shares of certain stock owned by them, and to share equally all benefits accruing under the pool, including all sales, was valid, without a transfer of the shares to any one person as trustee, or a power of attorney to any one person to sell the stock.

3. Defendant sold plaintiffs stock in the A. Co., and then agreed with them to form a pool, each contributing 200 shares of such stock, and also agreed to divert to such pool the royalties and proceeds from stock in the B. Co. until such time as the A. Co. should begin paying regular dividends. It was contemplated by all parties that the A. Co. would soon commence paying dividends, and defendants' royalties from the B. Co. were to cease on a certain date. *Held*, that the agreement for a pool was not

void on the ground that the duration of the pool was not sufficiently definite.

4. Where defendant sold plaintiff's brother 260 shares of stock, and sold plaintiff 140 shares under an agreement that the three form a pool of 600 shares, defendant contributing 200, and that they share equally all benefits accruing under the pool, including any sales, the issuance of the 140 shares to plaintiff's wife, with the full knowledge and direction of defendant, and the temporary pledge of the 260 shares by the brother, were not sales, within the contemplation of the agreement.

Appeal from St. Louis circuit court; H. D. Wood, Judge.

Action by Levi W. Green against Charles C. Higham. From a judgment for plaintiff, defendant appeals. Affirmed.

This is a suit for an accounting and the balance thereon alleged to be due plaintiff for his share of certain royalties collected by defendant from the American Brake Company. In March or April, 1891, defendant sold Arthur Green, a brother of plaintiff, 260 shares of the Consolidated Brake Company. Arthur Green testifies that defendant represented that the last-mentioned company was in a flourishing condition, and he might expect satisfactory dividends within a year. Defendant denies this. In 1892 defendant sold to plaintiff, through his brother, Arthur Green, 140 shares of Consolidated Brake stock. Arthur Green testifies that at the time of this last sale he reminded defendant of his statement that said company would pay a dividend, and that it had not done so. Contemporaneously with this last sale the two brothers and defendant entered into the following written contract: "Whereas, C. C. Higham, of St. Louis, Missouri, Arthur H. Green, of Rochester, N. Y., and Levi W. Green, of the same place, are each the possessor of two hundred shares of the capital stock of the Consolidated Brake-Adjuster Company; and whereas, the said parties are desirous of forming a pool of said stock for their mutual advantage and benefit; and whereas, said C. C. Higham agrees to divert to said pool the royalties and proceeds now received or which may be received by him from the American Brake Co. of St. Louis, Mo., until such time as the said Consolidated Brake-Adjuster Company shall begin paying regular dividends: Now, therefore, be it known that we, the undersigned, do hereby form a pool consisting of six hundred shares of said capital stock of said Consolidated Brake-Adjuster Co., of which we each shall stand possessed of two hundred shares, the understanding being that all benefits accruing under said pool shall be shared equally, including any sales of said stock, and that said royalties and proceeds also shall be equally shared, until such time as the said Consolidated Brake-Adjuster Company shall pay dividends as aforesaid, when the said royalties shall revert to the sole use and benefit of said C. C. Higham. Witness our hands and seals this 20th day of February, 1892. Chas. C. Higham. [Seal.] Arthur H.

Green. [Seal.] Levi W. Green. [Seal.] Witness: W. S. Higham." The Green brothers were brokers. Under this written contract defendant Higham from time to time received his royalties from the American Brake Company, and paid over to Arthur and Levi Green their respective shares, according to the contract, until the year 1895. This suit is for their share of those royalties since 1895. Arthur Green assigned his interest in the contract to his brother, the plaintiff. It should also be stated that when plaintiff bargained for the 140 shares he did not get the certificates of stock, but defendant gave Arthur Green a declaration of trust that he held 40 shares for Arthur Green's use and the above contract, and 100 shares for plaintiff's use, and these papers were all delivered to plaintiff. These transactions placed 400 shares in the Greens. The circuit court adjudged an accounting, and the matter was referred to a referee to take the account, and upon his report judgment was rendered for plaintiff for \$6,332. All proper motions for new trial and appeal were filed and overruled, and defendant appeals.

J. M. Holmes, Albert Blair, and Kent K. Koerner, for appellant. Lee W. Grant, for respondent.

GANTT, J. (after stating the facts). Three propositions are relied upon for a reversal of the judgment: First, that the agreement by defendant to divide his royalties from the American Brake Company with plaintiff and his brother was without consideration and unenforceable; second, that in fact no pool was formed under said agreement; third, no time was fixed for the duration of the pool, and, if formed, defendant had a right to discontinue it upon notice to plaintiff and his brother.

1. The circuit found that the sale of the 140 shares by defendant and his brother to plaintiff was the consideration upon which the contract was based. The gain arising from the sale of this stock was the motive on the part of defendant for agreeing to divide his royalties from the American Brake Company with plaintiff and his brother, and on their part the motive for buying additional Consolidated stock which had paid no dividend was to obtain the royalties which the contract secured them. We think the evidence sustains this conclusion. But defendant gives an additional reason why he desired to make this agreement: The stock was not salable in small blocks, and would be more salable in a block of 600 shares, and plaintiffs were brokers. This being so, the mutual agreements that each should share equally in the proceeds from the sale of the stock secured to defendant the benefit of any advantageous sale plaintiff or either might thereafter make of the stock. These motives for the written contract constituted a valuable consideration, which has been com-

prehensively defined to be "a benefit to the party promising, or to a third person at his request, or an inconvenience, loss, or injury, or the risk of it, to the party promised." 4 Minor, Inst. pt. 1, p. 16; 2 Bl. Comm. 446, note; 19 Smith, Cont. 141. The benefit which defendant expected to receive from the sale of the stock through the mutual efforts of himself and plaintiff and his brother satisfies the law. The amount of the consideration, so it be appreciable, is immaterial. We think the court correctly held this objection was not tenable.

2. The objection that no pool was ever formed is evidently predicated upon the idea that this word had some technical meaning. The Century Dictionary defines a pool to be "a joint adventure by several owners of a specified stock or other security temporarily subjecting all their holdings to the same control for the purpose of a speculative operation, in which any sacrifice of the shares contributed by one, and any profit on the shares contributed by another, shall be shared by all alike." We think that the word "pool" must be read in the light of the whole contract. There is nothing in this contract that requires all the 600 shares to be transferred to one person as a trustee, or that a power of attorney should be given to any one person to hold and sell or dispose of the stock. While this might have been done, the failure to do so in no way invalidates the contract they did make. Neither party required this at the making of the contract, or requested it afterwards. "The practical construction given by the parties themselves is a proper guide to its meaning, and is of more importance than what is the abstract meaning which this court may attach to its mere phraseology." *Patterson v. Camden*, 25 Mo. 21. The course of dealing between plaintiff and defendant under this agreement was uniform, and unquestioned, and concurred in by all parties for three years. Whether a pool, in a technical sense, was formed, is quite immaterial. A valid contract was entered into and observed by the parties thereto, and must govern as to their respective rights.

3. As to the point that there was no time of duration fixed, it falls within the maxim, "Id certum est." It was contemplated by all parties that the Consolidated Company would soon begin to pay dividends, and when it did the purpose of the pool was ended; and it necessarily ended when the royalties from the American Brake Company to defendant should cease, which, as we understand, would be January 1, 1899. As to the issuance of the 140 shares of stock to plaintiff's wife: It was done with the full knowledge and direction of defendant, who continued thereafter to pay the royalties as he had previously done. This was not a sale, in the contemplation of either of them. Nor was the temporary pledge of his 200 shares by Arthur Green a sale, within the terms of

the contract. None of the parties to the contract have ever sold their Consolidated Brake stock, and no breach by plaintiffs has occurred which would exonerate defendant from complying with the contract. Upon a review of the whole case, we find no ground for reversing the judgment, and it is accordingly affirmed.

SHERWOOD, P. J., and BURGESS, J., concur.

STATE v. WADE

(Supreme Court of Missouri, Division No. 2.

March 26, 1901.)

CRIMINAL LAW—BILL OF EXCEPTIONS—HOMICIDE—INSTRUCTIONS.

1. Where the trial court refused to grant an application to pass upon the question of accused's present insanity in order to take advantage of any error therein, the point must be saved and preserved in a bill of exceptions, and the mere copying it into the record and calling for it in the bill of exceptions was insufficient.

2. Where, on a trial for murder, one of the defenses was insanity, an instruction that the law of self-defense is applicable alike to the insane and to the sane, and that the defenses are consistent, and either one, if maintained, would authorize a verdict of not guilty, was improperly refused.

Appeal from circuit court, Clay county; E. J. Broadbuss, Judge.

Francis M. Wade was convicted of murder in the second degree, and appeals. Reversed.

Farris & Son, Mr. Cramer, and W. J. Courtney, for appellant. The Attorney General, for the State.

SHERWOOD, J. This is the second appearance of this cause in this court, the judgment of the lower court having been reversed on a former occasion because of the insufficiency of the indictment. 147 Mo. 73, 47 S. W. 1070. Since then the cause has again been tried, resulting in a verdict of guilty of murder in the second degree, and affixing the punishment at imprisonment in the penitentiary for the term of 15 years. Of its own motion, the trial court cut down this term to 10 years. The homicide charged in the indictment was the killing of Alexander Schamel by shooting him with a shotgun. The plea was not guilty, and this was supported by evidence tending strongly to show insanity of defendant when the act was done. Self-defense was also interposed. And there was evidence that while in the state penitentiary he was transferred to the insane ward of that institution, where he remained some weeks, when, the judgment in his cause having been reversed, he was returned to Clay county, and, a new indictment having been returned, he was again put upon his trial. The state is not represented in this court.

It is asserted for the defense that defendant made application through another for a

jury to pass upon the question of whether defendant was insane, and so incapable of making his proper and necessary defense against the accusation contained in the indictment; and it is also asserted that the court refused to grant a jury to pass upon the question of defendant's present insanity, and that the report of certain physicians appointed by the court to pass upon defendant's present insanity would be found on certain pages of the transcript. If the trial court ruled improperly on the subject of the application mentioned, the proper course, and the only course, to pursue, in order to take advantage of it in this court, was to save the point, and preserve it in the bill of exceptions. It could not be preserved—and the same may be said about the report made by the physicians—by copying it into the record, and then referring to it, and calling for it in the bill of exceptions, even if this had been done, since the statute only permits this sort of thing to be done in regard to motions for new trials, in arrest, and instructions. Everything else in the nature of evidence, applications for continuance, or other applications, unless preserved by being copied in the bill of exceptions, is tabooed. State v. Griffin, 98 Mo. 672, 12 S. W. 358. And we have many times decided that, so far as mere matters of exception are concerned, the only repository known for them in the law is a bill of exceptions. State v. Wear, 145 Mo. 162, 46 S. W. 1099, and cases cited.

Speaking of the instructions,—17 given at the instance of the state, and 13 at that of defendant, and 1 of the court's own motion,—they presented in a general way such views of the law as have frequently received our sanction. It is unnecessary, for a reason which will presently appear, to go more into particulars, or to discuss the instructions in detail.

Contention has been made that defendant was permanently insane at and before the perpetration of the homicidal act, and there is evidence bearing in that direction. If, of course, permanently insane before the act done, and this established by the evidence, the state, in order to convict, would have to show the act done during a lucid interval; because chronic or habitual insanity, once being established, is presumed to continue, until the contrary is made to appear. State v. Lowe, 93 Mo. 547, 5 S. W. 889. And if, on the other hand, insanity permanent in its nature should have been developed after the act done, still the state could not convict except during a lucid interval. Among instructions asked by defendant there was this one: "The jury are instructed that the law of self-defense is applicable alike to the insane as to the sane; that both defenses are consistent; and, if you find one or both of such defenses in favor of the defendant, you will return your verdict of not guilty." The theory of this

instruction was correct. It was not embodied in any other. It should have been given. For failure to give it, judgment reversed, and cause remanded. All concur.

DOERNER v. DOERNER et al.

(Supreme Court of Missouri, Division No. 2.
March 26, 1901.)

WILLS—DEVISE TO CLASS—CONSTRUCTION— RIGHT TO PARTITION.

1. Where testator made a devise to the children of his daughter as a class, with the evident expectation that other children would be born to her, the estate in remainder vests in the persons who were in esse when the will took effect, which estate will open during the continuance of the particular estate, and let in the after-born children of the daughter.

2. Where a will provided that, until the youngest of the children of the testator's daughter became of age, the daughter should have a right to the rents and profits, and that at such time her rights to the rents and profits should cease except as to one-third of the real estate for and during her natural life, when the youngest child reached majority, the mother and her children became tenants in common so as to authorize partition.

Appeal from St. Louis circuit court; L. B. Valliant, Judge.

Action by Charles Augustus Doerner against Eliza and Frances Doerner. From the judgment, Eliza Doerner appeals. Modified.

Suit for partition (brought March, 1897), and for sale of certain real estate, and an accounting for rents and profits, and for general relief. Whether the suit could be maintained depended on the provisions of the will of the testator, Ludwig Seitz, who died May 12, 1868. The evidence shows that, at the date of Ludwig Seitz's will (March, 1861), defendant Eliza Doerner had one child living, defendant Alwine Weber. At the date of the death of Ludwig Seitz she had three children living, defendants Alwine Weber, Emilie Zuendt, and Hans Egmond Doerner (born two months afterwards). Thereafter three other children were born to her, to wit, the plaintiff, Charles Augustus Doerner, the defendant Cecille Jay, and this respondent, the youngest child, Frances Doerner, who attained 21 years of age February 9, 1897, and prior to the institution of this suit. Louisa Seitz died January, 1894. The testator makes provision for his wife by his will, in the following clause: "I devise my beloved wife, Louisa Seitz, the house in which I now live, and the buildings appurtenant to the same, being on lot No. 10, in block No. 545, said lot containing 25 feet front on Franklin avenue, by 155 feet, more or less, to an alley 20 feet wide, and the household furniture of every kind. Further, a yearly revenue of \$600 to be paid in quarterly rates of \$150, in manner hereinafter provided for, and also the whole amount of interests of the stock on hand, which stock of wines, liquors, vinegars, etc., belonging to my business, is to

61 S.W.—51

be capitalized immediately after my decease; and the interests of the capital arising therefrom are to be paid to my said wife at the rate and in manner stipulated by me as follows in this my last will and testament. To have and to hold to her, my said beloved wife, Louisa Seitz, for the term of her natural life, in lieu and in full satisfaction of her dower in all lands and tenements whereof I shall die seised." He next provides for his son Charles Seitz by giving him a large amount of personal property and several parcels of real estate. Then follow the provisions of the will with respect to the testator's daughter Eliza Doerner and her children, by which the property described in plaintiff's petition, and which is now sought to be partitioned, is devised as follows: "I give and bequeath to my daughter Eliza, wife of August Doerner, all the not-incumbered income and profits of all and every the real estate, as well as the personal property, given, bequeathed, and devised by this, my last will and testament, unto my grandchild or children, the child or children of her, my said daughter Eliza Doerner, to use the same for the expenses of the maintenance and education of her child or children until she, he, or they shall have arrived at the age of 21 years, and, after he, she, or they shall have arrived at the said age, I order and declare that by these presents I give, devise, and bequeath unto my said daughter Eliza Doerner, for the term of her natural life, the lawful right of dower in all the real and personal estate as following, bequeathed and devised to her children or child, to have and to hold the same to her, my said daughter, Eliza Doerner, for the expenses of the maintenance and education of her children, and for her sole use and benefit, without control or any interference, and without the debts of her said husband or of any future husband. Now, therefore, I give and devise to my grandchild or grandchildren, the child or children of my said daughter Eliza Doerner [here follows description of one of the parcels of real estate involved in this suit], with all and every the buildings and improvements thereon; whereby I order and declare that I, by these presents, stipulate the first above herein mentioned clear yearly rent on same of \$600, quarter yearly with \$150, to be paid to my wife, Louisa Seitz, for and during the term of her natural life, are to be paid to the same, free of all taxes and other deductions, and are to be issuing and payable out of the rents of the real estate heretofore described and devised unto the child or children of my said daughter Eliza, wife of August Doerner; to have and to hold the same to my said grandchild or children, and her, his, or their heirs and assigns, forever. I further give and devise to my grandchild or grandchildren, the child or children of my said daughter Eliza Doerner [here follows the description of another piece of real es-

tate involved in this suit], to have and to hold to my said grandchild or grandchildren, her, his, or their heirs and assigns, forever." Then follow five precisely similar clauses, in which the testator devises to his grandchild or grandchildren various parcels of real estate, with one or two exceptions, involved in these proceedings, to each of which clauses he attaches the habendum: "To have and to hold the same to my said grandchild or children, her, his, or their heirs and assigns, forever." He then gives to his son Charles Seitz his vinegar business, excepting the stock on hand, which was to be capitalized for the benefit of his wife; and then directs that this capital and the household furniture shall, after the death of his wife, be divided between his son Charles and the children of his daughter Eliza. Finally, he gives the remainder of his personal estate, after payment of his just debts and the sum of \$300 to his wife, to his son Charles as one part, and to the child or children of his daughter Eliza as the other part.

There was a decree by the trial court on March 11, 1896, in which the issue as to the rents and profits was found in favor of defendant Eliza Doerner, and the accounting asked for by plaintiff denied; but the decree further found that each of the children of said Eliza Doerner, including said Frances, was entitled to a one-sixth interest in the real estate described in the petition, subject to an interest of Eliza Doerner in one-third thereof for life, and ordered partition and a sale of the property, appointing a commissioner for the purpose. From this decree, defendant Eliza Doerner appealed.

E. T. Farish, R. P. Williams, John D. Gibson, and M. G. Levison, for appellant. Kehr & Tittman, for respondent.

SHERWOOD, J. (after stating the facts). We are of opinion that the trial court correctly construed these provisions of the will brought in question by this litigation. It is quite evident from the clause of the will relating to Eliza Doerner that the testator anticipated that other children would be born to his daughter, and so made provision for them should they be born. But, apart from such provision, the law is well settled, in this state and elsewhere, that where, as in this instance, a devise is made to a class, there the estate in remainder will vest in the person or persons who were in esse at the time the deed or will takes effect, and such estate in remainder will open, during the continuance of the particular estate, and let in after-born persons who belong to the class created by the property conferring instrument. *Waddell v. Waddell*, 99 Mo. 338, 12 S. W. 349, and cases cited. Here the vested remainder took effect in possession in the grandchildren of Ludwig Seitz, on the 9th of February, 1897, when the youngest child of Eliza Doerner attained her majority,

which attainment of majority terminated Eliza Doerner's right to such rents and profits, except as to such right in one-third of the real estate devised, for and during her natural life. *Haskins v. Tate*, 25 Pa. 249; *Teed v. Morton*, 60 N. Y. 502; *Britton v. Miller*, 68 N. C. 268.

The term "lawful right of dower," as used in the will, is evidently not used in its technical sense; for in such sense it would be wholly and strangely inapplicable. It was used as a term of quantity and measure of extent of duration. Whenever the youngest child reached the age of 21, then Eliza Doerner became entitled to one-third of the property devised, "for the term of her natural life." Prior to that time the perception of the rents and profits belonged to her for the purpose mentioned in her father's will, to wit, to defray the expenses of the maintenance and education of her child or children, who during their minority were the principal objects of the testator's bounty. When the youngest child reached majority, then the children became entitled to two-thirds of the property, and their mother to one-third during her natural life. As to such respective shares, the mother and her children became tenants in common, with the rights of present possession, and this authorized a decree for partition.

Besides, remainder-men are entitled to partition as against the life tenant in possession, under the rulings in this state. *Reinders v. Koppelman*, 68 Mo. 482; *Preston v. Brant*, 96 Mo. 552, 10 S. W. 78; section 4373, Rev. St. 1899. For these reasons, the decree should be affirmed, except as to that portion which held Eliza Doerner entitled to the rents and profits after February 9, 1897. As to that portion the decree will be reversed, and the cause remanded to the lower court, with directions to take action in conformity to this opinion.

GANTT, J., concurs. BURGESS, J., not sitting.

DOERNER et al. v. DOERNER et al.
(Supreme Court of Missouri, Division No. 2.
March 26, 1901.)

PARTITION—ACCOUNTING—PLEADING.

1. Plaintiff, after stating that defendant had always collected the rents and profits of certain property sought to be partitioned, asked that an accounting be had of such rents and profits, and defendant in her answer set up that she had an exclusive right to such rents and profits. *Held* to put in issue the question of the rents and profits as to all the parties litigant, so as to authorize an accounting thereof.

2. In an action for partition and for an accounting as to the rents and profits, the court determined that under the will under which the property was held, defendant, in February, 1897, became entitled to one-third of the property during her natural life, and that her children, the other parties to the action, became entitled to a one-sixth interest in said property, subject to the mother's life interest. *Held*, that

from February, 1897, the defendant, who had collected the rents and profits of the property, was liable to account to each of the other parties to the amount of the rents, proportioned to the respective interest of each.

Appeal from St. Louis circuit court; L. B. Valliant, Judge.

Action by Charles A. Doerner and others against Eliza Doerner and others. From the judgment all the parties appeal. Reversed.

E. T. Farish, R. P. Williams, and A. O. F. Meyer, for plaintiffs. Kehr & Tittmann, for defendants.

SHERWOOD, J. This is part and parcel of the same suit as that appearing by a similar title, though by a different number (61 S. W. 801). After filing the petition some doubt arose in the minds of the attorneys as to whether or not the allegations in the petition were broad enough to let in proof of the rents and profits derived from the real estate since the 9th day of February, 1897, which is the day upon which the youngest child arrived at her age of majority. The plaintiff thereupon, on the day the case was set for trial, asked leave to amend the petition by interlineation, setting out the amount of rents and profits derived by Eliza Doerner, the defendant, from the property since the 9th day of February, 1897. The court denied this application in the following language: "I will deny the application. I think it is made out of time, and I think it is proper, perhaps, in the original bill, but certainly it is not proper at this time." The court in its decree found that Eliza Doerner was entitled to a life estate in one-third of the property, and that, subject to said life estate, plaintiff and the other defendants were each entitled to one-sixth of the property. Having thus found, the court by said decree further declared as follows: "And the court finds that the defendant Eliza Doerner is not liable for any rents or profits on the premises before her life estate is set aside and allotted to her, and finds the issue as to said rents and profits, and as to accounting therefor, in favor of the defendant Eliza Doerner." Within due time, the plaintiff and several of the defendants filed their motion to amend and modify that portion of the decree just above quoted, so as to charge defendant Eliza Doerner with the rents on two-thirds of the property from February 9, 1897. This motion being denied, the movers excepted. The plaintiff in this case in his petition, after stating that Eliza Doerner had always collected and received the rents and profits of the property, proceeds to ask "that an accounting be had of said rents and profits, and that there may be decreed to him his right, share, and interest therein." In addition to this prayer, he also prays for general relief. This petition, so far as plaintiff claims for rents, etc., is certainly good. In addition to that, defendant Eliza Doerner in her answer sets up that she

has "the exclusive right to the * * * income, rents, and profits thereof during the period of her life." This averment, on the familiar principle of "express ailer," put in issue as to who was entitled to the rents and profits. Garth v. Caldwell, 72 Mo., loc. cit. 630. And this averment in the answer of Eliza Doerner not only put in issue the question of rents and profits as to plaintiff, but as to the other parties litigant. But, more than that, Cecelle Jay, one of defendants, in her answer states that the rents and profits far exceeded the cost of education and maintenance, and asks for an accounting of the rents and profits, and that she be paid one-sixth of the rents and profits, less the amount heretofore expended on her education and maintenance. And Frances Doerner also, by her answer, put in issue the question of rents and profits which had accrued since the grandchildren attained their majority, and asked for general relief. Emilie Zuentz in her answer alleges similar matters as to rents and profits as does Cecelle Jay, and for further relief. So that the issue as to the party entitled to the rents and profits was most thoroughly and industriously put in issue, on the principle before adverted to. But, aside from all that, whenever the trial court determined that on the 9th day of February, 1897, Eliza Doerner became entitled to one-third of the property during her natural life, and that her children, subject to the one-third interest of their mother for life, became entitled to one-sixth each of said property on that date, thereby and thereupon it followed, as night follows day, that each of said devisees became, as matter of law, entitled from that date to an amount of the rents and profits proportionate to such respective interest. It results, therefore, that the cross appeals of plaintiffs and defendants must be decided in their favor, and that portion of the decree which caused their appeal must be reversed, and the cause remanded, as already announced.

GANTT, J., concurs. BURGESS, J., not sitting.

RIGGIN et al. v. BOARD OF TRUSTEES OF WESTMINSTER COLLEGE et al.

(Supreme Court of Missouri, Division No. 2. Feb. 28, 1901.)

WILLS—TESTAMENTARY CAPACITY.

It is no ground for setting aside a will because of want of testamentary capacity of testator that he was of advanced age and feeble, and that he gave his large estate to his wife and a stranger, to the exclusion of his stepbrother, where the will was several days in preparation, and while the testator was in his usual health and in possession of his mental faculties, and was witnessed by his personal friends, whom he had known for many years, and where his wife, who knew all about the provisions of the will was entirely satisfied therewith.

Appeal from Hannibal court of common pleas; Reuben F. Roy, Judge.

Proceedings by Eugene Riggins and Isabella Thornton against the board of trustees of Westminster College and others to set aside the will of William Sausser, deceased. Judgment for defendants, and plaintiffs appeal. Affirmed.

This is a proceeding under the statute to contest the validity of the will of William Sausser, who died on the 14th day of January, 1892, at the advanced age of 77 years. The validity of the will is assailed upon various grounds set forth in the petition, including undue influence in the procurement of the execution of the will by his wife, Adelaide Sausser, and the want of mental capacity in the testator to make a will. The trial court excluded all other questions, and confined the issues to the single one as to whether there was in fact a will or not. The proponents, having made due proof by the subscribing witnesses to the will of its proper execution, and of the sanity of the testator at the time of its execution, read the will in evidence and rested. The testator left no children. The contestants are the son and daughter of a deceased half-brother, who at the time of the execution of the will lived in the city of Los Angeles, Cal., and were in moderately affluent circumstances. The will is a holographic one, having been written by the testator on the 13th day of February, 1889, about 2 years and 11 months before his death. By it he disposed of his large estate by providing for his funeral expenses and the erection of a monument at the graves of himself and wife, and then bequeaths and devises to her, should she survive him, the homestead estate for life or widowhood, with all the property thereon, absolutely, and an annuity of \$2,500 per annum, to be paid her in two equal sums, semi-annually. The remainder of his estate, subject to the annuity, is given to the board of trustees of Westminster College in trust for the endowment of theological professorships and scholarships as therein provided for and directed. His wife survived him, and is one of the defendants to this suit. She knew perfectly well how her husband was disposing of his property while he was preparing his will, and fully approved of its provisions. Immediately after its execution the testator and his wife made a visit to the plaintiffs, in California. While the evidence shows the testator to have been a tall, spare man, of delicate constitution, it also shows him to have been a man of indomitable energy, of extraordinary intelligence, and of shrewd business capacity. He took much care against exposure, and very rarely required the services of a physician, and had not had one for four or five years before his last illness. He continued the management of his large business interests as he was accustomed to do down to and within a few days before his death. For the purpose of show-

ing the want of mental capacity in the testator to make the will, plaintiffs introduced evidence: That the testator was a queer man. That he looked "really funny." That "he talked kind of funny." That "he seemed to be physically weak. His eyes seemed to be suffering from some cause." Said "he was making plug for a rupture on his own body." "That he was very keen in his expression." "He was afflicted with bowel trouble." "He complained of headache-vertigo." "Years ago he had fits of frenzy." That some 45 years before his death he complained of being impotent. The use of intoxicating liquors. Losing \$100 gambling in a poker den, about which he cried, but got his money back. He pressed his debtors for money. Was miserly. Had been a dyspeptic. When he loaned money, he would have the notes made payable to other parties, and then indorsed to him, to keep from paying taxes upon them. That he thought it was right and proper for a person to keep from paying taxes upon his property if he could. Delusions as to inventions. Cruelty to an inoffensive slave. And other matters of a similar character, which are unnecessary to mention, and the fact that he gave his large estate, said to be worth \$150,000, to his wife and a stranger, and disinherited his only heirs at law and his half-brother, John Riggins. At the close of all the evidence the court, over the objection and exception of plaintiffs, instructed the jury that under the pleadings and the evidence the verdict must be for the defendants; and, the jury having so found, plaintiffs in due time filed their motion for a new trial, which being overruled, they appeal.

J. L. Robards, W. M. Boulware, and T. H. Bacon, for appellants. F. L. Scofield, H. S. Priest, and Geo. A. Mahan, for respondents.

BURGESS, J. (after stating the facts). There have been three printed briefs filed by counsel for plaintiffs in this case, containing in the aggregate 240 pages; and, while there are only 13 assignments of error in the original brief, these are discussed under 84 separate and distinct heads with marked ability, and in a manner which shows great research. But we shall not undertake to follow them in their order; for we are not inclined to believe that it would subserve any useful purpose to do so, or that it is at all necessary to a proper disposition of the case from a legal standpoint.

It is argued that the testator had not the testamentary capacity to make a will at the time of the execution of the one in contest, and in support of this contention a large number of incidents of a peculiar and eccentric character, heretofore specified, which occurred during the last 40 to 50 years of his life, are largely relied upon. In passing upon the same character of evidence in *Cauffman v. Long*, 82 Pa. 72, which was a will contest, it was said: "There was serious error in submitting the question of testamentary ca-

capacity to the jury at all. The learned judge should have withdrawn it altogether. At most, there was but a scintilla of proof. The evidence of the defendant upon this point amounts to nothing. One witness (Kirk Haines) swears that he thought the testator was a weak-minded man, because when he came to the store with his wife he allowed the latter to do the bargaining, and never interfered. Sheriff Rinehart thought he was a monomaniac, because he told his pastor, with whom he appeared to have had some difficulty, that 'We want one to preach Christ and Him crucified, and not for money, money, all the time, as you do.' Also, that at a church meeting there was a dispute about the control of the church property. During the controversy, Shimp, the minister, said: 'This is God's house.' Cauffman replied: 'It is not your house, nor God Almighty's house. It is my house. I built it.' This was not, perhaps, exactly orthodox; but when it is remembered that the testator, as was alleged, gave the lot, and materially aided in building the church, it hardly shows testamentary incapacity. Upon another occasion he expressed to the witness Rinehart his aversion to going to law, and thought he could not get justice. Abraham Long, another witness, says he thought his mind was wavering, from the fact that when the witness made some remark about the time of day he merely said, 'Hunck?' and that when he asked him where the women were, he said, 'Was sag't?' and looked queerly. Isaac Wright thought he was not sound in his mind, because he would not decide upon selling the witness his crop of grain. These are all the witnesses upon this point whose testimony is worth noting. I have not, of course, given all they said. What I have quoted is a fair specimen. We look in vain through the evidence for anything like insanity or delusion. A court has a higher duty to perform than merely to answer points of law. It is its duty to see that the law is faithfully administered. Such administration requires that a man's will—the most solemn instrument he can execute—shall not be set aside, without any sufficient evidence to impeach it. There is no redress here for an erroneous or improper verdict. But, where a case is submitted to a jury upon clearly insufficient evidence, such as no court ought to sustain a verdict upon, it is our plain duty to reverse." Upon this question it would be difficult to find an adjudged case more like the one at bar, in regard to this character of evidence, than the Chafin Will Case, 32 Wis. 567; and it was therein held that, giving the evidence its fullest effect, the mental peculiarities and eccentricities of character and conduct of the testator thus shown were not sufficient evidence of testamentary incapacity to justify a submission of the case to the jury. Again, in the case of *In re Smith's Will*, 52 Wis. 548, 8 N. W. 616, 9 N. W. 666, it was ruled that although the testator displayed some eccentricity of char-

acter, and was a believer in the power of the spirits of deceased persons to communicate with the living, he was not for that reason insane. And in the case of *Fulbright v. Perry Co.*, 145 Mo. 432, 46 S. W. 955, we held that eccentricities of character in the testator, mental peculiarities, unusual conduct in the manner of cultivating his farm and in managing his property, and in living the life of a recluse, aloof from his relatives, did not establish an unsound mind, or show the testator to have been incapacitated to dispose of his property by will. As was said in *Cauffman's Case*, supra, this evidence amounts to nothing. The rule in this state is that one who is capable of comprehending all his property and all persons who reasonably come within the range of his bounty, and who has sufficient intelligence to understand his ordinary business and to know what disposition he is making of his property, has sufficient capacity to make a will. *Benoist v. Murrin*, 58 Mo. 322; *Jackson v. Hardin*, 83 Mo. 175. And the law indulges the presumption that the testator was possessed of a sound and disposing mind, and where the formal execution of a will according to the requirements of the statute is shown, as was done in the case at bar, and the subscribing witnesses testify to the sanity of the testator, and he is of proper age to make a will, a prima facie case in favor of the proponents of the will is made out, and the burden of proof rests on the contestants to overcome this presumption by persuasive evidence. *Jackson v. Hardin*, supra; *Mad-dox v. Maddox*, 114 Mo. 35, 21 S. W. 499; *Carl v. Gabel*, 120 Mo. 253, 25 S. W. 214; *McFadin v. Catron*, 138 Mo. 197, 38 S. W. 932, 39 S. W. 771; *Fulbright v. Perry Co.*, 145 Mo. 432, 46 S. W. 955; *Sehr v. Lindemann*, 153 Mo. 276, 54 S. W. 537; *Tibbe v. Kamp*, 154 Mo. 545, 54 S. W. 879, 55 S. W. 440. Now, all the evidence there was, worthy of note, to overcome the presumption of the testamentary capacity of the testator and this prima facie case, aside from that which we have said was no evidence at all, was the advanced age of the testator, his feebleness, the fact that he gave his large estate to his wife and a stranger, to the exclusion of his nearest of kin, and falls far short, in our opinion, of the want of testamentary capacity in the testator to make the will,—indeed, no substantial evidence tending to show that fact. Moreover, the will was several days in preparation at the testator's home, while in his usual health and in the possession of his mental faculties. It was executed in the Farmers' & Merchants' Bank at Hannibal, and witnessed by personal friends whom he had known for many years. His wife knew all about the provisions of the will, and is entirely satisfied with its provisions. She testified that he was thin and fragile, but was as vigorous as most men of his age and form. The evidence showed that he was a prominent business man from 1872 to the time of his death, always attending to his own business, of strong, vigorous mind.

and a very capable business man. As one witness put it, "A pretty nice old gentleman to talk to; intelligent, bright, and active;" and by another, "A man above the average in business ability; a level-headed business man; very intelligent;" by another, "I think he was a very intelligent man;" by another, "He always impressed me as being a man of very sound mind, and, I thought, very shrewd in business matters; more than the average;" and by still another, "A rare man, so far as his capacity to do business was concerned; very few equals." Our conclusion is that the testator was entirely competent to make the will.

There was no reversible error, we think, in the exclusion of testimony. If men's wills are to be broken under the circumstances disclosed by this record, it is difficult to tell under what circumstances a will would have to be made, in order to withstand the assaults of disappointed heirs. Even if the case had gone to the jury, and they had found that the instrument of writing in contest was not the will of William Sausser, it would have been the plain duty of the trial judge to set aside the verdict as unsupported by the evidence; and, under such circumstances, it was his duty and prerogative to interfere before submission, and direct a verdict for defendants, the effect of which was to find that the writing proposed was the last will and testament of William Sausser. *Jackson v. Hardin*, supra; *Fulbright v. Perry Co.*, 145 Mo. 432, 46 S. W. 955. Judgment affirmed.

SHERWOOD, P. J., and GANTT, J., concur.

PAUCK v. ST. LOUIS DRESSED-BEEF & PROVISION CO.

(Supreme Court of Missouri. Jan. 25, 1901.)
INJURY TO EMPLOYEE—ASSUMPTION OF RISK
—CONTRIBUTORY NEGLIGENCE.

1. Where a master and servant knew for weeks the dangerous condition of the appliances which caused the injury to the servant, and there was no promise to repair, as the danger from defective appliances was not one naturally incident to plaintiff's employment, it was not assumed by him when he entered defendant's services; nor did he assume the risk by remaining in the service of defendant after he became aware of its dangerous condition.

2. Plaintiff was employed in a beef-packing establishment, and moved halves of beeves hung from rails about 15 feet above the floor, connecting with a main rail by switches. To his knowledge, the switches were defective, and on several occasions in attempting to connect the side rails with the main rail the halves of beef had been thrown from the rail. Defendant knew of the defective condition of the appliances for several weeks before the accident. *Held*, that the defect was not so manifestly dangerous that where a half beef was thrown from the rail upon plaintiff, injuring him, it would justify the court in holding, as a matter of law, that a person of ordinary prudence would not have used the appliances, and that therefore plaintiff could not recover, because of contributory negligence.

In banc. Appeal from St. Louis circuit court; Horatio D. Wood, Judge.

Action by Bernard Pauck against the St. Louis Dressed-Beef & Provision Company. Judgment for defendant was reversed in division, and defendant appeals. Affirmed.

The following is the opinion in division:

"BURGESS, J. This is an action for damages for personal injuries alleged to have been sustained by plaintiff, while in the service of defendant as laborer, because of its negligence in not furnishing him reasonably safe appliances used by him in and about his work. The defenses were contributory negligence on the part of plaintiff, and the assumption of the risk by him. At the time of the accident, defendant was the owner and operator of a large beef slaughtering and packing establishment in the city of St. Louis. On the main floor was a room about eighty feet long from north to south, and about sixty feet wide from east to west. At the north end of this room the beeves, having been first slaughtered, stripped, and halved, were suspended on side rails that ran, at about fifteen feet above the floor, due south about thirty-two feet, where they curved a few feet to the west, and made connection, by switches, with the main rail running east and west, which passed over a scale near the west side of the room, where the beeves were weighed, and then curved to the south side of the room, ran some distance close to the south wall, and then curved south into cooling rooms. There were twelve of these side rails, or six pairs, each rail being about five feet from the adjoining rail; the extreme west one being near the scale, which was at the west side of the room. Each rail was about two inches wide, flat on top, except for a ridge which ran the length of the rail in the center. The 'shackle,' as it was called, rested on a wheel which fitted and ran along on this ridge; and connected with the shackle, but suspended below the rail, was a hook, to which the half beef was attached. There was attached to the ceiling girders (to which the rails, which stretched a short distance below, were secured) at each point where the said rails were to connect with the main rail a simple mechanical device, consisting of a slot and wheel, from which were suspended two ropes. By pulling one, the wheel moved in one direction, and the side rail was switched a few inches and connected with the main rail; and the half beeves could be run onto the rail to the scale, and thence around to the cooling rooms. By pulling the other rope, the side rail was disconnected from the main rail and switched back a few inches to the starting point, thus leaving an open switch. If a half beef were then pushed along the side rail, it would run off, unless the side rail was again switched back to the main rail. These ropes hung within easy reaching distance of a person standing

on the floor. They usually ran the beeves along alternate side rails, but aimed to get the two halves of the same beef together at the scale and into the cooling room. The average daily number of half beeves pushed over these rails was two hundred and fifty. Plaintiff was a man aged about forty-two, and of the average shrewdness and intelligence of his class. He had worked in this room pushing the beeves for about three weeks just prior to the accident, and had learned to do his work in a day. It was work easily learned, and required simply main strength to push the beeves, and a little care in opening and closing the switches. The method followed by the workman was to put his left shoulder to the beef after it had been hung to the shackle, and in this attitude push it along the side rail; and after getting a number together he would connect the side rail with the main rail by pulling the rope, and then push the beeves one after the other onto that main rail and onto the scale, and thence to the cooling room. Sometimes plaintiff would weigh the beef, but usually a man stood at the scale for that purpose. Some had jumped or fallen off before this accident, while plaintiff was pushing, but plaintiff could not tell how many. He claimed the switches would not throw the whole way, and Gain Roetting, the weigher, would tighten them. Asked if he could see if the switch made connection, he said: 'If I had looked over them to see how the switch was; but, if I ran one beef over, then the second beef ought to go over. If the switch was open, the wheel would not go over? No.' He remembered throwing three off,—one falling in the cooler,—though he claimed the switches were fixed twice a week, or every other day. Plaintiff would hold the ladder for Gain Roetting, and would see what the latter did in fixing the switches, namely, to make them connect closely with the main rail; and he knew all the time, when the switch rails did not connect closely with the main rail, there was danger of the wheel running off and dropping the beef down on him. Plaintiff had thrown the switch and connected the side rail with the main rail, and had pushed one beef over; and when he was hurt he was pushing another beef over this same rail, using his shoulder, and looking straight ahead, with his head slightly downward, and not looking at the rail, as he had pushed one beef over all right, and assumed the one he was pushing would go over, also. The shackle and beef all fell upon him. Plaintiff never complained to any of his superiors in his employment of the unsafe condition of the rails and switches, which had been for three or four months before the accident continuously in the same condition as when it occurred. Defendant knew of the condition of the switches and rails for several weeks before the accident.

"At the close of plaintiff's evidence the

court, at the instance of defendant, instructed the jury that under the pleadings and evidence the plaintiff was not entitled to recover. Upon the giving of this instruction, plaintiff took a nonsuit, with leave to move to set the same aside. And after having filed his motion to set aside the nonsuit and for a new trial, and the same being overruled, plaintiff appeals.

"In passing upon the action of the court in sustaining the demurrer to the evidence, the evidence and every reasonable deduction to be drawn therefrom which tended to sustain the cause of action set forth in the petition must be considered as absolutely true, for such was the effect of the demurrer. The evidence clearly showed that the switches connecting the slide or switch rails with the main rails were loose and shaky, and would get out of position by shaking the beeves, and that the condition of the appliances was known to defendant company, or, at any rate, on account of its long continuance, by reasonable care and a due regard for the safety of its employees it might have known of it in time to have made the necessary repairs in time to have prevented the accident. That the accident was the result of the loose and defective condition of the appliances is equally clear, so that the question to be considered is whether or not plaintiff assumed the risk to be apprehended from the defective condition of the appliances which caused the accident. While it is the duty of the master to furnish his servant a reasonably safe place to work, yet if he fails to do so, and the servant remains in his service in the face of obvious dangers, he assumes the risk, and if he is injured by reason thereof the law affords him no redress. And while the law imposes the duty upon the master of furnishing his servant a reasonably safe place to work, and the servant has the right to rely upon the performance of that duty by him, and is not required to search for dangers not apparent to him, he has no right to close his eyes to obvious danger, and then hold his master responsible in damages for injuries received by him by reason of such danger. So, when the master knowingly—or might know by the exercise of ordinary care—furnishes to an inexperienced servant, or to one who has no knowledge of their condition, tools, implements, or appliances with which to work which are not reasonably safe for the purpose for which they are to be used, and injury occurs to the servant by reason thereof, without fault or negligence upon the part of the servant, the master will be held liable in damages for such injury. But in the case at bar both plaintiff and defendant knew for weeks before the accident of the dangerous condition of the appliances which caused the injury, and the question is whether or not plaintiff assumed the risk by remaining in the service of the company after he became aware of that fact; there being no promise

to repair the defect, or anything of that sort. The danger, being from defective appliances, was not one naturally incident to plaintiff's employment, and therefore was not assumed by plaintiff when he entered defendant's service. *Henry v. Railway Co.*, 109 Mo. 488, 19 S. W. 239; *Nichols v. Glass Co.*, 126 Mo. 55, 28 S. W. 991. But defendant contends that he assumed the risk by remaining in the service of the company after he became aware of the dangerous condition of the appliances in the absence of a promise by defendant to repair. In *1 Bailey, Pers. Inj.*, relating to master and servant, there is quoted with approval the following from *Settle v. Railroad Co.*, 127 Mo. 336, 30 S. W. 125: 'The rule is too well settled in this state to require the citation of cases that a person, when he enters the service of another, assumes all the risks and dangers usually incident to the employment in which he engages; but the rule is equally well settled that the employer is charged with the duty of not subjecting his servant to risks by his own negligence, and the servant does not assume the risk of dangers arising from his neglect. It is claimed that, though the duty to repair defects is neglected by the master, if the servant is advised of it, and thereafter elects to continue in the service and to use the defective means, he thereby assumes the risk of injury therefrom. The rule thus invoked would relieve the master of his duty as soon as the servant became aware of its violation. Such is not the law of this state. The duty to repair is a continuing one, and a failure to discharge it is negligence, though the servant may continue in the service after knowledge thereof. An express contract will not relieve him. The question has often been raised, discussed, and decided, whether a servant can recover for injuries in the use of machinery or appliances known by him to be defective. The nonliability of the master in such cases, however, is properly placed upon the ground of contributory negligence, rather than that of assumption of risk. The question is one of contributory negligence, which should be submitted to the jury, unless the defect is so glaringly hazardous that the court could declare, as matter of law, that a person of ordinary prudence would not use it.'

"It would seem to follow from what has been said that plaintiff did not assume the risk. Plaintiff therefore contends that the question whether continuing in the service of defendant after knowledge of the danger to be apprehended from the defective appliances will defeat his recovery was a question of contributory negligence, and should have been submitted to the jury. There can be no question as to defendant's knowledge of the defective condition of the appliances for several weeks before the accident. The company was therefore guilty of negligence in failing to remedy the defect. These facts, together with others in evidence, which the

demurrer to the evidence confessed to be true, entitled the plaintiff to recover, unless they showed that he was guilty of negligence contributing directly to his injury. If the defect in the appliances was so glaring that a man of common prudence would not have used them, plaintiff was not entitled to recover. *Huhn v. Railway Co.*, 92 Mo. 447, 4 S. W. 937; *Omellia v. Railroad Co.*, 115 Mo. 205, 21 S. W. 503, and authorities cited; *Swadley v. Railway Co.*, 118 Mo. 268, 24 S. W. 140. 'If the instrumentality by which he is required to perform his service is so obviously and immediately dangerous that a man of common prudence would refuse to use it, the master cannot be held liable for the resulting damage. In such case the law adjudges the servant guilty of concurrent negligence.' *Patterson v. Railroad Co.*, 76 Pa. 389. 'There may be cases where a servant would be wanting in due care by his incurring risk or injury in the use of defective or imperfect machinery or apparatus after he knew it might cause him bodily harm.' *Snow v. Railroad Co.*, 8 Allen, 441. We do not think, under the facts disclosed by the record, that the defect was so manifestly dangerous as to justify the court in holding, as a matter of law, that a person of ordinary prudence would not have used the appliances. It was only in such circumstances that it would have been justified in so doing. Although plaintiff knew of the defective condition of the appliances, he was not for that reason bound to quit the service of defendant, unless the danger was so glaring that a person of ordinary prudence would not have used them, but was required to exercise care and caution in their use commensurate with apparent danger; and these, under the evidence, were questions for the consideration of the jury. The judgment is reversed, and the cause remanded.

"GANTT, P. J., concurs. SHERWOOD, J., absent."

Johnson, Houts & Marlatt and Taylor & Taylor, for appellant. O'Neill Ryan, for respondent.

PER CURIAM. The foregoing opinion, filed by BURGESS, J., in this cause while it was pending in division No. 2 of the court, is approved and adopted as the opinion of the court in banc by a majority of our number.

GANTT, VALLIANT, MARSHALL, and BRACE, JJ., concur in said opinion. SHERWOOD, J., dissents.

BRASH v. CITY OF ST. LOUIS.
(Supreme Court of Missouri. March 26, 1901.)
MUNICIPAL CORPORATIONS—DEFECTS IN
SEWER—ACTION FOR INJURIES
—INSTRUCTIONS.

Where a city set up the defense that the breaking of a sewer was caused by the act of

God manifested in an unusual rainfall, and there was evidence that the sewer was defective by reason of improper construction and failure to repair, and that the rainfall was of an unusual character, it was proper to charge that if an unusual rainfall would have caused the breaking of the sewer, notwithstanding its defects, then the city was not chargeable with negligence; but if the breaking was caused by such defects, or if it was caused by such defects commingled and concurring with unusual rainfall, then the city was liable.

2. When a requested charge is fully covered by the charge given, its refusal affords no ground for reversal.

In banc. Appeal from St. Louis circuit court; Leroy B. Valliant, Judge.

Action by Minnie Brash against the city of St. Louis. From a judgment for plaintiff, defendant appeals. Affirmed.

B. Schnurmacher and Chas. C. Allen, for appellant. Clinton Rowell and J. H. Zumbalen, for respondent.

BRACE, J. This is an appeal from a judgment of the St. Louis city circuit court in favor of the plaintiff for the sum of \$650, for damages to her premises and personal property caused by the bursting of Rocky Branch sewer, and the overflow of water therefrom, on the 27th of May, 1896. The errors assigned for reversal are the giving of instructions numbered 1, 2, and 3 for the plaintiff, and the refusal to give defendant's instructions numbered 6 and 7. The defense was that the bursting of the sewer was caused by the act of God, manifested in an "unusual and unexpected rainfall and flow of water." The evidence tended to prove that the front of plaintiff's premises is level with Palm street; that her lot slopes to the rear, where it is three or four feet below the grade of Palm street; that the sewer back of her premises, and for some distance eastward, was built upon still lower ground, on a 20-foot right of way. The sewer at this point, for a distance of 150 feet, was built almost wholly above the surface of the ground; 3 feet of the side walls, and the entire brick arch, which is 5 feet high, being visible and exposed. This sewer was built through this block in 1872 or 1873, and at that time about 1 foot of earth was put on top of it. In the course of a few years this ballasting was washed away, and it was not replaced until after the accident; and for years prior to the accident about 150 feet in length of the sewer was exposed to view and to the elements, as above stated. For several years prior to the accident, a crack about one-half inch wide and 20 feet in length existed in the arch of the sewer where it was thus exposed, and a little west of plaintiff's premises. This crack extended through the arch, so that the water running in the sewer could be seen and heard through it. The evidence further tended to show that the Rocky Branch sewer was built along the course of a natural channel of drainage, Rocky Branch creek; that the

ground in said block upon which it was built was low and marshy; that, when the sewer was built, old fence planks were laid under the timbers upon which the walls rest; that at the time of the accident the walls had sunk and settled, and that one row of bricks had fallen out of the center of the underside of the arch at or near the place where it broke; that the sewer broke at the point where it was uncovered and exposed, and just where the crack in the arch was shown to have been; the whole arch, for a distance of 70 to 100 feet, caved in or was broken up; that sewers are built of a capacity to carry off an inch of water per hour, delivered to the sewer, for each acre of territory drained; that, if there is a rainfall of one inch an hour, not all this would find its way to the sewer, and a smaller part thereof would be delivered to the sewer in a sparsely-settled section, where many streets are unpaved, such as this was, than in a closely built up district; just west of the place where the sewer broke there was 15 feet of earth on top of it, and, if the sewer had been covered to grade at the point where it broke, there would have been 12 to 15 feet of earth on the arch; that sewers were designed to be covered with earth, which serves to strengthen them; and that in the city of St. Louis sewers are not built nearer the surface of the ground than 11 feet, and if there had been 10 feet of earth upon the sewer at this point it would, probably, not have burst. The evidence further tended to prove that the sewer burst between 5 and 6 o'clock p. m. of the 27th of May, 1896, during the prevalence of the cyclone of that date in South St. Louis; that in said city, at the custom house, Eighth and Olive streets, some two miles nearer the path of the cyclone than the place in question, the rainfall from 5 to 6 o'clock p. m. was 1.32 inches. Dr. Frankenfield, the official of the weather bureau, testified that: "We do not often have a rainfall of 1.32 inches an hour. We do have such an amount of rainfall, it is not often, but it does occur. * * * I would call it unusual to have more than an inch of rain fall in an hour. It is unusual, but not unprecedented. I have no idea how often that has occurred. I could come within reasonable limits, I suppose, but I do not know exactly. My best impression is that is about once a year, I should say." The evidence further tended to prove that the rainfall in the Rocky Branch sewer district was not as great as in some other portions of the city.

The general doctrine on the question in issue on the instructions is thus stated in 1 Shear. & R. Neg. (5th Ed.) § 39: "It is universally agreed that if the damage is caused by the concurring force of the defendant's negligence and some other force for which he is not responsible, including 'the act of God,' or superhuman force intervening, the defendant is nevertheless responsible, if his

negligence is one of the proximate causes of the damage, within the definition already given. It is also agreed that if the negligence of the defendant concurs with the other cause of the injury in point of time and place, or otherwise so directly contributes to the plaintiff's damage that it is reasonably certain that the other cause alone would not have sufficed to produce it, the defendant is liable, notwithstanding he may not have anticipated the interference of the superior force, which, concurring with his own negligence, produced the damage. But if the superior force would have produced the same damage, whether the defendant had been negligent or not, his negligence is not deemed the cause of the injury." And this is the prevailing doctrine in this state. *Wolf v. Express Co.*, 43 Mo. 421; *Read v. Railroad Co.*, 60 Mo. 199; *Pruitt v. Railroad Co.*, 62 Mo. 527; *Davis v. Railway Co.*, 89 Mo. 340, 1 S. W. 320; *Haney v. City of Kansas*, 94 Mo. 334, 7 S. W. 417; *Association v. Talbot*, 141 Mo. 674, 42 S. W. 679. There is nothing in the rulings in *Flori v. City of St. Louis*, 69 Mo. 341, or *Turner v. Haar*, 114 Mo. 334, 41 S. W. 737, inconsistent with this doctrine.

The plaintiff's instructions complained of are as follows: "(1) The court instructs the jury that it is the duty of the city to construct and maintain its sewers in such a manner as to make them safe against danger of breaking from any rainfall which is reasonably to be expected, and while the city is not bound to construct its sewers so that they will withstand extraordinary rainfalls or any act of God, yet it is the duty of the city to guard, as far as reasonable foresight and prudence can, against danger from extraordinary rainfalls by constructing and maintaining its sewers in accordance with the ordinary and usual methods adopted for the proper and safe construction and maintenance of sewers. Therefore, even if you find from the evidence that the break in the sewer shown in evidence resulted from an extraordinary rainfall, yet if you further find that the city failed to properly construct the sewer, or failed to keep it in proper repair, or failed to cover the sewer with earth, and that the failure of the city to so construct, repair, or cover the sewer with earth contributed to the breaking of the sewer,—that is to say, if you find that, notwithstanding the unusual rainfall, the break would not have occurred if the city had performed its full duty in the construction, repair, and covering of the sewer,—then your verdict will be for the plaintiff, if you find that she was damaged by the breaking of the sewer. (2) The court instructs the jury that if they believe from the evidence that the top arch of the sewer had sprung a crack at the point where it burst, and that the defendant had knowledge of said condition, or by the exercise of reasonable care and prudence could have discovered said condition, in time to

have repaired said defects before the break occurred, and if you further find from the evidence that the break in said sewer was occasioned by said defects, then your verdict must be for the plaintiff, if you find that she was damaged by the breaking of the sewer, even though you may further find that the break occurred during a rainstorm of unusual severity. (3) The court instructs the jury that if they believe from the evidence that the top arch of the sewer was entirely exposed and unprotected by any ballasting at the point where it burst, and that it had been allowed to remain in said condition for years by the defendant, and that the sewer burst in consequence of the top arch thereof being exposed and unballasted, and that plaintiff was damaged by the bursting of the sewer, then your verdict must be for the plaintiff."

The defendant's instructions, the refusal of which is complained of, are as follows: "(6) The jury are instructed that, if they believe from the evidence that the bursting of the sewer in the rear of the premises of plaintiff was caused by a storm of unusual force and violence, they will find a verdict in favor of the defendant. (7) The term 'negligence,' as used in these instructions, means the want of ordinary care, and the term 'ordinary care' means such care as a person of ordinary prudence would have exercised under the same or similar circumstances."

It may be conceded that there was evidence upon which the jury might have found that the rainfall in this sewer district in the hour between 5 and 6 o'clock p. m. of the 27th of May, 1896, was of such an unusual character as could not have been reasonably anticipated and provided against, and, applying the doctrine stated to the case, if such unusual rainfall would have burst the sewer anyhow, notwithstanding its defects, then the defendant is not liable, and so the jury were in effect told by instruction No. 2, given for the defendant. On the other hand, if the bursting of the sewer was caused by the defects mentioned in plaintiff's instructions numbered 2 and 3, it could not have been caused solely by the unusual rainfall, and the defendant is liable, as the jury were told in those instructions; or if the bursting of the sewer was caused by those defects, commingled and concurring with the unusual rainfall and flow of water, still the defendant is liable, as they were told in plaintiff's instruction numbered 1. Taking these instructions together, we think the case was fairly presented to the jury. Although the unusual rainfall may have been one of the causes of the bursting of the sewer, yet if the defects in the sewer were also concurring causes, producing that effect, the defendant is nevertheless liable; hence the court committed no error in refusing defendant's instruction No. 6. Defendant's instruction No. 7, defining "negligence," was fully covered by its instruction No. 2, and its

refusal affords no sufficient ground for reversal. The judgment is for the right party, ought to be affirmed; and it is so ordered. All concur, except MARSHALL and VALIANT, JJ., not sitting.

BOARD OF TRUSTEES OF WESTMINSTER COLLEGE v. PIERSOL et al.

(Supreme Court of Missouri, Division No. 2.
March 26, 1901.)

MORTGAGES — TRANSFER OF PROPERTY — RIGHTS OF PURCHASER—FORECLOSURE —MATURITY OF DEBT—APPEAL.

1. An objection that evidence was improperly admitted cannot be raised for the first time on appeal.

2. A party cannot complain of erroneous rulings on the admission of evidence, where he does not appeal.

3. Where by the terms of a note the interest is to become due at a specified time, and a deed of trust securing its payment declares that the whole debt shall become due in default of payment of interest, the note is not affected, as to the date of its maturity, by the terms of the deed, except for the purpose of enforcing the security.

4. One who has simply bought land subject to a trust deed, without assuming payment of the note secured thereby, is not entitled to question the ownership of the note by the plaintiff in a suit to foreclose the deed.

5. One who accepts a warranty deed reciting that it is made subject to a deed of trust executed on the same date takes the land subject to the trust deed, though he is in possession under a prior unrecorded land contract.

Error to circuit court, Morgan county; D. W. Shackelford, Judge.

Action by the board of trustees of Westminster College against John C. Piersol and others. From a judgment for defendants, plaintiff brings error. Reversed.

Ross & Washburn, for plaintiff in error. Wm. Forman, for defendants in error.

BURGESS, J. This is an action to foreclose a deed of trust upon certain lands in Morgan county, executed by defendants Piersol to William A. Lattimer on the 1st day of April, 1893, to secure the payment to Lattimer of a certain promissory note therein described. The petition, after alleging the execution of the deed of trust by defendant John C. Piersol and Lue H. Piersol, his wife, and describing the lands, proceeds as follows: "Plaintiff further states that, by mistake or oversight in the scrivener or the grantors in said instrument, the name of the trustee was not inserted, but that said conveyance was made in trust to secure the payment of certain indebtedness on the part of the said John C. Piersol to one William A. Lattimer, the party of the third part, the beneficiary in said deed of trust; that said indebtedness is evidenced by a certain promissory note dated April 1, 1893, for the sum of \$8,000, due five years after date thereof, together with interest thereon from date at the rate of seven per cent. per annum, which interest shall be

due and payable annually, and, if not so paid when due, to become as principal, and bear the same rate of interest; that said deed of trust and said note are of even date, both being dated April 1, 1893, and both are filed herewith, and marked, respectively, 'A' and 'B'; that said deed of trust was filed for record in the office of the recorder of deeds of Morgan county, Mo., on the 11th day of May, 1893, and was recorded in Book 10, pp. 265 to 268, of the records of said county. Plaintiff further states that said deed of trust contains the following covenants, to wit: 'Now, therefore, if the said party of the first part, or any one for them, shall well and truly pay off and discharge the debt and interest expressed in said note, and every part thereof, when the same becomes due and payable, according to the true tenor, date, and effect of said note, then this deed shall be void, and the property hereinbefore conveyed shall be released at the costs of the said party of the first part; but should the said parties fail or refuse to pay the said debt or the said interest, or any part thereof, when the same or any part thereof shall become due and payable according to the true tenor, date, and effect of said note, then the whole shall become due and payable, and this deed shall remain in force.' Plaintiff further states that said note was assigned, transferred, and delivered, for value received, and before due, by indorsement, to William H. Marquess, executor of William Sausser, deceased, and the said William A. Lattimer waived notice of protest for nonpayment in writing, over his signature, on the back of said note. Plaintiff further states that William Sausser departed this life on or about — day of —, 189—; that the said William Sausser died testate; that William H. Marquess was nominated and duly qualified as the executor of the estate of the said William Sausser, deceased; that this plaintiff, the board of trustees of Westminster College, is the sole legatee of William Sausser, deceased, by his last will and testament; that said note of \$8,000 was by the said William H. Marquess, executor of the said William Sausser, deceased, transferred by indorsement and delivered to this plaintiff, the board of trustees of Westminster College, as sole legatee under said will, and this plaintiff is now the legal holder and owner of said note and said deed of trust on said lands securing the payment of same. Plaintiff further states that the interest to April 1, 1894, in the sum of \$560, was paid on the 13th day of June, 1894, together with \$6.65 compound interest accrued thereon to that date, and that the interest for the year ending April 1, 1895, in the sum of \$560, was paid on the 9th day of November, 1895, together with the sum of \$22.45, compound interest on said debt, accrued thereon, but that default has been made in the payment of interest on said note of \$8,000, due, ac-

cording to the tenor and effect of said note, on the 1st day of April, 1896; that default has likewise been made in the payment of the interest due on said note April 1, 1897; and that thereupon this plaintiff has elected to deem the whole principal sum, as shown by said note, to become immediately due and payable, whereby the said John C. Piersol and the said William A. Lattimer are now justly indebted to this plaintiff, the board of trustees of Westminster College, in the sum of \$8,000, together with interest thereon at the rate of seven per cent. per annum, compounded annually, from the 1st day of April, 1896. Plaintiff further states that the defendant W. B. A. McNutt has or claims to have some interest in or lien upon the premises described in said deed of trust, by being the beneficiary in an incumbrance junior to that now held by the plaintiff, wherefore the said W. B. A. McNutt is hereby made a defendant herein, that he may have a legal notice of these proceedings, and answer herein if he shall so desire. Plaintiff further states that the defendant Randolph Fry is in possession of said premises under a conveyance from John C. Piersol and wife, made, executed, and delivered after the execution of the deed of trust filed in this cause; that he claims to be the owner of the equity of redemption therein; and that he bought with knowledge of and subject to said deed of trust, and he is hereby made a party to this action, that he may answer herein, and that his rights, if any he may have, may be adjudicated. Wherefore plaintiff prays for judgment on said note against the said John C. Piersol and William A. Lattimer for said sum of \$8,000, and interest thereon at the rate of seven per cent. per annum from the 1st day of April, 1896, to the rendition of judgment. And plaintiff further prays for a decree against the defendants John C. Piersol and Lue H. Piersol, his wife, William A. Lattimer, Randolph Fry, and W. B. A. McNutt, and each of them, and all persons claiming under them and either of them, that they be foreclosed of all interest, lien, and equity of redemption in the premises mentioned and described in said deed of trust; that said premises be sold, and the proceeds thereof applied: First, to the payment of the costs and expenses of this action; second, to the payment of the principal and interest due on said note,—and that the defendants John C. Piersol and William A. Lattimer be adjudged to pay any deficiency that may remain after applying to the payment of said note and the costs thereon all of said moneys applicable thereto; and for such other and further relief as to the court shall seem meet and just in the premises.”

Defendant Fry filed a separate answer, the material parts of which are as follows: “This defendant, further answering, and for a complete defense to plaintiff’s action, states that on the — day of February,

1893, this defendant and his co-defendant John C. Piersol made and entered into a contract in writing to the following effect, viz.: In consideration that this defendant would convey to said Piersol certain lands in the counties of Monroe and Gentry, in the state of Missouri, of the agreed value of four thousand dollars, and of the payment in cash of one thousand dollars, and the further payment of three thousand dollars, payable as hereinafter stated, the said John C. Piersol, being the owner thereof, agreed to convey by warranty deed, duly executed by himself and wife, the following described real estate, situate in Morgan county, Missouri, to wit: The northwest quarter, and that part of the southwest quarter north of the state road, of section four; the north half, and the north half of the southwest quarter of section five; and all of the southeast quarter of said section five,—all in township forty-two of range eighteen; also the southeast quarter, and the southeast quarter of the southwest quarter, of section thirty-two, and thirty acres off the west side of the southwest quarter of section thirty-three, all in township forty-three, of range eighteen west, and containing in all six hundred and forty-seven acres; subject, however, to a deed of trust made and executed by one John Briscoe and wife, which deed of trust was given to secure the payment of a certain promissory note for five thousand dollars in said deed of trust described; said deed of trust being recorded in Deed of Trust Record No. 7, at page 43, in the office of the recorder of deeds of Morgan county, Missouri. Defendant further states that said contract further provided that the payment of the three thousand dollars aforesaid was to be made after said lands above described were surveyed, and said contract further provided that for every acre of prairie land short of four hundred and eighty-seven acres there should be deducted from said three thousand dollars the sum of thirty dollars per acre, and that said contract further provided that for every acre of timber land short of one hundred and sixty acres there should be deducted from said three thousand dollars aforesaid the sum of ten dollars per acre. Defendant states that said contract is lost, and cannot, for that reason, be filed as an exhibit herein. Defendant further states that he performed all the conditions of said contract on his part; that on the 2d day of March, 1893, he was placed in possession of the mansion house situated on said land, and in the possession of the lands thereto belonging to the said John C. Piersol, and has ever since said date been in the actual possession of the same, but that the said John C. Piersol has wholly failed and neglected and refused to convey by good and sufficient title, or any title at all, the lands, as by his contract he was bound to convey; that on or about the — day of August, 1893, this defendant caused a survey of said

lands to be made by the county surveyor of Morgan county, Missouri; that by said survey there was shown to be only three hundred and twenty acres of prairie land, the same being one hundred and sixty-seven acres less than the amount guaranteed in said contract, thereby entitling this defendant to a credit of five thousand and ten dollars on the purchase price of said lands aforesaid. Defendant further states that said survey further showed that there was only six hundred and seventeen acres of the land in the tract contracted to be conveyed as aforesaid, thereby making a shortage of thirty acres in the total number of acres agreed to be conveyed to this defendant in pursuance of said contract, thereby entitling this defendant to a further credit of the sum of nine hundred dollars on the purchase price of said lands aforesaid. Defendant further states that on the 13th day of June, 1894, he paid on the purchase price of said lands the sum of five hundred and sixty-six dollars and sixty-five cents, and on the 9th day of November, 1895, he paid the further sum of five hundred and eighty-two dollars and forty-five cents on the purchase price of said lands, thereby entitling this defendant to the further credit on the purchase price of said land of the sum of eleven hundred and forty-nine dollars and ten cents, making a total payment on the purchase price of said land of twelve thousand and fifty-nine dollars and ten cents, and leaving a balance due on the purchase price of said lands of nine hundred and forty dollars and ninety cents. Defendant, further answering, states that the incumbrance placed on said land by said John Briscoe aforesaid, in favor of the Jarvis-Conklin Company,—the same being recorded in the office of the recorder of deeds of Morgan county, Missouri, in a deed of trust recorded in Book 7, at page 43,—is, was, and still remains a lien and charge on the lands aforesaid, and that the amount of the balance due on the purchase price of said lands as aforesaid is due and owing to the said Jarvis-Conklin Company aforesaid. Defendant further states that at the time he purchased and took possession of said lands there were no other liens or incumbrances on said lands than the one hereinbefore described, in favor of the Jarvis-Conklin Company; that this defendant, at the time he purchased said lands and took possession of the same, had no notice of any lien or pretended lien of plaintiff or its grantors on said lands."

By way of replication to the answer, plaintiff denied all new matter set up in said answer. The case was dismissed as to Lattimer. The other defendants made default.

The facts are about as follows: About the 28th day of February, 1893, defendant John C. Piersol entered into a written contract with the defendant Fry for the sale of the lands involved in this litigation. At the time of this sale there was an incumbrance

on the land in the nature of a deed of trust securing the payment of \$5,000 to the Jarvis-Conklin Company, of Kansas City, Mo. Fry testified upon the trial that this contract was lost, but that its provisions were substantially in accordance with the allegations in his answer, with respect to the terms of the contract and Piersol's failure to comply therewith. This contract was never placed upon record, but Fry took possession of the land under it on or about the 2d day of March, 1893. Thereafter, on the 1st day of April, 1893, John C. Piersol and wife executed a deed of trust by which the lands described in the petition were conveyed to secure the payment of a note of even date executed by them and one Jacob A. Piersol to William A. Lattimer for the sum of \$8,000, due and payable five years after its date, with 7 per cent. interest per annum, and, if interest not paid annually or when due, the same to be added to and become part of the principal, and bear interest at the same rate. On the same day Piersol and wife conveyed said lands to the defendant Fry by warranty deed; the expressed consideration being \$14,000, and in which it is recited that it is made subject to said deed of trust. The deed of trust was filed for record in the recorder's office of Morgan county on May 11, 1893, and the deed to Fry on the 23d day of June, 1893. Fry testified that the deed to him was sent by Piersol to the recorder of deeds of Morgan county before he knew anything about it, and that while he afterwards got it, and has ever since retained it, he never accepted it as called for by said contract, although he further testified that he knew the deed recited that it was subject to the \$8,000 deed of trust of even date, and that he had been paying the principal on the note since; that he paid to Piersol on the 13th day of June, 1894, \$566.65 on it, and \$582.45 on November 9, 1895. On the 23d day of February, 1895, defendant Fry and wife executed a deed of trust to B. R. Richardson, trustee, whereby he conveyed the land described in said first-mentioned deed of trust and in said warranty deed made by Piersol to said Fry, to secure the payment of a note of \$1,600 he had made to John C. Piersol, and which the said Piersol had assigned to W. B. A. McNutt, the beneficiary in said deed of trust. This second deed of trust contains the following clause: "Subject, however, to a deed of trust heretofore given to W. A. Lattimer to secure the payment of an eight thousand (\$8,000) dollar note and interest." The deed of trust last named was filed for record February 23, 1895. The \$8,000 note was transferred by W. A. Lattimer, indorsed in blank, to William H. Marquess, executor of the estate of William Sausser, deceased, and by said executor to the board of trustees of Westminster College, plaintiff herein, as the sole legatee of the said Sausser. Default having been made in the payment of interest for the

years ending April 1, 1896, and 1897, respectively, this suit to foreclose said deed of trust was brought against Piersol and wife, who executed it; Lattimer, as indorser; and Fry, who had bought the land subject to the deed of trust. McNutt was also made a defendant, but no question arises here as to him. The action, as against Lattimer, was dismissed. J. C. Piersol, Lue H. Piersol, and McNutt made default. Defendant Fry read in evidence, over the objections of plaintiff, the record of a deed of trust made by John Briscoe and wife, in 1886, conveying the lands in question to secure the payment of \$5,000 to the Jarvis-Conklin Mortgage Company. The trial resulted in a judgment in favor of defendants. In due time plaintiff filed its motion for a new trial, which was overruled, whereupon it sued out a writ of error from this court, and brings the case here for review.

While the trial court ruled all of the questions involved in the case necessary to make out a prima facie case on plaintiff's part, it rendered judgment against it; and, as no finding of facts was made, we are unable to conceive upon what theory it was thus decided, unless it was upon the ground that the prima facie case was overcome by defendant. We infer, however, from defendant's brief, that it is claimed by him that the judgment may be upheld upon either one of several grounds, among which is that the note declared upon was a 7 per cent. compound interest note, interest payable annually, while that described in the deed of trust is a seven per cent. simple interest note, both principal and interest due five years after the date of the note. But the note is not declared upon. It is an action to foreclose a deed of trust. Besides, there was no objection to the introduction in evidence of the note described in the deed of trust upon that ground, and, in so far as it is concerned, it cannot now be said that it was improperly admitted in evidence. When, however, plaintiff offered in evidence the deed of trust, defendant objected for the reason that it is void on its face and conveys nothing, and for the further reason that it appears therefrom that the note intended thereby to be secured is not the note offered in evidence by the plaintiff, and for the further reason that the indorsement on said deed of trust is not the best evidence as to the recording of said deed in the office of the recorder of deeds of Morgan county, and for the still further reason that said conveyance was executed by the grantor therein after he had parted with his title to said lands and delivered the possession of the same to the defendant Fry. While these objections were overruled and the deed of trust read in evidence, the judgment was in favor of defendant; and, as he has not appealed therefrom, he is in no position to insist upon an erroneous ruling from which he does not appeal.

It is also claimed that the note in ques-

tion was not due at the time this suit was instituted. But this position is not borne out by the facts, and is therefore untenable. The note was executed on the 1st day of April, 1893, due five years from date, and bearing 7 per cent. interest per annum,—the interest to become due and payable annually,—while the deed of trust by which its payment is secured provides that should the said first parties fail or refuse to pay the same debt or the said interest, or any part thereof, when the same or any part thereof shall become due and payable according to the true tenor, date, and effect of said note, then the whole shall become due and payable, and this deed shall remain in force, and the said party of the second part "may proceed to sell," etc. Now, the petition alleges and the evidence showed that default was made in the payment of the interest due on said note on the 1st day of April, 1896, and on the 1st day of April, 1897, in consequence of such default plaintiff asserts that by the provisions of said deed of trust the whole amount of the note became due; hence this suit. Where by the terms of a promissory note the interest is to become due thereon at a specified time, and it is provided by a deed of trust upon property securing its payment that, in default of the payment of such interest as it becomes due, then the whole amount of the note shall become due and payable, the note is not affected thereby, as to the date of its maturity, by the terms of the deed of trust, declaring that it shall become due in default of the payment of the interest, except for the purpose of enforcing the mortgage security. *Owings v. McKenzie*, 183 Mo. 323, 33 S. W. 802, 40 L. R. A. 154. But for that purpose the note, as to such default and its consequences, is controlled by the deed of trust.

Defendant insists that plaintiff failed to prove that it was the holder of the note, or that it was ever transferred and delivered to William H. Marquess, executor of William Sausser, deceased. But with respect to these matters, also, the court ruled adversely to defendant's contention, and permitted the note and the indorsements on it to be read in evidence; and, as defendant did not appeal, he is in no position to complain with respect thereto. Moreover, the makers of the note, its payee, indorsers, and indorsees, and the holder of the note were the only parties interested or concerned in these matters, and the grantors in the deed of trust made default, thereby admitting all the material allegations in the petition, while the other parties are not here complaining, and defendant Fry has no right to do so for them. Fry was not a party to either note or deed of trust, nor did he even assume the payment of the former, but simply bought the land subject to the latter. It is plain that the deed of trust from Briscoe to the Jarvis-Conklin Company afforded no defense to this action; and the only ques-

tion in the case is as to whether or not Lattimer, the payee in the note from Piersol and wife to him, and the beneficiary in the deed of trust which was given to secure its payment, had notice of the sale claimed to have been made of the lands embraced in the deed of trust by Piersol to defendant Fry at the time he received the deed of trust. There was nothing tending to show such notice, other than the actual possession of and residence by Fry and his family on the land at that time; his contract, though in writing, not having been placed of record in the county. It has been repeatedly held by this court that actual residence upon land is actual notice to all the world, which the occupant may legally assert in defense of his possession. *Davis v. Briscoe*, 81 Mo. 27; *Leavitt v. La Force*, 71 Mo. 353; *Farrar v. Heinrich*, 86 Mo. 526. In the case in hand, however, defendant Fry, after the execution of the deed of trust sued upon, accepted from Piersol a warranty deed to the land described in the deed of trust (except as to certain incumbrances mentioned in said deed), dated on the same day that the deed of trust is, acknowledged on the 12th day of April, 1893, and filed for record in the recorder's office of Morgan county June 21, 1893, in which it is recited that it is made subject "to a deed of trust this day made to William A. Lattimer to secure a note of \$8,000, with interest thereon at seven per cent., and to all taxes hereafter due." Thus, by subsequent contract, and for a new consideration, Fry took the lands subject to said deed of trust, which did away with any previous contract. Not only this, but he thereafter made to Piersol two payments, amounting to over \$1,000, on said \$8,000 note, which cannot be accounted for upon any other theory than that he purchased the lands subject to the deed of trust by which its payment was secured. Moreover, on the 23d day of February, 1895, Fry and his wife, Mary C. Fry, executed a deed of trust upon the same land to B. R. Richardson, as trustee for the use and benefit of W. B. A. McNutt, to secure the payment of a note for \$1,600 executed to John C. Piersol, and by him on the 18th day of February, 1892, assigned to said McNutt before it became due, in which deed of trust last named it is stated that it is made "subject, however, to a deed of trust heretofore given to W. A. Lattimer to secure the payment of an eight thousand (\$8,000) note and interest." These facts clearly show that the first contract between Piersol and Fry, under which the latter claims to have taken possession of the land, was abandoned, and a new and different contract with respect thereto entered into between them, in pursuance of which the deed by Piersol and wife to him for it was executed. The evidence of defendant did not, therefore, overcome plaintiff's prima facie case. For the reasons indicated, the judgment will be reversed and the cause remanded, with

directions to the court below to enter up a decree in favor of plaintiff foreclosing the equity of redemption of the mortgagors and those claiming under them in the land in question.

SHERWOOD, P. J., and GANTT, J., concur.

STEELE v. STEELE et al.

(Supreme Court of Missouri, Division No. 1.
March 12, 1901.)

CONTRACT TO MAKE WILL—BURDEN OF PROOF.

1. Where decedent took plaintiff, then 5 years old, from an orphan asylum, the only condition imposed by the manager being that the boy should have a good home in a Christian family, and reared plaintiff as his son, receiving from him a son's duty, and from time to time decedent made statements indicating that he intended to leave his property to plaintiff at his death, but there was no evidence that he ever contracted to leave his property to plaintiff or bound himself so as to impair his right to will his estate as he might thereafter see fit, plaintiff, even if adopted, occupied no better position than decedent's own son would have done, and could not recover the estate, as against the testamentary disposition thereof made by decedent.

2. Where plaintiff claims the estate of a testator who took plaintiff, when 5 years old, from an orphan asylum, and raised him as a member of testator's family, basing his claim on an agreement that testator would adopt him and leave him all testator's property, the burden is on him to present evidence so strong, cogent, and convincing as to exclude every doubt that testator made the contract.

Appeal from circuit court, Knox county; E. R. McKee, Judge.

Action by George W. Steele against Catherine Steele and others. From a judgment for plaintiff, the defendants appeal. Reversed.

This is a suit in equity for the enforcement, against the executors and legatees under the will of William Steele, deceased, of an alleged oral agreement to adopt the plaintiff, and leave him all the property which the testator should own at his death. The petition alleges that, in 1863, the plaintiff, whose name was Walter M. Avillney, about 5 years old, was in a Catholic orphan asylum in Chicago, and under the particular charge and care of Mrs. Dennis McCabe; that the testator, William Steele, then living with his wife, Catherine, on a farm in Wisconsin, was childless, and, desiring a child to adopt, entered into a contract with Mrs. McCabe that he would take the plaintiff to his home as his own child, the plaintiff to serve him as such, that he would legally adopt him, and at his death the plaintiff should inherit all his property; that under that agreement Mrs. McCabe delivered plaintiff to testator, who took him into his family, changed his name to George W. Steele, and they immediately entered upon the reciprocal relation of parents and child, performing their respective duties pertaining to that re-

lation, which continued until plaintiff was grown; that in 1872 William Steele, with his family, including the plaintiff, moved to Knox county, Mo., where he lived until his death; that when plaintiff was 23 years old, with the advice and approval of the testator, he went to California, where he was residing at testator's death, but while there he kept up a filial correspondence with his adopted father. The allegations as to the agreement to adopt and leave the property to plaintiff were denied in the several answers filed. Those were the only issues of fact in the case. Plaintiff read in evidence the depositions of Henry Harm and August Harm, taken in Wisconsin, who lived in the neighborhood where Steele had lived in that state, and remembered when he brought the plaintiff to his home there. These two witnesses testified to a conversation they had with William Steele in relation to the matter 30 years before. The age of one of these witnesses is not given, but that of the other is stated at 42 when the deposition was given, so that he was a boy 12 years old when Mr. Steele was holding this conversation with them. Henry Harm's recollection of this conversation was: "He told me he took that boy for his own boy, and when he died he would get the property. * * * Q. Did he say to you what he would do for him at his death? A. He would give him his property." On cross-examination: "Q. Did William Steele say anything to you about any contract under which he took the plaintiff? A. No." August Harm, having first stated that Mr. Steele told him the conditions on which he had taken plaintiff, was asked: "Q. What were the conditions? A. He took Walter to raise him and bring him up as his own boy, and after his death should be heir to his property. Q. Did you hear William Steele say that he would leave plaintiff his property at his death? A. Yes, sir; * * * William Steele told me that he had adopted the boy as his own, to bring him up as his own child, and to be heir to his property at his death." Cross-examination: "Q. Did William Steele say anything to you about any contract under which he took the plaintiff into his family? A. No, sir." Isaac Brown testified that about 1891 or 1892 he paid Mr. Steele \$324 that he owed him, and when he did so Steele said, "I'll just lay that aside for my boy." Plaintiff was then in California. Mr. Stewart testified that, in 1886 or 1887, Mr. Steele approached him on the subject of buying an interest in witness' hardware business for George, the plaintiff, saying that his principal reason was he wanted to keep George at home with him. Patsy Collins testified that when he was a boy, and with other boys of George's age, on Saturdays would try to entice him away from his work to read dime novels, the old man would reprimand George, and once he heard him say to George that "he ought to take care of his work a little closer, and not

be losing your time with these boys, because you are not working for me; you are working for yourself. You know, when I am dead and gone, whatever I have got will be yours." Mr. Jarvis testified that he had a conversation with Mr. Steele about George, some time after he had gone to California, and suggested to him that he ought to "assist the boy some"; to which Steele replied, "Well, yes; I will. I have done it. I have assisted him heretofore some; not to the extent I calculate to, if he conducts himself right." Mr. Randolph testified that he went one day to pay the old man \$100 which he owed him, and found him at work in the garden. Told him he ought not to work when he had such money. Asked him what he was going to do with his money; he could not carry it with him. "Oh, well," he says, "I am keeping it for George and Kate." Kate was his wife. Mr. Pardon testified that, speaking of doing his work himself instead of having witness to do it, he said: "I ain't really able to do it, but I have to do it. * * * I would rather take things a little easier. At my death, it all goes to George, I suppose, and the woman." Judge Hunott testified that Mr. Steele told him when George was in California that if he would come back he would set him up in business. There was testimony of other witnesses tending to show that Mr. Steele treated George and spoke of him as a father would his son, and while he was living with him collected some wages that were due him for work; that he was treated, to all appearances, as a son of Mr. Steele, and bore himself towards Mr. Steele as is usual for a son. On the part of defendants, the testimony was to the effect that, in 1867, Mrs. McCabe, the person named in the petition as the one with whom the contract was made, then living in Chicago, made a visit to Mrs. Keenan, with whom she was related by marriage, and who was a sister of Mrs. Steele, and resided in the same county in Wisconsin in which the Steeles resided. On that visit Mrs. McCabe made the acquaintance of Mrs. Steele. Shortly after her return to Chicago, Mrs. McCabe received a letter from Mrs. Keenan asking her if she could get a little boy for Mrs. Steele in some orphan asylum in Chicago. The result of it was that, after some ineffectual efforts to find such a boy, Mrs. McCabe called at the Orphans' Asylum of the Christian Brothers in Chicago, and this boy was given to her to be sent to Mrs. Steele. The only assurance the Brothers required was that the child was to have a good home with Christian people, and they accepted Mrs. McCabe's assurance on those points. Mrs. McCabe then took the child to the railroad, placed him in charge of a conductor whom she knew, with directions to put him off at Fox River station, in Wisconsin, where Mr. Steele was to meet him, and where Mr. Steele did meet him and take him home. This is substantially the evidence in

the case. The chancellor took the advice of a jury on the questions of fact. The jury made specific findings that William Steele contracted with Mrs. McCabe to take plaintiff into his home as his own child, and legally adopt him as such, and that plaintiff should receive and inherit all decedent's property at his death; that, in pursuance of that agreement, Steele took the plaintiff home, and kept him, with the full understanding that he was to have all decedent's property at his death; that plaintiff, understanding that agreement and in pursuance thereof, entered the home of William Steele, and conducted himself towards him as a dutiful son, up to the time of his death. The court adopted the finding of the jury as its own, except that it found that the contract was not made with Mrs. McCabe, but was made with the plaintiff himself, and decreed accordingly, from which decree the executor and legatees have appealed.

L. F. Cottey, F. J. O'Reilly, and J. W. Ehman, for appellants. G. R. Balthrop, F. H. McCullough, and C. D. Stewart, for respondent.

VALLIANT, J. (after stating the facts). The plaintiff's proposition is not merely that Mr. Steele contracted to adopt him, but also that he agreed to leave him all his estate at his death. An adopted child, in respect of his right of inheritance, is upon an equality with a real child. He will inherit in case his adopted parent dies intestate; but as a father may, by his will, give his property even to a stranger, to the exclusion of his own son, so may an adopting father defeat the expectation of his adopted son. The latter stands in no better condition than the real son. In the case at bar, even if it be conceded that the plaintiff was the adopted son of William Steele, the concession would avail him nothing, because William Steele has made testamentary disposition of his estate, giving to the plaintiff only a nominal legacy. Therefore the plaintiff, to establish his case, must show not only that he is entitled by the alleged contract of adoption to the position of heir, but also that, being more favored than an own child, he could not be disinherited by will. That is an advanced position for one to take, and, although not altogether untenable, strong proof is required to maintain it.

It is not certain from the plaintiff's pleading and evidence where he lays, as it were, the venue of his contract,—whether in Illinois or Wisconsin,—but the contract was made, according to his theory, before he came to Missouri. The common law did not provide for the adoption of a child, and if there is any statute, either in Illinois or Wisconsin, on the subject, it was not pleaded or shown in evidence, and we cannot take judicial cognizance of it, we only know that the common law prevails generally in those

states. The Steele family was living in Wisconsin at the time the plaintiff was received into it, and continued to reside there for six years thereafter. The plaintiff's status was fixed in the family before he came to this state, and is really to be judged by the laws of the state where it became fixed. The testimony of the two Harms comes nearer tending to prove the agreement alleged in the petition than that of any other witness, and, according to that, the agreement had already been made when they were residing in Wisconsin.

But let us, for the argument's sake, assume that the laws of Illinois and Wisconsin are in this respect like our own, and that an oral contract to adopt a child may, when it has been performed on the child's part, and an oral contract to give the adopted child the adopting parent's estate at his death may, when the child's part has been performed, be enforced in accordance with the equitable principles laid down in *Wright v. Tinsley*, 30 Mo. 389; *Gupton v. Gupton*, 47 Mo. 37; *Sutton v. Hayden*, 62 Mo. 101; *Sharkey v. McDermott*, 91 Mo. 647, 4 S. W. 107; *Healey v. Simpson*, 113 Mo. 340, 20 S. W. 881; *Teats v. Flanders*, 118 Mo. 661, 24 S. W. 126; *Nowack v. Berger*, 133 Mo. 24, 34 S. W. 489; *Alexander v. Alexander*, 150 Mo. 579, 52 S. W. 256,—still the plaintiff must fall in this case for the almost total absence of proof.

The plaintiff, at the time of the making of the alleged contract, was a young child in an orphan asylum. Whether his parents were, or either of them was, living we do not know. There was no one purporting to stand in loco parentis to him, unless it was the manager of the Christian Brothers' Asylum, and the only condition he imposed was that the child should be given a good home with Christian people. That condition was promised and was fulfilled. In removing him from the asylum no natural ties were severed. It was only a change from one home among strangers to another.

The learned counsel for the plaintiff have the right conception of the law, and state it with clearness in their brief: "We are aware of the fact that in the trial of this case the burden rested on the plaintiff, and it was his duty to present to the chancellor evidence so strong, cogent, and convincing as to remove and exclude every doubt that decedent made the contract; but such evidence may consist in the declarations and acts of decedent, with their attending circumstances." Giving to every particle of plaintiff's evidence full credence, it goes no further than to show that William Steele took the plaintiff into his family, reared him as a son, received from him a son's duty, and from time to time made statements indicating that he intended to leave him his property at his death. But that he had ever bound himself, so as to impair his own right to will his estate as he might thereafter see fit, there is not a word of evidence. But all the plain-

tiff's evidence is not entitled to be received with absolute confidence. As above said, the testimony of the two Harms comes nearer tending to prove the plaintiff's theory than any other, and that testimony stands on a very unsatisfactory foundation. It was a repetition of a casual conversation alleged to have occurred over 30 years before, when one of the witnesses was 12 years old, the age of the other is not given,—the conversation of a middle aged man with a school boy. But taking it at its face value, and analyzed, it amounts to nothing more than the expression of an expectation. Both witnesses said that he never said anything in relation to having made a contract to that effect. While the testimony for the plaintiff did not tend to show that there was such a contract, the testimony for the defendants showed beyond doubt that there was no such contract. The special findings of the jury have no foundation in the evidence to rest upon. The judgment is reversed, and the cause remanded to the circuit court, with directions to enter judgment for defendants dismissing the plaintiff's bill. All concur, except MARSHALL, J., absent.

WORLEY et ux. v. HICKS et al.

(Supreme Court of Missouri, Division No. 2.
March 12, 1901.)

HOMESTEAD—ABANDONMENT—EXECUTION —EJECTMENT—CHAIN OF TITLE.

1. Plaintiff acquired title to land, and occupied it with his family, as their homestead, for 19 years. A deed executed by him in the meantime was in fact a mortgage, and the land was never sold under it; but it was paid off with the wife's money, and the land was conveyed to her. *Held*, that plaintiff did not lose his homestead right, as to third persons, and the property was not subject to sale under execution.

2. Conceding that the deed passed title, it was a defeasible one, even after the conveyance to the wife, and did not render the land subject to sale under execution.

3. A declaration of law is correctly refused which assumes that the two persons named are one and the same person, when the evidence shows that they are different persons.

4. Where, in ejectment, defendant claims under the title derived through plaintiff, plaintiff need not, in the first instance, show title prior to the conveyance to himself.

Appeal from circuit court, Linn county;
W. W. Rucker, Judge.

Ejectment by George W. Worley and wife against John H. Hicks and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

E. R. Stephens, for appellants. A. W. Mullins, for respondents.

BURGESS, J. This is an action of ejectment for the possession of a farm, containing 96 acres of land, in Linn county. The petition is in the usual form in such cases. The answer of defendant Nichols admits possession, but denies all other allegations in

the petition. The answer of the defendant Hicks is of the same character, with the exception that it alleges that they were in possession of the land on May 20, 1897, under a lease from their co-defendant Nichols, which expired on the 20th day of February, 1898. The plaintiffs are husband and wife. The plaintiff George W. Worley purchased the land from Asa Scott, who (his wife joining with him) on the 20th day of May, 1878, executed to plaintiff George W. Worley a deed of general warranty therefor. Soon thereafter plaintiffs and their children moved upon the land, and lived there and occupied it as their homestead until dispossessed on May 20, 1897. In order to raise money to pay off a loan upon the land, plaintiffs borrowed from William F. Worley, a brother of George W. Worley, several hundred dollars, and, for the purpose of securing its payment, on the 11th day of February, 1889, conveyed to him the land. Thereafter the plaintiff Mrs. Worley acquired from her father's estate about \$1,700, out of which was paid the debt to William F. Worley, who then conveyed the land to her by deed dated May 2, 1890, and acknowledged on February 15, 1894. On March 4, 1891, the Nichols & Shepard Company obtained judgment in the circuit court of Linn county against William Worley, the plaintiffs' son, for \$1,374.60 and costs; and thereafter, on January 16, 1894, an execution was issued on said judgment, and the land in question levied on as the property of said William Worley, the judgment defendant, and under said levy the sheriff sold said land, and executed to the purchaser, the said E. C. Nichols, a sheriff's deed therefor. Under the claim of title acquired by said purchase and sheriff's deed, the said E. C. Nichols sued the said George W. Worley in ejectment for possession of said land, and on June 6, 1896, judgment by default was rendered in the circuit court of said Linn county in said cause in favor of the plaintiff and against said defendant for possession of it, and for damages and rents; and by virtue of an alias writ of possession issued on said judgment the sheriff of said county removed from said premises and dispossessed the said George W. Worley and his wife and three other persons, and placed said E. C. Nichols in possession. After being so dispossessed, the plaintiffs, George W. Worley and Henrietta Worley, his wife, on June 24, 1897, instituted this action for the possession of said premises. The case was tried by the court, a jury being waived, who, at the instance of plaintiffs, and over the objection and exception of defendants, declared the law to be as follows: "(1) If the court find from the evidence that the plaintiffs are husband and wife, and that soon after the plaintiff George W. Worley purchased the land in question and obtained his deed thereto dated May 20, 1878, read in evidence, they took possession of the premises in question, and thereafter continuously occupied the same

homesteader does not lose his right as such, as to third parties, by mortgaging his homestead; but, so long as he occupies it as such with his family, it is exempt from attachment and sale under execution, if not in excess of the value and extent prescribed by statute, as to all creditors, save and except the mortgagee and those claiming under him. But, even if the deed by the plaintiff George W. Worley to William F. Worley passed the title to the land to him, the title was defeasible, and that deed did not render the land subject to sale under execution against even George W., and the reconveyance by William F. to Mrs. Worley vested the legal title in her, so that in any event he owned the equitable title to the premises and occupied them as a homestead until it was conveyed by William F. to Mrs. Worley, after which plaintiffs still continued to occupy the land with their family as a homestead; and at no time after the plaintiff George W. Worley acquired title to the land, and moved onto and began to occupy it as a homestead, was it ever subject to attachment and sale under execution against him (section 3616, Rev. St. 1899), nor was it after she acquired title thereto.

The seventh declaration of law asked by defendants was correctly refused, for the reason that it assumed that William F. Worley and William Worley were one and the same person, and asked the court to declare the law to be that the deed from George W. Worley to William F. Worley of date February 11, 1890, transferred absolutely all homestead right that George W. Worley had in the land to one William Worley, when the evidence showed that they were different persons; that is, that William F. was the brother of George W., and William his son. *State v. Mason*, 96 Mo. 559, 10 S. W. 179; *Comer v. Taylor*, 82 Mo. 341. Besides, this identical question was presented by the second declaration of law given in behalf of plaintiffs, and the court found adversely to the position taken by defendant, and that finding was in accordance with the evidence.

Defendant Nichols claims title under the plaintiff George W. Worley by virtue of a sheriff's deed to him made in pursuance of a sale by said sheriff under an execution issued upon a judgment rendered in the circuit court of Linn county in favor of the Nichols & Shepard Company, and against William Worley, who, defendants contend, derived title from the plaintiff George W. Worley. It was not necessary, therefore, in order to plaintiffs' recovery, that they should in the first instance show any title to the land prior to the execution of the deed from Asa Scott and wife to the plaintiff George W. Worley on May 20, 1878. *Holland v. Adair*, 55 Mo. 40; *Butcher v. Rogers*, 60 Mo. 138; *Miller v. Hardin*, 64 Mo. 545; *Grandy v. Casey*, 93 Mo. 595, 6 S. W. 376; *Charles v. Patch*, 87 Mo. 450; *Finch v. Ullman*, 105 Mo. 255, 16 S. W. 863. And, it having there-

after been occupied as a homestead by plaintiffs, it was exempt from sale and execution, and defendant Nichols acquired no title to it by the sheriff's deed. But, whether the land was the homestead of plaintiffs or not, it was the property of one or the other of them, and was not, for this additional reason, subject to sale under the execution against their son William Worley; hence defendant Nichols acquired no title thereto by his purchase at the sheriff's sale.

There was, we think, no error committed in refusing declarations of law asked by defendants, nor in giving declarations of law on the part of plaintiffs. Nor was reversible error committed in the admission of evidence. There was sufficient evidence to justify the judgment of the court with respect to the amount of damages, as well, also, as to the monthly rents and profits, and the judgment should not be reversed upon either of those grounds. Finding no reversible error in the record, the judgment is affirmed.

SHERWOOD, P. J., and GANTT, J., concur.

REDLANDS ORANGE GROWERS' ASS'N v. GORMAN.

(Supreme Court of Missouri, Division No. 2
March 26, 1901.)

SALES—SHIPMENT—STIPULATION AS TO DATE —WARRANTY—WAIVER—DAMAGES.

Where plaintiff, who had contracted to ship oranges to defendant not later than a specified date, shipped them at a later date, and they were accepted by defendant without protest, the price having fallen in the meantime, defendant did not, by such acceptance, waive his claim for damages for the breach of the contract, since the stipulation as to the time of shipment was a warranty.

Appeal from St. Louis circuit court; Leroy B. Valliant, Judge.

Action by the Redlands Orange Growers' Association against John Gorman. Judgment for defendant, and plaintiff appealed. Certified from the St. Louis court of appeals, on affirming a judgment allowing defendant's counterclaim, on certificates of conflict. Affirmed.

L. R. Wilfley, for appellant. D. P. Dyer, for respondent.

GANTT, J. This cause has been certified to this court by the St. Louis court of appeals because Judge Bond, one of the judges of said court, considered the opinion of the majority of the judges of that court to be in conflict with a decision of this court. The facts appear in the opinion of Judge Biggs. His opinion is as follows:

"The plaintiff sues for four hundred and eighty-six dollars and fifty cents. The defendant set up in his answer a counterclaim for four hundred and fifty dollars as damages growing out of the failure of the plaintiff to ship the goods within the time stipulated in

the contract. A jury was waived, and the cause submitted to the court on the following agreed statement of facts: '(1) The plaintiff is a corporation organized under the laws of the state of California. The defendant is a citizen of the state of Missouri, and a resident of the city of St. Louis, and engaged in the business of a merchant at said city under the name and style of John Gorman & Bro. (2) On the 19th day of December, 1895, the plaintiff contracted to sell to the defendant two car loads of oranges, to wit, one car to contain three hundred boxes of fancy Redland naval oranges, at the price of two dollars and fifty cents per box; the other car to contain three hundred boxes of fancy Redland seedling oranges at the price of one dollar and seventy-five cents per box. (3) The plaintiff, at the time of said sale, specially agreed with the defendant as part of said contract to deliver said oranges free on board of railroad cars at Redlands, California, and to cause the same to be shipped to the defendant not later than December 21, 1895, as the defendant desired the oranges at St. Louis as early as possible, of which the plaintiff was at the time of said contract informed. (4) The said oranges were not delivered on said cars by the plaintiff on the 21st of December, 1895, and were not shipped to the defendant on that date, but said oranges were (without the knowledge or consent of the defendant) delivered by plaintiff on board of cars at Redlands, and by him caused to be shipped to the defendant on the 23d and 24th days of December, 1895. One of said cars being loaded and shipped on the 23d and the other on the 24th day of December, 1895. (5) At the time when said oranges arrived at St. Louis, and when they were delivered to the defendant, the market value of said oranges was four hundred and fifty dollars less than it was at any time at which said oranges would have arrived at St. Louis, or at which they would have been delivered to the defendant if they had been shipped within the time provided by said contract. (6) The defendant received notice by letter from the plaintiff two days prior to the arrival of said oranges in St. Louis of the dates at which the same had actually been delivered at and shipped from Redlands, California. (7) Upon the arrival of said oranges at St. Louis, the defendant, having notice of shipment as aforesaid, accepted the same without objection or protest. (8) The contract price of the oranges actually shipped as aforesaid amounted in the aggregate to the sum of \$1,236. The defendant had paid to plaintiff of said amount the sum of \$749.50, and refused, and still refuses, to pay the balance, to wit, \$486.50, being the amount herein sued for. (9) It is agreed, if the defendant is entitled to any damages on his counterclaim, the amount of \$450 shall be allowed therefor, and in such case the judgment shall be in favor of plaintiff for \$36.50 and costs; otherwise, the judg-

ment shall be for \$486, with interest from the 1st of January, 1896, and costs.' The court allowed the defendant's counterclaim, and rendered judgment in favor of plaintiff for \$36.50, and for costs. The plaintiff has appealed.

"The position of the appellant is that, when goods are delivered out of time, and the vendee accepts them without protest, he thereby waives his right to damages resulting from the breach of the contract, except where the goods are accepted of necessity; that is, where the surrounding circumstances are such as to make it necessary for him to accept in order to avoid the accumulation of much greater damage. We cannot accede to this view of the law. We believe the law to be that, where time is made the essence of the contract, delay beyond the stipulated time in the shipment or delivery of goods does not preclude the vendee from accepting them. If he does so, and is damaged on account of the delay, and he has paid the purchase money, he may bring this action, and recover his damage. If he has not so paid, he may recoup his damage when sued for the purchase price. The authorities treat such a stipulation in the name of a warranty or condition precedent that the goods will be shipped or delivered within the stipulated time. Beach, Mod. Com. Law, § 616. To hold that in such case an acceptance out of time, without objection or protest, is a waiver by the vendee of his claim for damages resulting from the violation of the agreement, is, to our minds, unreasonable. With equal reason it could be said that, where goods are bought with an express warranty of quality, and goods of an inferior quality are accepted by the vendee, he thereby waives his right to rely on the warranty. All of the authorities are against that proposition. Our views find ample support in the authorities. Lord Blackburn, in his work on Contracts, states the law on the subject as follows: 'When the contract was to deliver goods at a certain date, and that date is passed, the vendee may accept the goods, and bring his action for any damages he may have actually suffered in consequence of the late delivery. He does not, by accepting a late delivery, waive any claim he may have for damages arising from the delay; just as where, by accepting goods which were not up to the warranted quality, he does not waive his right to damages for breach of warranty.' Hare on Contracts states the rule thus: 'When the thing tendered under an executory contract differs as regards time, quality, amount, or kind from what the buyer agreed to receive, it may be declined, and the breach treated as entire, or it may be accepted as so much on account of what the contractor agreed to do or render, and an action brought for the amount by which the performance falls short of the promise.' This statement of the rule is subject to the qualification that time

must be of the essence of the contract, and there must be an express warranty as to the quality of the goods. In the case of *Dignan v. Spurr*, 3 Wash. 315, 28 Pac. 529, the supreme court of the state of Washington had the question before it. The court said: 'Counsel contended that appellant waived no right to damages arising out of any delay in delivering the brick by respondent, notwithstanding they were accepted at a later date than that fixed for their delivery by the agreement between the parties; and we are inclined to the opinion that the objection is well founded.' So, in the case of *Whalon v. Aldrick*, 8 Minn. 349 (Gil. 305), the supreme court of Minnesota says: 'The defendant, as the case shows, was entitled to have the logs in St. Croix boom in 1857. Six or seven hundred thousand feet of them were not so delivered, but were delivered the next year, and received by the defendant. This acceptance did not cut off any claim the defendant had for the nondelivery of the logs at the contract time, but enters as an element into the question of what damages he was entitled to recover.' In the case of *McMaster v. New York*, 108 N. Y. 563, 15 N. E. 417, the court says: 'The contention that where there is a breach of contract by one party, and the other thereafter is permitted to perform the same in part, receiving the contract price for such part performance, the injured party thereby waives or releases his right to damages for the breach, has no foundation in reason or authority. It is undoubtedly the rule that, where one party to a contract breaks, the other party may stop, and refuse further performance. But, instead of doing so, he may perform, so far as permitted, and then claim the damages he has suffered from the breach.' In *Bagby v. Walker*, 78 Md. 239, 27 Atl. 1033, the supreme court of Maryland said: 'Mere acceptance of the lumber after the expiration in the agreement for its delivery was not of itself a waiver of the breach committed by the failure to deliver it according to the terms of the contract; nor did such an acceptance preclude the vendees from subsequently suing to recover the damages resulting to them by reason of the nondelivery from the time of default up to the date of acceptance, nor from recouping, when sued by the vendors, those damages against the latter's claim for the purchase money.' So, in *Van Winkle v. Wilkins*, 81 Ga., loc. cit. 104, 7 S. E. 644, the supreme court of Georgia expressed the same view. It said: 'It was urged in the argument that receiving the material was a waiver both of its defects and of damages resulting from its nondelivery in due time. Why so? * * * Under the circumstances there was no obligation to return the machinery, or to offer to return it. * * * As to the damages resulting from delay, these had already been sustained when the mill was received. Its reception, in so far as it affected

at all, could only hinder more from ac-

cruing. It certainly could not increase them. There was no inconsistency between reception of the machinery and retention of the claim for damages on account of delay to furnish it by the time stipulated. To hold that there was a waiver by implication would be very unreasonable.' To the same effect is *Gaylord v. Karst* (Com. Pl.) 17 N. Y. Supp. 720. In the case at bar it was stipulated that the oranges should be shipped not later than the 21st of December. Was the time of shipment intended to be of the essence of the contract? If so, then the stipulation must be construed as a warranty or condition precedent, and not a mere representation. The doctrine of the foregoing cases must rest on this distinction. On no other principle can they be distinguished from the cases which hold that in the absence of an express warranty as to quality an acceptance of goods of an inferior quality to those bargained for will be held to be a waiver of the breach of the contract. 'In determining whether stipulations as to the time of performance of a contract of sale are conditions precedent, the court seeks to discover the intention of the parties; and, if time appears, from the language used and the circumstances, to be of the essence of the contract, stipulations in regard to it will be held conditions precedent.' Beach, Mod. Com. Law, § 618. There is no difficulty in determining the question in the present case. It was the evident purpose and intention of the parties that the shipment should be made at the stipulated date, so that the oranges might reach St. Louis in time for defendant to get the advantage of the better prices for such fruit, which usually prevails at the beginning of the holidays. The appellant cites in support of its position *Bock v. Healy*, 8 Daly, 156. That case declares the law as appellant contends. The opinion does not attempt to discuss the question on principle, but merely decided that, where goods are delivered out of time, the vendee, by accepting them without protest, waives his claim for damages for breach of the contract. The other authorities relied on hold that in executory contracts for the sale of goods, if there is no express warranty as to kind or quality, the vendee must examine the goods promptly, and, if they are not according to contract, he must return to the vendor. Failing in this, he will be held to have waived his objection to the quality of the goods. This we concede to be the law, but we deny its application in the present case. The judgment will be affirmed.

"Judge Bland concurs in this opinion as written. Judge Bond dissents, and is of the opinion that the decision is opposed to that of the supreme court in the case of *Estel v. Railroad Co.*, 56 Mo. 282. The cause will therefore be certified to the supreme court for final determination."

In our opinion, the law is correctly ruled by the majority of the court of appeals. As

said by the supreme court of the United States in *Norrington v. Wright*, 115 U. S. 188, 6 Sup. Ct. 12, 20 L. Ed. 366: "In the contracts of merchants, time is of the essence. * * * A statement descriptive of the subject-matter, or of some material incident, such as the time or place of shipment, is ordinarily to be regarded as a warranty in the sense in which that term is used in insurance and maritime law; that is to say, upon the failure of or nonperformance of which the party aggrieved may repudiate the whole contract." 1 Beach, Mod. Cont. p. 744, § 616, adopts Mr. Justice Gray's language as the law in such cases. As shown by Judge Biggs' opinion, such a stipulation is regarded by the courts as a warranty, and the rule is well settled that the stipulation is a warranty as to the time of delivery, and the vendee may receive the goods after the stipulated time of delivery, and, if he has paid the purchase money, may maintain his action for the damages occasioned by the breach, or, if he has not paid for the goods, may recoup the amount of his damages out of the purchase price. The difference in opinion between the judges of the court of appeals is based upon the different views they entertain as to the character of the stipulation as to time. We think, with the majority, it is a warranty. As to the case of *Estel v. Railroad Co.*, 56 Mo. 282, we think it is plain that the waiver of the time in that case was an express waiver of the time before the delivery began, and a consequent estoppel of the defendant under the facts to complain of the failure to deliver at the time specified in the contract, whereas the cases cited by Judge Biggs clearly demonstrate that the mere reception of the goods without protest or objection is not a waiver of the breach committed by the failure to deliver the oranges according to the contract. The judgment of the circuit court is affirmed, and the opinion of Judge Biggs adopted. All concur.

TORBERT v. JEFFREY.

(Supreme Court of Missouri, Division No. 1.
March 12, 1901.)

PARTNERSHIP—LOSSES—EQUITY—JURISDICTION.

1. Where A. furnished B. with money to buy apples at a certain price, B. to put in his time and certain contracts of purchase, and the two to share the net profits equally after all expenses were paid and A. reimbursed for his outlay, a partnership existed between them, though nothing was said as to the losses.

2. A court of equity is not deprived of jurisdiction of a suit between partners to wind up a partnership business by the fact that a part of the partnership property is stored in another state.

Appeal from circuit court, Saline county; Richard Field, Judge.

Suit by William Torbert against Robert Jeffrey. From an order refusing to revoke

an interlocutory order appointing a receiver, defendant appeals. Affirmed.

Stewart Taylor, for appellant. Wallace & Wallace, for respondent.

BRACE, P. J. This is an appeal from an order of the circuit court of Saline county refusing to revoke an interlocutory order of said court appointing a receiver. The action in which the order was made was for the settlement of a partnership account, and the property in the possession of the defendant, of which a receiver was appointed, was alleged partnership property. The main question in the case is whether, as to that property, the plaintiff and defendant were partners. The only direct evidence as to the alleged contract of partnership is that of the parties themselves, taken by deposition. That of the defendant was first read. His testimony on that subject is as follows: "Q. Mr. Jeffrey, I will get you to state what you consider the contract between you and Mr. Torbert to be. A. How do you mean that? Q. Just what you consider that contract as to buying those apples at Orrick, Missouri, to be between you and Mr. Torbert. A. Why, in the first place, he came to me, and said he had some contracts in Orrick, Missouri, or in the neighborhood, for so many apples from certain parties; and after a lot of talk about it, and him asking me four or five times to go in, I consented to advance him not to exceed \$1.10 a barrel, and whatever net profits there was after all expense was paid, he was to have one-half of it. Q. Your contract was, then, that the pay he was to get was to be half what net profits that would be realized after all expenses were paid? A. Yes, sir. He had a contract with those parties for \$1.00 a barrel, and he said he would put in his time. * * * Q. How were they billed when they were shipped to Kansas City by him? A. To Jeffrey Commission Company. Q. And were stored immediately at Armour's? A. At Armour's; yes, sir. Q. Was anything ever said between you and Mr. Torbert at that time with reference to his having any say-so with reference to the apples or their sale? A. Yes, sir; he had no right. Q. Just state what was the agreement with reference to the handling of the apples between you and Mr. Torbert. A. That I had absolute say about it until they were all sold, and to give him half of the proceeds after all the expenses were taken out on a certain amount of them. Q. Now, did he ever attempt to interfere with the management of the apples prior to the bringing of the suit,—prior to Mr. Wallace coming down to see you a few days before the suit was brought? A. Never. Q. Did he ever, prior to Mr. Wallace's visit above referred to, intimate in any manner a desire to have a voice in the management and control of these apples? A. Never. * * * Q. In the conversation in making

this contract, what was said with reference to Mr. Torbert having any say as to the management of these apples? A. At the commencement of it? Q. Yes. A. At the commencement of it I said I would advance not to exceed \$1.10 a barrel. He to draw on me, when the apples were loaded, not to exceed \$1.10 per barrel for the apples. Draw on me sight draft, bill of lading attached. That I would handle the apples to the best advantage. That he was to devote his time, free of cost, for his interest in the apples; and he agreed to it. When he returned after the thing was all over, I asked him if he could not sell some of them, and he says, 'You have got your money into it, and you can do the best you can with it.' * * *

Q. Now, you used the expression that Mr. Torbert was to give his time free, and superintend the packing of the apples, for his interest in the apples? A. Yes, sir. Q. Do you mean that Mr. Torbert was to have an interest in the apples or in the profits? A. In the profits. Q. If I understand you, it was that agreement that he was to be interested in one-half of the net profits, should there be any, in the apples? A. But that was not in the apples. Q. And he was not to have any voice in the management or sale of the apples? A. No; no." The testimony of the plaintiff on that subject is as follows: "Q. Now, I will get you to state what the contract between you and Mr. Jeffrey was, or, rather, state fully the conversation relating thereto. A. You mean previous to the time—the day—we made the contract? I cannot state exactly the conversation,—all of it; but Mr. Jeffrey knew that I had some apples bought down there, and he had spoken about it several times; not in any trade though, as I understood it, at least. But he knew I had some apples bought there, and the morning that this agreement was made I was in his office, and he asked me how many apples I had down there, and I told him I did not know; that I had those four orchards; and he then wanted to know again what I was to give for them, and I told him what I was to pay for them,—showed him the contracts I had. 'Well,' he says, 'you have got a pretty good thing there;' and he wanted to know why I did not buy more. I told him that I did not like to take hold of any more from the fact that I probably had all that I could handle, or something to that effect, and then he said that he would like to have ten thousand barrels, and he says: 'If you have not the money to handle them, how would you like to go in partners with me? You put in what you have got, and I will furnish all the money to pay for them and pay for the handling of them.' I told him that it was owing to what kind of an arrangement we would make, and he said that he would put his money against my time, and we would go partners on the deal. Q. Is that all? A. Well, we made the arrangement

then to go down there. Q. Well, now you have been stating the preliminary discussion, I will ask you to state now exactly what the contract was. A. The contract was that he was to furnish the money, and to pay for the apples, and to pay for the packing, and that I was to have half interest in the business after he got the amount of money he put in it. Q. That was expressly understood, was it, that he was to get out what money he put in first? A. Well, he did not say first. He said after he got what money he had in out. That was the agreement. He was to have his money, and then I was to have half of whatever was remaining. Q. Well, that meant first. Did you not understand it that way? A. No, I did not understand it to be first. Q. Now, I will ask you to state again what the contract was with reference to Mr. Jeffrey getting the money he advanced out of the apples. A. Well, the contract was that I was to have a half interest in it after he got the amount of money he put in the apples. He did not specify the time he was to get it, or anything about that. Q. Well, you used the word 'after,' did you not, which meant that you were to have a half interest in the apples after he got his money out? A. Yes, he was to get his money that he put into them. Q. And then you were to be equal partners? A. Yes. Q. You were not to be equal partners before he got his money out of them, were you? A. Well, it was not specified in that way whether we would, or anything about that. Q. Just state again in your own way. A. He was to have his money out of the apples. Of course, there is no dispute about that. Q. Now, were you to share in the apples or in the profits? A. That was stated just as the talk was. I do not know how you would interpret it. That is the conversation. That is the agreement, just as I stated it, that his money, of course, was to be paid back to him. Q. Well, now, have you ever had any idea that you were to share in the apples themselves? A. Why, after he got his money out of them, I certainly would share in the apples after his money came out of that, and I consider myself a sharer. * * * Q. Was anything said in the original contract about where the apples should be stored? A. I believe there was talk about it. He talked some about the Kansas City Ice & Cold-Storage Company, but I believe he said that he had some trouble with them, and he would see Armour. Q. Was anything said about your having any voice in the management of the apples prior to getting his money out of them? A. It was not specified anything about his getting his money out of them. He did not specify anything. Q. Did you say that Mr. Jeffrey was to get his money out of the apples, and then, after his money was gotten out, that you were to be partners in what there was left? A. Why, he said nothing about his money in speaking about them. The word 'after' was not used. He was to have his money

out of them. Q. Was nothing said about managing the apples before he got his money out of them? A. In speaking about the management of the apples he did not bring up the question of managing the apples. Q. I want you to direct your attention solely to the original first agreement, and ask you if anything was said at that time about the management and control of the apples? A. Yes, there was something said about the management and control of them—about the management of them. Q. What was said? A. In talking over he said this: That when he got the apples packed— First he had been talking to me in regard to handling dried fruits,—whether I knew anything about handling them or not,—and talking about wanting me to go to California; and in this talk he said, 'While you are running around, you can probably help dispose of those apples—to handle them.' Q. Was that all? A. Yes, all that was really said about the disposal or control of them. * * * Q. Mr. Torbert, that contract which you entered into, there was nothing said about just the profits? State just the words now. A. The words, just as near as I could state them, I have stated. Q. But I would like to have them again. A. In regard to putting these apples in (in regard to the apples I had bought, and what we were going to buy), he asked me,—he says to me, 'How would you like to put in what you have got, and me furnish the money to pay for all of them, and the expenses of packing, and go in partners in the deal?' Q. Now, Mr. Torbert, you stated, I believe, in the direct examination, that Mr. Jeffrey, when you told him of what you had down there,—the contracts that you had,—that he told you it was a good thing? A. Yes, sir. Q. Then it was not only your labor that was on your side, but the contracts you had with them? A. That was a part of the consideration. * * * Q. Mr. Torbert, you were here this morning when Mr. Jeffrey said something about you saying to him that he had the money in there, and for him to get it out. I wish you would explain about that, and state whether or not it is true. A. I wanted to sell some of the apples. Talked to him about it, and he said, 'No, do not sell the No. 1's now. They are going to be high;' and he said, 'Sell the No. 2's;' and I asked him what price we had best put on them. He said, 'From \$2.50 to \$3.00.' I told him that we could not sell the No. 2's then at this price. He said that the Wine Saps and Willow Twigs and Grimes Golden that were in the No. 2's were as good as most of the No. 1's that was on the market, and that he would not consent to take any less than \$2.50 to \$3.00. And as to me telling him that he had his money in the apples, and for him to get it out, I never told him any such thing. I never told him anything of the kind." It further appears in the evidence that in pursuance of the contract thus testified to the plaintiff shipped to de-

fendant 1,650 barrels of apples, drawing on the defendant for the purchase price thereof, which drafts to the amount of \$1,768, with the freight and other incidental expenses, amounting in the aggregate to over \$2,500, were paid by the defendant. The apples were stored in the Armour Cold-Storage Warehouse in Kansas City, Kan., a small quantity of them sold by the defendant, when this controversy arose, and this suit was brought.

1. The character of the contract between the parties is to be deduced from this evidence. In determining whether the relation between the parties constitutes a partnership, their intention governs, as that intention is disclosed, not by particular expressions, but by the nature and effect of the whole contract. This case belongs to that large class in which there is an agreement to share the profits of a venture, and nothing is said about the losses. "Participation in the profits and losses of a joint business or undertaking affords the usual, and perhaps the most cogent, test of the existence of an intention to form a partnership. An agreement for such participation is not, however, a conclusive test, and does not absolutely constitute a partnership as a conclusion of law, if other circumstances show that no partnership was intended. It is only prima facie proof, which may be rebutted by evidence of other facts and circumstances." 17 Am. & Eng. Enc. Law, 835a; *Donnell v. Harshe*, 67 Mo. 170; *Musser v. Brink*, 68 Mo. 242; *McDonald v. Matney*, 82 Mo. 358; *Newspaper Co. v. Farrell*, 88 Mo. 594; *Clifton v. Howard*, 89 Mo. 191, 192, 1 S. W. 26; *Thompson v. Holden*, 117 Mo. 119, 22 S. W. 905; 1 *Bates, Partn.* §§ 25, 29. And as a community in losses is a necessary corollary of a participation in the profits, a partnership may as well be predicated of an agreement to share net profits as of an agreement to share the profits and losses, and the same rule applies. Hence "participation in the profits of a business raises a presumption of the existence of a partnership. This presumption is not conclusive, but, if not rebutted, is sufficient to establish a partnership." 17 Am. & Eng. Enc. Law, 841b; *Lengle v. Smith*, 48 Mo. 276; *Phillips v. Samuel*, 76 Mo. 658; *Bank v. Althmeier*, 91 Mo. 191, 3 S. W. 858; 1 *Bates, Partn.* § 30; *Corey v. Cadwell*, 86 Mich. 570, 49 N. W. 611. When both parties furnish the capital, and are to share in the profits, ordinarily no question can arise as to the existence of a partnership. When one party contributes the capital and the other the labor, skill, or experience for carrying on a joint enterprise, such a combination constitutes a partnership unless something appears to indicate the absence of a joint ownership of the business and profits. 17 Am. & Eng. Enc. Law, pp. 842, 843. Such absence of joint ownership is indicated when, from the whole contract, it appears that the party

contributing his services is to receive a share of the profits merely as compensation for his services, as illustrated in some of the cases cited. But it does not appear from the fact that one part of the business is to be conducted by one of the parties and the other part by the other party, nor by the fact that the capital is to be returned to the partner putting it in before the profits are shared. These are but the ordinary incidents of a partnership. Applying these principles to the case in hand, after stripping this evidence of redundant matter, and the opinions and deductions of the witnesses, and confining our attention to what the parties actually said and did in this business, we find nothing to take it out of the category of an ordinary partnership in a joint venture, to be conducted on joint account, the net profits of which were to be equally divided between the partners.

2. It is suggested in brief of counsel for appellant that the court did not have jurisdiction to appoint a receiver in the case. As this was an action in equity between partners to wind up a partnership business and to settle a partnership account, the only basis for this suggestion seems to be that the apples, a part of the partnership property, were stored in the state of Kansas. There is nothing in this suggestion, which is fully answered by the authorities cited by counsel for respondent. The judgment of the circuit court refusing to revoke the interlocutory order appointing a receiver is affirmed, and the cause remanded to the circuit court to be proceeded with to final judgment. All concur, except MARSHALL, J., absent.

TANNER v. MISSOURI PAC. RY. CO.

(Supreme Court of Missouri, Division No. 1.
March 12, 1901.)

RAILROADS—INJURIES—PERSON NEAR TRACK
—CONTRIBUTORY NEGLIGENCE—FAILURE TO
LOOK OR LISTEN—RECKLESSNESS AND
WANTONNESS.

1. Plaintiff was struck by defendant's train between 1 and 2 o'clock in the morning, while standing in a space seven or eight feet wide between the tracks, at a depot platform. The train which struck plaintiff was due seven minutes later than a standing train beside which plaintiff was waiting for passengers to alight. Both trains had been reported on time, which fact plaintiff knew, but the train first due arrived five minutes late. There was room between the tracks so that a person could stand there unharmed while the trains passed. The headlight on the incoming train was lighted, and plaintiff could have seen the train had he looked, and heard it had he listened. He was thoroughly familiar with the time and manner of the trains' coming, being accustomed to meet them as hotel porter. *Held*, that the plaintiff was guilty of contributory negligence as a matter of law, so as to preclude a recovery for injuries received.

2. Defendant's servants were not guilty of such willful, reckless, or wanton disregard of human life as to render defendant liable for plaintiff's injuries despite his contributory neg-

ligence, because the train entered the depot at a speed slightly in excess of the ordinance, and the engineer could have seen the place on which plaintiff was struck in time to have stopped the train before reaching it.

Appeal from circuit court, Pettis county; George F. Longan, Judge.

Action by S. P. Tanner against the Missouri Pacific Railway Company. From a judgment in favor of the plaintiff, defendant appeals. Reversed.

M. L. Clardy and Wm. S. Shirk, for appellant. J. H. Rodes, Sangree & Lamm, and Barnett & Barnett, for respondent.

BRACE, P. J. This is an appeal by the defendant from a judgment of the circuit court of Pettis county in favor of the plaintiff for the sum of \$7,000 for personal injuries which, it is alleged in the petition, were caused by the negligence of the plaintiff in running its train at a rate of speed in excess of that allowed by city ordinance and without ringing its bell. The answer was a general denial and a plea of contributory negligence. At the close of plaintiff's evidence, the defendant demurred thereto, and at the close of all the evidence renewed its demurrer, and now insists that the trial court committed error in not sustaining the demurrer. This contention makes it necessary to determine the undisputed facts in the case, and, if upon them it is well grounded, the necessity of considering the other errors assigned is obviated.

The accident occurred on the 2d day of March, 1897, between 1 and 2 o'clock a. m., on the grounds of the defendant in front of its depot in the city of Sedalia. The depot fronts south, with a wooden platform extending south to the tracks. Along and in front of the platform, and on a level with it, are located five tracks, running east and west, numbered 1, 2, 8, 4, 5, from the platform, which extends across and between two or three of the tracks. South of the tracks, and in front of the depot, Osage street, 60 feet wide, running north and south, abuts the depot grounds, and forms one of the principal approaches to the station, to reach which all five of these tracks must be crossed. On the northwest corner of Osage street, fronting the depot grounds and tracks, is the Pacific Lunch Room. On the night in question the plaintiff was in the employ of the City Hotel as night clerk, and discharging the duties of porter for that hotel. Passenger train No. 9, coming from the east on track No. 1, was due at 1:43 a. m. Passenger train No. 10, coming from the west on track No. 2, was due at 1:50 a. m. The track is straight and level, and the headlight of a coming engine on it can be seen a half mile from the place of the accident. The bulletin board showed these trains on time. In fact, No. 9 came in about five minutes late, and No. 10 on time. The plaintiff, in the line of his employment, was in the Pacific Lunch Room, awaiting the arrival of these trains. The story of his injury is told by him in his evidence as follows:

In chief: "Q. You may state what you did after you got there,—to the lunch room. How long you stayed there, and how you came to go there, if you did, to meet number nine. A. I went over, and went in the side door to the lunch room, where we generally stopped out of the rain or cold weather, and stop in there occasionally when the train is not in sight or hear it coming. We drop inside there at the restaurant, and stop in there, and talk a few minutes, until the train comes; and we was all standing in there, talking. Some one said the train was coming. Q. Had there been anything said in there about the bulletins of the two trains before that? A. Well, it was reported number nine on time. Q. How about number ten? A. Both on time; that was the report. Q. Marked where, at the bulletin at the depot? A. Yes, sir; I didn't go over myself, but it was reported there among the hack drivers and the porters that number nine and ten was on time. Q. Now go on in your own way. A. And, when number nine was coming in,—we heard it coming in,—we all went out. I say, 'All;' several went out. Some went out the side door, and some the back. I went out the back door, and it was raining. You have to go east a little bit to get on the sidewalk,—the back door of the restaurant,—and I went north — Q. Did you go east when you stepped out of the back door of the restaurant? A. Had to go east to get to the corner of the building,—sidewalk. Q. Then how did you go when you got to the corner of the building,—to the sidewalk? A. I went north. Q. Where did you go,—north? A. I went north to the platform between number one and two track, where number nine and ten runs in on. Q. How long were you in there before number nine came in? A. Why, I just got there, and number nine came in. Q. From the east? A. From the east, by me. Q. Go on, from that; and, by the way, when you went across this track that number ten finally came in, state whether you looked or not,—if you looked. A. Yes, sir; I looked west. Q. Did you see anything that indicated a train coming? A. No, sir; nothing but some switch lights up there. They don't give no such light as an engine, you know. * * * Q. Then you crossed on over this track that number ten finally came in on, and got in between tracks number one and two? A. Yes, sir. Q. On which side of number nine were you when number nine came in? A. On the south side. Q. How wide is that platform between tracks one and two? I don't mean when the trains are in, but before they come in. How wide is the space between the rails? Give us your judgment. A. I couldn't say. Q. You never measured it, but give us your judgment about it. A. I judge, seven or eight feet there. Q. When trains come in, I suppose the cars project over the rails to some extent. How wide would the space be when two trains were standing in there, do you think? A. I judge it would be four or five feet. Q. Now, after

number nine came in from the east, you say you had your umbrella up? A. Yes, sir. Q. How did you hold your umbrella? A. Up over my head. It was raining. Q. What did you do after number nine came in? A. I was standing there waiting for passengers to get off. Q. Had you moved up east some? A. I may have stepped up a few steps. The smoking car is about middle ways where I was standing. Q. What do you mean by that,—the smoking car? A. That is the first coach. Q. And you mean that you were standing about the middle of the smoking car? A. Yes, sir; when the people were getting off. Q. If we knew where that car stood, we would be able to locate you. Do you know where that car stood? A. I think it was partly across Osage. I was standing on the platform between Osage, or on Osage. Q. You think you were standing on that platform where Osage, if it went through, would have gone right where you were? A. Yes, sir. Q. Well, what happened to you? A. The first thing I knowed, why— Q. How long had you been over there before number ten came in? A. I had been standing there, I guess, a minute and a half or two minutes. Q. What were you doing during that time? A. Standing there looking for passengers to get off. Q. Were you on the track that number ten came in on, do you think? A. No, sir; I don't think I was on the track. Q. What happened to you then? A. The train ran into me. Number ten run into me, and took my leg off. Q. Did you hear it before it struck you? A. No, sir. Q. Did it ring any bell,—the engine on number ten? A. No bell ringing. Q. You never saw it before it struck you? A. No, sir. Q. Which leg was it the train took off? A. Left leg. Q. Do you know whether your leg was taken off after you was thrown down, or was it hurt before you fell down? A. I couldn't say. It was taken off. I didn't know how it was taken off. Q. You were facing what direction when number ten struck you? A. I was facing northeast. Q. Your right side would be towards number ten as it came in, in a measure? A. Yes, sir. Q. You were facing northeast? A. Yes, sir; this direction. Q. And that would bring your right side, in a measure, at any rate, towards the track which was on the south of you? A. Yes, sir. Q. Now it was your left leg that was cut off? A. Yes, sir. Q. Whether you were knocked down, and after you were knocked down your foot got under the car, or whether your foot was struck in the first instance, you really don't know? A. Don't know how it was done; no, sir. * * * Q. When you were on this platform,—that is, between these two tracks,—do you remember of seeing other people in there at that time? A. The hack drivers and porters was east of me. They were standing at the opening between the two cars. Q. On which side of number nine? A. On the south side. Q. Of number nine? A. Yes, sir. Q. Standing east of you, as I understand you? A. Yes, sir. Q. How

far, I suppose, you don't know? A. I couldn't say how far east they were. They were down east. I wasn't paying any attention. I was watching to see who was going to get off the train. Q. Mr. Tanner, while you had been attending over there as a porter, from time to time, on which side of the incoming trains did you get passengers and take passengers to the trains? A. To the south side. Q. South side? A. Yes, sir."

On cross-examination: "Q. You were perfectly familiar with the manner at which these trains came in, and at the time at which they came, and had been for months before that? A. Before I was hurt; yes, sir. Q. You knew that number nine came in from the east seven minutes ahead of number ten from the west, when they were both on time? You knew that fact? A. Yes, sir. Q. You say it was reported to you this night that you went over there that number nine was on time and number ten also? A. It was reported there in the restaurant; yes, sir. Q. As you went out after hearing number nine coming, did you look at your watch to see whether she was coming on exact time or not? A. I did not. Q. You thought it was coming in on time, from the report that you heard? A. That is what the bulletin board showed, I think. Q. But from what you heard in the saloon— A. Restaurant. Q. You thought it was coming in on time? A. Yes, sir. Q. And you thought that number ten would not come in for the next seven minutes? A. Of course, number ten wouldn't come in for seven minutes. * * * Q. Did you not also say that, not expecting number ten for seven minutes yet, you was not looking for it, nor listening for it, at the time you were injured? A. Was not looking for it. If I had been looking for it, I would have seen it before it got onto me. * * * Q. After you got across the track that number ten was coming in on, you say you stood there for a minute and a half or two minutes before number ten came in? A. Yes, sir; number nine passed right by us. Q. And in a minute and a half or two minutes after that number ten came in and struck you? A. Yes, sir. Q. During that minute and a half you was standing on that track that number ten come in on, did you turn and look out west to see if a train was coming? A. I don't remember whether I looked west any more than once or not. Q. You think you looked west as you came across the track. Now, in this minute and a half or two minutes after you got across the track, did you again look west to see whether that train was coming? A. No, sir; I don't think I did. Q. Did you listen to see if you could hear it? A. No, sir; I didn't expect it. Q. And therefore paying no attention as to whether it was coming or not? A. I was standing there on the platform waiting for guests to get off. * * * Q. During the minute and a half that you stood there after you got across the track, and you say you

was looking for passengers getting off of number nine, was you paying attention to whether or not train number ten was coming in from the west? A. No, sir; I was not. I didn't look. I didn't turn around and look. * * * Q. Was you looking? If you was not looking, was you listening? A. I was not deaf. Q. Was you listening to see if that train was coming during that minute and a half you stood there on that platform? You was not, was you? A. I was not paying— I didn't hear anything. If I had heard it, of course— Q. That is not the question. You understand what I mean. Was you listening? Was your ears open to hear whether or not that train was coming? A. I didn't hear it; no, sir. Q. You know that is not an answer to my question. * * * Was you listening with a special view to ascertain whether that train was coming or not? A. Why, well, I'll have to say I reckon I didn't. * * * Q. Anything the matter with your ears that night? A. No, sir. Q. You cannot explain why you didn't see that locomotive headlight? A. I cannot explain it. I could have seen it if I had looked. Q. You could have seen it if you had looked, and your eyes were all right? A. My eyes were all right, certainly. Q. You didn't hear any one hollering at you on the other side of number ten. Was there anything the matter with your ears that night? A. No, sir. Q. Your ears were in good condition? A. Yes, sir. Q. You had an umbrella up over your head? A. I did."

As there was some evidence tending to prove that train No. 10, coming in on track No. 2, was running at a rate of speed exceeding the maximum rate prescribed by the city ordinance, and that its bell was not being rung, the court committed no error in sending the case to the jury, unless by these undisputed facts such contributory negligence on the part of the plaintiff is shown as to preclude a recovery. That it is so shown is a conclusion as to which reasonable minds cannot well differ. The plaintiff, an adult in possession of all his faculties, familiar with the place, the time, and movement of these trains, without looking or listening, or paying any attention thereto whatever, deliberately placed himself in the line of danger of train No. 10, coming in on track No. 2, on time, and is struck, when by looking he could have seen, and by listening he could have heard, that incoming train, and have avoided the danger to which he thus voluntarily and unnecessarily exposed himself. A clearer case of contributory negligence could not well be made out. The only shadow of an excuse for such negligence is that he had heard that the bulletin said that both trains were on time, and, if this was so, then, No. 9 having just come in, No. 10 would not be in for seven minutes. Hence he paid no attention to his danger from that train. He took no care whatever to verify this report; did not even look at his watch for

that purpose. If he had, he would doubtless have discovered that No. 9 was in fact late, and that No. 10 was then nearly due. However that may be, while bulletins are required by law, and serve useful purposes, they can, at best, do no more than predict—suggest a probability—as to the arrival of trains, and no man has a right to shut his eyes, close his ears, and put himself in a place of danger on or near a railroad track on the faith of such a forecast. No reasonably prudent man will do so. Hence it must be held that the plaintiff was guilty of such contributory negligence, in being within the danger line of track No. 2 when he was struck, as to preclude a recovery, and that the court committed error in sending the case to the jury, unless, after the plaintiff had thus put himself in a place of danger, the conduct of the defendant's employes in the management of the train was characterized by such willful, reckless, or wanton disregard of human life as that the defendant shall not be heard to say that the plaintiff was guilty of such negligence. *Morgan v. Railroad Co. (Mo.) 60 S. W. 195; Kellny v. Railway Co., 101 Mo. 67, 13 S. W. 806, 8 L. R. A. 783.*

We have looked in vain through all the evidence in this voluminous record for any indicia of such willful, reckless, or wanton disregard of human life upon the part of defendant's servants. There was barely evidence enough to take the case to the jury on the main issues tendered by the plaintiff, and, while there was some evidence from which the jury might have found that the train came into the depot grounds at a rate of speed slightly in excess of that prescribed by the ordinance, there is none to indicate a reckless rate of speed. It is also true that there was ample evidence from which the jury could have found that the place at which the plaintiff was struck was plainly visible to the defendant's operatives on the engine a sufficient distance for them to have safely stopped the train before it reached that place. But, conceding all this, what would have been seen by the defendant's servants at that place? No person on track No. 2, on which the train was moving; the plaintiff and several other persons on the platform between that track and track No. 1, on which train No. 9 was standing, presumably prudent persons, having a proper regard for their own safety; and, if any of them were within the line of danger from the approaching train, that they would be on the lookout for it, and would step out of its way as it approached them, and leave the way clear, and hence there would be no necessity for stopping the train on their account before reaching the usual stopping place, some 200 or 300 feet distant, where it did stop. This would have been the conclusion of an ordinarily prudent manager of the movement of such a train, and the defendant's servants, thus managing the train

in question, cannot be convicted of a willful, reckless, or wanton disregard of human life, in not stopping the train before it reached the place where plaintiff was struck, because, forsooth, he proved to be an imprudent person, without a proper regard for his own safety, and did not step out of the way of the train, as he might easily have done, and as he would have been reasonably expected to do. The demurrer to the evidence ought to have been sustained. Hence it becomes unnecessary to consider the other errors assigned, and the judgment of the circuit court, for this error, will be reversed. All concur, except MARSHALL, J., absent.

SHARP v. MISSOURI PAC. RY. CO.

(Supreme Court of Missouri. March 26, 1901.)
RAILROADS—CONTRIBUTORY NEGLIGENCE—
INJURIES.—EMPLOYEES—SECTION HANDS—
SIGNALS—SPEED OF TRAIN—WILLFUL OR
WANTON INJURY.

1. Plaintiff's decedent was killed by a train which he knew would pass in a few minutes. As the train approached he was standing outside the rail, working, leaning over so that his head was close to the track. The train, which was running 12 or 15 miles an hour, was visible for over a quarter of a mile. It was customary for the section men to work on the track until the engine got very close, so that no warning was given deceased until the engine was within 70 or 75 feet, when his companions called and the engineer blew the whistle. Had deceased straightened up, he would have been out of danger; but he remained in the same stooping posture, and was struck on the head by the pilot beam. *Held*, that deceased was guilty of contributory negligence as a matter of law, so as to preclude a recovery on the ground that defendant was negligent.

2. The engineer was not guilty of such willful, wanton, or reckless disregard of human life as to render defendant liable notwithstanding the deceased's contributory negligence.

In banc. Appeal from circuit court, Jackson county; Charles L. Dobson, Judge.

Action by Margaret Sharp against the Missouri Pacific Railway Company. From a judgment in favor of the plaintiff, defendant appeals. Reversed.

Elijah Robinson, for appellant. Teasdale, Ingraham & Cowherd, for respondent.

BRACE, P. J. This is an appeal from a judgment of the Jackson circuit court in favor of the plaintiff for the sum of \$5,000 damages for the death of her husband, William Sharp, who on the 2d day of November, 1895, was struck by one of the defendant's trains and killed, and whose death, it is alleged in the petition, was caused by the negligence of defendant's servants, "in this, namely: First. The agents, servants, and employes of defendant in charge of said train negligently, carelessly, and unskillfully failed to give reasonable and sufficient notice of the approach of said train by blowing the whistle or ringing the bell, or by otherwise warning the deceased of the approach of the train. Second. The agents, servants,

and employes of defendant in charge of said train negligently, carelessly, and unskillfully failed to stop said train after they knew, or might have known by the exercise of ordinary care, of the danger in which said deceased was placed. Third. That the agents, servants, and employes of defendant in charge of said train negligently, carelessly, and unskillfully failed to stop said train in time to avoid injuring the deceased. Fourth. The agents, servants, and employes of said defendant in charge of said train negligently, carelessly, and unskillfully failed to keep watch along the track in the direction in which the train was moving towards said deceased." The answer was a general denial and a plea of contributory negligence. At the close of plaintiff's evidence, defendant demurred thereto, and at the close of all the evidence renewed its demurrer. The refusal of the court to sustain the demurrer at either stage is assigned as error, and this presents the crucial question in the case. The material evidence in the case is as follows:

Plaintiff's Evidence.

W. B. Cooper testified: "I live at Lee's Summit, and on November 2, 1895, I was in the employ of the Missouri Pacific Railway Company at that place, as a section laborer. William Sharp was also a section laborer, working in the same gang with me. At that time there were five laborers and the foreman in the gang,—J. M. Green, foreman, F. A. Radford, Abner Keller, James Himes, and myself. On the day Sharp was killed we were working in pairs, putting in ties. In doing that we were two together, but Sharp was working alone. He was the regular track walker, and would go over the track every day, and he had gone over it that morning. He got back from going over the track between eleven and twelve o'clock that forenoon, and went to work with the rest of us. Going through Lee's Summit, the track runs east of south and west of north. The place where we were working there that morning is southeast of the main part of the town,—southeast of the depot. At the time Sharp was killed we were between half and three-quarters of a mile southeast from the depot. The nearest crossing that we were to was what we called the 'School Crossing'; that is, the crossing that crosses from the school house there by the park, which is a public crossing. We were between a quarter and a half a mile from that crossing, which was between us and the town. From where Sharp was killed to the first crossing southeast was fully a mile and a half. The track from where Sharp was killed, easterly, is level for about three-quarters of a mile, and is absolutely straight. The track runs alongside of the park, and we were about 120 feet south of the park fence. The baseball grounds lie south of the park, and also extend up to the railroad track. People use the track occasionally in going out to the

baseball grounds or the park. I have noticed a good many people walking out that way. * * * I had been working just northwest of Mr. Sharp, and just before he was killed we took our tools, and moved down the track southeast of him. About the time I started to move from where I had been working northwest of him I noticed the train approaching from the southeast. I suppose it was about a quarter of a mile distant. I didn't hear it before I saw it. When I saw the train I was walking in the direction that it was coming from, and I saw it coming, and kept walking along the track until it got pretty close to me, when I stepped off the track to one side to let it pass me. I stood there to one side of the track, waiting for the train to pass me; for I saw that it was too close to go to work again. The place where I stepped off was about where I was going to go to work again, and so I had to stand there until it passed, and I kept my eye on the train, noticing it as it was coming up, until it was right close to me, and when it was right about beside me, I turned my head a little in the direction in which the train was going, and saw Mr. Sharp standing close to the track, on the south side of the south rail. We had taken out an old tie, and he was standing down in the bed where the old tie had been, and was working, cleaning it out, so that a new tie could be put in; but he was standing outside of the rail,—standing with his feet outside of the rail on the south side,—but stooping over the rail, working on the inside between the rails,—working with a pick. I don't remember whether he was in that position when I passed him, but he was in that position when I turned my head and noticed him. Mr. Keller was working with me, and we had just put in a tie northwest of where Sharp was working, and had gone to a point southeast of him to put in another. I think the distance from Sharp to the point southeast of him, where we went to put in another tie, was about fifteen feet. As the train approached, I was standing on the south side of the track, in between the rails of the side track. I don't exactly recollect where Mr. Keller was standing just at that time. He and I were the nearest people to where Mr. Sharp was working at the time he was killed. I never noticed whether the train was puffing when I first saw it approaching, but it was not puffing, as if pulling hard, when it got close to me. The wind was blowing about due south, kind of diagonally across the track. It was not very strong,—just a moderate wind. As the train approached, I had my face towards it, and I gradually turned around, and, when I got turned far enough, I saw Mr. Sharp still working there, paying no attention, and I saw it was getting pretty close to me, and I said, 'Look out!' I didn't call his name, but, as it got closer right away, I said, 'Look out, Dad!' for we

all called him 'Dad' on the road there; and about that time it was right up to him, and hit him. From the time I had passed Mr. Sharp he hadn't changed his position any way. He was standing there in the same way right up to the time the train struck him. I didn't see any signal or hear any until they blew the whistle,—until the whistle blew for danger. I can't say exactly how far the train was from Mr. Sharp when the whistle blew, but I think it was about two rail lengths, or sixty feet, from him. It might have been more. My face was towards the train as it came down the track. I don't know as I was standing square this way towards the track, or whether I was standing square this way; but whatever way I was standing I was situated so I could see the train, and I was watching it as it came up. I could not say exactly how close the train was to me before my attention was directed to Mr. Sharp, but I know it was very close,—right up to me, almost. It was getting very close, I know that. It was about two rail lengths from me when I first hollered, but Sharp didn't do anything to indicate that he heard me when I hollered the first time. The second time I hollered was just when the train was right to me, and I can't say that he heard me. I just noticed him move, and that was all, and it seemed as if the train struck him almost immediately. The whistle blew before I said, 'Look out! Look out, Dad!' I don't remember whether the whistle blew before I hollered the first time. I didn't notice the engineer at the time the accident occurred, but had noticed him when the train was approaching, about two hundred yards distant. He was either standing or sitting at his place in the cab. The engineer could see half or three-quarters of a mile along the track. I can't tell how far the engine knocked Sharp when it struck him, but I suppose ten or twelve feet. I suppose it was two hundred yards northwest from where Sharp was struck to where the caboose came to a standstill. I don't remember how many cars there were in the train, but it was a good long train. Sharp didn't speak after he was struck. When the engine was about sixty feet from Sharp, it gave two short, sharp blasts of the whistle close together. I could not say how long it was from the last sound of the whistle until the engine struck Sharp. I suppose, possibly, there was time for a man to straighten up after the last blast of the whistle was sounded and before the train struck him, if he had done it right away. I didn't hear any bell rung."

Cross-examination: "Mr. Sharp and I were working there in the same section gang. He had been working there on that section for ten years, to my knowledge. The section on which we were working extends from about one mile east to about four miles west of Lee's Summit. In working on sections that way, men become very familiar with the

numbers of the trains. The number of the train that struck Sharp was second 129. What I mean by 'second 129' is this: The first train due at Lee's Summit after twelve o'clock is a freight train, and it is numbered 129, and it is due there at that place—that is, Lee's Summit—at 12:54, and it carries flags. The first number of any regular train that is in sections carries flags for the next section to follow it, and we understand the meaning of the flags. If there is no other section to follow it, it carries no flags. The red flags indicate there is another train of that same number coming behind, and, when the first one comes and carries flags, that indicates there is another section of it, and we look for it along at almost any time. When a train is run in sections, the sections are numbered first, second, and so on, with the number of the train; that is, first 129, second 129, and so on. The train that struck this man was second 129, and the first section was due there at 12:54. It passed about on time. I had no watch, and could not say to a minute, but it must have been about on time; for it passed just before we went to work, and we always went to work at one o'clock. We ate dinner that day right by the side of the track, on the south side, about nine feet from the track, Mr. Sharp with the balance of us. The flags that are carried to indicate that another train is following are red flags, and the first section of No. 129 that passed before we went to work was carrying red flags on the engine in a conspicuous place, where they could be easily seen. Now, when a train carries those flags, it is notice that there is another section of the same train following; that it practically runs on the same time as the first section. These different sections run ten minutes apart. Sometimes they may be delayed a little, but those flags indicate that there is another section coming, and we expect it along at almost any time after the first section has passed. After we ate dinner, Sharp and the rest of us went to work again. We ate right close to the place where we went to work. I think that he went to work right at the same spot where he had been working before dinner, but I don't remember about that. We were engaged that day in taking out old ties and putting in new ones. Sharp went to work there where he was struck right away after he ate dinner. Keller and I went to work at a point about thirty feet northwest of where Sharp was at work, and then moved from there to a point on the track a little southeast of where he was at work. In going from one point to the other we walked southeastwardly. I was between the main track and the passing track, and Keller was close to me, but on the opposite side of the track. That is my recollection. When we passed Mr. Sharp he was at the point where he was struck. I don't think we said anything to him as we passed. We didn't say anything to him about the ap-

proaching train. Didn't think it was necessary. I don't know that I thought anything about it at all. He was standing on the outside of the rail. If it had occurred to me that he was in any danger, I would have spoken to him as I passed, but it didn't occur to me that he was in any danger, although I saw the train approaching. Where he was standing, if he had just stood up straight, the train might not have struck him or touched him at all. I don't know how far that beam extends out on the front of the engine, but it seems to me that if he had stood up straight possibly it would not have struck him, but I can't say positively how that would be. Q. Well, now, a man standing there in that position, digging, he would be out as far as the ends of the ties; that is, his feet would be out as far as the ends of the ties, wouldn't they? A. Well, of course, if he was standing on the outside he would be standing right at the ends of the ties. His feet would be in between them, probably. Q. That is, if he was standing on the outside of the rail? A. Yes, sir. Q. Well, now, how far do the ties project out over or beyond the rail on the outside? A. Sixteen and a half inches. Q. Now, what portion of his person was struck? A. Well, I noticed it strike his head. Q. What was it struck him? A. That beam that is there. Q. That is, the end of what they call the 'pilot beam' struck his head? A. Yes, sir; I suppose so. It is that square timber there. Q. Say this is the engine here, there is a large timber there, that is in front of the engine just above the top, and at the hind end of the cowcatcher? A. Yes, sir. Q. That is about twelve inches square, is it not? A. Yes, sir; about that. Q. And it projects out on each side of the front part of the engine, does it not? A. Yes, sir. Q. It projects out beyond the boiler? A. Yes, sir. Q. And that piece of timber is what you say struck Mr. Sharp? A. Yes, sir. Q. It struck him on the head? A. Yes, sir. Q. And killed him? A. Yes, sir. Q. He was killed instantly? A. Yes, sir; he did not live any length of time to amount to anything. Q. Now, I want you to tell the jury whether or not you examined him after he was killed? A. I looked at his head. Q. You saw where it struck him? A. Yes, sir. Q. Now tell the jury where the wound was. A. Well, right above his right eye there was a three-cornered hole made in his head, and another place on the back of his head on the other side. Q. The engine could not have struck him there very well, could it, from the way he was standing? A. No, sir. Q. That was probably made by his falling over. After the engine struck him, he probably fell over backwards against something? A. I don't know, but that is what I supposed. Q. Now, this three-cornered hole that you speak of, or three-cornered wound, was near the top of the head, and above and back of the right eye? A. Yes, sir. Q. A little forward and above the right

ear? A. Yes, sir. Q. Was there any other wound on him? A. Well, his jaw was broken also. Q. Now, I understand you to say on your direct examination that, at the time just before the time this accident occurred, you passed Mr. Sharp going south on the track, with your tools, for the purpose of going to work at another place, having got through with your work where you had been working, and you went about fifteen feet past where Mr. Sharp was working when you got out of the way, and waited for the train to pass? A. Yes, sir. Q. And you told the jury, also, I believe, that naturally you were looking in the direction from which the train was coming? A. Yes, sir. * * * Q. Well, the exact position you were standing in, you don't just recollect, but you do remember that you happened to look around towards Mr. Sharp about the time the train whistled, and saw that he was still in that position, stooping over the track there, working? A. Yes, sir. Q. And you hollered to him? A. Yes, sir. Q. And that did not attract his attention? A. No, sir. Q. And then, as the train came by you, you hollered again? A. Yes, sir. Q. And I suppose, immediately after you hollered, so quickly you say, as I understand you, that you did not have time to estimate the time, or do anything, the train whistled and it struck him? A. Yes, sir; it seemed to hit him almost instantaneously after I hollered the last time, just about as the last of the holler was made, the engine hit him. It was all done very quickly, though. Q. Now, I understand you to say that the engineer on that train could have seen him half a mile off? A. Yes, sir. Q. Now, is it not a fact that he could have seen the engine the same distance if he had been paying any attention to it? A. Yes, sir; I suppose he could. Q. Well, don't you know he could, if he had been looking? A. Yes, sir; I think there is no doubt about that. Q. Well, he did not pay any attention to you when you first hollered? A. No, sir; not that I seen. Q. He did not, as a matter of fact, pay the slightest attention to you? A. He never made any motion or indicated that he did. Q. Did he the second time you hollered? A. Well, he turned his head that way (illustrating). I don't know whether he heard me or not, or whether it was the whistle. Q. The second time you hollered, he just seemed to turn his head that way? A. Yes, sir; that was just about the time that the train was very close to him,—right on him, I might say,—he seemed then to turn his head like that. * * * At the time the train struck Sharp it was running at a moderate rate; the ordinary rate for trains to run at that place,—as trains usually run when approaching a station. The engine that struck Sharp was one of those large freight engines. The engineer's position is on the right-hand side of the cab, and on that particular train he was on the north side of the engine. Q. Now, I will ask you

this question: Where Mr. Sharp was standing, and where the engineer was located, whether he was sitting or standing in coming up to that place where Mr. Sharp was from the east, is there not a certain point, before the engine reached Mr. Sharp, where the front end of the boiler would get between the engineer and Mr. Sharp, and obstruct the view of the engineer? I do not ask you to fix that point, but is there not a point where that would occur? A. Yes, sir; it would come in between them, of course. Q. Before the engine reached Mr. Sharp, the boiler would obstruct the view of the engineer? A. Yes, sir; there is no disputing that. Q. Now, when the train whistled those two sharp blasts of the whistle, I understood you to say you thought the engine was at least two rail lengths, and probably more, distant from Mr. Sharp? A. Yes, sir; something near that; it might be less. Q. Now, is it not a fact that, if Mr. Sharp had given attention to those whistles, he would have had abundance of time to straighten up, and even step back, wouldn't he, before the train reached the point where he was? A. Well, he would, if he had moved right quick. Q. Suppose he was standing in that position, and the train was coming at the rate of speed you say it was— What was the rate of speed? What did you say? A. Oh, I suppose twelve or fifteen miles an hour. Q. Well, then, suppose he was standing there in that position, and the train whistled down there sixty feet away, and, as you say, it was running at a moderate rate of speed; he could have stepped back out of the way of the train in a second, or less than a second, of time, couldn't he? A. Yes, sir; of course he could, if he knew what he was doing, if he knew the danger he was in, and had the presence of mind to move quick, he could. * * * Q. Well, as a matter of fact, Mr. Sharp did not give any indication of paying any attention to the train when it whistled for him? A. No, sir. Q. And you don't know how to account for his conduct on that occasion? A. No, sir. Q. Did you ever hear Mr. Sharp remonstrated with about his habit of standing on the track and letting the trains get within dangerous proximity to him? Did you ever hear him remonstrated with, and warned about the danger of doing that? A. Yes, sir. Q. Before that time? A. Certainly, it was before that time. Q. Have you heard him warned about that? A. Yes, sir; I have heard him spoken to about that. Q. Well, how often have you heard him spoken to in regard to a habit of that kind? A. Well, I can't say positively; but as much as two or three times, I think. Q. Who did you hear speak to him about that habit? A. I have heard the foreman speak to him. I have heard Mr. Green speak to him. Q. And who else have you heard speak to him about that? A. I have heard his son Ed. speak to him, and I have heard Mr. Radford speak to him. Those are the

three that I have heard speak to him about it. Q. You remember those three? A. Yes, sir. Q. Up to the time the train whistled there was nothing to indicate to your mind that Mr. Sharp was not going to get out of the way? A. No, sir; I had no thought that he was in the way at that time, until I saw him there. Q. The train was about a quarter of a mile distant when you started down the track? A. Yes, sir; about that distance or further. Q. Of course, it was getting nearer all the time, and the time when you passed Mr. Sharp it was probably still closer? A. Yes, sir; it was coming all the time. Q. And the position he occupied at that time was not such as to indicate to your mind that he was in any danger? A. No, sir. Q. And it did not occur to you that he was in any danger until about the time the train whistled? A. No, sir; it was about that time that my eye caught him, and then I thought he was in danger, of course, for I hollered to him. Mr. Sharp was a low, heavy-set, compactly-built man, strong and vigorous, but not very well at that time. He had a spell of rheumatism before that. His general health was good, but he complained of his rheumatism. His eyesight was good for a man of his age. I have noticed him reading newspapers without glasses. His hearing was good. * * * I don't pretend to say that the whistle was not blown before I heard it give the two sharp toots that I have spoken of, but, if so, I didn't hear it. Working on the track that way, we become so familiar with the sound of the whistle that, unless there is something to particularly attract our attention to it, we can't tell afterwards whether the whistle has blown or not. If it was blown, and I heard it, I haven't the slightest recollection about it. If I happened to pay attention, I could hear the rumbling of a train a quarter of a mile, but I didn't notice the rumbling of that train until I started up the track and saw it."

J. A. Keller testified: "I live at Lee's Summit. On the 2d day of November, 1895, I was in the employ of the Missouri Pacific Railway Company, working on the section. I remember the occasion of William Sharp getting killed. I was working with Mr. Cooper. We were working up east of him when he got struck, but before that had been working just west of him. We were putting in a new tie. After we finished putting in the tie west of him, we went to another place just east of him. At the time Mr. Sharp was struck, I was standing right across the railroad track opposite Mr. Cooper. I was on the north side of the track, and Mr. Cooper on the south side, some fifteen or sixteen feet from Mr. Sharp. I could not tell exactly the distance. When I heard the signal given by the train, it was on up ahead of us a piece, eastwardly, and coming west. I guess it was about 65 or 70, or perhaps 75, feet away from him when the signal was given. I didn't hear any one holler to Mr. Sharp, nor did I look at him when

I heard the signal. From the time we passed him, going from the point west, to the point east of him, I don't think I noticed him. The signals that were given by the train were two right short, sharp, keen whistles. They were not so very long. * * * Cross-examination: "I think the train was kind of slowing up at the time it struck him, but would not be sure about it. I could not tell how fast the train was running at the time it struck him, but don't think it was running as fast as freight trains usually run out on the road between stations. I am positive about that. * * * I was on the opposite side of the track from Mr. Sharp, and the train came between me and him, and therefore I did not see him struck. The train might have been further than 65 or 70 feet away from him when it whistled. I am satisfied that it was that far. I suppose the train was running, at the time of the accident, ten or twelve miles an hour. * * *

W. B. Cooper, recalled, testified: "I would presume the speed of the train at the time of the accident was about ten or twelve miles an hour,—probably fifteen miles an hour. I will say from ten to fifteen miles an hour. I don't know positively how many cars there were in the train, but I suppose from eighteen to twenty-five,—somewhere along there. The track was dry. I suppose the track was not exactly level, but it was nearly level."

Defendant's Evidence.

J. M. Green testified: "My name is J. M. Green. On the 2d day of November, 1895, the day William Sharp was killed, I was section foreman of that portion of the Missouri Pacific Railway covering the point where the accident occurred. William Sharp and several other section men were working on the track just east of Lee's Summit. I had gone up the track in the direction of Lee's Summit some little distance, to examine some splices. At that point the track is straight for quite a distance, and the train could be easily seen for several hundred yards. I heard the train whistle, and turned around and started back in the direction where the men were at work. The train was quite a distance away when it first whistled. William Sharp was standing on the outside of the track, working with a pick. As the train approached, the other men got out of the way, but Sharp continued to work, leaning over the rail working with a pick. He was on the south side of the track. He did not seem to notice the approach of the train. I shouted, and motioned to him to get out of the way. I heard one of the section men also halloo to him. He did not pay any attention to us, nor did he pay any attention to the approaching train. When the engine was four or five rail lengths from him, the engineer again sounded the whistle, but he paid no attention to it, and the engine struck him and killed him. If he had straightened up, the engine would not have struck him. The train was running ten or twelve miles an

hour. It had already begun to slow up for Lee's Summit. I have observed railroad trains so much, and for such a long time, that I can form a very fair estimate of the speed of trains. Mr. Sharp had, before that time, been in the habit of remaining on the track when the train was approaching until it would get in dangerous proximity to him, and he had before been warned in regard to it."

Charles Boyle testified: "My name is Charles Boyle. I live at Sedalia, Mo. I am a locomotive engineer, and in the employ of the Missouri Pacific Railway Company. I was running the engine which struck and killed William Sharp on November 2, 1895. When approaching Lee's Summit I sounded the whistle for the crossing, which is about a quarter of a mile east of where Sharp was struck. When I got within about 600 feet of where he and the other section men were at work, I sounded the whistle to warn them of the approach of the train. They all seemed to get off the track. When about 100 or 150 feet from where he was struck, I saw that he was standing close to the track, and leaning over it with a shovel or pick or something of that kind in his hand, and I blew the whistle again. I supposed the man had got out of the way, but the fireman told me the engine struck him. If he had only straightened up, he would not have been struck. I had begun to slow up for Lee's Summit, and was not running faster than ten or twelve miles an hour at time of accident. My place is on right-hand side of engine, and he was on left side of track."

John Houser testified: "My name is John Houser. I live at Sedalia. Am a locomotive fireman, in employ of Missouri Pacific Railway Company. I was firing on engine which struck and killed William Sharp, near Lee's Summit, last November. Just before the accident, I had been putting coal in the engine, I heard the whistle sounded, and put down my shovel, and closed the door to the furnace, and stepped in the cab to ring the bell, and, just as I got to front of cab so I could see out, the engine struck the man. It barely did strike him. He was on the outside of the rails, but a little too close to the track. I did not see him till the instant he was struck. The engineer had blown the whistle for the crossing, which is about a quarter of a mile east of where accident occurred, but that is not the time I referred to when I was firing up. When he blew that whistle we had already passed that crossing, and must have been in a hundred or two feet of where the man was struck."

The plaintiff also introduced some evidence tending to prove that the train could have been stopped within a space of 150 feet, and the defendant's evidence tended to prove that it would have required a space of from 18 to 30 car lengths in which to stop the train at the speed at which it was going.

and that the view of the track in front of the engineer is obstructed by the smokestack for about 50 feet. And on cross-examination of one of defendant's witnesses (Schleben) plaintiff drew out the following evidence: "To warn persons on the track, we give several toots of the whistle, depending on circumstances. We don't ordinarily wait until we get up within a foot or two of a point where some part of the engine will obstruct our view, before giving the signal. I would give the signal to warn a person on the track twenty car lengths away. The distance would depend a good deal on circumstances,—upon who it is. If it was a section hand, I would not give any toots at all, because they will stay on the track and work until the last minute before they will get off the track. The fact as to whether I would give the danger signal would depend upon whether the party was a section hand, unless it appeared that he didn't hear or see us. As a rule, we don't give a section man any warning at all. Of course, if we should get very close to him, and he didn't show any signs of getting out of the way, I would warn him the same as anybody else. By 'close,' I mean ten or twelve car lengths. I would then give a signal by continual toots of the whistle. I would say that the whistle could be tooted as often as thirty times in running a distance of 350 or 400 feet." And on redirect examination that witness testified as follows: "Section men are in the habit of working right along until the engine gets very close to them. If a man was standing on the side of the track, I would not give the signal as readily as if he were standing on the track, unless he was so close that the train might strike him in passing. A man may be on the track studying, and not thinking about the train, and we make an alarm with the whistle to put him in mind of where he is and his danger. That is the only purpose of sounding the whistle, and, if a man is standing on the outside of the track, we don't give the danger signal as quick as if he is on the track. If a man, on the outside of the rail, had his back to us, we would give the signal as quick as if he were on the inside,—that is, if he were all alone,—but if there were others working there with him I might not. * * *

It requires no close analysis of the evidence in this case to discover that, while there are slight differences in the opinions and in the estimates of time and distance between some of the witnesses, there is really no substantial conflict in the evidence. All the witnesses seem to have testified fully, freely, and fairly touching the matter according to the best of their knowledge and memory. And, making all reasonable inferences in favor of the plaintiff from the undisputed facts thereby established, it is not possible for reasonable minds to differ as to the fact that the negligence of the deceased in being within the danger line of section

No. 2 of the defendant's train at the time he was struck contributed directly to the injury which resulted in his death.

He was a man of mature years, in possession of all his faculties, with good eyes and ears, and with an experience of many years as a section hand on this railroad, and was familiar with the movements of its trains and their signals. He was distinctly advised, by the passage of section No. 1 with its flags flying, that section No. 2 was coming, and to be on the lookout for it. It did come on time, in accordance with the warning given, and its coming was plainly visible for a quarter of a mile from the place where the deceased was standing. Nevertheless he continued at his work with a portion of his body within the danger line, facing the track, without paying any attention whatever to the coming train, when by simply turning his head, or even casting his eyes in that direction, he could have seen the train in ample time to have moved out of its way with the greatest leisure, if he had chosen to do so. The only inference that can be drawn from his conduct is that he either did not look or listen for the train, and for that reason was unconscious of its approach, or, being conscious of its approach, he willfully remained on the danger line, and thus committed suicide. Indulging the more charitable inference in his favor, he was, at least, guilty of such inexcusable negligence, contributing directly to his death, as to preclude a recovery in this action, unless the conduct of the servants of the defendant managing the train was characterized by such willful, wanton, or reckless disregard of human life, also contributing to his death, as that the defendant ought not to be heard to say that the plaintiff was guilty of such negligence. *Tanner v. Railway Co.* (not yet officially reported) 61 S. W. 826; *Morgan v. Railroad Co. (Mo.)* 60 S. W. 195; *Kelley v. Railway Co.*, 101 Mo. 67, 13 S. W. 806, 8 L. R. A. 783.

The facts and circumstances which bring a cause within this exception to the general rule that contributory negligence of the plaintiff or deceased precludes a recovery are as variant as the cases in which it has been invoked, and but little assistance can be derived from adjudicated cases, in which the facts are seldom analogous to the one in hand. To arrive at a correct conclusion in a given case, the only rational mode is to put ourselves in the place of the one charged with such conduct, and interpret his conduct in the light of all the facts and circumstances by which he was surrounded and in view of which he acted.

In this case our inquiry is confined to the conduct of the engineer who had the control and management of section No. 2, and to his conduct, not towards persons on crossings or quasi crossings or trespassers on the track, but towards a co-employee in the service of the same master, and as familiar with the

movements of the master's trains and their signals on this section of the road, of which he was the track walker, as was the engineer himself. That the engineer was competent and skillful is not questioned. That in approaching the place of the accident he was running his train at the usual and ordinary rate of speed, was at his post, on the lookout, and promptly saw the deceased is undisputed. When he first saw him, however, he saw him in connection with his associates, and as a part of the gang of trackmen, some of whom were on and some beside the track, and discovered that those on the track, as the train was approaching them, were, as was their habit, moving out of danger; and, knowing that they had been warned to be on the lookout for his approach by the preceding section, he had every reason to believe that all would do so. Upon a nearer approach, however, he discovered, from the position of the deceased beside the track, that the whole of his body was not outside the danger line, and he gave the usual danger signals, at a distance sufficient to have enabled the deceased easily to have withdrawn himself from his exposed position before the train reached him, as the engineer supposed he had done until he was afterwards informed that the deceased had been struck. Of course, it is impossible to say exactly at what distance the engineer discovered the exact situation of the deceased in regard to the danger line, or at exactly what distance from him the engineer gave the danger signal. But, conceding that the situation of the deceased could have been discovered at such distance as to have suggested the propriety of giving the danger signal sooner than it was given, and that it might have been sounded oftener than it was, there was nothing in the situation that seemed to imperatively demand that it should have been sounded sooner or oftener, and certainly nothing in the whole conduct of the engineer on the occasion that could be characterized as a willful, wanton, or reckless disregard of human life,—such as is necessary to take the case out of the general rule that contributory negligence precludes a recovery. The court erred in overruling the demurrer to the evidence, and for this error the judgment will be reversed. **All concur.**

MANKAMEYER v. EGELHOFF.

(Supreme Court of Missouri, Division No. 2.
March 26, 1901.)

APPEAL AND ERROR — JURISDICTION — SUPREME COURT—APPEARANCE—
WAIVER OF PROCESS.

1. Where, in an action between private persons for injuries, plaintiff recovered a judgment for \$100, the supreme court has no juris-

dition of an appeal therefrom, there being no question properly raised as to any constitutional construction.

2. Where defendant in an action for injuries answered the second amended petition, and submitted himself to the jurisdiction of the court, and went to trial, he cannot afterwards complain that he had not been served with process.

Appeal from circuit court, Jackson county; J. H. Slover, Judge.

Action for injuries by Catherine Mankameyer against J. C. Egelhoff. From a judgment in favor of plaintiff, defendant appeals. Appeal dismissed, and record ordered transferred to the Kansas City court of appeals.

Frank Titus, for appellant. Amos H. Kagy and J. H. Bremerman, for respondent.

BURGESS, J. This is an action for damages for personal injuries sustained by plaintiff by reason of the alleged negligence of the servant of defendant while in the line of his employment. The amount of damages claimed was \$5,000. The answer of defendant, upon which the case was tried, was to the second amended petition, which, it is alleged, was a departure from the cause of action stated in the original petition, and that plaintiff was entitled to a new writ of summons upon such new cause of action, and that to be compelled to answer said last petition in this cause without such due legal procedure, to which he was entitled, being a citizen of this state, is a deprivation of defendant's property and property rights without the due process of law guaranteed to him by the laws and constitution of the state. Upon a trial before the court and a jury, plaintiff recovered a verdict for \$100, upon which judgment was rendered. The amount, therefore, involved in this appeal is \$100; and as the controversy is between private persons, in which the title to real estate is not in question, and no question properly raised as to the construction of the constitution of the United States or of this state, the supreme court has no jurisdiction of the appeal.

Even if defendant was not served with process on the second amended petition, and it was necessary that it should be done in order to give the court jurisdiction over him (upon which we do not pass), as he answered that petition, and submitted himself to the jurisdiction of the court, and went to trial, he could not thereafter complain that he had not been served with process, and thereby eliminated the constitutional question, if any there was, from the case. It follows that this court is without jurisdiction of this appeal, and the record herein is ordered to be transferred to the Kansas City court of appeals.

SHERWOOD, P. J., and GANTT, J., concur.

GORE v. RILEY et al.

(Supreme Court of Missouri, Division No. 2.
March 26, 1901.)

HOMESTEAD—DOWER—WIDOW—CHILDREN
—JOINT TENANTS—VALUATION
OF INTEREST.

1. Under Rev. St. 1889, § 5439, providing that on the decease of a householder his homestead shall vest in his widow and children, the widow and children are not each entitled to a certain or definite part as tenants in common, but the homestead passes to them jointly or as joint tenants.

2. Under Rev. St. 1889, § 5440, providing that in setting off a widow's dower the homestead shall first be set off, and her interest therein determined, and, if that be less than one-third the value of decedent's real estate, she shall be awarded so much as, added to her interest in the homestead, shall equal such one-third, the estimate of the value of her interest in the homestead should not be lessened because there are minor children who may occupy it with her until their majority.

3. Where, in setting off to a widow the homestead and her dower in her deceased husband's estate, the commissioners value her interest in the homestead at the full appraised value of the land, she being 37 years of age, the valuation is not so unreasonable as to justify a reversal of the judgment on that ground.

Appeal from circuit court, Jackson county;
E. P. Gates, Judge.

Action by William G. Gore, as administrator of the estate of John T. Riley, against Talitha Riley and others. From a judgment of the circuit court affirming a judgment of the probate court assigning dower and homestead to defendants, and from an order denying a new trial, defendant Talitha Riley appeals. Affirmed.

Paxton & Rose, for appellant. John A. Sea and John D. Strother, for respondent.

BURGESS, J. This suit was instituted by J. A. Riley, administrator of the estate of John T. Riley, deceased, but since it has been pending in this court J. A. Riley died, and the present plaintiff has been duly appointed administrator of said estate, and, upon his motion, substituted as plaintiff herein instead of J. A. Riley, deceased. On the 7th day of December, 1896, the administrator of John T. Riley, deceased, filed his petition in the probate court of Jackson county, in which it was alleged: "That said John T. Riley died seised of the following described real estate, situate in the county of Jackson aforesaid, to wit, the west half of the northeast quarter, and the east half of the northwest quarter, and the northwest quarter of the southeast quarter of section 20, township 48, and range 30. That said premises were also occupied by said John T. Riley during his lifetime as a homestead. That said Talitha Riley is the widow of the said John T. Riley, deceased, and as such is entitled to dower in said premises, and, together with the three minor children above named of deceased, is entitled to a homestead interest therein. That plaintiff is administrator of

the estate of said John T. Riley. That the estate is in debt. That there is no personal property to pay off said indebtedness. That the defendants have not had their dower and homestead in said premises admeasured, nor have they made any application or instituted any proceedings for the setting aside of said dower and homestead. Plaintiff therefore prays the court for an order setting apart homestead to all of said defendants and assigning dower to the said Talitha Riley as their rights may appear." The probate court appointed commissioners, who made the following report:

"To the Honorable Probate Court of Jackson County, Missouri: We, the undersigned commissioners appointed by the probate court of Jackson county, Mo., at the February term, 1897, being the 20th day of March, 1897, cause No. 1,934, to set out the homestead from the real estate of J. T. Riley, deceased, and also to set out the dower of Mrs. Talitha Riley, widow of said J. T. Riley, in the real estate of said J. T. Riley, deceased, beg leave to report as follows: We met, and, after being qualified, as evidenced by affidavit herewith submitted, and after notifying the parties in interest, we proceeded to view and value the real estate of said J. T. Riley, deceased. We value the said real estate as follows:

No. Acres.	Description of Sec.	Sec.	Twp.	R.	Valuation.
40 acres	N. E. $\frac{1}{4}$ of N. W. $\frac{1}{4}$	20	48	30	\$1,200
40 acres	S. E. $\frac{1}{4}$ of N. W. $\frac{1}{4}$	20	48	30	1,000
40 acres	N. W. $\frac{1}{4}$ of N. E. $\frac{1}{4}$	20	48	30	1,000
40 acres	S. W. $\frac{1}{4}$ of N. E. $\frac{1}{4}$	20	48	30	800
40 acres	N. W. $\frac{1}{4}$ of S. E. $\frac{1}{4}$	20	48	30	1,100
200	Totals				\$5,100

—Thus showing the total valuation of said real estate to aggregate \$5,100. We then proceeded, quality and quantity of land being relatively considered, to allot and set apart as such homestead, valued at \$1,500, the northwest quarter of the southeast quarter, and twenty acres off of the south side of the southwest quarter of the northeast quarter, of section 20, township 48, and range 30. We also find the value of the interest of the said widow, Mrs. Talitha Riley, in the homestead so set out, to be \$1,500 for and during her natural life, which sum does not equal one-third of the value of all the real estate of which the said J. T. Riley died seised. We therefore proceeded to allot and set out as dower for the widow, Mrs. Talitha Riley, south ten acres of the north half of the southwest quarter of the northeast quarter, section 20, township 48, range 30, valued at \$200, which, together with the value of the interest of said Mrs. Talitha Riley in the homestead aforesaid mentioned, equals \$1,700, being one-third of the value of all the real estate of which the said J. T. Riley died seised. We also set out as roadway twenty feet off the south side of the southeast quarter of the northwest quarter of said section 20, township 48, range 30. * * * This 20th

day of March, 1897. Respectfully submitted. Jno. O. Capelle, S. F. Davis, O. V. Slaughter, Commissioners. Filed March 20, 1897."

The probate court approved this report, overruling exceptions of the widow, Talitha Riley, and she appealed to the circuit court. The case came up at the September term of the circuit court of Jackson county, Mo., at Independence, 1897, and was submitted to the court on the following agreed statement of facts: "It is agreed between the parties hereto: That the valuation placed by the commissioners, Capelle, Slaughter, and Davis, upon the land out of which homestead and dower is to be set out, are correct as to the whole and as to the separate tracts, and that the residence of the deceased was upon the northwest quarter of the southeast quarter of section 20, township 48, range 30. That the widow, Talitha Riley, is 37 years of age, and that the children's ages are as follows: Lou Lee Riley, 14 years; May Belle Riley, 11 years; and Alverta Riley, 3 years of age. That Lou Lee Riley and May Belle Riley are the stepchildren of the widow, Talitha Riley, and do not reside with her on said homestead, but do reside, and have since babyhood resided, with their maternal grandmother, and are now in delicate health, requiring the constant care of said grandmother, and cannot at present reside upon said lands. It is agreed by the parties that upon the above facts the court shall determine whether or not said report shall be approved, and, if not approved, shall determine how much, if any, and what land is to be added to that part which has been set apart by said commissioners to the widow as dower, it being agreed that the valuation of the part set out as homestead to the widow and minor children is correct." On November 27, 1897, the circuit court approved the report of commissioners, and defendant Talitha Riley excepted. Within four days she filed her motion for new trial as follows: "Comes now said Talitha Riley, and asks the court to grant her a new trial in said cause: (1) Because the finding of the court is against equity and the law; (2) because the finding of the court is against the evidence, and against the pleadings and the agreed statement of facts submitted in this cause." On December 11, 1897, the court overruled this motion for a new trial, and defendant Talitha Riley excepted. She then filed her affidavit for appeal, which was allowed. The minor defendants were represented by their guardians.

It is clear from the reading of section 5439, Rev. St. 1889, that upon the decease of the husband and father the homestead estate owned by him at the time of his demise passed to his widow and children jointly until the children become of age. *Rhorer v. Brockhage*, 86 Mo. 544. The widow and minor children are not tenants in common in the homestead estate (*Canole v. Hurt*, 78 Mo. 649), but their rights are more in the nature

of that of joint tenants, as they may occupy the homestead jointly as long as the right to do so exists. The contention of the widow that she and each one of the minor children are entitled to a certain or definite part, or of the time each should have it, and that such interest has a fixed value, is untenable; for it is plainly not in accord with the law or its spirit. This could not be so unless they were tenants in common, which they are not. The value of the lands of J. T. Riley was \$5,100. The commissioners set out \$1,500 worth of land as a homestead, and then added to this \$200 in addition, as dower for the widow, making in all \$1,700; and Mrs. Riley's contention is that her interest in this \$1,500 homestead ought to have been computed, and then enough land added to the interest so found to make up her \$1,700, dower for life; or, in other words, if she had less than a \$1,500 interest in the homestead, the whole \$1,500 ought not to have been deducted from her dower, but that her dower should be diminished only by her interest in the homestead, and not by its entire value. By section 5440, Rev. St. 1889, it is provided that, where commissioners are appointed to set out a homestead, they shall, in cases where the right of dower also exists, also set out such dower, and they shall first set out such homestead, and from the residue of the real estate of the deceased shall set out such dower, but the amount of such dower shall be diminished by the amount of the interest of the widow in such homestead; and, if the interest of the widow in such homestead shall equal or exceed one-third interest for and during her natural life in and to all the real estate of which such housekeeper or head of a family shall have died seised, no dower shall be assigned to such widow. In passing upon this statute in *Bryan v. Rhoades*, 96 Mo. 485, 10 S. W. 53, it is said: "It will be seen that the amount of dower must be diminished by the amount of the widow's interest in the homestead. If the widow's interest in the homestead equals or exceeds in amount dower in the entire estate, then she can have no dower. If her interest in the homestead is less than dower in the entire estate, then she is to have the difference set off to her in dower. *Graves v. Cochran*, 68 Mo. 76. The homestead must first be set out. This is the plain letter of the statute. Until that is done, and the widow's interest therein valued, it cannot be told that she is entitled to dower. When her interest in the homestead is valued, and her dower in the entire estate is valued, if there is a difference in her favor then the amount of that difference is to be set off to her in dower in property other than the homestead. The proceeding to set out the homestead and assign dower is but one cause of action. The two go together. The amount of dower is dependent upon her interest in the homestead." In the case at bar the commissioners proceeded in accordance with the

statute, and the valuation of the widow's interest in the homestead, considering her age, cannot be said to be so unreasonable as to justify a reversal of the judgment upon that ground. The judgment should be affirmed, and it is so ordered.

SHERWOOD, P. J., and GANTT, J., concur.

SANFORD v. HERRON et al.

(Supreme Court of Missouri, Division No. 2.
March 26, 1901.)

EJECTMENT—LIMITATIONS—ADVERSE POSSESSION—JUDGMENT IN FORMER EJECTMENT—WRIT OF POSSESSION—EVIDENCE—SUFFICIENCY—DIRECTION OF JUDGMENT.

1. Judgment in ejectment was rendered December 12, 1883, and a writ of possession and ouster issued thereunder January 23, 1884, and from the latter date the plaintiff in such suit and his privies were in actual, open, adverse possession till January 26, 1894, when one holding under defendants in the former ejectment brought ejectment against the heirs and privies of the plaintiff therein. *Held*, that the plaintiff in the second ejectment was barred by the statute of limitations of 10 years, notwithstanding the writ of possession issued within that time, since the judgment in the first ejectment estopped the defendants therein from denying that they held under the plaintiff, and their possession was his possession, as between him and them.

2. Where plaintiff in ejectment, which was barred by limitations as to the property in its entirety, attempted to recover one room, alleged to have been occupied within 10 years by one in privity with him, but the evidence failed to designate which room, he could not recover.

3. Where the whole title of the respective parties in ejectment was before the supreme court on appeal by defendants, and no good purpose could be subserved by another costly trial, and the court was of opinion that plaintiff could never recover against defendants, judgment for plaintiff would be reversed, and judgment directed to be entered for defendants.

Appeal from St. Louis circuit court; James E. Withrow, Judge.

Action by Alfred Sanford against Henry Herron and others. From a judgment in favor of plaintiff, William C. Uhrl and others appeal. Reversed, and directed for defendants.

John M. Dickson, for appellants. E. P. Johnson, for respondent.

GANTT, J. An action in ejectment in statutory form was commenced January 26, 1894, for a parcel of ground on Moore street, in block 211 of the city of St. Louis, 25 feet front or width, 50 feet in length or depth, being south part of lot 4, in Moore's addition to said city, and alleged to be occupied by house No. 12, on Moore street. Mrs. Emilie Uhrl and Miss Ida Rose, the sole heirs at law of Dr. Edward Rose, are the defendants who assert title, and the other defendants are their tenants. Plaintiff claims title under a tax deed and mesne conveyances from the grantee therein. The heirs of Dr. Rose claim under the foreclosure of a deed of

trust given by John C. Blech, the common source of title, executed prior to the assessment and levy of the taxes for which the judgment for taxes was obtained. Plaintiff's chain of title is as follows: A sheriff's deed to Stephen Turner, dated and acknowledged May 11, 1882, under an execution issued on a judgment in favor of the state, at the relation of Hudson, collector, against John C. Blech, Charlotte Gebhart, and Michael Geary, for taxes of 1879. From the files in said case, it appeared that a summons was issued August 13, 1881, returnable to October term, 1881, of the circuit court of the city of St. Louis, and was personally served on John C. Blech, August 25, 1881, and a non est as to defendants Gebhart and Geary. There was an allegation in the petition that Blech had conveyed the property to Michael Geary as trustee to secure a debt to Charlotte Gebhart, which deed of trust was recorded in Book 840, p. 816, of the recorder's office. On October 13, 1881, an order of publication was made on the non est return, for the reason that the ordinary process of law could not be served on said Gebhart and Geary. The order recited the pendency of the suit for taxes of 1879 to the amount of \$22.10, upon the following real estate, to-wit: "A lot of ground on Moore street, in the city of St. Louis, in city block 211, 25 feet in front or width, and 50 feet in length, being the south part of lot No. 4, in Moore's addition to said city." The order was returned February term, 1882. The order was published four times in the Post-Dispatch newspaper. The first insertion was December 5, 1881, the second December 12, the third December 19, and the fourth December 26, 1881. Judgment was taken by default, March 22, 1882. Execution issued April 4, 1882. Sale was advertised May 10, 1882, and was sold on that day to Stephen Turner for \$305, which, after satisfying the judgment and costs, left a surplus of \$225.62. These records were offered by defendants to show that Mike Geary and Dr. Rose were not parties to the suit. Plaintiff next offered warranty deed from Stephen Turner and wife to Mary E. Turner, dated May 18, 1882. On May 19th, Mary E. Turner, by deed of trust, conveyed this lot to M. P. Jones, trustee for W. M. Dickey, to secure note for \$1,500. This deed of trust was afterwards foreclosed, on five days' public notice, and the lot conveyed to J. V. Hilton, October 25, 1883. By quitclaim Hilton conveyed to John Oliver, December 13, 1883, filed for record December 17, 1884. John Oliver conveyed to plaintiff, Sanford, August 20, 1890, deed recorded August 26, 1895. Greffet, a real-estate agent, testified he got the surplus of the tax sale, and gave it to Blech. He fixed the rental at \$22 to \$25 a month, if kept in good condition; but the house was 35 years old, and tenanted by negroes. On the part of defendant, the evidence was first proof that Mrs. Uhrl and Miss Ida Rose were the sole heirs

at law of Dr. Edward Rose, who died February 12, 1887; that Dr. Rose held the note and deed of trust given by John Blech to Mike Geary for the use of Charlotte Gebhart; that Blech paid the interest to Dr. Rose up to 1883; that the deed of trust from Blech to Geary for Gebhart was foreclosed May 17, 1883. Twenty-two receipts for interest paid by Blech to Dr. Rose, beginning September 6, 1869, and ending October 12, 1880, were read in evidence. The note of Blech for \$1,500, payable five years after date, to the order of Charlotte Gebhart, was read in evidence; also assignment thereof by Charlotte Gebhart to Dr. Edward Rose. The same was also credited by Isaac Mason, who acted as trustee in the foreclosure, May 17, 1883, with \$942.08, net proceeds of the sale of the lot on that day. The deed of trust was also assigned by Charlotte Gebhart to Dr. Rose. This deed of trust was foreclosed May 17, 1883, and deeded to Dr. Rose. On June 13, 1883, Dr. Rose brought ejectment for this lot against Isaac H. C. Curry, Lavina Curry, formerly Haskell, Moses Nevitt, and Simon Kane. Personal service was had on all defendants. Judgment was obtained by him December 12, 1883, for possession and \$166.66 damages, and monthly rents fixed at \$25 a month. Execution issued thereon January 23, 1884, and writ of possession executed January 28, 1884. After the defendants in ejectment were served, they attorned to Dr. Rose, and continued as his tenants down to a comparatively recent time, when other tenants of defendant took possession and held until the commencement of this suit, January 26, 1884. One Albert Isbell, among others, became a tenant under Dr. Rose of said premises after the ejectment suit. Manetho Hilton testified that he thought one Martha Stewart paid him a month's rent January 24, 1884. This woman was not a party to the ejectment suit and judgment rendered thereon December 12, 1883. Hilton says he represented John Oliver, who obtained a deed to the lot the day after Dr. Rose obtained his judgment in ejectment. He testified that not a cent of rent was paid to him or Miss Turner or John Oliver after January 24, 1884. Witness had been applied to to bring this suit, but he refused. At another time this witness stated that Martha Stewart paid rent through Wolff & Co. up to January 24, 1884. Other evidence shows that Wolff & Co. were the agents of Dr. Rose, and after his death of his daughters.

Upon the facts disclosed, little doubt can exist as to the merits of this case. They are all against the plaintiff. The tax bill under which he claims appears to have been handed around from one to another, as convenience might dictate. With absolute knowledge of Dr. Rose's possession of the lot in dispute from January, 1884, no effort was made to dispossess him in his lifetime. He remained in possession until his death, in 1887, when his title and possession devolved

upon his two daughters, Mrs. Uhri and Miss Ida Rose. With no notice of an adverse claim, they have been permitted to receive the rents with which they are now charged. According to plaintiff's own theory, he and those under whom he claims have permitted an adverse, open, and peaceable possession to remain in defendants and their father for 10 years, lacking 1 or 2 days, accordingly as they count the time. Hilton, for whom the parties seem to have held the tax title, says he declined to bring this suit. Unless it was held for him, his self-denial is not apparent.

The vital question, as the answer is now framed, is whether plaintiff was not barred by the statute of limitations of 10 years. As already said, plaintiff's own evidence establishes that Dr. Rose, and his daughters as his heirs, had been in the actual, open, adverse possession of the lot in suit for 10 years prior to the commencement of this suit, lacking 1 day.

Defendants insist, however, that Dr. Rose having foreclosed the deed of trust given him by Blech, the common source of title, and obtained his trustee's deed on May 17, 1883, and having thereafter brought his action of ejectment against the tenants in possession, and obtained his judgment for the possession of the lot December 12, 1883, and followed it up by his writ of possession and ouster on January 28, 1884, whatever possession, if any, plaintiff had by reason of the occupancy of said tenants was interrupted from the date of that judgment, and the subsequent possession has been shown to be out of plaintiff since that date. It must be kept in view that plaintiff and those under whom he claims assert possession through the defendants in the ejectment suit of Dr. Rose against Curry et al. In that suit Dr. Rose obtained judgment on December 12, 1883, for the possession of the lot in question. After the rendition of that judgment, the defendants therein were estopped from longer remaining in possession as tenants of J. V. Hilton. Moreover, Hilton's claim expired December 13, 1883, by his quitclaim to Oliver. These tenants not only did not but were estopped from turning over the possession to Oliver as against Dr. Rose, whose judgment in ejectment, and writ, with the possession thereunder, were a constant assertion of adverse title from that day up to the bringing of this action, over 10 years thereafter, and Oliver and Sanford were never at one moment in lawful possession of the lot during all that time.

It has been often ruled that a judgment in ejectment against one in adverse possession breaks the continuity of the adverse possession. It was ruled, after careful examination by this court in banc, in *Snell v. Harrison*, 131 Mo. 495, 32 S. W. 37, that a valid subsisting judgment in ejectment against one in possession, and claiming adversely, interrupted the peaceable possession of the defendant, and suspended the running of the statute in his

favor; overruling *Mabary v. Dollarhide*, 98 Mo. 198, 11 S. W. 611, so far as a different doctrine was announced on this point. The necessary result of that decision was to invest the plaintiff in the ejectment judgment with possession in law of his undivided part of the lands recovered. In *Estes v. Nell*, 140 Mo. 639, 41 S. W. 940, the question again arose as to the effect of a judgment in ejectment as between the parties and privies thereto, and it was held: "It was not necessary, in order to suspend the statute of limitations as against the plaintiff [in ejectment], that a writ of restitution should have issued, or that they should have taken possession under that judgment. The running of the statute was interrupted, and did not run against plaintiffs during the life of the judgment, although no writ of restitution issued." This last case correctly defines the effect of a judgment in ejectment. It is *res adjudicata* as to parties thereto, and the matter adjudicated upon, until set aside or reversed, or its legal effect destroyed, by the result of another action of ejectment for the same land by the parties or their heirs who were defendants therein. While it does not prevent a defendant from yielding possession and bringing another action in ejectment to try the title, until he does so he and his privies are bound thereby.

What, then, was the effect of the judgment of December 12, 1883, upon the possession of J. V. Hilton, asserted through the occupancy of Curry et al., the defendants in that judgment? We answer, that from the date of that judgment, and during its life, the said defendants were conclusively estopped from recognizing Hilton as their landlord, or continuing his possession by any act of theirs, in opposition to the rights of Dr. Rose, the plaintiff therein. Unless this is so, it is idle to say that a judgment of a court of competent jurisdiction has any binding force upon the parties thereto. While that judgment did not bar an action of ejectment in favor of Oliver, who purchased from Hilton the next day after the judgment, upon no sound principle of law can it be asserted that Oliver's quitclaim deed transferred to him the possession which had been adjudged to Dr. Rose, nor could the defendants therein, whose possession had been adjudged tortious by the court, by a surreptitious payment of rent put Oliver in possession,—as it is well settled that a judgment in ejectment binds not only those against whom it is rendered, but all others who come in under them. Nor is there any legal evidence that they attorned, or attempted to attorn, to Oliver.

Within the contemplation of law, whatever rights Oliver may have had to bring his own action of ejectment, from the date of that judgment Curry et al., the defendants in the ejectment, were estopped from denying they held under Dr. Rose, and their possession, as between him and them, was his possession, and this continued up to the time they attorned to Dr. Rose, which they were author-

ized by our statute to do. As is said in *Prior v. Scott*, 87 Mo. 309: "Where the prior possessor has been turned out by an opposing claimant in judicial proceedings, all presumptions in his favor, growing out of said prior possession, if not terminated, are, at least, shifted in favor of his successful opponent." It results, then, that, upon the admitted state of facts shown by this record, whatever possession those under whom plaintiff claims, held through the defendants in that ejectment, passed to Dr. Rose by his recovery in that case, and, as it has remained in him and his heirs continuously since the 12th of December, 1883, the plaintiff and those under whom he claims have been ousted by an adverse possession for more than 10 years, and the court erred in not giving defendants' first instruction.

2. One other point only needs to be noticed. It was attempted to show a possession of one room by one Martha Stewart. As to this claim, it is sufficient to say that every presumption is against the *bona fides* of this claim. At most, it would not affect the recovery of all the premises outside of that room, and still the judgment must have been for defendants for all save that room; but the evidence is wholly insufficient to sustain a recovery outside of that consideration, for the reason that it utterly fails to designate the room which it is alleged she occupied at that time. Moreover, there was no proof that she was a tenant of any part of said building. Nagle says Stewart & Curry were one. Every presumption upon the facts disclosed in evidence is that if she was in the house she was there in subordination to Curry, who was sued and ejected. Nothing was attempted to be shown further than she was there in the house, and on one occasion paid Wolff & Co. some rent. The payment of rent is a fact going to the establishment of a tenancy, but by no means sufficient, in or of itself. Out of all the owners of this tax title, it surely would have been an easy matter to have shown that Martha Stewart was a lessee of that building at the time the ejectment was brought. "The receipt of rent is only a *prima facie* acknowledgment of the existence of a tenancy, and is always subject to explanation; for where the amount received does not appear to have been paid as rent, or bears but a small proportion to the annual value of the premises, the rule does not apply." *Tayl. Landl. & Ten.* § 23. In this case there was no evidence of the amount paid, and hence it is impossible to say it bore a fair proportion to the annual or monthly value of the premises. All the evidence tending to show Martha Stewart was a tenant of J. V. Hilton or Oliver does not amount to a scintilla, and can form no basis of recovery in an ejectment wherein the burden is on the plaintiff. As the whole title of the respective parties is before the court, no good purpose can be subserved by another costly trial, and as, in our opinion, plaintiff can never recover against

defendants, the judgment is reversed, with directions to enter judgment for defendants.

SHERWOOD, P. J., and BURGESS, J., concur.

FRANCISCO v. WINGFIELD et al.

(Supreme Court of Missouri, Division No. 1. March 12, 1901.)

EXECUTORS AND ADMINISTRATORS—ACCOUNTING—JURISDICTION OF COURT—ADMINISTRATOR DE BONIS NON—PUBLIC ADMINISTRATOR—LIABILITY TO ACCOUNT—DEFENSE.

1. Under Rev. St. 1889, §§ 47, 48, requiring executors or administrators on their removal or resignation to deliver all personal property to their successors, and making it the duty of the successors to move the court to compel such executors to make final settlement, the county court has jurisdiction of the application of a succeeding administrator to force the public administrator, who took charge of an estate on the removal of an executor thereof, to make a final accounting.

2. Where a will positively directs the executor to sell testator's realty, the power of sale is not personal, but passes to a succeeding administrator on the removal or resignation of the executor named in the will.

3. Where a will positively directs the executor to sell testator's real estate, a successor of the executor who sells the property does not hold the proceeds as trustee for the heirs, but as assets of the estate, and may be compelled to account therefor in the county court, under Rev. St. 1889, §§ 47, 48.

4. Where an executrix is not discharged on an accounting, but the estate is continued to enable her to carry out a power to sell real estate given in the will, the jurisdiction of the county court to compel an accounting by an administrator afterwards appointed on the removal of the executor cannot be defeated on the ground that such accounting terminated the administration, and that the subsequent removal and reappointment were void, and that the property is thus held as trustee, and not as administrator.

5. The power of the probate court to appoint an administrator de bonis non is not defeated by the fact that all the estate debts have been paid.

Appeal from circuit court, Saline county; Richard Field, Judge.

Proceedings by George M. Francisco, as administrator, against James Wingfield and others, to compel an accounting by the latter as a former administrator of the estate represented by plaintiff. From a judgment dismissing the proceedings, plaintiff appeals. Reversed.

Robt. M. Reynolds and L. W. Scott, for appellant. Duggins & Rainey, for respondents.

ROBINSON, J. This is a proceeding, under sections 47, 48, Rev. St. 1889, instituted in the probate court of Saline county against James Wingfield, former administrator in charge of the estate of George S. Hawkins, deceased, whose authority had been revoked, and the sureties on his official bond, to ascertain the amount and kind of property in his hands, and compel him to account with the plaintiff as administrator de bonis non of the deceased, and for judgment against Wing-

field and his sureties. The probate court dismissed the proceeding for want of jurisdiction. Plaintiff then appealed to the circuit court, where, upon trial anew, like judgment was rendered, and the plaintiff appealed.

The record shows that George S. Hawkins died in Saline county, Mo., in 1871, leaving a will which was duly admitted to probate in that county. He appointed M. M. Rhoads and his wife, Francis M. Hawkins, as executors thereof. After giving his wife a life estate in all his personal property and a large portion of his real estate, the will provided: "I will the remainder of my land, being on the south side of the road above named, and the Faucett tract, be sold by my executors, the money arising from the sale of said land to be loaned out, and that my wife be permitted to use the interest of the same in assisting her in the raising of and educating of my younger children. After the death of my wife, I will that my executor is fully authorized and empowered to take in charge all of my property, both real and personal, that is on hand, and to sell and dispose of the same either at public or private sale, and divide the proceeds among my children." The widow alone qualified, and took charge of the property and proceeded to administer on the estate. She made an annual settlement in 1872, and gave notice of her intention to make a final settlement at the January term, 1874, of the probate court. On January 9th she appeared and filed an account for final settlement, showing a balance in her hands of \$375.80. The probate court approved the settlement, found that all the debts had been paid, and thereupon ordered "that she retain said sum of \$375.80 as her property under the will, and that the administration of such estate be continued for the purpose of carrying out the provisions of the will of the said deceased,—in selling the real estate and lending out the money received from the same." The widow continued in charge of the estate until August, 1885, when the probate court, by reason of her marriage, revoked her letters, and ordered defendant Wingfield, public administrator of Saline county, to take charge of said estate as administrator de bonis non with the will annexed. At the time her authority was revoked she had in her hands as executrix, in addition to the balance of \$375.80, the sum of \$855 in cash, and several notes taken by her on account of purchase price of certain real estate sold under the power of sale contained in the will. In pursuance of said order Wingfield made an inventory of all the real and personal property belonging to the estate, except that portion of the land theretofore sold by the executrix, and filed the same in the probate court. On her failure to turn over the notes and money in her hands, Wingfield, as such administrator, begun a statutory proceeding in the probate court to require her to account, and

for judgment against her and the sureties on her bond, which ultimately terminated in a judgment in favor of Wingfield for \$855. This judgment was afterwards collected by him. She also delivered to him a note for \$890 received by her for the purchase price of certain real estate sold by her, as executrix, under the power of sale contained in the will. Afterwards Wingfield sold the remaining portion of the real estate, except that portion in which the widow had a life estate, under the power given by the will, as administrator, and as such received the purchase money and executed deeds therefor. Such sale was reported to and approved by the probate court, although there never was any order of the court directing the sale thereof. The administrator continued to make regular annual settlements with the probate court, in which he charged himself with the amounts received from the sale of real estate, and interest thereon, together with the amount collected on the judgment against the executrix, and took credit for the expenditures until 1892, after which time no further settlements were made. In August, 1895, the probate court revoked the letters of Wingfield and ordered plaintiff, then public administrator of Saline county, to take charge of the estate and administer the goods unadministered belonging to the estate. At the time of revocation of his authority there remained in his hands, as shown by his annual settlements, notes and money amounting in the aggregate to \$5,517.05, derived from the sale of this real estate, in reference to which no order of distribution had been made. On Wingfield's failure to make a final settlement of the estate and deliver to plaintiff, as his successor, the amount of money and property shown to be in his hands as the proceeds of the sale of real estate, this proceeding was instituted against him and his sureties on his official bond, based on the theory that upon the death of the testator the probate court became vested with jurisdiction to administer on his estate, and that the jurisdiction thus obtained continued until the estate was finally wound up and all the money and property in the hands of the administrator belonging to said estate, and received in his official character, accounted for and delivered to the parties entitled thereto; that having, by virtue of his authority as administrator de bonis non, received the proceeds of the sale of these lands, both he and his sureties are bound to account in his character as such administrator with his successor, under the supervision of the probate court. In other words, the plaintiff maintains that inasmuch as Wingfield, by his own showing, received the proceeds of the sale of land belonging to the estate, under color of his office, he is chargeable therewith, and can be required to account in his official capacity with the probate court therefor. Counsel for defendants, on the other hand, contends: First. That the

estate was finally settled by the executrix in January, 1874, and consequently there was nothing further for the probate court to do; that by reason of such settlement the probate court lost jurisdiction of the matter, and that all proceedings of said court touching the estate since such settlement, including the order appointing Wingfield administrator de bonis non, as well as the order placing the estate in plaintiff's charge as his successor, are absolutely void, and that the plaintiff was not entitled to recover the proceeds arising from the sale of land under the power in the will. Second. That as the money in Wingfield's hands was derived wholly from the sale of real estate, under a specific power given by the will, creating an independent trust, the same is not an asset of the estate, but constituted a trust fund, which was held by him as trustee, and not in his representative capacity; that he was not chargeable in this proceeding with, or liable for, the proceeds received from the sale of real estate sold by him as such administrator under the power of sale contained in the will, and therefore is not accountable in the probate court for a fund received by him as trustee; moreover, that all controversies in reference thereto should be determined in a court of chancery.

So that the question first presented by this appeal is the right of the probate court to compel an accounting by defendant Wingfield after the revocation of his authority and the appointment of his successor. The authority of the probate court to require an accounting is expressly given in this state by statute. Section 47, Rev. St. 1889, which was in force at the time this proceeding was instituted, provides that: "If any executor or administrator dies, resigns, or his letters are revoked, he or his legal representatives shall account for, pay, and deliver, to his successor * * * all money, real and personal property, of every kind, and all receipts, credits, deeds, evidences of debt, and such papers of every kind of the deceased, at such time and in such manner as the court shall order, on final settlement with such administrator or executor or his legal representatives, to be made on motion of his successor. * * *" By the succeeding section it is provided: "If any executor or administrator resign or his letters be revoked, it shall be the duty of his successor, * * * to move the court to compel the executor or administrator removed, or having resigned, to make final settlement; and on such motion after due notice to such executor or administrator the court having jurisdiction shall ascertain the amount of money, the quality and kind of real and personal property, and all the rights, deeds, evidences of debt, and the papers of every kind of the testator or intestate in the hands of such executor or administrator, or that came into his hands, and remain unaccounted for at the time of his resignation or removal from office or revoca-

tion of his letters and to enforce such order and judgment against such administrator or executor, and his sureties if they had due notice of proceedings. * * * The manifest purpose of the statute is that all the property belonging to the estate shall remain in the hands of the executor or administrator, subject at all times pending the administration to the jurisdiction and supervision of the probate court; this supervisory control being necessary for the purpose of properly administering the estate. It is clear from these various statutory provisions, says Norton, J., in *Scott v. Crews*, 72 Mo. 261, "that upon the revocation of the letters of an administrator the county court is clothed with the power to have a settlement made in that court by the removed administrator. It is also clear that such a settlement is to be made at the instance of the successor. * * * While an administrator holds the assets of an estate primarily for the payment of debts, the further duty is imposed upon him, after the debts are extinguished by payment, of paying to the heirs and distributees, under the direction of the court, what may remain in his hands applicable to that purpose. His full duty is not performed till both these things are done." When the public administrator is ordered to take charge of and administer on an estate, and there is a will, he is vested with the same powers and assumes the same obligations as the executor or administrator with the will annexed; and if he does not make settlement and pay over to his successor the assets remaining in his hands as such administrator, he and his sureties are liable to the summary proceeding provided by the statutes, or to an action on his official bond. It is clear, therefore, that the remedy against an administrator whose authority has been revoked is in the hands of his successor.

It appears from the record in this case that Wingfield, as administrator, in addition to the note of \$390 which the removed executrix delivered to him, recovered a judgment against her and the sureties on her bond for \$855, all of which was collected and received by him as such administrator, and brought in to his accounts and settlements with the probate court. Besides, he sold all the real estate covered by the third clause of the will, except the portion thereof sold by the former executrix, which sales were reported to and approved by the probate court, and carried into his annual accounts and settlements as administrator, and took credit for taxes, interest paid the widow, probate fees, and compensation for himself and attorneys. The balance shown to be in his hands by this record is composed wholly of the proceeds of the sale of those lands. By section 137, Rev. St. 1890, it is provided that the sale of real estate under a will may be made by the acting executor or administrator with the will annexed, if no other person be appointed by the will for that purpose, or if such person fail

to perform the trust. In *Dillworth v. Rice*, 48 Mo. 136, Wagner, J., in construing this section, says: "The statute law authorizing the sale of land by an administrator with the will annexed, where the executor has failed or neglected to act, has existed ever since we have been a state. Every testator, in making his will, must be presumed to be cognizant of it, and I am satisfied that the statute should be held to extend to a power of sale conferred on executors, where they are peremptory in their character, although they may be accompanied with and involve the exercise of discretion." The same rule is announced in *Evans v. Blackiston*, 66 Mo. 437, and in *Dix v. Morris*, Id. 514. In commenting on the authority of an administrator de bonis non with the will annexed to sell real estate under the power of sale contained in a will, Norton, J., in the latter case, remarked: "It was expressly provided in the will that the executor should have authority to sell all or any portion of the testator's estate, real or personal, on such terms as to him should seem good, in order to carry out its provisions. This unquestionably gave him full power to assume control of both the realty and personalty, and sell the same, independent of any order of the probate court." The power of sale conferred by the will in question is absolute and unconditional, except as to the time and mode of performing the duty imposed. The testator, it will be observed, directed a positive and peremptory sale of this land and the distribution of the proceeds thereof by his executors, untrammelled by any conditions or limitations whatever. This power clearly comes within the scope of the official duties imposed by law on executors, is executorial in its nature, and follows the office. So that the administrator with the will annexed could properly execute such power. In *Woerner, Adm'n*, § 399, it is said: "A direction to convert the whole estate into money after the death of the executrix * * * vests the power, by implication, in the administrator de bonis non, with the will annexed. So, when power is given by will to executors to sell real estate, with a view to distribute proceeds among legatees, the power belongs to them by virtue of their office, and may be exercised by an administrator cum testamento annexo. * * * Where the will imposes upon executors the duty of selling real estate, without discretion, the power follows the office. * * * In such cases the direction to sell the real estate for the purpose of administration amounts to a conversion of the land, and the proceeds become legal assets, for which the executor, as such, and not as a trustee, is liable." In speaking of the rule of equitable conversion, which imposes upon real estate directed by the testator to be sold for the purpose of distributing the proceeds to the persons designated by him the character of personal property, the same author, in another section (section 343), says: "The rule

invoked by this doctrine is that in equity property will be treated as being already what the testator intended it to become. If the conversion is complete, out and out, or absolute, and for all purposes, it operates immediately upon the death of the testator, and therefore determines the devolution of the property to the heirs, devisees, or executors,—not according to the character in which the testator left it, but according to that into which he has directed it to be converted. * * * It should be remembered, however, that, where there is an imperative direction to convert, the discretion given as to the time of sale or the mode or manner does not work an exception to the rule; but if the conversion is postponed to a time certain, before the arrival of which the property is, according to the testator's direction, to be enjoyed by persons other than the ultimate beneficiaries, there is, of course, no conversion until the expiration of such time."

As already seen, the power of sale conferred upon the executor in the case here under consideration was absolute and imperative, peremptorily requiring them to sell the land and distribute the proceeds thereof, unhampered by conditions or limitations. The power thus given is in no sense personal to the executors, and does not constitute a personal trust or confidence, but, on the contrary, is one of those powers annexed to and following the office of the executor, and may, under our statute, be exercised by an administrator *de bonis non* with the will annexed. Cases are not wanting to support the doctrine that under such circumstances the purchase money received from the sale of real estate becomes personal assets in the administrator's hands, for which he and his sureties are liable. In *Dix v. Morris*, 66 Mo. 514, which was a proceeding by *scire facias* issued by the probate court against Morris, as surety on an executor's bond, for refusing to pay the balance found in the latter's hands on final settlement, it was sought to avoid payment of such balance by showing that the amount thereof was made up altogether of rents and the proceeds of the sale of land. The bill authorized the executor "to sell and convey, by deed or otherwise, all or any portion of my said estate, real, personal, or mixed, on such terms or conditions as he may think proper." In disposing of this question the court used the following language: "It was expressly provided in the will that the executor should have the authority to sell all or any portion of the testator's estate, real or personal, on such terms as to him should seem good. In order to carry out its provisions. This unquestionably gave him the power to assume control of all the realty and personalty, and sell the same, independent of any order from the probate court." This case is referred to and expressly approved in *McPike v. McPike*, 111 Mo. 227, 20 S. W. 12. In speaking of the power over the real es-

tate conferred by the will, the court, in the course of its opinion, said: "This unquestionably made the real estate assets in his hands, for which he and his sureties were liable." In *Gamble v. Gibson*, 59 Mo. 585, it was held, that although the general principle is that the realty descends to the heirs, and the executor has nothing to do with it, except in case of deficiency of assets, yet when, as a matter of fact, he does retain charge of it, and collects the rents, he is responsible for them as executor. In *State v. Scholl*, 47 Mo. 84, the administratrix, without any order of the probate court, sold a leasehold, the fixtures and good will of a saloon, and left the state without accounting for the proceeds of the sale received by color of her office, and her sureties were accordingly required to make good the loss to the estate. And more recently, referring to the same subject, in *Re Glover's Estate*, 127 Mo. 161, 29 S. W. 982, this court said: "Defendant having received the fund as administrator of the partnership estate, he should be estopped to deny that he holds it in his representative capacity, and should account for it as such administrator." Although the general rule is that the real estate of a deceased person descends upon his death to his heirs or passes to the devisees mentioned in the will, yet when an executor is positively and peremptorily authorized by the will to sell the real estate, and he exercises such authority and receives the purchase money, he must account with his successor in the probate court for the proceeds of such sale. It will be observed that the will in the present case directed an absolute and peremptory sale of the real estate by the executors. This, we think, operated as a conversion of the same into personal property, if not from the death of the testator, at least from the date of sale; and the proceeds arising from the sale of land made by the executrix, and turned over to Wingfield as her successor, together with the proceeds of all sales made by him since that time, are legal assets, for which he must account as administrator in the probate court. *McMahan v. Compton*, 19 Mo. App. 494; 2 *Woerner*, *Adm'n*, §§ 339, 342.

This court has universally held that whenever an executor or administrator comes into possession of real estate by virtue of his office, whether by force of statute or under the terms of a will, he is chargeable with all rents and proceeds of sale arising therefrom, and received by him in the exercise of his official functions. *Gamble v. Gibson*, 59 Mo. 592; *State v. Scholl*, 47 Mo. 84; *Woerner*, *Adm'n*, § 513; *Lewis v. Carson*, 93 Mo. 587, 3 S. W. 483, 6 S. W. 365. The latter case was a statutory proceeding in the probate court against a removed administrator and his sureties to ascertain the amount of money and property in his hands, and compel him to account therefor. The executor appointed by the will declined to act, and

ters of administration with the will annexed were granted to Carson. His letters having been revoked, Lewis, the public administrator, took charge of the estate. The removed administrator assumed control of the real estate and collected the rents. The will provided that certain legacies should be paid by the executor as soon as practicable, and he was authorized to sell real estate to pay the same. The deceased owned $\frac{3}{4}$ of $2\frac{1}{2}$ acres of land on Grand avenue, in St. Louis, Mo. Carson purchased the other $\frac{1}{4}$ interest. The administrator, however, did not sell under the power conferred by the will, as he might have done; but he and his sister in their individual names sold the whole tract, and carried the proceeds of such sale into his accounts as administrator. The question, therefore, was whether the removed administrator should be charged with the proceeds of such sale. Black, J., after reviewing the authorities, makes the following observation: "Although the money was not raised by virtue of his office as administrator, still the administrator received and applied it in his official capacity. He disregarded his duty in not selling under the will or by order of the court, but he received the proceeds and disbursed them under color of his office. Under the principles of the case cited and that of *State v. Purdy*, 87 Mo. 94, we hold that the administrator and his sureties are accountable for the proper application of the proceeds of the sale of the $2\frac{1}{2}$ acres." Tested by the authorities cited, we hold that the power of sale given by the will here under consideration, being absolute and imperative, is annexed to and follows the office of executor, and survives, by virtue of our statute, to the acting administrator with the will annexed. The direction to sell the real estate for the purpose of administration amounts to a conversion of the land, and the proceeds thereof become personal assets, for which Wingfield, as administrator de bonis non, and not as trustee, must account in the probate court. It follows, therefore, that the probate court had jurisdiction to ascertain the amount of money in his hands, and compel an accounting therefor with plaintiff, as his successor.

We have examined the authorities cited by counsel for defendants, and, while some of them seem to support their contention, yet we think the weight of authority and the better considered cases are more in accord with the conclusions here reached. We are unable to discover the application of the case of *In re Rickenbaugh*, 42 Mo. App. 328, to this controversy, unless it be as to whether or not, under our statute (Rev. St. 1889, § 130), the power of sale given by the will survived to the administrator with the will annexed. On this point the decision is clearly adverse to defendants' contention, as it was there held that, where the power of sale conferred by the will is positive and peremptory, then the statute makes it ob-

ligatory upon the administrator de bonis non to execute the power and make the sale. In that case the power of sale conferred by the will upon the executors was not a power given him in his capacity as executor, but, rather, a distinct and independent trust, whose execution depended upon a contingency which might or might not happen. It was entirely personal to the appointee, existing separate and apart from the office of executor, and therefore not within the jurisdiction of the probate court. The present case is not one of that kind. The will did not, as here, positively and peremptorily direct that the land should be sold untrammelled by conditions or limitations. The only point in judgment in the *Rickenbaugh* Case was whether the executor was entitled to commission on the valuation of land conveyed by him to the legatees in accordance with the terms of the will. In the case of *Coll v. Pitman's Adm'r*, 46 Mo. 51, relied on by counsel for defendant, an administrator with the will annexed, under the power given by the will sold land, but failed to make a deed to the purchaser; and the latter applied to the county court for specific performance, which was refused. It was held that inasmuch as the duty of the administrator to make a conveyance arose out of his contract with the plaintiff, and not out of the will, the probate court had no jurisdiction, and the circuit court was the proper forum in which to enforce the contract,—as much so as if the contract had been made by a devisee under the will. That case, therefore, has no bearing on this. The court never intended to hold that where the will, as in this case, directed an absolute sale of land by the executor, and the distribution of the proceeds thereof, and the executor failed to act, the power of sale could not be carried out by the administrator de bonis non, and the latter, in case of his removal, be compelled to account with his successor in the probate court for the proceeds of such sale.

It is next suggested in defendants' brief that the settlement made by the executrix in January, 1874, operated to take the administration of the estate out of the jurisdiction of the probate court, and consequently all subsequent proceedings thereof, including the appointment of Wingfield administrator de bonis non, as well as the order appointing the plaintiff his successor, are void, and that in contemplation of the law he never had charge of the estate as administrator, and therefore cannot be required to account in the probate court for the proceeds arising from the sale of these lands. This contention cannot be sustained. While it is true that the executrix duly published notice of her intention to make a final settlement of the estate at the January term, 1874, and afterwards actually filed her accounts for such settlement, showing a balance of \$375.80 in her hands, unfortunately

for defendants' contention the court, while approving the settlement, declined to order the discharge of the executrix from her trust or permit the estate to be finally closed up, but, on the contrary, by an order of record, expressly decreed that the estate should remain open, and the administration thereon be continued for the purpose of selling the real estate under the power contained in the will, and loaning out the proceeds thereof. The record further shows that at the time of such settlement the executrix had sold a portion of the real estate under the power contained in the will, and still had in her hands a note for \$1,200, representing a balance due from the price thereof, together with \$800 in cash received by her on account of the purchase money thereof, which, however, was not accounted for in her settlement, and in respect to which no order of distribution was made, but for which she afterwards accounted with defendant Wingfield as her successor. It must be regarded as settled in this state that, until a decree is entered in the probate court discharging the executor or administrator, the office continues, and the executor or administrator remains clothed with the duties of his office, and subject to the control and supervision of the probate court. *Rugle v. Webster*, 55 Mo. 246; 2 *Woerner, Adm'n*, § 572. It results, therefore, that Mrs. Hawkins was still executrix when her authority was revoked in August, 1885, and as such remained within the jurisdiction and subject to the orders of the probate court.

The suggestion that, as all the debts against the estate had been paid, the probate court was without authority to appoint an administrator de bonis non, and, if appointed, he could not maintain this proceeding, is equally untenable. This precise question was decided in *Scott v. Crews*, 72 Mo. 261, where it was held that it was not essential to the validity of the appointment of an administrator de bonis non that there should be outstanding debts against the estate. The power of the probate court to appoint an administrator de bonis non is not limited to cases where debts remain unpaid. When such an administrator is appointed it becomes the duty of the former administrator, under the supervision of the probate court, to pay over to him all the money and property in his hands applicable thereto, whether the estate was indebted or not. *State v. Farmer*, 54 Mo. 439. Defendant Wingfield, as administrator, having sold all the real estate belonging to the deceased, except that in which the widow had a life estate, under the power of sale contained in the will, and received the proceeds therefor, together with the notes and money delivered to him from the former executrix, and shown to be in his hands at the time of his removal, it becomes his duty to make a settlement of his accounts with the plaintiff, as his suc-

cessor, and upon such settlement to pay over to him the balance of such sale so remaining in his hands, whether the estate was indebted or not. *State v. Heinrichs*, 82 Mo. 542.

It follows from the foregoing considerations that the judgment of the court below is reversed, and this cause remanded to the circuit court, with directions to proceed in accordance with this opinion, and ascertain the amount of money and property in Wingfield's hands belonging to said estate, and render a judgment against him and his sureties therefor.

BRACE, P. J., and VALLIANT, J., concur. MARSHALL, J., absent.

WEST MISSOURI LAND CO. v. KANSAS CITY S. B. RY. CO.

(Supreme Court of Missouri, Division No. 1.
March 29, 1901.)

CORPORATIONS—VALIDITY OF CONTRACT—ESTOPPEL—DEFERRED PAYMENTS—DEDUCTIONS.

1. A corporation sold land to defendant, the contract of sale providing for certain deferred payments. The charter of the corporation had expired before the contract was made, and thereafter the plaintiff corporation succeeded to its rights, and sued on the note representing the deferred payments. The purchaser's pleadings admitted the execution of the note, and alleged a readiness to pay the same, on the plaintiff's compliance with the contract of sale. *Held*, that such pleading estopped the purchaser from objecting to the introduction of the contract and note in evidence, on the ground that they are void for the reason that the corporation had no legal existence when they were executed.

2. Where a party contracts with a corporation, it is a recognition of the existence thereof, which will estop such party from objecting to the introduction of such contract in evidence in an action thereon, on the ground that it is void for the reason that the corporation had no legal existence when executed.

3. Where land is purchased on deferred payments, subject to be reduced on failure of title to a certain portion thereof, and suit is brought to recover the deferred payments, and defendant admits being in possession of the land, and no superior outstanding title is shown, or that defendant paid any money to procure any such title, it is not error to instruct that defendant is not entitled to any reduction therefor.

Appeal from circuit court, Jackson county.

Action by the West Missouri Land Company against the Kansas City Suburban Belt Railway Company to recover deferred payments on real estate. From a judgment in favor of the plaintiff, the defendant appeals. Affirmed.

Lathrop, Morrow, Fox & Moore, for appellant. John L. Peak, for respondent.

BRACE, P. J. This is an appeal by the defendant from a judgment of the Jackson circuit court in favor of the plaintiff for the sum of \$6,169.87. On the 24th of December, 1891, the West Kansas City Land Company and the Consolidated Terminal Railway Company entered into a written contract, as fol-

lows: "This agreement, made and entered into the 24th day of December, 1891, by and between the West Kansas City Land Company, a corporation, party of the first part, and the Consolidated Terminal Railway Company, a corporation, party of the second part, witnesseth: That the party of the first part has this day bargained and sold to the party of the second part, and its assignees, the following described real estate, to wit: A strip of land 28 feet in width, over and across the land hereinafter described, situate in Kansas City, Jackson county, Missouri [describing the land]; the whole length of the above-mentioned strips, taken together, being about 1,280 feet, at and for the consideration of ten thousand (10,000) dollars, upon the following terms: Four thousand dollars upon the delivery to the second party by the first party of a special warranty deed as to itself, and a good and sufficient bond, with satisfactory security, for the sum of six thousand dollars, payable in three years after its date, with interest thereon at the rate of eight per cent. per annum, payable semiannually. The above strip of ground is bought for the purpose of being used as a right of way by the party of the second part, and the party of the second part is hereby given sixty days in which to locate its said right of way over and across the lands above described, or a portion of said lands. And it is further understood that, as there are some claims to portions of said land to be used as a right of way, if the second party be defeated in any suit as to portions of said right of way, so as to reduce the said right of way so to be obtained from the party of the first part to less than 1,200 feet in length, then there is to be deducted from the consideration hereinbefore mentioned such a proportion of the ten thousand dollars as the difference between the length of right of way hereafter found to be owned by the first party and 1,200 feet bears to the said 1,200 feet; and if such proportion of the ten thousand dollars so to be deducted is more than six thousand dollars, the amount of said bond, the balance thereof to be deducted shall be refunded to the second party by the first party, but, if such a proportion of the said \$10,000 to be deducted be less than \$6,000, then the same shall be applied as part payment upon the said \$6,000 bond; or should the party of the second part decide, before constructing its line, not to use portions of the land hereinbefore mentioned, so that the right of way occupied should be less than 1,200 feet in length, then the deduction is to be made from the consideration of \$10,000, or applied as part payment upon said bond in the same proportion, and in the same manner, as last above mentioned. The party of the second part is to contest at its own expense, so far as such expenses are concerned, all suits in reference to title to right of way procured under and by the terms of this contract; the said first party, however, through its attorney, giving such aid and information to sec-

ond party in said contest for right of way as may be desired by the second party. In case no suits are brought concerning said right of way within three years, or in case those brought should not in any event reduce the length of the right of way conveyed to less than 1,200 feet, then said bond is to be paid, with interest, on the day when it is due; but, in case such suits have already been begun, then the second party may retain the sum proportioned as above mentioned, so as to provide against any ultimate loss in case suits should be decided against the second party. The party of the first part hereby agrees to deliver to the party of the second part a good and sufficient special warranty deed as to itself to all of said right of way upon demand, within thirty days, upon the payment to it of the said sum of \$4,000 in cash and the said bond; and the right is hereby given to the first party to reserve in said deed all riparian rights of accretion. This contract is to be consummated and papers to be passed and exchanged within 15 days from date hereof. In witness whereof the parties of the first and second part have caused these presents to be signed by their respective presidents, and attested by their respective secretaries, and their corporate seals to be hereunto affixed, the day and year first above mentioned. Executed in duplicate. West Kansas City Land Company, by Hunter M. Meriwether, President. [Seal.] Consolidated Terminal Railway Company, by E. L. Martin, President." Soon thereafter the defendant, the Kansas City Suburban Belt Railroad Company, by consolidation with, became the successor of, the said Consolidated Terminal Railway Company in said contract, and in pursuance thereof executed and delivered to the said West Kansas City Land Company its promissory note for the balance of the purchase money, as follows, to wit: "\$5,600.00. Kansas City, Mo., November 11th, 1892. Three years after date, for value received, the Kansas City Suburban Belt Railroad Company promises to pay to the order of the West Kansas City Land Company, at the office of the Missouri, Kansas & Texas Trust Company, in Kansas City, Missouri, the sum of fifty-six hundred dollars, with interest thereon at the rate of eight per cent. per annum, payable semiannually. This note is given in accordance with a contract between West Kansas City Land Company and the Consolidated Terminal Railway Company, of date December 24th, 1891, which contract is referred to and made a part of this instrument, and the same is subject to equities that may hereafter arise between the maker hereof as the successor of the Consolidated Terminal Railway Company and the assignee of said contract and the West Kansas City Land Company. Kansas City Suburban Belt Railroad Company, by E. L. Martin, Pt." And thereupon, in pursuance of said contract, the said West Kansas City Land Company executed and delivered to the defendant its deed

for said lands, dated the 17th of November, 1892. In the meantime, on the 20th of September, 1892, one Joseph A. Reppell had commenced an action of ejectment against the defendant and the said Consolidated Terminal Railroad Company, in which at the April term, 1894, of the Jackson circuit court, he obtained judgment against them for the recovery of a portion of said strips of land, and on the 7th of November, 1895, an opinion was handed down in division No. 1 of the supreme court, which was afterwards adopted as the opinion of the court en banc (*Bradley v. Reppell*, 133 Mo. 545, 32 S. W. 645, 34 S. W. 841), in which it was held that the charter of the West Kansas City Land Company expired by limitation on the 14th of March, 1879, and that thereafter the said company had no corporate existence. Thereupon the plaintiff corporation was organized and duly incorporated, for the purpose of administering the assets of the said defunct corporation, whose lands were conveyed to the plaintiff by deed dated December 10, 1895, and its other assets transferred to the plaintiff by the statutory trustees of said defunct corporation, and thus the plaintiff became its successor and the holder of said promissory note. The defendant paid the interest on said note according to its tenor, until its maturity, but thereafter refusing payment, after demand and offer of a conveyance duly executed by plaintiff to the defendant to all the land in said contract mentioned. This suit was brought to recover the balance due on said note, being the amount of the face of the note, with interest from maturity; the plaintiff in its reply, and again in open court, tendering the deed so offered, and depositing the same with the clerk subject to the order of the court.

1. On the trial the defendant objected to the introduction of the contract and note in evidence, on the ground that those instruments were void, because at the time of their execution the West Kansas City Land Company had no legal existence, and no power to contract; and its counsel now insist that the court erred in not sustaining its objection, and in refusing to direct a verdict for the defendant on the evidence as afterwards requested by instruction. The defendant in its answer admits "the execution of the note sued on, whereby the Kansas City Suburban Belt Railroad Company promised to pay to order of said West Kansas City Land Company \$5,600, three years after date thereof [November 11, 1892], subject to the equities arising under the contract hereinbefore mentioned, and the deed given for said land hereinafter described"; claims credits on said note under said contract in the sum of \$4,105 as of the date of the note on account of the strip to which its title failed in the Reppell suit, and of a strip which it is therein alleged the defendant never obtained possession of under the contract, called the "Dold Strip"; and says: "Defendants are ready and willing, when the pretended con-

61 S.W.—54

veyances and contracts made by West Kansas City Land Company and defendants, or their constituent companies, have been carried out and effectuated by proper conveyances of plaintiff, to pay all moneys due under such deeds and contracts;" invokes the protection of the warranties contained in the deed of said West Kansas City Land Company of November 17, 1892; and prays "that the note sued on herein by plaintiff be credited \$4,105 as of the date of its execution; that the covenants contained in the contract pleaded in the petition and in the deed of November 17, 1892, be specifically performed; that the plaintiff be adjudged a trustee for the use and benefit of defendant railroad company of the title to the lands described in said deed; that defendant be permitted to pay into court the sum of money due plaintiff after the allowance of the credit above named; and that thereupon plaintiff be ordered and required to execute and deliver to defendant railroad company a good and sufficient warranty deed to the land attempted to be conveyed to it, November 17, 1892." And after the plaintiff in its reply, in the line of the defense set up in the answer, tenders the deed, duly executed, in performance of the contract as prayed for, and brings the same into court for that purpose, the defendant, on the admission of evidence on the trial, springs this attack upon the contract itself, and thus sought to avail itself of a defense not set up in the answer and inconsistent therewith. That the defendant was by its own pleadings estopped from making such an attack is, we think, manifest, but such estoppel might well be placed on broader ground; for while in *Bradley v. Reppell*, 133 Mo. 545, 32 S. W. 645, 34 S. W. 841, it was held that no person, unless estopped by his own action, was precluded from showing that the charter of the West Missouri Land Company had expired in 1879, and thereafter, having no corporate existence and no power to contract, one claiming title by adverse possession, and sustaining no contractual relation with said company, was not estopped from attacking a deed of the company made after that date, to which he was neither party nor privy. It was also held, in entire consonance with this ruling, as well-settled law, "that one who has contracted with an organization as a corporation in its corporate name is estopped from denying the existence of such corporation at the time of making the contract, or of alleging any defect in its organization affecting its capacity to contract or sue as a corporation upon such contract. 4 *Thomp. Corp.* § 5275; 4 *Am. & Eng. Enc. Law*, p. 198, and cases cited, note 1, p. 109; 2 *Mor. Priv. Corp.* §§ 750, 753; 1 *Beach, Priv. Corp.* § 18. And so it has been ruled in this state in many cases, including those next cited in the brief of counsel for respondent. *Railroad Co. v. McPherson*, 35 Mo. 13; *Insurance Co. v. Needles*, 52 Mo. 18; *City of St. Louis v.*

Shields, 62 Mo. 247; Stoutimore v. Clark, 70 Mo. 471; Manufacturing Co. v. Montgomery, 74 Mo. 101; St. Louis Gaslight Co. v. City of St. Louis, 84 Mo. 202, affirming 11 Mo. App. 55; Broadwell v. Merritt, 87 Mo. 95; Smelting Co. v. Richards, 95 Mo. 106, 8 S. W. 246. Of course, such estoppel extends as well to the privies of, as to the parties to, such contracts. Hasenritter v. Kirchoffer, 79 Mo. 239; Ragan v. McElroy, 98 Mo. 349, 11 S. W. 735; Broadwell v. Merritt, 87 Mo. 95; Reinhard v. Mining Co., 107 Mo. 616, 18 S. W. 17." We have again gone over this ground in the light of the able brief of the learned counsel for the defendant, and find our confidence in the soundness of this doctrine unshaken, and, applying it to the case in hand, it is also again manifest that the court did not err in refusing to entertain the defendant's attempted attack on the contract in this case.

2. The defendant in its answer claimed a credit under the contract for 108 feet, at \$8.83 per foot, on account of the Reppell strip, and the plaintiff on the trial conceded that it was entitled to a credit on that account, but contended that the credit should be for only 28 feet. The question as to the amount of this credit was submitted to the jury under proper instructions, and a credit on the note allowed in accordance with plaintiff's contention, and of this no complaint is made. So that the only remaining question on this appeal is as to the credit claimed by defendant on account of the Dold strip, as to which the court gave the following instruction for the plaintiff: "(1) The court instructs the jury that, under the pleadings and the evidence in this case, the defendant is not entitled to any reduction from the note set forth in plaintiff's petition on account of the controversy, litigation, or settlement between the defendant Kansas City Suburban Belt Railway Company and the Jacob Dold Packing Company." And refused the following instruction asked for by defendant: "(8) The court instructs the jury that if you shall believe from the evidence that the defendant, Kansas City Suburban Belt Railroad Company, by being defeated in any suit as to portions of said right of way, was prevented from taking possession of any strip of ground which was purported to be conveyed to it by deed of date November 17, 1892, and offered in evidence, for the purpose of building its railroad thereon within a reasonable time, or was prevented from retaining possession of any of the land so conveyed in said deed after it had once secured possession thereof, unless by the repurchase of said ground from other parties claiming the lands in question, then the defendant, Kansas City Suburban Belt Railroad Company, should be credited, as of date November 11, 1892, with the value of such portions of right of way, at the rate of eight and one-third dollars per lineal foot, of which it was so prevented from taking or retaining

possession." The answer admits that the defendant is in possession of the Dold strip, and on the trial its president testified that the defendant is in possession of all the land conveyed by the West Kansas City Land Company. The defendant failed to show any adjudication of the title to that strip adverse to the plaintiff, any superior outstanding title, any eviction under such title, or that it paid any sum of money to procure any such outstanding title. It claims to have paid money to obtain possession from the Dold Company, but how much, if anything, it paid therefor does not appear. As the case stood upon the evidence, we do not think the court erred in its action on these instructions. The judgment of the circuit court is affirmed. All concur, except MARSHALL, J., absent.

GOODMAN v. CROWLEY et al.

(Supreme Court of Missouri, Division No. 1.
March 29, 1901.)

RESULTING TRUSTS—SUFFICIENCY OF EVIDENCE—PLEADING.

1. Plaintiff sued to establish a trust in land purchased by defendant's decedent under an alleged contract that the purchaser should hold it for plaintiff, taking legal title in the purchaser's name, the purchaser at the time being, as alleged, indebted to plaintiff; such purchase to be made in consideration of the settlement and payment of the indebtedness. There was no proof that the purchaser was indebted to plaintiff, but there was evidence that she had stated to a third person that she had purchased the land for the plaintiff, and that the title was held by her to prevent the husband of the plaintiff from disposing of the land. The plaintiff and her husband took charge of the property, paid the taxes thereon, received the proceeds, which were much greater than the taxes and expense of improvements, but there was no evidence of any contract. Held insufficient to establish a resulting trust in the land in favor of plaintiff.

2. If a contemplated gift by the decedent to plaintiff failed for want of a sufficient conveyance, equity has no power to supply that defect by ordering a conveyance, or convert the imperfect settlement or gift into a declaration of trust.

Error to circuit court, Ray county; E. J. Broadbuss, Judge.

Suit by Permella J. Goodman against John S. Crowley and others to establish a resulting trust in realty. From a decree in favor of the defendants, plaintiff brings error. Affirmed.

J. L. Farris & Son, for plaintiff in error.
Lavelock & Divilbiss, for defendants in error.

ROBINSON, J. This is a suit in equity, brought by appellant against the administrator and heirs of Nannie Crowley, deceased, the object and purpose of which is to have a trust declared in 40 acres of land in Ray county, in this state, and title thereto vested in plaintiff, and to enjoin the administrator

from proceeding with the sale of said lands as the property of said Nannie Crowley, deceased. The grounds specified for the pretended trust are set forth in the following allegation of the bill: "Plaintiff, for further statement of her cause of action and equitable relief, states that on or about June 12, A. D. 1890, Nannie Crowley, being indebted to plaintiff in the sum of about \$800, and knowing that plaintiff wanted to purchase the following described real estate, to wit, the northwest quarter of the southwest quarter of section 19, township 54, range 29, Ray county, Missouri, which lay close to and adjoining homestead of plaintiff, and knowing that plaintiff, in order to purchase said land, was compelled to collect the amount then due and owing from her, the said Nannie Crowley, she, the said Nannie Crowley, in consideration of the settlement and payment of said indebtedness due the plaintiff as aforesaid, promised and agreed with plaintiff to purchase the land as aforesaid for plaintiff, taking the title to said land in the name of her, the said Nannie Crowley, as trustee for plaintiff; that soon after said agreement, and pursuant thereto, the said Nannie Crowley purchased the lands as aforesaid, taking the legal title in her name; that immediately upon the purchase of said lands as aforesaid, plaintiff, by and with the consent of said Nannie Crowley, took possession of said lands, and since about the — day of June, A. D. 1900, has had the absolute and undisputed possession and control thereof; that, believing that said lands belonged to plaintiff, plaintiff, with full knowledge on the part of said Nannie Crowley, erected valuable and lasting improvements thereon, to wit, a barn, costing about the sum of \$100, which was erected about the year 1892, and also an orchard at about the cost of \$100; that by reason of the premises the said Nannie Crowley was a trustee holding the legal title of said premises for the sole benefit, use, and behoof of plaintiff, her heirs and assigns, forever." The defendants answered separately by way of general denial to the allegation of plaintiff's bill, and after a hearing of the facts the bill was, by the court, dismissed. The controversy is practically one between the plaintiff and the creditors of Nannie Crowley, deceased, represented by the administrators, who had obtained an order from the probate court for the sale of the land in suit to pay the debts of the deceased. If it may be said that the petition sufficiently stated a contract between the plaintiff and the deceased, Nannie Crowley, to raise a trust in plaintiff's favor as to the land in suit, the testimony failed not only to establish the contract as alleged, but to prove any contract whatever regarding the land between plaintiff and the deceased, and there was nothing for the trial court to do but to dismiss plaintiff's bill as it did. The simple statement of the deceased to Mrs. Osborn, at the time she bought the land, as

to her intentions in buying it, as well as the casual remark made to a neighbor, who sought to rent the land of her, as to who had charge of it, and to whom he must go if he desired to rent it, were entirely insufficient to warrant the declaration of such a trust, in the face of the unqualified provision of the deed to the contrary to the deceased. The statement of Mrs. Osborn to the effect that the deceased, Nannie Crowley, had told her, before she bought the land of witness, that she wanted to buy it for her sister Jane (the plaintiff herein), and afterwards, when she had bought it, and taken the deed to it in her own name, that she had done it in order that Mr. Goodman (the plaintiff's husband) could not run through it, as he had done with his wife's other property; and that made by the neighbor who applied to rent the place of said Nannie Crowley to the effect that she told him that she had nothing to do with it; "that Jane (meaning the plaintiff) was running it, and, if he wanted the land, he would have to see her,"—when considered in the light of the admitted facts that the land was paid for with the funds and property solely of the deceased, Nannie Crowley, and that the deed to the land had been taken in her name, and that she paid the taxes upon the land regularly every year up to the date of her death, and at all times claimed to own it, are wholly insufficient to establish the contract as alleged, or to show a state of facts from which the existence of such a contract could be inferred. Nor does the further fact shown that the husband of plaintiff had the continued use and control of this land from the time of its purchase by the deceased, Nannie Crowley, in 1890, up to the date of her death in 1897, and that at one time he built upon it a small corner crib out of cheap, rough lumber, establish the existence of the contract alleged, or constitute facts from which such a contract would necessarily be inferred. Without proof of the existence of an obligation (as alleged in plaintiff's petition) against the deceased, Nannie Crowley, for \$800 (the cost of the land in suit), in favor of plaintiff, which was to be extinguished and settled if the land in suit was purchased and paid for by the said Nannie Crowley, and that she purchased and paid for the land under such an agreement, the statements of the deceased, Crowley, to Mrs. Osborn, as to her intention and purpose in buying the land, and for whose use she was holding it, as well as the statement made by Miss Crowley to the neighbor as to who had charge of and was running the land, amount to nothing. If the deceased, Miss Crowley, had agreed with plaintiff and promised to do for her all that the witness Osborn and the neighbor of plaintiff, Mr. McQuary, say that she told them, and nothing more had been shown, that agreement could not have been enforced against the deceased, Crowley, during her life, as it cannot be against her heirs and representatives now. At best, the state-

ment of the deceased, Nannie Crowley, could not be construed to mean more than that she intended to and had made a voluntary gift to or settlement upon her sister (the plaintiff herein), and no rule of equity is better settled than that courts cannot be invoked to perfect a defective gift or a voluntary settlement attempted wholly without consideration, however praiseworthy or commendable the effort might appear. While such gifts or settlements, if legally and properly made, will be upheld, they must stand as made, or not at all. If the settlement has failed for want of a sufficient conveyance when made, a court of equity has no authority to supply that defect by ordering a conveyance, or convert the imperfect settlement or gift into a declaration of trust, merely on account of such imperfection. As the donor left the transaction, so the court will leave it. Whatever may have been the intention of the deceased regarding the land in suit, no equity would arise in favor of plaintiff from her mere declaration of it, to whomsoever made, as the gift or settlement was in fact never executed; and from what was said by deceased no act was shown to have been done by plaintiff regarding the land from which an equity in her favor would arise, if an issue of that kind could be raised and determined, where plaintiff, as here, pleaded a contract, and alleged that it was supported by a valuable consideration. The mere unexplained presence of a small and inexpensive corner upon the land, other than that it had been built there by the husband of plaintiff at some time during the six or seven years that he used and cultivated the land freed from the payment of rent, is too trivial a circumstance upon which to raise an equity in favor of plaintiff, especially when the outlay for such improvements, if paid for by plaintiff or her husband, is shown to be insignificant when compared with the value of the use of the land for cultivation during that period of time. But, as said, if any trust relation existed between plaintiff and the deceased, Nannie Crowley, it must have grown out of the fact of the existence of the contract alleged in the petition to have been entered into between them, and not that relation arising by operation of law from the acts and conduct of the parties to each other regarding this land, as the appellant now, by her brief filed herein, seeks to have asserted. To appellant's present insistence it would be a sufficient answer to say, however, that where there is a failure to establish the contract as alleged, or where a state of facts different from those pleaded are developed on the trial, and the pleadings are not amended to conform to the evidence, no relief can be granted. It is a universal rule that the recovery sought or the relief asked must be founded upon and consistent with the facts set out and embraced in the pleadings. Upon the facts as developed and under the pleadings as they stood, but one judgment

was possible, and that the trial court entered its judgment is therefore affirmed. All concur, except MARSHALL, J., absent.

HUTCHINSON v. MISSOURI PAC. RY.
(Supreme Court of Missouri. March 28, 1901.)
Motion for rehearing overruled.
For former opinion, see 61 S. W. 635.

VALLIANT, J. The motion for rehearing proceeds upon a misconception by the learned counsel of the opinion delivered. There is nothing in that opinion to indicate "that notwithstanding the deceased saw, or might have seen, the train within a few feet of her, when she went upon the track, she had the right to presume that she could cross in safety, and when the engine was almost on her she had the right still to indulge the presumption that she could do so, and stoop to recover a scarf she had dropped." Nor does the opinion hold "that the prior and concurring negligence of the company in running its train at a prohibited rate of speed relieves deceased's representatives from the consequences of that act," nor "that the evidence of her negligence ought to be disregarded, for the reason that she could not be negligent because she had a right to assume that the persons in charge of the train would observe the ordinance limiting its speed to six miles an hour." The opinion says: "That act [running the train in violation of the ordinance] was negligence per se, and if it was the cause of the accident the defendant was liable, unless the deceased contributed to the result by her own negligence." It holds that in considering the question of her negligence the ordinance was a fact to be taken into account, and that that raised a question of fact. But there is no intimation in the opinion that that presumption (that she relied on the ordinance) is to be taken as conclusive. The language of the opinion is: "The city ordinance prohibited the train running at a higher rate than six miles an hour, and in the absence of proof that she knew, or had reason to apprehend, to the contrary, the law will presume that she trusted, as she had a right to trust, that the defendant was running its train at not more than six miles an hour, in obedience to the ordinance, and that she regulated her movements accordingly." That leaves the defendant entirely free to show, if it is a fact, that the circumstances and conditions were such as that, notwithstanding the ordinance, she had reason to apprehend that the train was running at a higher rate than that prescribed. This defendant has met that issue frequently, and knows how to handle it.

Nor is there anything in the record to justify the assumption that Mrs. Hutchinson stopped within 50 or 80 feet of the engine to pick up her scarf. The facts clearly shown

are that she was sitting in the station at night, waiting for a train. She heard a whistle, and said, "That is our train; we must be in a hurry." She went out on the platform, and saw the headlight of the approaching train, which was then at Ellendale, and clearly visible, although it was half a mile away. It was a dark night, and whether she could in fact see how fast the train was coming was a question. But the opinion says, if there was nothing in the case to justify her in thinking that the train was running at a slow rate, she was chargeable with knowledge that the train might lawfully run by the station at 40 miles or more an hour, and if she ventured upon the track she did so at her peril; but the fact of the ordinance was a fact that might enter into her calculation, unless she had reason to apprehend the train was running in violation of the ordinance, and that that made a question for the jury. If the train was running in submission to the ordinance, it would have taken it just five minutes to have covered the distance from Ellendale to the point of the accident, but at 40 miles an hour the distance was made in less than one minute. The motion for rehearing is overruled.

BURGESS, C. J., and BRACE and GANTT, JJ., who concurred in the original opinion, concur in the above.

• EPPERSON v. EPPERSON et al.

(Supreme Court of Missouri, Division No. 1.
March 29, 1901.)

REFORMATION OF INSTRUMENTS—DEEDS—DESCRIPTION—MISTAKE—BAR—LIMITATIONS OF ACTIONS—EJECTMENT.

1. Defendant's father, in 1870, conveyed land to him by a deed describing five tracts in a certain section, two of which were described as the "southeast quarter of the southwest quarter" thereof: the whole containing 189.38 acres. The grantor was the owner of five tracts of land constituting one farm, and known as the "Home Place," one of which was the northeast quarter of the southwest quarter, which was not described in the conveyance. Defendant entered into and remained in possession of the five tracts until he sold same, about 1896, claiming and using them as his own; his father and mother living with him until their death, always recognizing the whole tract as his, the father stating that he had deeded it to defendant. *Held*, in ejectment, in 1896, for the northeast quarter of the southwest quarter, that such tract was omitted from the deed by mistake, and defendant was entitled to have it corrected to include such tract.

2. Defendant and his assigns having been in continuous, peaceable, and uninterrupted possession of premises, which, by mistake, were not all included in the description in the deed, for more than 26 years, without ever having their title or possession questioned until ejectment brought for the land omitted, and until which time it had never become necessary for them to take affirmative action, limitations are not a bar to a correction of the deed in the action of ejectment.

Appeal from circuit court, McDonald county; J. C. Lamson, Judge.

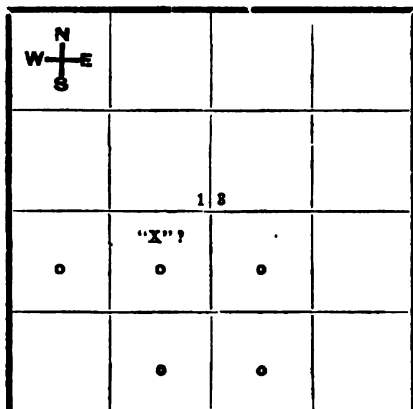
Ejectment by Martin Epperson against George W. Epperson and others. From a decree in favor of defendants, plaintiff appeals. Affirmed.

John B. Christensen, for appellant. Trimble & Braley and W. R. Thurmond, for respondents.

BRACE, P. J. This is an action in ejectment by the plaintiff, a son and one of the heirs at law of Aphrey Epperson, deceased, who sues to recover an undivided fifth of the following real estate, situate in McDonald county, to wit, the N. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 13, township 22, range 13. The defendants claim title under a deed in which it is alleged there was a mistake in the description of this 40-acre tract, which they ask to have corrected. The finding and decree was for the defendants, and the plaintiff appeals.

On the 1st day of January, 1870, the said Aphrey Epperson, by his warranty deed of that date, duly executed and acknowledged, in which his wife, Elizabeth Epperson, joined, relinquishing her dower, conveyed to his son the defendant George W. Epperson the following described tracts or parcels of land, situate in McDonald county, in the state of Missouri, that is to say: "The southeast quarter of the southwest fractional quarter of section thirteen (13), township twenty-two (22), range thirty-three (33), containing thirty-nine and 38-100 acres; also the southwest qr. of the southeast quarter of section thirteen (13), township twenty-two (22), range thirty-three (33), containing forty acres; also the southeast quarter of the southwest quarter of section thirteen (13) in township twenty-two (22) of range thirty-three (33); also the northwest quarter of the southeast quarter, and the northwest quarter of the southwest quarter, of section thirteen (13), in township twenty-two (22), range thirty-three (33), containing eighty acres. All of the above tracts and lots of land, except five acres off of the southeast corner of the southeast quarter of the southwest quarter of section thirteen (13), in section twenty-two, range thirty-three (33), and five acres off the southwest corner of the southeast quarter of the southwest quarter of section thirteen (13), in township twenty-two (22), range thirty-three (33); in all, one hundred and eighty-nine and 38-100 acres." This is the deed under which the said defendant George W. Epperson and his vendee and co-defendant the Ozark Orchard Company claim title. It is evident upon the face of this deed that the grantor intended to convey five tracts of land, all situate in section 13, township 22, range 33, and containing in all 189.38 acres, but, by repeating the description of one of the tracts,—i. e. the southeast quarter of the southwest quarter of said section,—that he in fact conveyed only four tracts, containing in all only 149.38 acres. Thus a mistake appears upon the face of the deed;

and when, in connection therewith, it is considered that the grantor was in fact the owner of five tracts of land in that section, containing in all 189.38 acres, one of which was the northeast quarter of the southwest quarter, all lying contiguous, and constituting one farm, in the shape shown in the following diagram:



—X, the land in controversy, being the northeast quarter of the southwest quarter of said section, the reasonable inference at once arises that the mistake was made by writing the word "south" for the word "north" in the description of that 40, and that in fact that 40 was intended to be included in the conveyance. When, in addition, it is considered that the said George at once entered into the possession of the farm, consisting of these five 40's, containing in all 189.38 acres, and known as the "Home Place," and thereafter, until he sold to his co-defendant, a short time before this suit was brought, on the 3d of October, 1896, continued in the uninterrupted possession thereof, claiming, cultivating, and improving the same as his own; that his father, the said Aphrey, and his mother, the said Elizabeth, from and after the date of said deed continued to live with him on the place, always thereafter recognizing it as his in its entirety, until their death (that of the father occurring in the year 1870, and of the mother in the year 1886 or 1888), as did the plaintiff himself, and the neighborhood generally, until about the time this suit was brought, the father having declared before the execution of the deed that he intended to convey the home place to George, and afterwards that he had done so, and both of them, by their conduct thereafter, indicating that such was the fact. —It would seem, upon these undisputed facts, that there is but little room for doubt as to the mistake or of its character. And the defendants having been in the continuous, peaceable, and uninterrupted possession of the premises for more than 26 years, without ever having their title or possession questioned until this suit was brought, until which time it had never become necessary for them to take affirmative action, there is no ground

for invoking the statute of limitations as a bar to the equitable relief sought by them in this action (Michel v. Tinsley, 69 Mo. 442; Cooper v. Deal, 114 Mo. 527, 22 S. W. 31), and which the circuit court granted. The judgment of the circuit court is therefore affirmed. All concur, except MARSHALL, J., absent.

SMOOT v. JUDD et al.

(Supreme Court of Missouri, Division No. 1.
March 12, 1901.)

HUSBAND AND WIFE—CONTRACTS—MARRIED WOMAN'S DISABILITY—RES ADJUDICATA—PLEADING—JUDGMENT—COLLATERAL ATTACK—PROCESS—SERVICE—EQUITY.

1. Where there was no service of process on defendant, and she had no knowledge of the pendency of the suit, a sheriff's deed of such defendant's land, given in pursuance of a sale on execution on a default judgment in the action, will be set aside in a suit in equity.

2. Where a married woman sued to set aside a sheriff's deed given in pursuance of an execution sale of her real estate, on the ground that the sheriff's return of process in the action in which the judgment taken by default was rendered was false, in that no service of process had been had on her, and issue was taken on such claim, it was error to permit the sheriff to testify that he left a copy of the writ with plaintiff's husband for her; the issue relative to the return being as to its truth or falsity when the judgment by default against plaintiff was entered.

3. Where plaintiff sued to set aside a sheriff's deed given in pursuance of an execution sale of her real estate, on the ground that the sheriff's return of process in the action in which the judgment was rendered was false, in that no service had been had upon her, and defendant sought to show that she had had actual knowledge of the suit, it was error to permit one who had represented her as attorney relative to the claim for which the judgment was rendered to be examined as to statements made to him by the plaintiff.

4. Plaintiff's undivided interest in certain land was sold on execution against her, and, on proceedings by the execution purchaser for partition against the other owners, plaintiff petitioned to be made a party to the proceedings on the ground that the execution purchaser had acquired no title to her interest, but the petition was denied on the ground that the title could not be litigated in the partition proceeding. *Held*, that in a suit by plaintiff to set aside the sheriff's deed on execution sale of her interest, on the ground that no process had been served on her in the action in which the judgment against her was rendered, the ruling in the partition proceedings denying her petition was not res adjudicata as to the question of the execution purchaser's title.

5. Where plaintiff's undivided interest in land was sold on execution against her, and on partition by the execution purchaser other parties purchased the interest, it being established in a suit by plaintiff to set aside the sheriff's deed that no process had been served on her in the action in which the judgment against her was rendered, plaintiff was entitled to a cancellation of the deed to the purchasers on partition sale, and to an accounting for the rents and profits of her interest.

On Rehearing.

1. Where a married woman sued to set aside a sheriff's deed given in pursuance of an execution sale of her real estate, on the ground that the sheriff's return of process in the action in which the judgment was rendered against

her was false, in that there had been no service on her, and issue was taken by defendant as to the truth or falsity of the return, and on the trial defendant sought to show service in fact by delivery of the summons to plaintiff's husband, and her knowledge of the action, on a new trial awarded on appeal defendants should be allowed to amend their answer so as to admit the falsity of their return, but averring service in fact.

2. Where a married woman sued to set aside a sheriff's deed given in pursuance of an execution sale of her real estate, on the ground that no process was served on her in the action in which the judgment was rendered, but defendants contended that there had been a service in fact, and that she had knowledge of the pendency of the suit, and that a copy of the summons had been given her husband to deliver to her, the husband was not a competent witness on the issue relating to the service.

3. Where a married woman sues to set aside a sheriff's deed given in pursuance of an execution sale of her real estate, on the ground that no process was served upon her, if an issue is tendered showing that her husband was made an agent to deliver process to the wife, by the sheriff, the husband would be a competent witness on such point.

Appeal from circuit court, Barton county; D. P. Stratton, Judge.

Suit by Ella G. Smoot against G. S. Judd and others. From a judgment in favor of defendants, complainant appeals. Reversed.

This is a suit in equity to set aside a judgment rendered against plaintiff, a sheriff's deed to her undivided interest in certain land sold under execution of the judgment, and two sheriff's deeds to the same land in a partition proceeding brought by the grantee in the first deed against the parties owning the other undivided interests in the land. The person in whose favor the judgment was rendered, and who was also the purchaser at the execution sale, and the purchasers at the partition sale, are parties defendants.

The facts of the case are: In 1887 the plaintiff was a married woman, living with her husband, in Barton county. She owned some real estate in Jasper county, which was all the property she had. On April 15, 1887, she executed, jointly with her husband, a promissory note for \$683.61, payable one day after date, to defendant Judd, and a mortgage on the Jasper county land to secure it. The note on its face mentions the mortgage and the land mortgaged. This note was given for money advanced by Judd to plaintiff's husband. She was at the time she signed the note and mortgage in Kentucky on a visit, and her husband was at their home in Missouri, where he signed the papers. Judd lives in Kentucky, and is a lawyer. The mortgage was afterwards released by Judd, who seems to have been very friendly and indulgent to plaintiff and her husband. But in July, 1891, the note was not paid nor the interest, and the mortgaged property, or rather the property that had been mortgaged but released, had been sold by the plaintiff and her husband. Judd placed the note in attorneys' hands for suit, and suit was

brought on it against plaintiff and her husband to the September term, 1891, of the Barton circuit court. The petition in that case did not describe the defendants as husband and wife, and there was nothing on the face of the petition or note to show that the plaintiff was a married woman, neither was there any such information in the sheriff's return. The return was personal service on both defendants. There was no answer filed, and accordingly, at the September term, the court rendered final judgment by default against both defendants for the amount of the note and interest, \$925.13, and costs. Afterwards a brother of plaintiff died intestate, leaving certain real estate in Barton county, and leaving as his heirs at law a brother and three sisters, of whom the plaintiff was one. Execution issued on the above-mentioned judgment, and under it the sheriff sold the undivided interest of the plaintiff in that land on March 10, 1892, and the judgment creditor, Judd, became the purchaser, and received the sheriff's deed accordingly. That is one of the deeds sought to be canceled. In October, 1893, Judd brought suit against the other heirs of plaintiff's deceased brother for partition of the land, alleging that by purchase he had become the owner of the undivided interest of the plaintiff, Mrs. Smoot. Plaintiff in this suit filed a motion in that suit stating that she owned an interest in the property sought to be divided, and asking to be made a party, but her motion was overruled. But it seems she did file an answer, said to be by leave, but on motion of the plaintiff in that suit, Judd, her answer was stricken out. The grounds of that motion were: "Because Ella G. Smoot has no right or authority in law to be made a party defendant in this suit; because said answer seeks to try the title to a tract of land described in plaintiff's petition and sought to be partitioned; because said Ella G. Smoot has ample remedy, and is fully protected, if any rights she has, which will not be affected by the proceedings in this case." There was a decree for the sale of the land for partition, and it was sold accordingly, and the defendants Amos Brand and William Jackson became the purchasers in several parts, and received the sheriff's deeds for the parts they respectively purchased. Those deeds are also assailed in this suit. The evidence showed that the sheriff's return on the summons in the suit on the note was false in reference to the plaintiff in this case, Mrs. Smoot. She was not served personally, as in the return stated. The court suffered the sheriff to testify that when he called to serve the writ Mrs. Smoot was quite sick in bed, and for that reason he did not intrude, but served the writ on her husband, who was co-defendant, and left a copy of the writ with him for his wife, and upon that evidence the court allowed the sheriff then to amend the return. There was some effort to show that she had actual

knowledge that the suit was pending, but the proof in that direction was shadowy. One of the attorneys for Judd testified that he called on plaintiff and her husband about the note before suit was brought, to try to collect it, and gave them to understand that suit would be brought if it was not satisfactorily arranged, but that he had no further conversation with her until after the judgment had been rendered, when there was some negotiation between them looking to a sale of the land and a purchase by Judd, with time allowed to redeem. That negotiation resulted in nothing. He said that in that negotiation they had an attorney's advice. That attorney was called by defendants, and over plaintiff's objection that if he was, as he claimed to have been, plaintiff's attorney, he was incompetent to testify as to what his client said, the court allowed him to testify. He said: "I remember having had a conversation with you [defendants' attorney] in regard to the Judd suit, and I remember distinctly that what the Smoots wanted in that case was that I delay the Downing suit and the Judd suit until they could make a turn in their affairs to make time to pay the money. That is all they wanted, as far as the representation they made to me. The fact is, as to the Judd suit, Mr. and Mrs. Smoot, when they talked to me about it, said that Mr. Judd had treated them very kindly, and they did not want to fight the suit, and simply wanted time in which to meet the obligation." Cross-examined: "Q. Were you employed by Mr. Smoot to look after his interest in this Judd suit? A. I was employed in and about the suit; yes. * * * Q. Were you employed by Mr. Smoot to look after this suit? A. In the way he wanted it looked after, I was. Q. You were employed by him? A. Yes, sir. Q. Did you let that suit go by default? A. Yes, sir. Q. Why? A. They wanted no expenses made, on the agreement that Mr. Judd was to give them time to pay off the note. Q. When was that? A. I do not think I talked to Mrs. Smoot prior to the time judgment was rendered, but after the judgment was rendered I talked to her. * * * Q. Mrs. Smoot did not employ you to look after that Judd matter? You did not have specific employment to look after that Judd matter in behalf of Mrs. Smoot? A. As I stated originally, Mr. Smoot talked to me about the matter, but I do not remember that I had any talk with Mrs. Smoot about it until after the judgment was rendered. Took it for granted that it interested them both. She was his wife. Whatever he did was all right." It was not disputed that after the judgment was rendered this attorney was consulted by Mrs. Smoot in relation to the administration of her deceased brother's estate. She testified positively that she never spoke to him about the Judd suit, and knew nothing herself about it, nor that a judgment had been rendered, until in look-

ing after her interest in her brother's estate she found that it had been sold. The foregoing are substantially the facts in the case. The chancellor found the issues for the defendants, and dismissed the plaintiff's bill, from which decree she appeals.

Willis H. Leavitt, for appellant. Thurman, Wray & Timmonds, for respondents.

VALLIANT, J. (after stating the facts). 1. The case was tried on the theory that the note was a Missouri contract, and subject to our laws, and that was probably correct, although it was signed by Mrs. Smoot in Kentucky, mailed to her husband here, who signed it, and returned it to Kentucky, where it was delivered to the payee, who was a resident of that state. No place of payment is mentioned in the note, but as the makers lived here, and, so far as the married woman's obligation is concerned, the property charged with its payment being in Missouri, this may be considered as the place intended for the performance of the contract. The law of the place where the contract is to be performed is the law of the contract. That point, however, is not very material in this case, because in 1887 the common-law disability of a married woman to incur a general personal liability by making a promissory note was the law in this state, and, if there was a statute in Kentucky removing such disability, it has not been pleaded or proven.

It is conceded by the counsel on both sides that at the date of the note in question (1887) a married woman could not by such an instrument incur the liability of a debt for which a judgment in personam could be rendered against her, to be satisfied generally of her goods and chattels, lands and tenements. But the contention for the defendants is that in 1891, when suit was brought on the note, she had been by section 6804, Rev. St. 1890, reduced to the condition of "a feme sole, so far as to enable her to carry on and transact business on her own account, to contract and be contracted with, to sue and be sued, and to enforce and have enforced against her property such judgments as may be rendered for or against her, and may sue or be sued at law or in equity, with or without her husband being joined as a party," and that, therefore, when the court at that date rendered judgment against her, the judgment was valid. If a person sui juris is sued, and brought regularly into court by process to answer a petition that states on its face a good cause of action, though he may have a good defense, yet if he omits to plead it, or if he pleads it, yet fails to sustain it by proof, and the judgment goes against him, his defense is extinguished in the judgment, and cannot afterwards be set up against it; and to that condition modern legislation has brought married women. If the petition in the case of Judd against

Smoot had stated upon its face that the defendants were husband and wife when the note was signed, it would not have stated a cause of action against the wife, because it would have shown that at that date she was incapable of making a note. But the petition omitted that statement, and the court had no right to presume that either defendant was non sul juris. But, if Mrs. Smoot was in court by process, the duty devolved upon her to plead that fact, and that would have been a complete defense to the suit. She was then (assuming that she had been duly served with process) as responsible for her acts in relation to that suit as her husband was for his own acts. She could make her defense good if she chose to do so, or she could waive it, and let judgment go against her, and if she waived it, and let the judgment go, she could not afterwards complain.

The numerous cases cited in the briefs of counsel to show that a judgment in personam against a married woman upon a money obligation is void are cases that arose when the law recognized that a married woman's highest duties were those that pertained to her as wife and mother, and when it did not expect of her that close attention to affairs of business that it expected of others, and when it drew over her its shield of protection. But that particular protection is now withdrawn, and she must take care of her own business affairs. In the suit of Judd against Smoot the petition stated a cause of action, the sheriff's return showed that the process had been served upon both defendants in person, and therefore it appeared from the record that the court had jurisdiction of both the subject of the suit and the persons. The judgment, on the face of the record, is entirely valid, and cannot be assailed collaterally; that is, it cannot be now questioned on the ground merely that a fact existed which might have been interposed as a valid defense, but was not.

But this is not a collateral attack, nor is it an attempt merely to plead now a defense which she had the opportunity to plead then, but which opportunity she neglected. This is a direct assault in a court of equity upon the judgment. There is no necessity for reviewing now the authorities on this branch of equity jurisdiction. This court has recently discussed the subject, with the aid of the authorities, in *Wonderly v. Lafayette Co.*, 150 Mo. 635, 51 S. W. 745, 45 L. R. A. 386. The doctrine is thus stated by an able law writer: "The power and jurisdiction of courts of equity to enjoin a party from enforcing a judgment which has been obtained, when it would be against conscience to permit him to do so, is at the present day so firmly established, so salutary in its operation, and so thoroughly in accord with the promptings of justice, that it is difficult to realize the stubbornness and bitter jealousy with which the beginnings of its exercise

were resisted." 1 Black, Judgm. § 1. An eminent text writer has said: "A defendant in an action at law has no defense on the merits, which he is precluded from setting up or making a part, and a judgment is rendered against him, equity will exercise its jurisdiction in his behalf by enjoining further proceedings to enforce the judgment, or by setting it aside, so that a trial may be had on the merits." Pom. Eq. Jur. § 836. Another author concerning mistake and accident says: "An accident is a repeated mistake." §§ 871, 919. The author also gives the meaning of the terms "accident" and "mistake" affecting equity jurisdiction in §§ 836 and 839.

When the law books speak of an accident on the merits, it means legal mistake. It means that the law recognizes and gives effect to. That Mrs. Smoot had such a defense in that suit is conceded. That defense was known at the time to the plaintiff. That defense was known to the plaintiff when the case is conceded. That she was served with process in the case, and that she knew that the suit was pending, is shown by the evidence. She had no opportunity to make her defense known to the plaintiff in that suit, Judd v. Smoot, without fault in the matter. He was the plaintiff in that suit, and she was a married woman, and legally bound on the note, yet he did not state in his petition that the defendants were husband and wife. It cannot be an omission that it was fraudulent when the plaintiff filed his petition, and he had a right to presume that Smoot would be summoned in that suit, and that when she should appear in court she could plead the defense, and that would end it. But the fact is a fact which conspired with other facts to deprive her of her defense, and any neglect on her part. A court interposes in such matters when the defense has been done through accident or oversight, as readily as when there has been fraud.

When the fact was proven beyond a doubt, and the sheriff's return on the writ was false, the court allowed the plaintiff's objection, to testify that the writ was a copy of the writ to plaintiff's husband. The court in the trial of this case had no right to allow the sheriff to return in that case. The only case on the point of the sheriff's return in relation to the return as it was in the judgment by default was rendered against her, and she averred that the return she averred was false, and joined on that averment. Her protest was addressed to that issue, and it was not an averment beyond controversy. I have been informed that in case she had shown that the return in issue was false, the defendants would be allowed another return on her, and give

issue to try, she might have been prepared for that also. But she was not required to make such preparation nor to anticipate such an issue. The defendants strove to maintain the return as it was. When the plaintiff offered her evidence to disprove it, they objected on the ground that the return was conclusive, and it was not until the falsity was proven that an attempt to set up another return was made. The sheriff was defendants' witness, but he could give no explanation or excuse for the falsity of the return. He said, "I do not know what made me make the return as I did."

There was some attempt to show that the plaintiff had actual knowledge of the pendency of the suit. But the defendants' evidence on that point went scarcely further than tending to show that she knew the note was in the hands of attorneys and that suit was threatened. Against her own positive testimony that she had no knowledge of the suit until after the judgment had been rendered there is scarcely any evidence at all.

Even the attorney who claimed to represent her (and whose testimony was clearly incompetent), while he testified in chief as to what "the Smoots" wanted "as far as the representation they made to me," yet on cross-examination he said that it was Mr. Smoot who spoke to him, and that he did not see Mrs. Smoot until after the judgment was rendered. Her testimony was that she knew nothing of it until her interest in the land had been sold.

There are numerous decisions in this state in which it is held that the sheriff's return on the writ is conclusive as between the parties to the suit. *Heath v. Railway Co.*, 83 Mo. 617; *Decker v. Armstrong*, 87 Mo. 316; *State v. Finn*, 100 Mo. 429, 13 S. W. 712. But that well-established principle of law has no application in a suit in equity to set aside the judgment founded on the return on the equitable ground of fraud, accident, or mistake. The fact that Mrs. Smoot might have a remedy at law by suit on the sheriff's bond does not deprive her of her remedy in equity to vacate the judgment obtained by means of the false return. The remedy at law which will defeat a suit in equity is a remedy on its same cause of action against the same defendants. *Thorn & Hunkins Lime & Cement Co. v. Citizens' Bank of St. Louis* (Mo. Sup.) 59 S. W. 109, and authorities there cited.

It has been frequently held in other states that a judgment by default rendered on a false return will be set aside or its execution enjoined in a court of equity. *Crafts v. Dexter*, 8 Ala. 767; *Rice v. Tobias*, 89 Ala. 214, 7 South. 765; *Bell v. Williams*, 1 Head, 229; *Ridgeway v. Bank*, 11 Humph. 523; *McNeill v. Edle*, 24 Kan. 108; *Ryan v. Boyd*, 33 Ark. 778; *Blakeslee v. Murphy*, 44 Conn. 188; *Great Western Min. Co. v. Woodmas of Alston Min. Co.*, 12 Colo. 46, 20 Pac. 771; *Hickey v. Stone*, 60 Ill. 458. Indeed, it would be so

contrary to right and justice to allow a judgment obtained by such means to stand that it is strange there could be any question of the power and duty of a court of conscience in the premises.

The constitution of Missouri ordains that "no person shall be deprived of life, liberty or property without due process of law." Article 2, § 30. A more flagrant violation of this constitutional provision cannot be conceived than to take one's property by means of a false return of the process. But the root of equity jurisdiction in such case is planted deeper than in even a written constitution; it is planted in that enlightened sense of right and justice that lies at the foundation of all our laws, and finds chief expression in a court of equity. Mrs. Smoot had a good defense to that suit, and the plaintiff there knew it, and by means of a false return judgment by default was rendered against her. Thus, without fault on her part, she was afforded no opportunity to interpose her defense. Such a judgment cannot be suffered to stand in a court of equity.

2. Execution issued on the judgment, and under it the sheriff sold Mrs. Smoot's undivided interest in the land she inherited from her brother, and at the sale the plaintiff in the execution, Judd, became the purchaser. Then he instituted proceeding for partition against the other heirs. Mrs. Smoot petitioned the court to be made a party to the proceeding, but her petition was denied. She filed an answer, however, in which she denied that Judd had acquired title to her interest, and sought to raise an issue as to plaintiff's title, but on motion of the plaintiff in that suit her answer was stricken out, and the cause proceeded to final decree, under which the property was sold for partition, and the defendants Brand and Jackson became the purchasers at the sale. Now it is insisted that the decree in that case is conclusive against the title asserted by Mrs. Smoot here: that what was there adjudged is as to her res adjudicata. The court refused to admit her as a party, and struck out her answer upon the ground that the question of title could not be tried in that case, and that any interest she might have in the land could not be affected by the decree and proceedings there. Those were the grounds asserted by the plaintiff in that case in his motion to strike out, and that is what the court decided. That ruling was res adjudicata of that point, and it was the only thing decided in that case that was res adjudicata as to Mrs. Smoot. As to the dispute between Mrs. Smoot and the plaintiff in that case in reference to her claim of title, there was no decision. There is nothing in that proceeding that impairs the rights she asserts here.

3. The purchasers at the sheriff's sale, under the decree in the partition suit, acquired the title that the parties to that suit had; nothing more. Section 7089, Rev. St. 1889, now section 4353, Rev. St. 1899; *Pentz v.*

Kuester, 41 Mo. 417; *Cashion v. Faina*, 47 Mo. 133; *Stephens v. Ellis*, 65 Mo. 456; *Hart v. Steedman*, 98 Mo. 452, 11 S. W. 993. They took at the sale whatever Mr. Judd had to convey of the interest that Mrs. Smoot inherited from her brother, and they took it subject to her equities. As against Mr. Judd, the plaintiff is entitled to a cancellation of the sheriff's deed under the execution, and as against the purchasers at the partition sale she is entitled to the same, the effect of which is to vest the title of an undivided one-fourth of the land in her, and she is also entitled to an account from them of the rents and profits of her one-fourth interest. The judgment is reversed, and the cause remanded to the circuit court of Barton county, with directions to enter a decree enjoining defendant Judd from enforcing his judgment rendered at the September term of that court, 1891, so far as it affects Mrs. Smoot; and canceling the sheriff's deed to Judd dated March 10, 1892; and declaring that the plaintiff, Mrs. Smoot, is entitled to an undivided one-fourth of the land described in the petition in the partition suit in spite of the sale made by the sheriff under the decree in that suit; and directing an accounting by defendants Brand and Jackson with plaintiff of the rents and profits had and received by them, respectively, of her undivided fourth; and upon the coming in of the account, and ascertaining of the amounts due her, rendering judgment in her favor for the same against those two defendants, respectively, each for the amount he has received, and judgment against all the defendants for costs. All concur, except MARSHALL, J., absent.

On Rehearing.

Upon a reconsideration of this cause on the motion for rehearing, we are of the opinion that the ends of justice would be better served by remanding the cause to the circuit court for trial de novo, with leave to defendants, if they see fit, to amend their answer admitting the falsity of the return as made, but averring service in fact of the nature indicated by their evidence, and actual notice to the plaintiff of the pendency of the suit, upon which plaintiff may join issue. We see no reason to change our views on the law points contained in the original opinion. In their argument on this motion counsel comment on the failure of the plaintiff's husband to testify at the trial. Upon the issue relating to the service as the pleadings were at that trial the husband was not a competent witness, but, if an issue is tendered showing that he was made by the sheriff the agent to deliver the writ to his wife, he would be a competent witness on that point. The judgment of this court of date March 12, 1901, is therefore so modified that, instead of remanding the cause with directions to enter a decree as therein specified, the judgment of the circuit court is reversed, and the cause remanded to that court for a trial de novo, according to the views in our original opinion

and herein expressed, and with leave to amend the pleadings as above indicated.

BRACE, P. J., and ROBINSON, J., who concurred in the original opinion, concur also in what is here said.

REEDY v. ST. LOUIS BREWING ASS'N et al.

(Supreme Court of Missouri, Division No. 1.
March 29, 1901.)

MUNICIPAL CORPORATIONS — INJURIES ON SLIPPERY SIDEWALK—LIABILITY OF ABUTTING OWNER—SLIPPERY ICE AN OBSTRUCTION—ERRONEOUS INSTRUCTIONS.

1. Where plaintiff was injured by falling on an icy sidewalk in front of defendant brewing company's premises, the ice having formed from water from a leak in a pipe extending across the top of the building, the defendant was not liable for the injuries because of a defect in the gutters and down spouts draining the roof of the building, as there was no duty on it to maintain and keep in good repair gutters and down spouts sufficient in size to carry off water from such a source.

2. Smooth and slippery ice covering a sidewalk for a space of 15 feet, which formed from water running off the roof of an abutting building on account of a leak in a water pipe thereon, is a dangerous obstacle, which the city is bound to remove within a reasonable time after notice, where there is no other ice or snow on the streets, since it was possible and practicable for the city to remove the same.

3. Plaintiff was injured by falling on an icy sidewalk. The ice formed from water escaping from a leaking water pipe on the roof of an abutting building, early in the evening the night before the accident. The abutting property owner had covered the ice with malt sprouts to render it less dangerous, which remained on the ice all day until about 5 o'clock in the evening, when boys swept them off to skate on the ice. Plaintiff fell on the ice about two hours thereafter, and in an action against the city and the abutting owner for the injuries thus received, in which a change of venue had been taken, the jurors not being drawn from the same vicinage as the place of the accident, the jury were instructed that the defendant city was liable if it knew "by its proper officers having charge of and keeping its streets in repair, or by the exercise of ordinary care would have known," of the defective condition of the sidewalk, in time to have caused the ice to be removed before plaintiff was injured. *Held*, that such instruction was erroneous and prejudicial to defendant city, in that it left a great deal of inference to be drawn from the common knowledge which the jurors derived from their everyday experience as to the duties of proper city officers in regard to ascertaining within the time the condition of the walk, there being no evidence as to such duties.

4. In an action against a city for injuries received by falling on an icy sidewalk, where the evidence did not show that there was any other ice or snow in the city, it was error to charge on the theory that the city would be liable only in case the snow or ice was suffered to be piled up so as to create a veritable obstruction.

Appeal from circuit court, Gasconade county; Rudolph Hürzel, Judge.

Action by John Reedy against the St. Louis Brewing Association and another. From a judgment in favor of the plaintiff, defendants appeal. Reversed.

Kehr & Tittman, B. Schnurmacher, Carl Unger, and Alex. Nicholson, for appellants. A. R. Taylor and B. L. Mathews, for respondents.

VALLIANT, J. Plaintiff slipped and fell on ice on a sidewalk in one of the public streets of the defendant city, and suffered serious injuries. This suit is to recover damages for those injuries. The defendants were sued as joint tortfeasors. The joint injury is alleged to consist in neglecting to remove the ice from the sidewalk within a reasonable time after its existence was known, or would have been known, if reasonable care had been observed. The defendant the St. Louis Brewing Association is charged in the petition to have caused the ice to form by suffering water from its abutting premises to flow upon the sidewalk in freezing weather. The particular fact of negligence alleged against the brewing association is that the gutter on that defendant's building was in "defective condition"; "that, owing to the insufficiency of the spouts and gutters on said building, the water from the roof of said building overflowed upon the sidewalk of said street, where it was frozen, and became a dangerous obstruction to passage over said sidewalk. The defendants answered severally, denying the allegations of negligence, and pleaded that plaintiff was himself guilty of negligence that contributed to his injuries. It appeared from the evidence that the brewing association owned buildings at the southeast corner of Eighteenth street and Cass avenue, running south to a paved alley 20 feet wide. Next south of the alley is its storage house, which is about 40 feet high. The buildings north and south of the alley are connected by a bridge. On the building east of the storage house there was a water tank supplied by a pipe running across the bridge from north to south. It was a 2 or 2½ inch pipe, packed in a wooden box, extending over the roof of the storage house to the tank. This was a flat gravel roof 40 by 42 feet, with a copper gutter around it 4 inches wide at the bottom and 8 at the top, with a 4½-inch down spout of galvanized iron. As to the condition of the gutter, the testimony was conflicting. Two of plaintiff's witnesses said it sagged in the center, and one said it bent outward. Defendants' witnesses testified that it was in perfect condition, of best material and workmanship, set on brick the entire length of the wall, and could not sag; that the pitch of the roof was 18 inches from east to west, and the gutter and down spouts sufficient to carry off the rainwater that would accumulate on a roof of that size. Plaintiff lived in the same block just south of the brewery, and visited it almost every day. On the evening of November 30, 1906, between 7 and 7:30 o'clock, plaintiff went to the brewery, and informed the night watchman the water was running off the roof upon the sidewalk. The two

went out together, and saw water running off the roof of the storage house. The night watchman went upon the roof, and there found that a leak had occurred in an elbow in the pipe leading to the tank. He went across the bridge to the mill house, and turned off the water. Then got a broom and swept the water off the sidewalk as well as he could. The superintendent of the brewery, who lived near, was notified, and he caused two men to spread malt sprouts on the sidewalk where the water had fallen, with a view to prevent the ice becoming slippery, as it was then cold and freezing. There was no rain or snow. The weather was clear, dry, and cold. The water that had thus fallen from the roof of the storage house, or so much of it as had not been swept off, became frozen, and covered the sidewalk from the building line to the curb with a coating of ice. The ice was thicker near the building line and the curb than in the center. The location is a thickly-inhabited part of the city, and a great many people (the witnesses said thousands) passed over the place the day following, which was December 1st. About 5:30 p. m. that day a lot of boys were seen sweeping the malt sprouts from the ice to convert it into a skating place, and used it for that sport. About 7 o'clock that evening the plaintiff, while walking in the center of the sidewalk on this ice, slipped and fell, receiving serious injuries.

In its instructions, the court, after presenting in other respects the plaintiff's hypothesis of the case, including the formation of ice on the sidewalk, rough and uneven, so as to be a dangerous obstruction to persons passing, directed the jury to find for the plaintiff against both defendants if they found from the evidence that "the water was caused to so fall upon said sidewalk because the gutter of said building was out of repair and insufficient to carry the water from the roof of said building," "and if the brewing association did not use ordinary care in maintaining the gutters in that condition, and in suffering the ice to so remain on the sidewalk, and if the city knew, or by the use of ordinary care would have known, of the condition in time to remove it." Other instructions, upon like hypotheses (leaving out that of the city's duty), directed a verdict against the brewing association alone, to all of which exceptions were taken. It is unnecessary to here copy the instructions given for defendants, but it is sufficient to say that, in general, they directed a verdict for defendants, and each of them, unless the acts of negligence propounded in plaintiff's instructions were established by the proof, or if the plaintiff was himself negligent. For the city the instructions given carried the theory that the mere formation of ice or accumulation of snow on the sidewalk did not constitute a condition for which the city would be liable, but that the ice or snow would have to be so rough and uneven as to constitute an obstruction dangerous to per

sons using the sidewalk, while exercising ordinary care. Each defendant asked an instruction in the nature of a nonsuit, and, among others, instructions to the effect that ice which was smooth and slippery was not an obstruction, but, to become such, it must be rough and uneven in its surface. Those instructions were refused, and their refusal assigned for error. There was a verdict for \$4,500 for plaintiff against both defendants, from which they appeal.

1. The first proposition advanced by the defendant brewing association is that the petition makes no case of joint liability of the two defendants, but that as to the one the charge is negligence in suffering water to be discharged on the sidewalk in freezing weather, and as to the other allowing an obstruction to remain in the street for an unnecessary period after it was known, or would have been known by the use of proper care. It is argued upon the authority of *Norton v. City of St. Louis*, 97 Mo. 537, 11 S. W. 242; *City of St. Louis v. Connecticut Mut. Life Ins. Co.*, 107 Mo. 92, 17 S. W. 637; *Baustian v. Young*, 152 Mo. 317, 53 S. W. 921, and other cases cited, that the abutting owner is not responsible for the condition of the sidewalk in his front, but that the duty to look after that is on the city alone. It does not, however, impair the doctrine laid down in those cases to say that an individual may become liable and jointly liable with the city for an unsafe condition of the sidewalk. This liability does not arise from the fact that he is owner of property abutting the sidewalk, but from the fact that he is instrumental in causing the condition, either by his willful act or negligent omission to perform a duty which the law imposes on him. If he is allowed an extraordinary use of the sidewalk for his private convenience, as, for example, to place in it a manhole for the reception of coal (*Benjamin v. Railway Co.*, 133 Mo. 274, 34 S. W. 590), a water meter (*Carvin v. City of St. Louis*, 151 Mo. 334, 52 S. W. 210), or an excavation in close proximity to the sidewalk for a foundation for a new building (*Wiggin v. City of St. Louis*, 135 Mo. 558, 37 S. W. 528), the law imposes on him the exercise of reasonable care to guard the public from injury in such use. And it may be said that if the individual neglect to perform any duty that the law imposes on him in particular, and a dangerous condition of the sidewalk results, then a new duty on him in relation to that condition arises, and, of course, with greater force, it would be so if that condition was the result of his willful act.

Now, the petition in this case charges that the defendant brewing association maintained a defective gutter, and that the insufficiency of the spouts and gutters resulted in the discharge of water on the sidewalk, where it became frozen. If, therefore, it was the lawful duty of that defendant to maintain spouts and gutters sufficient to pre-

vent a discharge of water on the sidewalk, its neglect to do so, and the resultant ice, imposed a duty on that defendant with reference to the ice which the law would not have imposed if the water had fallen from the clouds in the form of rain or snow. It is said by this defendant that there is no law requiring it to have gutters and down spouts on its buildings at all. There is no statute on the subject that we are aware of, but the principle of the common law is that, while the owner of adjoining property is not responsible for the natural flow of water across his land on to the land of his neighbor, yet he is liable if he collects it in a quantity by artificial means, and discharges it in a flood on his neighbor's land, and that principle underlies that feature of this case. Water accumulated on a large roof, and directed to a single point, may cause a nuisance for which the owner of the house would be liable. If, therefore, the petition is to be construed into stating a case in which the brewing association was negligent in suffering water to be discharged on the sidewalk where it became frozen, and formed a dangerous condition (and that seems to have been the construction put upon it by both parties and the trial court), then it showed a condition of the sidewalk for the continuance of which for an unnecessary period both defendants would be liable, the joint wrong being the neglect to remove the obstruction.

2. But neither the petition nor evidence of plaintiff presents a theory of duty on the part of the brewing association to furnish gutters and down spouts to carry off water from a bursting pipe or a bursting tank. Conceding that the gutter sagged in the center, and that it bent outward (upon which point the testimony was conflicting), and that it was insufficient to carry off this water, it does not follow that the gutters and spouts were not sufficient to carry off the rain and melting snow that might fall upon the roof, and that is all that would naturally be inferred as their purpose. Suppose the pipe had burst at a point on the bridge over the alley, the water would probably have reached the sidewalk when it is crossed by the alley entrance without passing through the gutter; or suppose the tank had burst, what would the defective gutter have had to do with the flooded sidewalk? These ideas are suggested to point the fact that there is no relation, as far as the pleadings and proof show, between the office of the gutter and the water in the pipe. When this pipe burst, the water may have been forced in a body by the pressure on the mains to a given point, where the gutter was unable to impede it. But the gutter was not designed for that purpose. There is nothing in the case as made upon which the court could hold the brewing association liable for failure to furnish a gutter and down spouts sufficient to carry off water from a bursted pipe; and, even if the evidence had showed that the gutter was insuffi-

cient to hold rainwater, that would not have helped out the plaintiff's case, because the plaintiff's injuries did not result from a discharge of rainwater on the sidewalk. There is no suggestion, either in the pleadings or evidence, that there was any defect in the pipe that burst, or that the bursting was attributable in any degree to negligence of defendant brewing association. Since the water did not get on the sidewalk by reason of any willful act or neglect of duty on the part of this defendant, the condition of the sidewalk in consequence was the city's affair alone. The trial court should have given the brewing association's instruction for a nonsuit.

3. The law requires a city to keep its streets and sidewalks in reasonably safe condition for the purposes for which they are designed, and holds it liable to one who, while properly using the street, suffers injury in consequence of its dangerous condition, provided the city had neglected a reasonable opportunity to remove the danger. The questions that we meet, therefore, on this branch of the case, are: Did the ice in this instance render the sidewalk dangerous? If so, did the city have a reasonable opportunity to remove the danger before the plaintiff suffered? Snow and ice on sidewalks have been the occasion of many injuries to persons, and the law books are full of instances where the duty of a municipality in respect to such conditions has been discussed. Running through all the cases to which our attention has been called on this subject, we find the general proposition that ice or snow upon a sidewalk or in a street is not to be classed with dangerous obstructions, such as a city is required to remove. It would be more accurate to say that it is a dangerous obstruction, but that it is excepted from the category of obstructions for which the city is liable upon the ground of the impracticability of requiring the city to remove it. There are, for example, in this city, many hundred of miles of sidewalks upon which snow falls and ice forms when the weather suits, and immediately upon its fall the snow is beaten down by the feet of thousands walking over it. To some extent the sidewalks and streets may be and are cleared of such obstruction, but to remove it entirely or to a degree that would render it not dangerous is impracticable, and therefore not embraced in the law's reasonable requirements. There is another reason for making snow or ice on the sidewalks and in the streets an exception to that dangerous condition for which a city is liable; that is, when that condition exists generally it is obvious, and every one is on his guard. Any pedestrian on the sidewalk or traveler in the street is warned by all his surroundings that ice and snow abound, and consequently danger of slipping and falling is to be apprehended at every step. The law is reasonable in this, as in all things. There is a collection of in-

teresting cases in the briefs of the learned counsel on this subject which are authority for saying that when the ice or snow is merely smooth and slippery it is not such a dangerous condition as will render the city liable, but that that condition arises only when the ice or snow has been suffered to accumulate so as to form an uneven surface, making it dangerous to attempt to pass over. *Stanton v. City of Springfield*, 12 Allen, 566; *Mason v. City of Boston*, 14 Allen, 508; *Stone v. Inhabitants of Hubbardston*, 100 Mass. 49; *Grossenback v. City of Milwaukee*, 65 Wis. 31, 26 N. W. 182; *Broberg v. City of Des Moines*, 68 Iowa, 523, 19 N. W. 340; *Taylor v. City of Yonkers*, 105 N. Y. 202, 11 N. E. 642; *Kaveny v. City of Troy*, 108 N. Y. 571, 15 N. E. 726; *Harrington v. City of Buffalo*, 121 N. Y. 147, 24 N. E. 186; *Chase v. City of Cleveland*, 44 Ohio St., 505, 9 N. E. 225; *Henkes v. City of Minneapolis*, 42 Minn. 530, 44 N. W. 1026. The principle involved in those cases was present in the minds of the court and counsel in the trial of this case, as was shown in the instructions given and in those asked and refused. But the circumstances of the case at bar do not bring it within the reason upon which the doctrine of those cases is founded.

In the first place, while the evidence showed that the ice was thicker at both edges of the sidewalk than it was in the center, yet it was not such a piling up of ice at either side as would convert it into a dangerous obstruction if it was not dangerous otherwise, and, besides, the plaintiff fell in the center, where the ice was smooth, and he fell because it was smooth and slippery. And, on the other hand, the reasons which except slippery ice on a sidewalk from the category of dangerous obstructions for which a city may be liable do not exist in this case. The water which was frozen here did not fall in rain or snow from the clouds, the city was not confronted with a thousand miles of ice-covered sidewalks to look after, nor were the people using the sidewalk at this point admonished by the general conditions surrounding them that ice was to be expected. The weather was dry, clear, and cold. There was ice at that point for a distance of about 15 feet, but not elsewhere. That the condition was dangerous is demonstrated by the plaintiff's fall; that the danger could have been removed with little labor or expense is beyond question. Therefore the city is not excused as it is when its powers are overcome by nature covering the face of the earth with ice and snow. In one of the cases above cited under this head (*Henkes v. City of Minneapolis*), there is an expression to the effect that no difference in principle is seen between a case of ice formed from rain or snow and that formed from water escaped from a hose of a fire engine. But the facts of that case do not mark it so distinctively as to make it an authority for that proposition, because, although water from the hose had entered into the case, yet it scarcely

changed the conditions. The court said: "The sum of all the evidence is that it was, and for some time had been, cold winter weather, and all the sidewalks of the city were covered with ice to a certain extent, so that "if a man did not take care he was liable to slip and fall almost any place." In *Chase v. City of Cleveland*, supra, the Ohio court put the exemption of the city from liability on account of ice on the sidewalk upon the ground that it would be unreasonable to require the city to remove the obstruction. Said that court: "It is not unreasonable to assume that there were hundreds of similar places in the city of Cleveland at the time of the accident to plaintiff. To effectually provide against dangers from this source would require a large special force, involving enormous expense." We hold that where the sidewalk is in fact rendered dangerous, because of slippery ice formed from accidental or incidental discharge of water, such not being the prevalent condition of sidewalks at the time, it is the duty of the city to cause the danger to be removed within a reasonable time after it has notice, or by the exercise of ordinary care would have discovered the condition.

This brings us to the second question under this head: that is, did the city neglect that duty? The city is not negligent unless it knew, or should have known, that the dangerous condition existed, and after such notice, actual or constructive, it was entitled to a reasonable time to remedy the fault. *Baustian v. Young*, 152 Mo. 317, 53 S. W. 921. The water had fallen upon the sidewalk about 24 hours before the accident. It seems to have been frozen, or some of it, almost immediately, and the brewery people covered the surface with malt sprouts, with a view to rendering it less dangerous, and these remained until about an hour and a half before the plaintiff fell. During the day it was said thousands of people passed over it in safety. It was about nightfall when the boys swept the malt sprouts off, and made a skating place of it. It was after dark when the plaintiff fell. The only evidence of notice to the city was contained in those circumstances. The instruction on this point was: "And if the jury find from the evidence that the city of St. Louis, by its proper officers having charge of keeping its streets in repair, knew, or by the exercise of ordinary care would have known, of said defective conditions of said sidewalk in time, by the exercise of ordinary care, to have caused said ice to be removed before plaintiff's injury, and neglected to do so." The question of notice in such case is one of fact, and where it is to be inferred from circumstances it depends upon those peculiar to the case. No definite rule can be laid down, either as to duration or conditions. *Franke v. City of St. Louis*, 110 Mo. 516, 19 S. W. 938. We cannot say that the circumstances in this case did not justify the court in submitting that question to the

jury, but in submitting it the court left a great deal of inference to be drawn by the aid of that common knowledge which jurors derive from their every day experience. While that is a source of information which the law under certain conditions authorizes a jury to draw upon, yet because of its uncertainty it should be resorted to with caution. In this case we must remember the jury was not drawn from the vicinity of the accident, nor was it composed of men familiar with the duties of the city officers. The cause had been taken by change of venue to Gasconade county, and it was tried by a jury of strangers to the scene of action. Therefore, when the court gave them the instruction that required them to consider the care that would be exercised by the city's "proper officers having charge of keeping its streets in repair," it left them very much to conjecture. If plaintiff relied upon an inference of notice derived from the ordinary duties of the city officers, he should have furnished this jury some evidence on that point. The question was confused before the jury with questions relating to the liability of the brewing association that should not have been submitted. This was doubtless to the city's prejudice.

If the dangerous condition was to be reckoned from the time the boys swept the covering of malt sprouts off the ice, in the absence of proof that the city had actual notice, the court might, with propriety, have refused to submit to the jury the question of the city's constructive notice, depending, as it did, on an inference to be drawn from the length of time the condition had existed, because the plaintiff's fall occurred within less than two hours after the boys had swept off the malt sprouts, and it was about dusk when that was done. But it cannot be assumed conclusively, as a matter of law, that the condition was safe until the boys did the mischief. The ice had been there 24 hours, which was long enough to have, at least, raised a question of constructive notice, and it could have been removed entirely in a very short while with trifling expense. Whether seeing that the ice was covered with malt sprouts was all that the situation reasonably demanded, and all that could have been reasonably expected, of the city, with the ordinary means at its hands, was a question of fact, and one which the jury was possibly better equipped, with common knowledge of things, to try, than they were the question relating to the duties of the city's "officers having charge of keeping its streets in repair." The case was tried on a wrong theory. The instructions were fashioned on those decisions above cited, which related to a condition of ice and snow all over the city rendering it practically beyond the city's means to remove, and holding the city liable only in case the ice or snow is suffered to be piled up so as to create a veritable obstruction to climb over. The jury were told that if they found that condition they should find for the plaintiff,

and the jury so found, although there was no evidence of such a condition. There was evidence, as we have seen, tending to show that the sidewalk for a distance of about 15 feet was covered with smooth, slippery ice, which rendered it dangerous, and that it was altogether practicable to remove the danger, and that the city would, by the use of ordinary care, have known of the condition in time to have removed the ice or obviated the danger. The case, as between the plaintiff and the city, should have been given to the jury with appropriate instructions on that theory. There was no case at all made against the brewing association. The judgment is reversed, and the cause remanded to the Gasconade circuit court, to be retried according to the views herein expressed. All concur, except MARSHALL, J., absent.

WALL v. BEEDY et al.

(Supreme Court of Missouri, Division No. 1.
March 29, 1901.)

FRAUDULENT CONVEYANCE — PREFERENCE —
FRAUDULENT INTENT OF GRANTOR — KNOWLEDGE OF GRANTEE — EVIDENCE — DEED
FRAUDULENT PER SE — EXPRESS CONSIDERATION — POSSESSION OF PROPERTY BY
VENDEE — FAILURE TO RECORD CONVEYANCE — EVIDENCE — BURDEN OF PROOF — ADMISSIBILITY — DECLARATIONS — PROOF OF
CONSPIRACY — LACHES.

1. A conveyance by an insolvent debtor to a creditor of real estate of a less value than the indebtedness owing such creditor is not fraudulent as to other creditors, though the creditor knew of the fraudulent intent of the grantor, since a creditor has a right to procure a preference.

2. Where suit is brought to set aside a conveyance by an insolvent debtor to a creditor, the burden of showing the good faith of the transaction is not on the latter, though the debtor is shown to have intended to hinder and delay his other creditors, but the creditor attacking the conveyance must show its fraudulent character.

3. Declarations by an alleged fraudulent vendor, after the conveyance of the property, are not admissible, in the first instance, to prove a conspiracy between the vendor and the vendee to defraud the creditors of the former.

4. Where there is no evidence of a conspiracy between an insolvent debtor and a creditor to whom he conveyed property to defraud other creditors, subsequent declarations of the debtor are hearsay, and inadmissible in a suit to set aside the conveyance.

5. Where an insolvent debtor conveys real estate worth \$6,000 to a creditor in consideration of the payment and assumption by the latter of debts aggregating \$6,413, the conveyance is not rendered fraudulent by the fact that it recites a consideration of \$6,750.

6. A conveyance of real estate by an insolvent debtor to a creditor is not rendered fraudulent by the fact that the vendor remains in possession of the premises as a tenant of the vendee.

7. An assessment list taxing real estate in the name of an insolvent debtor, who has conveyed the property to a creditor, is not sufficient to show that the property belongs to the vendor, who remains in possession thereof, when the latter is shown to have signed the list without knowing that such property was

included therein, and the vendee actually pays the taxes thereon.

8. Where a conveyance from an insolvent debtor to a creditor is not recorded by the latter until nine days after its receipt, but there is no agreement withholding it from record, and the creditor does not obtain other credit thereon, the delay does not render the conveyance fraudulent.

9. Where a creditor, knowing of a fraudulent conveyance by his insolvent debtor, does not attack the conveyance for nine years, and until after the land is greatly enhanced in value, his laches will be a defense to a subsequent suit by him to set the conveyance aside.

Appeal from circuit court, Pettis county.

Suit by Henry J. Wall against J. C. Beedy and others to set aside a conveyance of real estate as in fraud of creditors. From a decree dismissing plaintiff's bill, he appeals. Affirmed.

This is a suit in equity, instituted on October 14, 1895, to set aside a deed to 320 acres of land in Johnson county, executed on November 3, 1886, by defendant Wherry and wife to S. S. and J. R. Chappell and the defendant Beedy, and the conveyance by S. S. Chappell and J. R. Chappell, on December 18, 1889, to Beedy, of their interest therein, and vest title to the same in plaintiff, on the ground that such deeds were obtained as the means of a fraudulent conspiracy between Wherry, Beedy, and the two Chappells to hinder and delay the creditors of the former. The trial resulted in the dismissal of the plaintiff's bill, and plaintiff appealed.

W. S. Shirk and S. T. White, for appellant.
O. L. Houts and Chas. E. Yeater, for respondents.

ROBINSON, J. (after stating the facts). The great mass of evidence set out in appellant's abstract of the record represents the testimony of a large number of witnesses, some of whom were examined and cross-examined twice or more, and page after page bears lightly, or not at all, upon the material issues involved. To review this testimony exhaustively would require time, labor, and patience happily not necessary to the proper disposition of this case. The facts necessary to a correct understanding of the questions involved in this appeal may be stated as follows: In November, 1886, and for some time prior thereto, defendant Beedy was engaged in the banking and lumber business, at Windsor, Mo., and the two Chappells and Wherry were in the stock business, residing several miles from town. Shortly before the first conveyance by Wherry and wife, in November, 1886, Beedy, who, it seems, was president of the Windsor Savings Bank, became solicitous about Wherry's indebtedness to the bank, consisting at that time of five notes, amounting in the aggregate, exclusive of interest, to the sum of \$2,478.65, and desired to obtain additional security therefor. The two Chappells were indorsers on these notes. Wherry was security for one of the

Chappells on a note to Beedy's bank also, and all three were heavy borrowers in the other local bank. The two Chappells and Wherry were each supposed to be worth about \$10,000, but their farms were all under mortgage. At the suggestion of Beedy, S. S. Chappell notified Wherry to call at the bank and make some arrangement about giving additional security for his bank indebtedness. In course of the interview between Beedy and Wherry in reference to such security, Beedy first learned of the existence of a mortgage to John McFadden on the farm in controversy, amounting, with interest thereon, to \$2,246.36, and also a judgment against Wherry in favor of the Johnson County Savings Bank for \$1,260.37, including interest, which, together with the taxes of 1886, amounting to \$68.51, brought the total amount of incumbrances on the farm up to about \$3,593.24. The evidence shows that at the date of the conveyance, in November, 1886, the farm was only worth about \$6,400. On this basis, Wherry's equity in the farm, after deducting the lien indebtedness, was worth about \$2,800. In addition to his indebtedness to the bank, Wherry owed Beedy individually \$320, evidenced by a note upon which he and L. E. Chappell, a younger brother of the other two Chappells, was a joint maker. As a result of these negotiations, Wherry finally agreed to convey the farm to Beedy and the two Chappells, subject, however, to all liens and incumbrances thereon, in consideration of their assuming such incumbrances, and paying his indebtedness to the bank, and the Wherry and Chappell note for \$320, and thereafter executed the first conveyance complained of accordingly. The consideration recited in the deed is \$6,750. There is some evidence of an agreement to reconvey the farm to Mrs. Wherry, and the execution of quitclaim deed for that purpose. Beedy testified that he agreed with Mrs. Wherry to sell the farm back to her for the same amount that he gave for it, but that she was unable to raise the money, and nothing aside from the making of the deed was ever done in the matter. Mrs. Wherry testified that Beedy agreed to give her a deed when she paid for the land, and actually made out a deed, but it was not delivered because of her inability to pay for the land. Beedy and the two Chappells then gave the bank their note for the sum of \$2,500, and secured the same by a deed of trust on the land in controversy, took up the Wherry notes, and surrendered the \$320 note. At the request of Beedy, a chattel mortgage was also given by S. S. Chappell, on 181 head of cattle owned by him to secure the bank's note. The evidence shows that Beedy was worth at this time over \$100,000, and, being the only really solvent man on the note, his name made the bank perfectly secure without the Chappells; but in order to protect himself for having signed the note to the bank with the Chappells,

61 S.W.—55

which took up the Wherry notes, he required the Chappells to sign the deed of trust to their interest in the farm, and S. S. Chappell to give the chattel mortgage upon the cattle. After the conveyance in question Wherry remained in possession of the farm until 1892, agreeing to pay rent therefor at the rate of \$500 a year and to keep up the repairs. The rent was collected by Beedy from Wherry, and applied in payment of interest on the incumbrances and the note for \$2,500 made in paying Wherry's indebtedness to the bank. In July, 1888, Beedy paid the McFadden note and mortgage, amounting at that time, principal and interest, to the sum of \$2,387.75, having previously paid one year's interest thereon, and took an assignment of the note to himself.

About the same time, S. S. Chappell drew a draft on Beedy for \$1,106.85, in payment of the judgment in favor of the Johnson County Savings Bank, and took an assignment of such judgment to himself, his brother, and Beedy. Prior to this, however, and on the next day after the first conveyance, Wherry gave Beedy a chattel mortgage on certain personal property, consisting of horses, mules, cattle, sheep, and farm implements, to secure the payment of a note for \$1,506 given for borrowed money and a lumber account. When first applied to for this security, Wherry declined to give a mortgage, unless Beedy would lend him \$300 or \$400 more money. This Beedy, after some hesitation and protest, finally concluded to do, in order to obtain the desired security, and the chattel mortgage was executed accordingly. By an agreement between Beedy and Wherry, the latter was to sell the sheep and stock, and apply the proceeds in extinguishment of the mortgage indebtedness. In pursuance of this agreement, Wherry sold the sheep and a part of the stock, and applied the proceeds arising therefrom in part payment of this note, thereby reducing the same to \$700. In December following, Wherry gave another chattel mortgage on the personal property remaining unsold to secure a note for the latter amount. The property covered by the second mortgage was afterwards sold, and the proceeds applied in extinguishment of the indebtedness thereby secured. The evidence further shows that Beedy received the stipulated rents from Wherry, and applied the same as above stated. The taxes on the farm in controversy, which run all the way from \$38 to \$66 a year, were paid regularly every year by Beedy.

The note for \$2,500 executed by Beedy and the two Chappells, and secured by their deed of trust on the farm in controversy, was received and held by the bank as a part of its assets, and at the wind up, when the bank went out of business, the other stockholders took cash for their share of the assets, and Beedy received his share in uncollected notes, secured by deeds of trust, in

Heu of cash, including, among others, the note for \$2,500; thus carrying out his arrangement with the Chappells to assume and pay such note, in consideration of the transfer of their interest in the farm in controversy to him. The plaintiff claims title under a sheriff's sale on execution issued upon a judgment against Wherry. The record shows that for nearly nine years before the commencement of this suit the plaintiff says that he knew that the deeds in question were fraudulent, and never took any steps to assert his rights. In the meantime, however, the construction of a railroad near this farm greatly enhanced its value.

The validity of the transfer of the farm in question is assailed on the ground that Wherry's intention in conveying the same was fraudulent, and that Beedy took such conveyance with knowledge of Wherry's fraudulent intent. The plaintiff contends that defendant Beedy occupies the position of an ordinary purchaser from an insolvent vendor, and therefore his knowledge of Wherry's purpose renders the sale voidable, at the instance of his other creditors, even though he did not participate in that purpose. On the other hand, counsel for defendant maintains that the transaction was a preference, and not voidable at the instance of other creditors of Wherry, notwithstanding the fraudulent intent of Wherry and defendant's knowledge of such intent, provided he did not participate in such fraudulent purpose, and that with respect to the deeds in question he stands in the position of a preferred creditor. A careful reading of the testimony satisfies us that the transfer of the Wherry farm was simply a preference made in discharge and satisfaction of his indebtedness to Beedy, Beedy's bank, McFadden, and the Johnson County Bank, amounting in the aggregate to about \$6,413.14, and to protect defendant Beedy and his associates for their assumption of part of such indebtedness. And we are further satisfied from the evidence that Beedy took the deeds in question in good faith, in payment of antecedent indebtedness to himself and his bank, for which he at the time was working, and for the purpose of protecting himself with respect to the indebtedness so assumed, and the court below so found. This he had a perfect right to do, even though such transfer might operate to hinder or delay other creditors, and Wherry intended it should have that effect. Mere knowledge of such intent is not sufficient to avoid the transaction, so far as Beedy is concerned. In other to produce such result, he must have actually participated in Wherry's fraudulent purpose.

We do not intend to follow counsel through the great multitude of cases which they have cited and discussed, as we have not through the intricate detail of the testimony commented upon. The reason stated in a few well-considered cases will answer our purpose. It may be regarded as entirely set-

tled in this state that a debtor may prefer one creditor over another, by direct payment or transfer of property, providing the property is taken in satisfaction or assumption of a just demand, and not as a mere screen to secure the property to himself. This doctrine is clearly expressed in *Sexton v. Anderson*, 95 Mo. 373, 8 S. W. 564, where the distinction is drawn between a mere purchaser and a preference. In pointing out the distinction, this court said: "Generally, a sale of property, with the intent on the part of the seller to thereby hinder, delay, or defraud his creditors, and knowledge of such intent on the part of the purchaser, renders the sale void, though the purchaser pay a valuable consideration for the property, because the purchase of the property under such circumstances amounts to a participation in the intended fraud. But a debtor, though unable to pay all of his creditors, may pay one or more to the exclusion of others, either in money or the transfer of property, and the favored creditor or creditors may accept such preference. If the preferred creditor in such case acts in good faith, and takes the money or the property for the sole purpose of saving a bona fide debt, mere knowledge that the debtor intended to hinder, delay or defraud his creditors does not render the transaction void as against the creditor taking a preference; for simple knowledge, under such circumstances, it is held, does not amount to a participation in the intended fraud." This doctrine again finds utterance in *Albert v. Besel*, 88 Mo. 152, where the interpleaders had assumed certain indebtedness of the defendant. In course of the opinion in that case it is said: "The evidence in general tends to show that the interpleaders paid for the goods the fair value, and that they purchased the same for the sole purpose of protecting themselves, because of their suretyship for Besel on the debts assumed. They had a perfect right to buy the goods for that purpose, though the purchase might operate to hinder and delay the other creditors in the collection of their demands, and though, to their knowledge, Besel intended the sale should have that effect, provided they did not participate in the fraudulent purpose of Besel." The case at bar does not fall within the doctrine applicable to a mere purchaser from an insolvent vendor, where, under the authorities, the purchaser's knowledge of the fraudulent intent on the part of the vendor makes the sale voidable at the instance of other creditors of the vendor, even though he did not actually participate in that intent. The evidence clearly brings this case within the principle announced in *Albert v. Besel* and *Sexton v. Anderson*, above cited, and kindred cases in this state. An examination of this class of cases will show that a transfer of property, as a preference by an insolvent debtor, to one or more of his creditors, in payment of a bona fide indebtedness, is governed by entirely different rules

than those which apply to an ordinary purchaser from an insolvent vendor. In the former class of cases, the favored creditor is not only not required to consult the interest of the other creditors of the insolvent fraudulent debtor, in accepting and taking property from him, but, in looking after his own interest, may utterly disregard them. The effect of any preference sought means, of necessity, that some other less fortunate creditor is to be hindered and delayed in the collection of his debt, and upon what principle the knowledge of that fact by the preferred creditors, or the further knowledge on his part that the debtor intended that the transaction should have that effect, should operate to avoid the transaction, is difficult to conceive. Where the right of preference, as in this state, is recognized, we cannot see how it is possible for one creditor, who gets nothing more from the debtor than sufficient to pay off, discharge, or settle his just claims, to commit a fraud against the rights of other creditors, or how he can be said to have participated with the debtor in the commission of a fraud.

The authorities cited by counsel for plaintiff in support of their contention are not deemed applicable or controlling where the transfer, as in this case, was a preference as distinguished from a mere purchase, and for this reason we have not commented on them. In this connection, it is also insisted by appellant that it devolved upon Beedy to show the good faith of the transaction between him and Wherry, whereby the farm in question was transferred to the former. This contention, we think, is clearly untenable. It has been uniformly held by the appellate courts of this state that the burden of proof always rests upon the party assailing the transaction for fraud.

The plaintiff alleges in his petition and seeks to show that the sale was fraudulent, and therefore void as to him. It was incumbent upon him, therefore, to show that the sale sought to be invalidated was fraudulent in point of fact. This precise question was before this division in the recent case of *Bank v. Worthington*, 145 Mo. 100, 46 S. W. 745, and there it was held the burden of proving the fraud was upon the plaintiff, who alleged its existence. Nor is the rule in this respect in any wise to be altered by means of the fact that in the transaction assailed one of the parties to it is shown to have undertaken to commit a fraud against the right of the plaintiff. The fact that Wherry has fraudulently intended, in this conveyance of his property to defendant, to hinder and defraud his other creditors, among whom was the plaintiff, does not operate to change the rule of evidence, or to relieve the plaintiff from making good the allegations of fraud against the defendant in connection with that transaction, or shift the burden upon the shoulders of defendant to show its honesty so far as concerns himself.

These cases are not distinguishable from the present case in its essential features. It is true, cases may be found holding that in the case of a mere purchaser from a fraudulent grantor, where the fraudulent purpose of the grantor is shown, it then becomes incumbent upon the purchaser to show payment of the consideration and the good faith of the transaction; yet we apprehend that such case does not arise in the state of facts here presented, and for that reason such cases are not applicable.

Again, Wherry's statements and admissions subsequent to the conveyance, in reference to the ownership of the farm, etc., were clearly incompetent, unless made in furtherance of a conspiracy to defraud his creditors. In order, however, to make such declarations competent on the ground of a conspiracy between Wherry, Beedy, and the Chappells to defraud the former's creditors, there must have been some evidence, aside from his declarations, to establish such conspiracy. As there is no evidence tending to prove the existence of such a conspiracy at the time the declarations were made, the statements of Wherry were the merest hearsay, and not admissible for any purpose. The only evidence relied upon to show such conspiracy between Beedy and Wherry consisted wholly of the declarations of Wherry. No rule is better settled than that a conspiracy cannot be established in the first instance by the declarations of one of the supposed conspirators. It is unnecessary, therefore, to further discuss or advert to the testimony concerning the declaration of Wherry.

Since, again, the uncontradicted evidence shows that at the time the conveyance was made the land in controversy was only worth \$8,400, and that an indebtedness in excess of the value of the land was paid by Beedy, it is not perceived why the failure to state in the deed the exact amount thus paid and assumed, as contended by appellant, can affect the fairness or good faith of the transaction. The mere fact that the consideration expressed in the deed is \$8,750, instead of the exact amount of the debts paid and assumed, is, under the circumstances of this case, wholly immaterial, as the debts paid and assumed by Beedy exceeded the highest value placed upon the farm by any of the witnesses testifying in the case. It would seem, therefore, that the recited consideration in no wise affected the validity of the transfer. The explanation of this transaction, so far as consideration is concerned, is perfectly consistent with honesty and fair dealing.

It is insisted with much earnestness by counsel for plaintiff that the transfer in question was also fraudulent on the part of Beedy, as shown by the continued possession of the farm by Wherry after its conveyance to Beedy and the Chappells, and for that reason should be set aside. While the circumstance that Wherry continued in possession

of the farm from 1886 to 1892, a period of about six years, unexplained, might tend to show that the defendants were not in good faith, the explanation and the reasons given therefor by both Wherry and Beedy seem fair and satisfactory. They testified that Wherry paid an annual rental of \$500 a year, besides keeping up the fences and repairs. Beedy testified that he applied the rents so received in payment of taxes, and interest on the McFadden judgment and mortgage, and the bank's note. Under the facts as narrated by the witnesses, the circuit court was amply warranted in finding that Wherry's possession was that of a mere renter, and therefore not fraudulent.

It is also contended that the assessment lists of 1889 and 1891 show that Wherry was the real owner of the farm. G. G. Valentine, the former assessor, testified that these lists were in the handwriting of Bowen, his deputy assessor, and Wherry testified that the assessment lists were handed to him by the deputy already filled out, and he just signed them, without knowing that the farm was embraced therein, and we think the court below was justified in finding that Wherry signed the assessment lists under a misapprehension, as explained by him, especially as the uncontradicted evidence shows that Beedy paid the taxes for this and subsequent years.

It is next contended that there was fraud and collusion between Wherry and Beedy in withholding the deed from record. *Bank v. Doran*, 100 Mo. 40, 18 S. W. 836, and *Bank v. Buck*, 123 Mo. 141, 27 S. W. 341, are a type of the cases relied on by counsel in support of this contention. While the deed was executed on November 3, 1886, and was not recorded at Warrensburg until November 12th following, there is no evidence whatever of any agreement or understanding to withhold the deed from record. The delay in recording the deed seems to have been occasioned by a mere oversight or neglect on Beedy's part, and not the result of any fraudulent purpose or collusive understanding with Wherry. There were no circumstances in connection with the failure to file the deed for record from which fraud can be inferred. The rule announced in *Bank v. Doran*, *supra*, and kindred cases to the same effect, cited by the plaintiff, is inapplicable here. The facts of the case at bar clearly distinguish it from those cases. In those cases it was held that an agreement by a mortgagee to withhold his mortgage from record is a fraud upon subsequent creditors. In the *Buck Case* there was an express agreement that the mortgage, which was in the form of an absolute deed, should not be filed for record, and that the existence thereof should be concealed, whereby the mortgagors were enabled to obtain credit from the plaintiff in that case for a large sum of money. But no such facts appear in this record. These cases come under review in *Bank v. Bohrer*, 138

Mo. 369, 39 S. W. 1047, when it was held that the mere withholding of a deed from record was not evidence of fraud. The court said: "It has always been held in this state that the title of a bona fide purchaser or mortgagee under a deed or mortgage not recorded is good against creditors at large, and is also good against sales under judgments and executions, if the deed or mortgage is duly recorded before such sales." There is no evidence in this record which shows knowledge on the part of Beedy that Wherry was obtaining credit on the faith of his ownership of the farm, or that the plaintiff in fact gave to him any credit whatever after the execution of his deed to Beedy and the Chappells. It is too clear for further discussion that the delay in recording the deed, under the circumstances disclosed by this record, in no wise misled the plaintiff, or affected the rights of any judgment creditors of Wherry. The court below, with the testifying personality of the witnesses before it and better opportunities for arriving at a correct conclusion upon the evidence than we have, found nothing in the case to militate against the good faith of Beedy, or from which his participation in the fraudulent purpose of Wherry can be inferred; and we are disposed to adopt that finding, especially as such finding is entirely justified by the evidence. Even though Beedy's fraudulent participation in the transfer was in some manner sustained by the evidence, the plaintiff was guilty of such laches in asserting his rights as to preclude a recovery.

This suit was not begun until October, 1895, nearly nine years after the execution of the deed in question, during which time the plaintiff lived in the vicinity, and knew that Beedy was claiming to own the farm under such deed, which he claims to have known all the time was a fraud, and never took any steps to assert his rights, until the construction of a railroad near this land enhanced its value to \$10,000. This conduct on the part of the plaintiff, in connection with other facts and circumstances shown by the record, effectually preclude him from relief in a court of equity. Where, as in this case, a party has slept upon his rights for the period of nine years, with knowledge of the fraudulent character of the deed sought to be invalidated, and allowed the opposite party to expend his money, or waits until the lands have greatly increased in value, either from such expenditure or otherwise, a court of equity might properly refuse to interfere, although the statute of limitations has not run. *Kelly v. Hurt*, 74 Mo. 565; *Bliss v. Prichard*, 67 Mo. 187; *Moreman v. Talbott*, 55 Mo. 397; *Landrum v. Bank*, 63 Mo. 56; *Hatcher v. Hatcher*, 189 Mo. 614, 39 S. W. 479. For the foregoing considerations, the judgment of the circuit court will be affirmed.

BRACE, P. J., and VALLIANT, J., concur;
MARSHALL, J., absent.

STATE ex rel. NUNNELEE, County Collector,
v. HORTON LAND & LUMBER CO. et al.
(Supreme Court of Missouri, Division No. 1.
March 29, 1901.)

TAXATION — MANUFACTURERS — LICENSE — STATEMENT OF PROPERTY — FAILURE TO MAKE BOND — BREACH — DAMAGES — ACTION — DEFENSES — PLEADING — SUFFICIENCY — EVIDENCE — INSTRUCTIONS.

1. Rev. St. 1889, §§ 6821, 6897, require all manufacturers to be licensed and taxed on all raw materials, finished product, and machinery; to give a bond for the payment of such tax; and file on the first Monday in June in each year a statement of the greatest aggregate amount of raw material and finished product on hand between the first Monday in March and the first Monday in June of the then current year, as well as all machinery. Sections 6905, 6907, provide that the bond of every person or firm failing to file such statement shall be deemed forfeited, and judgment be rendered against it for three times the amount of revenue due for the year, and costs. An action was commenced on such a bond, the petition alleging failure to file the statement required on the first Monday in June, 1896, and that the taxes for the year 1896 on the valuation of defendant's raw materials, finished products, and machinery were a certain amount, and praying judgment for three times that amount. *Held* proper to overrule defendant's objection to the introduction of testimony on the ground that no cause of action was stated, because the bond sued on covered taxes to accrue during the tax year beginning June 1, 1896, since the action was not for taxes or for damages for failure to pay taxes.

2. It was not error to admit evidence of the value of defendant's raw material and finished products on hand on any day between the first Monday in March and the first Monday in June, 1896, and of the machinery used in the business or owned on the 1st day of June, 1896.

3. The bond of defendant, duly executed and delivered to the collector, was sufficient evidence to prove that the license was delivered to it.

4. The evidence having tended to prove all the material allegations of the petition, it was not error to refuse defendant's declaration of law that the court sitting as a jury declares that under the law and the evidence the finding must be for defendant.

5. It was not error to refuse defendant's declaration that it was not liable if it was not engaged in the business of manufacturing, but had its property all levied on and sold under an execution prior to the 1st day of June, 1896; no such issue being presented by the pleadings.

6. The fact that defendant's property had changed hands before the 1st of June, 1896, would be no defense in an action to recover damages for its neglect to file the statement required by law.

Appeal from circuit court, Ripley county; John G. Wear, Judge.

Action by the state on a bond, on the relation of John H. Nunnelee, collector of Ripley county, against the Horton Land & Lumber Company and others. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

J. C. Sheppard, for appellants. Geo. W. Crowder, for respondent.

BRACE, P. J. By statute it is provided that "all manufacturers in this state shall

be licensed and taxed on all raw material and finished product, as well as all the tools, machinery and appliances used by them, in the same manner as is or may be provided by law for taxing and licensing merchants." Rev. St. 1889, § 6821. And by section 6897 of that revision it is provided that "any person, or copartnership of persons applying for a license to vend merchandise shall before he or they shall receive such license, execute a bond to the state with two or more good and sufficient sureties, who shall be freeholders at the time, conditioned that he or they will on or before the first day of November next following pay to the collector of the proper county the tax due upon such license, which bond shall be approved by the collector and his approval indorsed thereon." And by the next section the form of the bond is prescribed. The defendants, in pursuance of these statutory provisions, and in the form prescribed, executed and delivered to the collector their bond, as follows:

"Manufacturer's License Bond. Know all men by these presents that we, the Horton Land and Lumber Company, as principal, and L. A. Kelsey and W. H. Horton, as security, freeholders of the county of Ripley, are held and firmly bound unto the state of Missouri for the payment on the first day of November next, to the said collector of said county, of all taxes which may then be due from the principal in this bond for the twelve months ending the above-mentioned date upon their license as manufacturers, and in default of such payment to pay all damages and costs which may be adjudged against them by law. Given under our hands this 6th day of December, 1895. Horton Land and Lumber Company, I. D. Bell, Sec'y. Lewis A. Kelsey. W. H. Horton.

"Approved the 9th day of Dec., 1895. J. H. Nunnelee, Collector of Ripley County."

The statute further provides that on the first Monday in June in each year manufacturers shall file separately their sworn statement of the greatest aggregate amount of raw material and finished products which they may have on hand between the first Monday in March and the first Monday in June of the then current year on any one day between said times, as well as the tools, machinery, and appliances used in conducting their business or owned by them on the first day of June of each year. Rev. St. 1889, § 6821. It is then made the duty of the county clerk to enter an abstract of such statements in a book, the amount of each statement and the amount of each kind of taxes levied thereon, and on or before the 1st day of October to make out and deliver to the collector a copy of such abstract, taking his receipt therefor, and charging the collector with the amount of such taxes. Rev. St. 1889, § 6899. The law then provides that every person to whom such license shall have been granted "who has filed a correct statement as herein required, and failed to pay

the amount of revenue so owing, to the collector of the proper county, shall be deemed to have forfeited the bond given by him or them in virtue hereof, and judgment shall be rendered for the plaintiff in damages, for double the amount of such revenue and costs" (Rev. St. 1889, § 6904); and that "every such person or copartnership of persons who shall fail to file such statement at the time and in the manner required shall be deemed to have forfeited the bond given by him or them, in virtue of this chapter, and judgment shall be rendered for the plaintiff in damages for three times the amount of revenue which shall be found to be due for the year and costs" (section 6905); "that upon forfeiture of any bond as provided it shall be the duty of the collector of the proper county to institute suit without delay by some attorney to be selected by him, upon the bond forfeited against the principal and all sureties, jointly or severally, as may be deemed advisable; and the court in which the judgment shall be rendered, if judgment shall be for the plaintiff, shall tax as costs in the case, to be paid as other costs, a reasonable fee in favor of the attorney prosecuting the action" (section 6907).

This is an action by the collector on the bond aforesaid for damages under section 6905, the plaintiff charging in his petition that the defendant the said Horton Land & Lumber Company obtained a manufacturer's license on the 6th of December, 1895; that it was a corporation engaged in the business of manufacturing lumber during the months of March, April, and May, 1896; that the defendants executed and delivered the bond aforesaid; that said lumber company failed to file the statement required by statute as aforesaid; that "the greatest amount of the raw materials and finished products which said defendant the Horton Land & Lumber Company had on hand at any one time between the first Monday in March and the first Monday in June, 1896, was of the value of \$25,000, and that the tools, machinery, and appliances used in conducting its said business by it on the first Monday in June, 1896, amounted in valuation to \$24,872.35, and altogether in the aggregate amounted to \$49,872.35 in valuation of the raw material, finished products, and tools, machinery, and appliances. And plaintiff further states that on said greatest and aggregate amount in valuation there became due to the state of Missouri taxes in the following sums, at the lawful and established rate of taxation from the said defendant the Horton Land & Lumber Company, namely:

Year 1896. State revenue tax.....	\$ 74 81
" " State interest tax.....	40 87
" " County revenue tax.....	249 37
" " School tax	364 07
Interest since January 1, 1897.....	14 76
	<hr/>
	\$752 88

—All of which taxes remain due and unpaid, as fully as set forth in an itemized tax bill

under the hand of said Collector Nunnele herewith filed. Wherefore the plaintiff states, that the state of Missouri is damaged by the said failure of the said defendant the Horton Land & Lumber Company to pay said taxes to the amount thereof, \$752.88, and plaintiff prays judgment against said Horton Land & Lumber Company, and its securities on its said bond, Lewis A. Kelsey and W. H. Horton, for three times the amount of said revenue so due and unpaid, to wit, \$2,258.64, according to the statute made and provided for such cases; and also for the allowance to the plaintiff's attorney of \$100 as attorney's fees in this case, according to said statute." The answer was a general denial. The case was tried by the court without a jury.

1. At the trial the defendants objected to the introduction of any evidence on the ground that the petition did not state facts sufficient to constitute a cause of action. The overruling of this objection is assigned as error, the point made being "that the petition states that the defendant the Horton Land & Lumber Company was engaged as a manufacturer during the months of March, April, and May, 1896, when the bond sued on covered taxes which were to accrue, if at all, during the tax year beginning June 1, 1896. This, as well as other points made for reversal, are founded upon a misconception of the nature of the action. This is not an action for the recovery of the taxes of 1896, nor for the recovery of damages, under section 6904, for failure to pay the amount of the taxes for that year, levied in accordance with a correct statement filed by the lumber company as required by law, but for damages under section 6905, for the failure of the lumber company to file the statement required by law, whereby such taxes might have been assessed, levied, and collected in the manner provided by law. The character of the action is determined by the facts stated in the petition, and not by the prayer for relief. The bond covered not only damages under section 6904, for failure to pay such taxes when so assessed and levied, but also damages under section 6905, for failure to file the proper statement whereby they might have been so assessed, levied, and collected. Hence the court committed no error in overruling defendants' objection to the introduction of evidence in support of the petition, and committed no error in admitting evidence tending to prove the value of raw material and finished products on hand on any one day between the first Monday in March and the first Monday in June, 1896, and of the tools, machinery, and appliances used in conducting their business, or owned by them, on the 1st day of June, 1896.

2. At the close of the evidence the defendants asked the court to declare the law of the case as follows: "(1) The court, sitting as a jury, declares the law to be that under the law and the evidence in this case the

finding must be for the defendants. (2) The court further declares the law to be that, if it believes and finds from the evidence that the defendant the Horton Land & Lumber Company was not engaged in the business of manufacturing, but had its property all levied upon and sold under an execution sale prior to the 1st day of June, 1896, then the finding should be for the defendants." The court refused to so declare, and this refusal is assigned as error. The evidence tended to prove all the material allegations of the petition, and, if the delivery of the license to the lumber company be deemed a material allegation, the bond itself, duly executed and delivered by the defendants to the collector, was sufficient evidence of that fact; so there was no failure of proof, and the court committed no error in refusing defendants' declaration No. 1.

3. Defendants' declaration No. 2 is not predicated on any issue made by the pleadings, and was evidently drawn on the misconception of the nature of the action to which we have referred. Issues cannot be tendered by the evidence in a case, and, if they could, the fact that the defendant's property had changed hands before the 1st of June, 1896, if such was the fact,—of which there was slight evidence brought out on a recross-examination of one of plaintiff's witnesses,—afforded no defense for defendant's neglect to file the statement required by law, to recover damages for which this action was brought under the statute, and not for taxes on property of the defendant for the fiscal year beginning June 1, 1896, nor for damages for nonpayment of such taxes. The court found the issues for the plaintiff, and rendered judgment in his favor against the defendants for the sum of \$758.66 and costs and for \$75 attorney's fee. We find no error of which defendants can complain, and the judgment of the circuit court will be affirmed. All concur, except MARSHALL, J., absent.

KANSAS CITY S. B. RY. CO. v. McELROY.
(Supreme Court of Missouri, Division No. 1.
March 29, 1901.)

EMINENT DOMAIN — RAILROADS — RIGHT OF WAY — INSTRUCTIONS — REASSESSMENT OF DAMAGES — EVIDENCE — REPORT OF COMMISSIONERS — APPEAL — REVIEW — ARGUMENT OF COUNSEL — COMMENTS ON EVIDENCE.

1. In condemnation proceedings, by a railroad the company claimed that defendant's land not appropriated was benefited by switch connection. The court charged that the fact that other abutting railroad lands were afforded similar switch connection did not prevent the jury from considering such connections as of peculiar benefit to defendant's lands, and, if the jury believed, after allowing the value of the land taken, and the peculiar benefits to that remaining, that the value of the land not taken was as great with the railroad as the whole tract was without the railroad, they should allow no damages. *Held*, that it was not error to refuse to charge that, if the jury believed

that defendant's land had been enhanced in value by the railroad so as to make switch connections possible, such increase was a benefit to be deducted from any damages otherwise sustained, and that the phrase "peculiar benefits" meant any increase in the value of defendant's land caused by the construction of the railroad; since the instructions refused were, in effect, a reiteration of those given.

2. In a proceeding before a jury to reassess damages awarded by commissioners for the condemnation of lands by a railroad company, where the amount awarded by the commissioners had been paid, and possession taken, it was not error to admit the report of the commissioners in evidence when the jury were instructed that they should not allow the amount awarded by the commissioners to influence their judgment as to the measure of damages, since it was necessary for the jury to know the amount of the commissioners' award in order that credit might be given plaintiff for the amount paid, and interest might be awarded defendant for the excess in case the damages found by the jury should exceed those awarded by the commissioners.

3. Where improper remarks of counsel to the jury are made the basis of an application for a new trial, but are not made a part of the record otherwise than by reference in affidavits filed to support the motion, which is opposed by counter affidavits by the counsel alleged to have made the improper statements, denying that he made them, the trial judge has had such superior opportunities for observation and knowledge concerning the disputed facts that the appellate court will consider itself bound by the decision of the trial court in denying the motion for a new trial.

Error to circuit court, Jackson county; J. H. Slover, Judge.

Condemnation proceeding by the Kansas City Suburban Belt Railway Company against Hugh L. McElroy. From a judgment awarding defendant damages, plaintiff brings error. Affirmed.

Lathrop, Morrow, Fox & Moore, for plaintiff in error. Holmes & Perry, for defendant in error.

ROBINSON, J. This proceeding was instituted by plaintiff to condemn a strip of land 36 feet wide for its railroad through four lots in Kansas City owned by defendant. The condemnation commissioners appointed by the court filed their report assessing the sum of \$8,000 as damages to the defendant, McElroy, the owner of the lots, to which report both the plaintiff and defendant duly filed exceptions. A trial by a jury was had in the circuit court in April, 1896, which again resulted in a verdict assessing defendant's damages at \$8,000. To reverse the judgment entered upon that verdict, plaintiff has sued out a writ of error from this court.

Although numerous formal assignments of errors have been made, the brief filed by counsel for plaintiff in error shows that all have been abandoned except the two following: First, "the court erred in refusing to instruct that benefits to the property in controversy by reason of switch facilities were special benefits"; and, second, "the court erred in admitting in evidence the report of the condemnation commissioners, and in permit-

ting counsel to comment upon it in his closing argument to the jury." Plaintiff's first assignment of error is based upon the action of the trial court in refusing to give instructions numbered 8 and 9 asked by it at the close of the testimony, a copy of which is here inserted: "No. 9. If the jury believes from the evidence that all or any portion of McElroy's lands between Main and Delaware streets have been enhanced in their market value by reason of abutting upon the railroad as built, so as to make it possible to run switch tracks from the railroad to different portions of his lands without crossing the lands of other people, then such enhancement in the market value is a peculiar benefit, which should be deducted from any damages which he might otherwise have sustained." "No. 8. The court instructs the jury that the phrase 'peculiar benefits,' as used in these instructions, means any enhancement of or increase in the market value of McElroy's lands, or any part of them, by reason of the location, construction, and operation of the railroad over them as it is located, which is not shared by other lands in that vicinity which are not touched by the railroad." While the instructions, within and of themselves, announce no improper rule of law that would make them for that reason objectionable, several other instructions were given to the jury declaring the law announced therein in substantial terms; and these instructions, if given, would have been but the merest repetition of the same legal proposition, tending by their reiteration to confuse, rather than to assist, the jury in determining the real issues involved. The court, at plaintiff's instance, gave instructions 3, 4, 5, 7, and 11 below, which explain themselves, and make further comment upon them unnecessary: "(3) The court instructs the jury that the fact that other lands abutting on this railroad may be afforded the same or similar opportunities of switch connection as are afforded to the lands of McElroy does not in law prevent the jury from considering, in connection with all the other facts and circumstances in evidence, such opportunities for switch connections as of peculiar benefit to McElroy's lands, if in fact they increased the market value of his lands, or any part of them. (4) If the jury find from the evidence that the McElroy lands did not abut on Second street, and that a switch track could not be built to his lands from Second street without crossing lands belonging to some other person or persons, then the jury must consider that his said lands did not have any switch privileges from the railroad on Second street. (5) In determining whether or not the lands of McElroy not taken by the right of way can make switch connections with the railroad, the jury should not confine themselves to the present grade or elevation of the property, but should consider it at any other grade or elevation to which it is reasonably susceptible of being reduced." "(7)

The court instructs the jury that if, after making due allowance for the value of the land taken, and after deducting therefrom the said peculiar benefits, if any, they believe that the market value of the land not taken was as great with the railroad there as the whole tract was without the railroad, then the defendant, McElroy, is not entitled to any damages, and the jury should not allow any." "(11) If the jury find that the peculiar benefits, if any, to this property, equal or exceed the value of the land taken, and the damage, if any, to that not taken, then their verdict should be in the following form: 'We, the jury, find that the defendant, McElroy, is not damaged by reason of the location, construction, and operation of the railroad over his lands, and we assess no damages in his favor on account thereof. —, Foreman.' " In view of the evidence in the case, and the general conduct of the trial, the instructions, as given, were not possible of misconstruction, and no good result would have been subserved from the further instructing of the jury as to the meaning of the phrase "benefits," or that "switch facilities" afforded to defendant's land by the construction of plaintiff's railroad, whereby it was increased in value, should be considered as special benefits. "Switch facilities" constituted the only claim of peculiar benefit suggested in the evidence or by the record. In no other particular was it suggested that defendant's lands not taken were benefited by the plaintiff's railroad running through it. In fact, whenever the word "benefit" was used, it could not have been understood by the jury as referring to anything other than to "switch facilities." The instructions, as given, when taken together, and considered in the light of the facts of the case, declare the law for plaintiff as favorable as it had the right to ask. They correctly define peculiar benefits, and authorize the jury to consider any switch facilities afforded by the railroad over defendant's property as "peculiar benefits"; and, as said before, no especial good to plaintiff could reasonably have been anticipated from a repetition of the same legal propositions, clothed in the new form of the refused instructions numbered 8 and 9 asked by plaintiff. This court has repeatedly held that, when the instruction given fully covers the law applicable to the facts of a case, the refusal of other instructions asked will not be error, although the refused instructions may have stated correct applicatory law. Certainly, no harm was occasioned to plaintiff in this case by reason of the court's action in refusing to give to the jury its instructions numbered 8 and 9 as requested.

To appellant's second assignment of error—that the court improperly admitted in evidence the report of the commissioners, and in permitting defendant's counsel to comment upon it in his closing argument to the jury—it would be a sufficient answer to say,

if a wrong had been done by both acts, its evil consequence must have been effectively removed by the court's clear and unmistakable instruction to the jury, whereby they were charged that, "in estimating the damages, if any, done to defendant's land by reason of the location of the plaintiff's railroad over and through it, you will not consider, or be in any way influenced by, the fact that the commissioners allowed the defendant the damages stated in their report read to you." While realizing that the effort to correct by instruction the influence produced by prejudicial facts improperly communicated to the jury is oftentimes barren of proper results, there is nothing in the character of the facts disclosed by the report of the commissioners, or the comment thereon by counsel for defendant, calculated to produce that ineradicable influence upon the minds of the jury, favorable to defendant or his cause, or unfavorable to plaintiff or its cause, which the merest suggestion from the court would not remove. Every improper fact that reaches a jury during the progress of a trial cannot be said to awaken an inextinguishable prejudice in its mind, favorable to the party that injects it, for, if so, then the only remedy for the trial court, when an improper fact had once gotten to the jury, would be to grant a new hearing,—a proposition so productive of evil results, and so easy of abuse, that it could not be sanctioned for a moment. It is the peculiar character of the fact, or the fact at a peculiar time, that causes appellate courts to feel and say, as they sometimes do, that the prejudicial fact, although instructed against, was not removed, and for that reason order a reversal of the judgment which may have been influenced by the improper and hurtful fact. But the simple fact that the commissioners' estimate of damages, read from in cold type, was given to the jury (called upon to reassess the damages to the same property), is not a fact of a character calculated to awaken that unalterable prejudice or that ungovernable passion in the minds of the jurors that an instruction, as given by the court in this case, would not remove it. On behalf of respondent it is contended, however,—and, we think, properly,—that for particular purposes the reading of the report of the commissioner to the jury is not subject to the criticism leveled against it by appellant, and was not of itself improper, although it is conceded that the jury had no right to be influenced by or to consider the amount of the commissioners' award as a basis for arriving at their estimate of the damages actually sustained by defendant. If it be borne in mind that the plaintiff had paid into court, in accordance with the award of the commissioners, \$8,000, for the use of defendant, and had taken possession of defendant's land, and that defendant, although appealing from the amount of that award, had received same from the clerk pending

his appeal, as it was his right to do, and that at the retrial in the circuit court the evidence introduced by him tended to show that his damages were largely in excess of the award of the commissioners, the amount of that award might become a fact that the jury should know to estimate properly the amount of verdict they should return for the defendant. As defendant would be entitled to interest on any excess of damages the jury might determine he was entitled to receive above the sum which he had secured on account of the commissioners' award, it was proper that the amount of that award be given to them for the purpose of making that computation. And again, as the plaintiff would be entitled to a credit for the amount of such award so received by defendant against any damages the jury might believe he had sustained on account of the taking of his land by plaintiff in excess of the amount of the award, it was a fact alike essential to plaintiff as the defendant that the jury be informed as to the amount of the commissioners' award, that a verdict be entered for the proper amount, and not for the full amount of the estimate made by them of defendant's damages. The court in this case not only instructed the jury to what extent it was improper for them to consider or be influenced by the amount of the award of the commissioners' report, but by the following instruction it gave to them explicit directions as to how the amount of that award should be used by them in the making up of their verdict: "The court instructs the jury that before the plaintiff took possession of the land condemned in this case it was required to pay to the defendant, McElroy, the amount of damages allowed him by the commissioners, which in this case was \$8,000; and it is admitted that said McElroy has received the same, and that the plaintiff has taken possession of said land; and if, under the instructions of the court, you should find that the defendant, McElroy, has sustained damages by reason of said taking in an amount in excess of said sum of \$8,000, you may allow interest on such excess at the rate of six per cent. per annum from the time at which said land was taken, in September, 1892, and your verdict should be for the total amount of damages thus found by the jury, after deducting the said sum of \$8,000 so paid to the defendant, and your verdict should be in the following form: 'We, the jury, find that the defendant, McElroy, has sustained damages by reason of the taking of his land in controversy in this case by the plaintiff, in the total sum of — dollars, and from this sum we have deducted the sum of \$8,000 heretofore received by said defendant, McElroy, leaving a balance still due him on account of said damages of the sum of — dollars. —, Foreman.'" The instructions in this case, when taken together, and read as a whole, are most complete, and it is diffi-

cult to conceive how a jury could have been misled by them.

Appellant's further contention that one of defendant's counsel was permitted to comment upon the report of the commissioners' award before the jury, unrebuked by the court, is not very satisfactorily presented. The comment of the counsel is not made part of the record otherwise than by reference to it in the affidavits filed to support appellant's motion for a new trial, and against the correctness of the record as thus presented defendant's counsel, charged with having improperly commented upon the amount of the commissioners' award to the jury, files the following counter or explanatory affidavit: "Affiant says that he made an argument in the case to the jury, and in the course of his argument he alluded to the fact that there was great diversity in the testimony of the experts as to the value of the real estate; and affiant referred especially to the following instruction, which had been given by the court: 'The court instructs the jury that they are not bound by the opinion of the witnesses as to the value, damages, or benefits, but should consider such opinions in connection with the location of the property, its facilities as to ingress and egress, its position relative to the abutting streets, together with all the facts and circumstances adduced in evidence, and from these form their own opinions as to the values, damages, and benefits.' And affiant then referred to the fact that the witnesses for the defendant had placed a value on the property at from \$150 to \$200 per foot, while the witnesses that had been introduced on the part of the plaintiff had placed it very much lower, and in many instances as low as \$50 a foot; and affiant then referred to the fact that the opinion of experts could not be much relied on, and he then mentioned the fact that it appeared that the commissioners had put a value on this ground of \$8,000, and he referred to the fact that such men as Henry C. Harper and others constituted that commission; and, when objection was made to this, affiant followed it up immediately, when he was interrupted, and said that his purpose in referring to all these matters was simply to illustrate the diversity of opinion in regard to values, and that for that reason it had been thought wise to let the jury themselves inspect the property. Affiant distinctly referred to the fact that the court had instructed the jury that they were not to be controlled by the amount awarded by the commissioners; and affiant distinctly stated, when reference was made to that in connection with the other values, that it was simply an illustration of the uncertainty of what was called 'expert testimony.' * * * Affiant says that he did not use the language that the jury were 'bound to consider' the report of the commissioners in awarding Mr. McElroy \$8,000, but that he did distinctly state that the court had instructed them that

they were not to consider, or be in any way influenced by, such report." The trial court, with these affidavits in support of and against the motion for new trial upon that question before it, and with its knowledge and observation of what actually took place during the closing argument by defendant's counsel, determined that plaintiff's rights had not been prejudiced by anything that occurred at that time, or during the progress of the case, and overruled plaintiff's motion for a new trial, and to its action in the premises we feel bound at this time. In the determination of a motion for new trial, involving the consideration of conflicting or discordant facts, we must be bound by the action of the trial court, as upon its finding and determination of any question of fact made during the trial of the cause. But if it be conceded now, as in the discussion of the other features of appellant's second assignment of error, that the reading to the jury the report of the commissioner was wrong, and that the comment of defendant's counsel in his closing argument to the jury upon the amount of that award was made as appellant contends, the evil of both these errors was cured by the court's instruction, above quoted, whereby the jury were told that in estimating the damages, if any, done to defendant's land by reason of the location of plaintiff's railroad over and through it, they would not consider, or be in any way influenced by, the fact that the commissioners allowed to defendant the damages stated in this report. If the amount of the commissioners' award had been eliminated by proper instructions from the consideration of the jury, the comment upon the existence of this fact by the counsel of defendant would likewise be ignored by the jury in following out the direction of that instruction. Finding no substantial error committed against the rights of appellant, the judgment of the trial court is affirmed. All concur, except MARSHALL, J., absent.

ANDERSON v. UNION TERMINAL R. CO. et al.

(Supreme Court of Missouri, Division No. 1.
Dec. 11, 1900.)

RAILROADS—ACCIDENT ON TRACKS—CONTRIBUTORY NEGLIGENCE—PROXIMATE CAUSE—NEGLIGENCE—ACTION FOR DAMAGES—EVIDENCE—ADMISSIBILITY—HARMLESS ERROR—INSTRUCTIONS.

1. It is error, in an action against a railroad for injuries received in an accident on its tracks in a city street, to permit ordinances regulating the manner of operating such lines therein to be given in evidence, without showing that they were accepted by the company.

2. The admission of erroneous evidence in a jury case is harmless error, where the court afterwards instructs that such evidence should be disregarded.

3. Where a witness for plaintiff testifies on direct examination as to statements made by defendant, and testifies on cross-examination

as to similar statements made by plaintiff's mother and sister, the plaintiff cannot contradict such latter statements, since he made the witness his own concerning the conversation with the mother and sister.

4. Where a railroad negligently allows a pile of cinders to remain by the side of its tracks, and a boy 9 years old stumbles over it and falls under a train, without negligence on his part, the negligence of the company is the proximate cause of the accident.

5. Where a railroad company maintaining tracks in a city street, and required to maintain the street in repair for 20 years, leases its line under a contract requiring the lessee to maintain the tracks, a condition therein that the lessor renounces all duty to the public vitiates the lease; and hence the lessor is liable for injuries resulting from the negligent act of the lessee to allow an obstruction of the street.

6. Where the answer of a railroad company owning a railroad in a city street admits placing a pile of cinders in a street, which caused the injury complained of, and the evidence shows that the cinders were placed there by a lessee which operated the road for the purpose of repairing the track, but that such repairs were paid for by defendant, it is not error to refuse to sustain defendant's demurrer to the evidence based on the ground that it is not liable for the acts of the lessee.

7. Plaintiff was a boy 9 years of age, and his evidence showed that he was injured while attempting to cross a railroad track on a city street, and by falling over a pile of cinders on the tracks of the company and rolling under the train while attempting to back away from the track in order to get out of the way of a train. Plaintiff saw the train at a considerable distance before he started towards the track. *Held*, in consideration of the boy's age, that it was not error to submit the question of contributory negligence to the jury.

8. Where an instruction given at plaintiff's request lacks a necessary element, such error is cured by an instruction, as given at defendant's request, which supplies such element.

9. An instruction in an action against a railroad for an injury received on its tracks is not erroneous because it authorizes a recovery if defendant's negligence was the cause of the injury, though "proximate cause" is the more accurate term.

10. An instruction that negligence is the want of ordinary care, which is the care which is reasonably to be expected from an ordinarily prudent man in view of all the circumstances, is not erroneous, in not stating that the care should be the same as required of such a man under like circumstances, since there is no substantial difference in the meaning.

11. Where the evidence in an action against a railroad company shows that the injury complained of was caused by plaintiff falling over a pile of cinders while backing away from a train, and there is no evidence that he ever faced the cinders, it is not error to refuse to instruct that a verdict should be rendered for defendant if the cinders could have been easily seen by a boy of plaintiff's age while approaching and facing them.

12. Where the defendant in an action against a railroad company for an injury received on its tracks asks instructions submitting the question whether the plaintiff's age and capacity were sufficient to require him to do certain acts, it is not error to refuse instructions that the failure to perform such acts will prevent a recovery.

13. The refusal of requested instructions is not error, where the subjects to which they relate are fully covered by instructions given.

14. The statement by counsel for plaintiff to the jury, in an action against a railroad company for an injury on its tracks, that the defendant was a "lawbreaker from the jump," is not sufficient to warrant a reversal of a judgment for plaintiff, where all the statements made by counsel are not shown by the record.

15. A petition in an action against a railroad company for injuries received on its tracks in a city street, which alleges that the company negligently maintained a pile of cinders which made the highway unsafe and caused the injury, will authorize a recovery at common law for defendant's negligence, though it is also alleged that the latter was violating an ordinance.

Appeal from circuit court, Jackson county; J. H. Slover, Judge.

Action by Otto Anderson, by next friend, against the Union Terminal Railroad Company and another. From a judgment in favor of plaintiff, defendants appeal. *Affirmed*.

Trimble & Braley, Edwin Silver, and Lathrop, Morrow, Fox & Moore, for appellants. Ellison & Turpin and Frank Hagerman, for respondent.

ROBINSON, J. This action is brought by the plaintiff, Otto Anderson, a minor, by his next friend, against the Union Terminal Railroad Company and the Kansas City Suburban Belt Railroad Company, for personal injuries received by him on December 7, 1895, on Ohio avenue, between Wood street and Armstrong avenue, in Kansas City, Kan. The injury, it is claimed, was occasioned through the alleged negligence of defendants in placing upon and maintaining in said street a pile of cinders and ashes. The cause was tried before a jury, and plaintiff recovered a judgment of \$6,500. From this judgment defendants appealed.

The defendants answered separately. Their answers, however, set up the same defenses. After admitting the incorporation of defendants, and generally denying the other allegations of the petition, the answers averred, in substance: First. That the track was laid under Ordinance 2164 of Kansas City, Kan.; that it was new, unfinished, and incomplete, and necessary to be ballasted and surfaced, and to accomplish such purpose the Union Terminal Railroad Company a short time before the injury in question caused to be scattered beside and along the track on Ohio avenue cinders, which were afterwards used for ballasting and surfacing same, but that same at no time constituted an obstruction to travel. Second. The plaintiff was guilty of contributory negligence, in that he negligently approached so near the track without looking to see or listening to hear whether the train was approaching. Third. That plaintiff's injuries were caused by his attempt to climb upon a moving train, in violation of Ordinance 54, prohibiting such acts. The reply was a general denial of the new matter set forth in the answer. Briefly stated, the records present substantially the following case: The Terminal Company constructed and owned a railroad track running at grade, east and west, in the center of Ohio avenue, in Kansas City, Kan. A double-track cable street railway was operated upon James street, which runs north and south, crossing Ohio avenue at right angles. The cable cars crossed the Ter-

minal Company's track at grade about every two minutes. The next parallel street west of James is Wood or First street, upon which were operated, at grade, the tracks of the Kansas City, Northwestern, and Chicago Great Western Railroads. The next parallel street to Wood was Armstrong avenue, or Second street. Between Armstrong avenue and Wood street the Terminal Company maintains a track on the south side of the street. The Suburban Company was organized on July 13, 1892, by a consolidation, under the laws of this state, of the Consolidated Terminal Railway Company and the Kansas City Suburban Belt Railway Company. Prior to the consolidation, however, the Terminal Company leased its road to the Consolidated Terminal Railway Company, and the latter agreed to maintain and operate the same. The evidence discloses that the railroad in question was constructed and put in operation in 1892 or 1893. The ordinance by virtue of which defendants occupied the street with a railroad contained a grant to the Terminal Company and its assigns of the right to maintain and operate a road upon condition that the railroad company "shall plank and maintain all crossings of streets and alleys now laid out, or that may hereafter be laid out, across the tracks of said company, with three-inch oak plank, for the full width of said street and alleys, between the rails of its tracks, and for the space of three feet on the outside of the rail of its track, and also where said railway is built on Ohio avenue, said railroad shall plank the space between its tracks, and eighteen inches on either side thereof, the entire length of Ohio avenue occupied by said railroad except where said railway crosses streets and alleys, it shall be planked as aforesaid, for the space of three feet on the outside of the track." It seems that this condition of the franchise was never complied with. A day or two before the accident in question the Suburban Company hauled a lot of cinders and dumped them at the side of the track on Ohio avenue, between Wood street and Armstrong avenue, and permitted them to remain in sloping piles, just as dumped from the train. Although this work was done by the Suburban Company, yet it appears that the expenses thereof were charged up to and paid by the Terminal Company. There was evidence tending to show that it was negligence in defendants to leave the cinders in the condition in which they were placed. It further appears that the plaintiff, a lad between 9 and 10 years of age, lived on the west side of Wood street, about 50 feet from the corner of Ohio avenue. The lot, however, extended to the alley between Wood street and Armstrong avenue. He had been down watching boys skating on a pond a short distance east of James street, and left there for his home, intending to go in at the alley. He passed along the south side of Ohio avenue until just after he crossed Wood street, when he started to cross Ohio avenue

to the opening of the alley leading to his home. When he left the pond the Suburban train was switching in that vicinity. It was the custom for trains to stop before crossing the railroad track on James and Wood streets, to enable the trainmen to go forward to see if the crossing was clear. Just after the plaintiff crossed James street he looked back, and saw the train still switching. After he had crossed Wood street he looked again back to the east, and saw the train nearing James street; thus making it necessary for the train to stop twice before it passed Wood street, if it observed the custom of flagging trains that might be passing on the cross streets. After crossing Wood street he started to cross Ohio avenue, and reached a point within one or two steps of the track, when he looked again to the east, and saw the train approaching and within 15 or 20 feet of him. The engine was at the rear of the train of six or seven cars, pushing them, and no employé was at the front or west end on the lookout, though the rules of the company require it. Thinking there was not time to cross in front of the moving train in safety, the boy stepped back, in order, as he says, to get out of the way of the train; but as he did so he stumbled against and fell over one of the cinder piles, which he says he had not noticed, and which had not been leveled, but had been left three or four feet high, just as it had been dumped from the car by defendants. When he fell, he says, he tried to scramble out of the way, and slipped down off of the cinder pile, till one leg slipped under the moving train and was cut off. The other facts necessary to be stated will appear later on in the opinion.

The court below permitted plaintiff, against defendants' objection, to read in evidence section 3 of Ordinance 833 of Kansas City, Kan., making it unlawful to deposit cinders in the street, and Ordinance No. 522, prohibiting the backing of a train without a watchman at the end, requiring the ringing of the bell on all moving trains, and limiting the rate of speed to six miles an hour, without any averment in the petition of the acceptance of said ordinances by the defendants. The court, however, at the close of the evidence withdrew said ordinances by an instruction, and directed the jury to disregard the same. It is contended by defendants that under the rulings of this court in *Sanders v. Railway Co.*, 48 S. W. 855, and *Byington v. Railroad Co.*, 49 S. W. 877, the court below erred in permitting plaintiff to read the ordinances in evidence without an allegation that defendants had accepted the same, and that the instruction given by the court at the conclusion of the evidence, directing the jury to disregard the ordinances, did not cure the error complained of. The admission of the ordinances, under the rulings of this court in the above cases, was undoubtedly erroneous. But, as the objectionable evidence had been eliminated from the case by instruction, the error in their

admission was cured. It is well settled in this state that, where erroneous evidence has been admitted during the trial, the error in its admission may be cured by afterwards withdrawing the objectionable evidence from the jury. *Stavinow v. Insurance Co.*, 43 Mo. App. 513; *O'Mellia v. Railroad Co.*, 115 Mo. 205, 21 S. W. 503; *McGinnis v. Loring*, 126 Mo. 404, 28 S. W. 750. In *Stephens v. Railroad Co.*, 96 Mo. 207, 9 S. W. 589,—an action for personal injuries sustained by an employé while acting as track repairer,—it was held that the court may exclude improper evidence, and when this is done the fact that such objectionable evidence was heard by the jury will not operate as a reversal of the judgment. Particularly is that so where nothing appears to indicate that the verdict was in any way affected by it.

Miss Head was introduced as a witness by defendants, and testified, in effect, that about six or seven weeks before the trial she met the plaintiff on his way home from school, and had a conversation with him touching the accident; that she inquired of him how the accident occurred, and he replied that he was jumping on the car, and stumbled, and was thrown under in some way, and his leg cut off. Subsequently, on cross-examination, plaintiff's counsel brought out the fact that some time after the accident Miss Head, who had been plaintiff's school-teacher, went to his home, and saw him and his mother and sister. The witness was then asked by counsel for plaintiff if she "found out the same thing that time," to which the witness answered, "The mother stated the same thing to me that day." The witness further stated, in response to the question of plaintiff's counsel, that Hulda Anderson (plaintiff's sister) was also present at the time of the conversation referred to. Subsequently, during the course of plaintiff's testimony in rebuttal, his mother and sister were both called as witnesses, and, against the objection of defendants, were permitted to contradict the evidence brought out on the cross-examination of Miss Head. It is earnestly insisted that the court below erred in permitting the plaintiff's mother and sister to contradict Miss Head as to the conversation she testified to during the visit to plaintiff's home. We are of the opinion that plaintiff made Miss Head his own witness as to what occurred on the occasion of the visit to plaintiff's home. The court therefore erred in permitting Mrs. Anderson and her daughter to contradict Miss Head's statement by disproving the conversation with Miss Anderson as testified to by Miss Head. *State v. Branch* (Mo. Sup.) 52 S. W. 391. The error, however, in the admission of this testimony of Mrs. Anderson and her daughter, as in the instance of the introduction of the ordinances, under the circumstances, was, we think, cured by the instruction given by the court withdrawing the objectionable testimony from the jury, and directing them to disregard it.

Defendants next contend that, in so far as concerned negligence in the maintenance of the cinder pile, it was not the proximate cause of the injury. As said above, there was evidence tending to show defendants' negligent maintenance of the cinder pile. If, therefore, the pile of cinders was negligently maintained, and the plaintiff, without fault on his part, was passing along the street, and stumbled over the same, so that his leg passed under the moving train operated by the party so negligently obstructing the street, it cannot be said that such negligence was not the proximate cause of the injury. This point will therefore be ruled against defendants.

It is also claimed that the trial court committed error in refusing instruction No. 3 asked for by defendant the Terminal Company, in the nature of a demurrer to the evidence; the point being that the latter company was not guilty of any negligence, as the cinders in question were actually placed upon the street by the Suburban Company. By its franchise it became obligatory on the Terminal Company to maintain its track for the period of 20 years, and, as a condition to the exercise of the franchise, it was required to plank the track between and outside of the rails. In leasing to the Consolidated Terminal Company, which is one of the constituents of the Suburban Company, the latter company agreed to maintain the track; but by a paragraph in the lease the Terminal Company renounced all its duties to the public, thereby violating the lease. Consequently the lessor remains liable for the acts of the lessee. Aside from this, however, the answer of the Terminal Company admits that it placed the cinders on the street for the purpose of ballasting and surfacing up the track; and by an admission made during the trial it appeared that the work was actually done by the Suburban Company, but paid for by the Terminal Company. Under these circumstances, the Terminal Company, which by its answer says that it placed the cinders on the street for its own purpose, is undoubtedly liable.

It is next insisted that the act of plaintiff (having the intelligence, experience, knowledge, and general capacity he is shown by the evidence to possess) in approaching so near the track without looking back to see if the train was coming, and also in stepping backward from the track to avoid collision on discovery of the train close upon him, until he fell over the cinder pile, was such contributory negligence as precluded a recovery, and consequently the court below erred in giving plaintiff's fourth instruction, to the effect that if the jury should find that plaintiff was a boy of immature age and had not the capacity of an adult, and that he exercised such care as ought reasonably to have been expected from one of his age and capacity, then he was not guilty of contributory negligence. The testimony of plaintiff

and his witnesses shows that the Terminal track was at the grade on Ohio avenue, running from east to west. On James street, crossing Ohio avenue at right angles and at grade, was a double-track cable street railway. These trains were running every one or two minutes. Wood street, one block west of James, also crossed Ohio avenue at right angles, and upon the same were the tracks of another railroad, also crossing at grade. The next street west, and paralleling Wood, is Armstrong avenue. At James and Wood street there were no watchmen. So, when defendant's train would cross these streets on the grade crossing of other roads, it was necessary for the train to stop and have one of its employes go ahead, to see if the way was clear, before signaling the train to cross. This took about two minutes at each crossing. After plaintiff crossed James street on his way home he saw the train switching several blocks distant. There was nothing in this to indicate that the train was approaching. When plaintiff got to Wood street, he said, he looked again, and the train was then near James street. After going a short distance he started to cross Ohio avenue, and when he got within one or two steps of the track he saw the train within 10 or 20 feet of him, and, thinking that it was dangerous to cross in front of it, he stepped backward, and stumbled over a cinder pile, which he says he had not seen and did not know was there; and as he fell he attempted to scramble out of the way, but slipped off the pile in such a way that one of his legs was caught and cut off by the passing train on defendant's road. On the other hand, the defendant's theory, based on the testimony of two of its employes (Rush and Hunter), is that plaintiff, with another boy, stood at a car on the side track near Wood street, and, as it passed, plaintiff ran towards it and tried to jump on the second car ahead of the engine,—the fourth or fifth from the end,—but in doing so he lost his footing, fell under the cars several feet east of the cinder pile, and was not picked up at the cinder pile, as stated by plaintiff's witnesses, but several feet east thereof, near where he received his injury. The plaintiff's story is that he went under the first or second car at the west or front end of the train. Witness Schrader testified that when he saw him he was three or four car lengths from the engine. The testimony of the witnesses Rush and Hunter was also contradicted by plaintiff's witnesses. Under the circumstances, considering plaintiff's youth and capacity, it cannot be said, as a matter of law, that he acted without ordinary care. The rule seems to be well settled in this state that a child is not to be judged by the strict standard of an adult; neither is he to be charged with contributory negligence, if he acted as might reasonably be expected from one of his age and capacity. *Boland v. Railroad Co.*, 86 Mo. 484; *McCarthy v. Railway*

Co., 92 Mo. 536, 4 S. W. 516; *Eswin v. Railway Co.*, 96 Mo. 290, 9 S. W. 577; *Burger v. Railway Co.*, 112 Mo. 238, 20 S. W. 439; *Lynch v. Railway Co.*, 112 Mo. 420, 20 S. W. 642; *Schmitz v. Railway Co.*, 119 Mo. 256, 24 S. W. 472, 23 L. R. A. 250; *Donoho v. Iron Works*, 75 Mo. 401; *Riley v. Railway Co.*, 68 Mo. App. 652; *Van Natta v. Power Co.*, 133 Mo. 13, 34 S. W. 505; *Anderson v. Railroad Co.*, 81 Mo. App. 116. In *Burger v. Railway Co.*, 112 Mo., loc. cit. 249, 20 S. W. 439, Macfarlane, J., in speaking of contributory negligence, as applied to a boy between 9 and 10 years of age, said: "Common experience and observation teach us that due care on the part of an infant does not require the judgment and thoughtfulness that would be expected of an adult person under the same circumstances. In the conduct of a boy we expect to find impulsiveness, indiscretion, and disregard of danger, and his capacity measured accordingly. A boy may have the knowledge of an adult respecting the dangers which will attend a particular act, but at the same time he may not have the prudence, thoughtfulness, and discretion to avoid them which is possessed by an ordinarily prudent adult person. Hence the rule is believed to be recognized by all the courts of the country that a child is not negligent if he exercises that degree of care which under like circumstances would reasonably be expected of one of his years and capacity. Whether he uses such care in a particular case is largely a question for the jury." In the more recent case of *Anderson v. Railroad Co.*, 81 Mo. App. 116,—an action by plaintiff's father against the present defendants for expenses incurred and loss of the boy's services,—the controlling facts were identical with the case at bar. The Kansas City court of appeals, in an opinion written by Judge Ellison, and concurred in by the other members of the court, held that a given act, charged to be contributory negligence, cannot be applied to all persons alike. If the party doing the act is a child, the question is not whether the act is such that an ordinarily prudent person of mature years would have committed it, but is whether the act is such as might be expected from a child of the knowledge, age, and discretion the party charged is shown to be. In course of the opinion it is said: "The reason of the rule exempting children from responsibility does not depend so much on the knowledge and sprightliness of the child as it does on his indiscretion, imprudence, lack of judgment, and impulsiveness. All children nine years old know as well as grown persons that if a railway car runs over them it will kill or maim them. They know that as well as they know that fire will burn them. Yet, speaking generally, of course, all children near that age are by nature more reckless and thoughtless than grown persons, and consequently are more likely to be run over or burned. The law of nature has implant-

ed thoughtlessness and imprudence in the child, as it has prudence and caution in the ordinary man." Of course, there are cases in which the court can say, as a matter of law, that under the peculiar facts of the case the child did not act as one of his age and capacity should have acted, and consequently was guilty of such contributory negligence as to preclude a recovery. This, however, is not such a case. We have been referred by the learned counsel for defendants to a line of authorities of which *Payne v. Railway Co.*, 136 Mo. 562, 88 S. W. 308, is a type, in which it is claimed that the court in banc held that in the case of a boy about the plaintiff's age, with intelligence and knowledge of the danger connected with crossing railroad tracks, he is chargeable with contributory negligence, just as an adult person would be. Judge Sherwood, who wrote the opinion in the *Payne* Case, never contemplated a departure from the rule laid down in *Burger v. Railway Co.*, supra. These cases merely decide that a child may so act, notwithstanding his youth, as to be guilty of contributory negligence as a matter of law. But they do not decide that the child's age is not to be taken into consideration, even if he was at the time of the accident a bright, intelligent, and active child. These cases simply hold that under the peculiar facts of the particular case, considering the child's age and intelligence, he did not act as one of his age and capacity might reasonably have been expected to act. We are of the opinion that under the facts in this case the question whether plaintiff used such care as ought reasonably to be expected from one of his age and capacity was properly submitted to the jury by the instruction complained of.

The defendants challenge the correctness of plaintiff's second instruction, which is as follows: "If the jury find from the evidence that defendants, or either of them, on or about December 7, 1895, negligently placed or maintained a pile of cinders upon Ohio avenue, in Kansas City, Kan.; that it was unnecessary to have said cinders in such condition as you may find them to have been; that such cinders constituted an obstruction to travel upon said street, and did not leave the street in a reasonably safe condition, and that plaintiff stepped upon or against the same, and was thereby thrown to the ground, so that passing cars ran over one of his legs, crushing and mangling it,—then plaintiff is entitled to a verdict against the defendant or defendants which you find to have so placed and maintained the pile of cinders, provided you further find that there was negligence in placing and maintaining such cinders, and such negligence, if any, was the cause in producing the injury, and that plaintiff was not, on his part, guilty of negligence which directly contributed to his injury." It is insisted that the question whether the cinder pile remained in the

street an unreasonable length of time was not submitted to the jury by this instruction, as it should have been. This error was cured by instruction No. 15 given for defendants. By this instruction the jury were told, in effect, that defendants had the right to leave material in the street with which to construct or repair its track, provided the same was used for the purpose of repairing or surfacing the track within a reasonable time after they were left in the street. So, when these two instructions are considered and read together, the question whether defendants unreasonably prolonged such use of the street was fairly submitted to the jury. It is not perceived how defendants could possibly have been prejudiced thereby. The rule is clear that if any omission exists in plaintiff's instructions, and it is supplied by those given for defendants, the error is cured. *Owens v. Railroad Co.*, 95 Mo. 169, 8 S. W. 350; *Meadows v. Insurance Co.*, 129 Mo. 78, 81 S. W. 578. As the omission in plaintiff's instruction was supplied by defendants' fifteenth instruction, there is no reasonable error on that account.

The further objection is made that the jury were told that plaintiff could recover if this negligence "was the cause in producing the injury" in question. While the term "proximate cause" is the more common expression to be found in similar instructions, and is more accurate in phraseology, it is not perceived how the jury could have been misled by the language used.

It is also urged that the court below erred in giving plaintiff's third instruction, defining "negligence." This instruction is as follows: "Negligence is the want of ordinary care, and ordinary care is that degree of care which ought reasonably to be expected from a person of ordinary prudence, in view of all of the circumstances developed in evidence. If either defendant failed to exercise ordinary care in placing and maintaining said pile of cinders in question, then it was guilty of negligence." The specific criticism to this instruction is that, instead of the words "in view of all of the circumstances," there should have been used "under like circumstances." We do not think there is any merit in this objection. There is no substantial difference in the two expressions. The same idea is expressed by the words in either case. The care which ought reasonably to be expected of a person under "like circumstances" simply means under the "circumstances shown in evidence."

The plaintiff's instructions, as a whole, when taken in connection with those given for defendants, fairly presented the law of the case to the jury, and, when so considered, are in harmony with the controlling decisions of this court, and furnish to defendants no just ground of complaint. The defendants' instructions in the nature of a demurrer to all evidence were properly refused.

The court's refusal to give defendants' in-

struction No. 12, as follows, is next assigned as error: "The court instructs the jury that if the pile of cinders over and upon which Otto Anderson says he fell at the time of this injury was so high and open to view that it could easily be seen by one of his age and experience approaching said pile, while facing it, and that Otto Anderson was going in the direction of said pile until within about five steps thereof, and then turned around and went backward, and fell over said pile and rolled under the cars, your verdict must be for defendants." This instruction is subject to the criticism that it is not predicated upon the facts of the case. There was no evidence that the plaintiff was going towards the cinder pile, facing it, and then turned around and went towards it backward. He may have been going by or at the side of the cinder pile, but there is not the slightest evidence that he faced it, and while facing it turned around to look away from it. The evidence shows that plaintiff was not aware of the presence of the cinder pile. Therefore he had the right to assume that the cinder pile was not there. Again, it may be said that, even though plaintiff knew of the existence of the cinder pile, it cannot be said that he was guilty of negligence *per se* in not seeing it. *Buesching v. Gaslight Co.*, 78 Mo. 219; *Barr v. City of Kansas City* (Mo.) 16 S. W. 483. Moreover, this instruction requires of plaintiff the same care as an adult, instead of submitting to the jury the question whether, in view of his age and capacity, he exercised the care that ought reasonably to be expected of one of like age and capacity. Besides, it was directly in conflict with defendants' thirteenth and seventeenth instructions, leaving it to the jury to say whether the plaintiff's age and capacity were such as to require of him the acts specified in the instruction. Clearly, defendants could not complain that the court below adopted the theory invited by instructions given on their behalf. *Holmes v. Braidwood*, 82 Mo. 610.

There was no error in refusing instructions, Nos. 11 and 16 asked for by defendants. These instructions read as follows: "(11) The court instructs the jury that a railroad track is in itself a warning of danger, and it became Otto Anderson's duty when he approached the track in question to remain far enough away from the track while trains were approaching or passing to be safe from collision with the cars, and from stumbling over obstructions which might cause him to fall; and if the jury believe from the evidence that Otto Anderson came near defendants' track while the train was approaching, and stumbled over a pile of cinders, which caused him to fall under the wheels, when he either did see or might have seen the train coming, by looking, or heard it by listening, and avoided the said pile of cinders by looking, your verdict must be for the defendants." "(16) If Otto Anderson

was of such age and experience with reference to the movement of trains and cars as to know the dangers incident thereto, and if he went upon the track or near the cars for the purpose of getting upon the same or passing in front or around the same while in motion, he was guilty of contributory negligence, and the plaintiff cannot recover in this action, notwithstanding you may believe the defendants were guilty of negligence with reference to the speed of its train, the allowing of cinders to remain along its track, or in the running of its train without a watchman on the front car, or in any other respect." The observations made by us in disposing of defendants' refused instruction No. 12 are equally applicable to, and dispose of, this point. Moreover, by defendants' instructions Nos. 8, 14, and 17, and plaintiff's fourth instruction, the jury were fully and specifically instructed upon the subject of contributory negligence. Hence there was no error in refusing these instructions.

Objection is also made to the remarks of Mr. Hagerman, counsel for plaintiff, in his closing argument to the jury, in which he, referring to the franchise granted to the defendants, said, over defendants' objection, that "they were lawbreakers from the jump." As all that counsel said in regard to the matter does not appear from the record, we cannot say there was any abuse of discretion by the trial court. There is certainly nothing in the brief reference to this subject in the record that would justify the reversal of a judgment otherwise properly obtained.

The defendants finally make the point that plaintiff, having brought suit on statutory or ordinance negligence, should not have been permitted to recover for common-law negligence, as the latter was a different cause of action, and, if recovery was permissible for it, such could have been the case only on an amended petition. Unfortunately for defendants' contention, the petition is not based upon the ordinance. The averments in relation to the ordinance are merely cumulative. Eliminate all reference to the ordinance, and enough remains to state a good cause of action of common-law negligence. The petition, in part, reads as follows: "At the side of and between the said tracks, and in said city, upon the said street, the defendants negligently placed, and on December 7, 1896, negligently maintained, a pile of cinders and ashes, constituting an obstruction to the travel upon said street. Said obstruction made the street unsafe for travel, and directly violated the terms of section 8 of Ordinance 883 of this city." The above allegations were followed immediately by the proper averments of the ordinance. Manifestly, this paragraph of the petition states a good cause of action of common-law negligence, independent of the ordinance. While the averment is made that such obstruction was prohibited by the ordinance of the city, still it will be observed that the unsafe condition

of the street is the basis of the cause of action. In making out his case the plaintiff was not confined to the ordinance. The evidence tended to show that it was negligence in defendants to leave the cinders piled up in the street. Hence it cannot be said there was an entire failure of proof; neither was there a variance, but merely a failure to prove the cause of action in its entirety. Enough, however, was shown to sustain the action. As was said in *Werner v. Railway Co.*, 81 Mo. 368, "it is not a case of variance, but an instance in which negligence of the character alleged is proven, but not to the extent alleged, but sufficient to support the action." The case at bar is unlike and clearly distinguishable from *Hansberger v. Railroad Co.*, 48 Mo. 196; *Holliday v. Jackson*, 21 Mo. App. 660; *City of Kansas City v. Hart* (Kan. Sup.) 57 Pac. 939; *Railway Co. v. Wyler*, 158 U. S. 283, 15 Sup. Ct. 877, 39 L. Ed. 983,—cited by counsel for defendants.

The case seems to have been fairly tried, and, there being no error substantially affecting the merits, the judgment will be affirmed. All concur.

NEWTON v. NEWTON.

(Supreme Court of Missouri, Division No. 2.
March 26, 1901.)

APPEAL — EXCEPTION — HOMESTEAD — CONVEYANCES IN FRAUD OF MARITAL RIGHTS—DOWER—ELECTION.

1. Ruling on demurrer may be reviewed on appeal without an exception.

2. An exception recited in the record proper does not preserve the matter thus recited, which can be done by a bill of exceptions alone.

3. An ante-mortem conveyance by a husband of his homestead in order to defeat his wife of her dower right is void under Rev. St. 1890, § 3616, debarring the husband from selling, mortgaging, or alienating the homestead in any manner whatever.

4. A conveyance of land or personalty by a husband during his last sickness, and in contemplation of death, without consideration, and for the purpose of defrauding his wife of her marital rights, gives ground for equitable interference.

5. Under Rev. St. 1889, § 4518, entitling a wife to one-half the real and personal estate belonging to the husband "at the time of his death absolutely," equity will enforce the wife's interest in property sought to be conveyed by the husband before his death to defeat her marital rights, though the legal title be not in him at the time of his death.

6. Under Rev. St. 1889, § 4520, entitling the widow of a husband dying childless to elect to take her dower as provided in section 4513, to wit, a one-third interest for life in land of which the husband was seised at any time during coverture, free from debts; or as provided in section 4518, to wit, a one-half interest in all property belonging to the husband "at the time of his death absolutely," subject to debts,—by electing to take under section 4518, the wife does not ratify conveyances made by the husband with the fraudulent intent to cut down her marital rights.

7. A defect in a petition to enforce dower in failing to show that the declaration of election was filed within 12 months after grant of letters, etc., as required by Rev. St. 1889, § 4522, 61 S.W.—50

is cured by a statement showing that the husband died less than a year before the commencement of the suit.

Appeal from circuit court, Miller county; D. W. Shackelford, Judge.

Action by Clara Dell West Newton against George W. Newton. From a judgment for plaintiff, defendant appeals. Affirmed.

Moore & Williams and W. M. Williams, for appellant. W. S. Pope and W. M. Lumpkin, for respondent.

SHERWOOD, J. This was a proceeding instituted in the Miller circuit court to set aside a conveyance of certain lands in Miller county. Leaving off caption of petition, and setting forth its substance and material portions, plaintiff therein states "that she was married to Samuel Newton, now deceased, before any of the dates and times mentioned in this petition, and from and after their marriage was his wife until his death, on the 22d day of December, 1896; that during their coverture, and for a long time prior to the 21st day of November, 1896, the said Samuel Newton was the owner of in fee, and seised and possessed of the following lands situate in Miller county, giving description of such lands, composing about 300 acres, as well as property situate in the town of Eldon (giving description), which lots in Eldon plaintiff and her husband during his lifetime occupied as their homestead, of all which lands and lots plaintiff's husband died seised and possessed; that on the 21st day of November, 1896, while the said Samuel Newton was in his last sickness, and not expecting to live for but a short time, and shortly before his death, he conveyed the aforesaid lands to the defendant for the purpose of defeating, as far as he could, the marital rights of the plaintiff in said property after his death, and that the defendant took and received the conveyance for said property well knowing the reason and intention of the said Samuel Newton in conveying the property aforesaid to him, and with a view to aid her said husband as far as he could in depriving her of her marital rights after his death; that the defendant paid nothing for the said land so conveyed; that there was not sufficient consideration for said conveyance, and the only real consideration was that the defendant, who was the brother of the plaintiff's husband, might take the land discharged, as far as possible, of her marital rights under the law, and that said conveyance was made by her husband and received by the defendant in fraud of plaintiff's rights, and for the purpose of defrauding her out of her marital rights after the death of her husband; that there were no children born of the marriage aforesaid, and that said Samuel Newton died leaving no children or other descendants in being capable of inheriting; that he did not owe anything at the time of his death, nor is his estate, now being administered upon

in the probate court of Miller county, Mo., in any wise indebted or incumbered, nor did he owe anything on the 21st day of November, 1896, or prior thereto, or at the time of making the conveyance aforesaid to defendant; that at the time of the conveyance aforesaid her said husband was the owner of a large amount of personal property, of horses, mules, wagons, farming implements, cattle, household and kitchen furniture, money, notes, bonds, mortgages, deeds of trust, and various other kinds of property, and evidences of debt and choses in action, a particular description of which she is now unable to give, but of the value of at least \$20,000; that he likewise conveyed to the defendant at the same time, without consideration, and in anticipation of soon dying, and for the purpose of depriving her of her marital rights in his estate after his death, and of defrauding her, by that device, out of the same, and to prevent her from claiming her said marital rights under the provisions of section 4518 of the Revised Statutes of Missouri, and thereby to put the whole of his property, both real, and personal, and mixed, as far beyond her reach as possible, and to impoverish her so that she would be unable to sue for and recover her rights in his property as his widow after his death; that since the death of the said Samuel Newton she has duly filed her election to take dower under the provisions of section 4518 of the Revised Statutes of Missouri of 1889, as required by section 4522 of the said Revised Statutes of the state of Missouri, and filed the same in the office of the probate court of Miller county, Mo., that being the court granting letters of administration on the estate of her husband and having jurisdiction thereof, and also filed her declaration or deed of election in the office of the recorder of deeds of Miller county, Mo., for record; that after the death of her husband, Samuel Newton, the defendant took possession of the real estate aforesaid under the aforesaid fraudulent conveyance to him, and still holds the possession thereof, and she has been by him deforced of her dower and marital rights therein; and she again here charges that the conveyance and all the acts and doings of the defendant and of her said husband in and about the same were a fraudulent contrivance on their part to prejudice her rights; that the said conveyance was made with the avowed design of depriving her of her rightful portion of her husband's estate, to which she was lawfully entitled, and was made with the intention on the part of both the defendant and her said husband of preventing her from electing to take dower in the estate of her husband under the provisions of section 4518, Rev. St. 1889; that her said husband and the defendant took counsel, before the making of said conveyance, how to cut off the plaintiff of her just share of the estate after her husband's death, and how to deprive her of her right of election as aforesaid guarantied to

her under the laws of the state; that at the time of the making of said conveyance to the defendant her husband was in a very low condition, with conscious certainty of approaching death, he then having no hope of recovery; that the defendant was well aware of the facts here charged, and of each and all of them, and was a party thereto, and actively participated in all of the frauds and contrivances aforesaid; that she never at any time relinquished her dower or marital rights in said land in any way whatever, either during the lifetime of her husband or since his death. Wherefore she prays the court that it, in consideration of the above facts, adjudge and decree that the said deed aforesaid, which is recorded in the recorder's office of Miller county, Mo., in Book 10, at page 55 thereof, be declared fraudulent as to her, and in fraud of her marital rights as the widow of the said Samuel Newton, deceased; that she be adjudged the owner of a one-half interest in said lands, and that the defendant be deemed and held in law and equity to hold the said lands in trust only, and so as not to deprive her of her marital rights therein, as attempted by the acts herein complained of; and that this court adjudge and decree that a partition and division of said lands be made between the plaintiff and defendant, giving to each the one-half thereof; and also that this court appoint commissioners to make such partition and division; and for all such other and further orders, judgments, and decrees in and about the premises as will do her complete justice, and give her all of her marital rights as the widow of Samuel Newton, deceased, of which she has been so fraudulently and forcibly deprived; and also to adjudge against the defendant the value of the rents and profits of the property aforesaid, to which she has been lawfully entitled since the death of her husband, and which she avers to be of the monthly value of fifty dollars, and also for her costs and other proper relief."

To the above petition defendant interposed the following demurrer: "For cause of demurrer defendant shows that said petition does not state facts sufficient to constitute a cause of action. Second. That said petition shows upon its face that several causes of action have been improperly united therein. Third. The petition discloses the fact that the plaintiff, as the widow of Samuel Newton, deceased, has filed her election to take and receive as her share and interest in his estate under the provisions of section 4518 and of section 4522 of the Revised Statutes of Missouri of 1889, and that her declaration of such election has been duly filed in the office of the clerk of the probate court and in the recorder's office of Miller county, and by such election she ratified the deeds and conveyances made by her deceased husband in his lifetime, and an action will not lie to set aside such deeds and conveyances in order that she may elect to receive one-half of

his real estate under the provisions of section 4518, Rev. St. aforesaid."

The trial court held the petition sufficient. Defendant stood on his demurrer, and final decree went as prayed in the petition.

1. It is alleged in defendant's abstract that defendant excepted to the action of the court in overruling his demurrer to the petition. The record shows no such exception; but an exception in such case neither helps nor hurts, as a demurrer will keep without an exception. *Spears v. Bond*, 79 Mo. 467; *Hannah v. Hannah*, 109 Mo. 236, 19 S. W. 87. Besides, an exception recited in the record proper does not preserve the matter thus recited. That is the sole and appropriate function of a bill of exceptions, which alone possesses such preservative power. *State v. Wear*, 145 Mo. 162, 46 S. W. 1099.

2. A demurrer admits, not the truth of such facts as are alleged in a petition, but the truth of such facts as are well pleaded, and not otherwise or elsewhere. *Bliss*, Code Pl. (3d Ed.) § 418; 1 Chit. Pl. (16th Am. Ed.) *693; *Com. Dig.* "Pleader," Q. 6, and other cases cited in note. The facts in the case at bar are sufficiently well pleaded, provided they are "sufficient to constitute a cause of action." This is the main point in controversy, which the demurrer raises to the petition's sufficiency. A subsequent portion of the petition, relating to personal property, will be discussed later on.

3. Now, first as to the real estate. It is certain that under the provisions of section 3010, Rev. St. 1899, the husband of plaintiff was debarred from and incapable of selling, etc., the homestead at Eldon, and such a sale is declared by that section to be null and void.

4. Relative to the sale of the other realty, the rule is well settled in other jurisdictions that a conveyance of land, made by a husband to defraud his wife of her dower in the circumstances mentioned in the questioned petition, constitutes a valid basis for invoking equitable aid and relief. In *Walker v. Walker*, 66 N. H. 390, 31 Atl. 14, 27 L. R. A. 799, *Blodgett, J.*, observed: "Upon the facts found at the hearing, the bill can be maintained. The attempt of the plaintiff's husband to dispose of nearly all of his personal estate so that he should have the enjoyment and control of it for life, and the plaintiff be deprived of any portion of it at his decease, cannot be sanctioned. It is settled law that conveyances of real estate made by the husband during the coverture for the purpose of defeating the wife's rights are, as to her, fraudulent and void. Whether the same rule obtains in transfers of personal property for the like purpose when the husband reserves therein no right to himself is a question upon which the authorities are somewhat at variance; but where the transfer is a mere device or contrivance by which the husband, not parting with the absolute dominion over the property during his life, seeks at his

death to deprive his widow of her distributive share, there is no substantial conflict of authority that the rule applicable to conveyances of realty prevails. * * * Marriage does not debar a man from all right to dispose of his property during his life according to his will and pleasure. On the contrary, 'nothing is better settled than the power of a husband to dispose of his personal property in good faith, by gift or otherwise, during coverture, free from all post-mortem claims thereon by his widow.' *Dickerson's Appeal*, 115 Pa. 198, 8 Atl. 64, 2 Am. St. Rep. 547, 552. It simply debars him from making gifts and conveyances with the view of defeating his wife's marital rights, and to this extent only is his power of disposal clogged and fettered. When his object is not to defraud her, he may, therefore, lawfully sell or convey, and he may even make a gift of his property for any lawful purpose." And a decree entered in conformity to the views above expressed was affirmed; that decree having granted to plaintiff her proper proportion of the personal estate of her deceased husband, he having attempted by gifts, etc., during his life, to defeat her marital rights therein,—citing authorities, the most of which are cited in plaintiff's brief, and which fully support the views in the case from which quotation has just been made. *Scribner* says: "So the wife may be relieved in equity against a fraudulent conveyance executed by her husband with intent to defeat her dower; and to the extent of establishing the invalidity of the conveyance as against the wife this relief may be had during the lifetime of her husband. So in a case where the husband purchased lands of his son at an exorbitant price, and executed his bond and mortgage for the purchase money, with intent to prejudice his wife's interests in his estate, a court of equity, after the death of the husband, required the son to satisfy the bond and mortgage from the personalty which had come to his hands." 2 *Scrib. Dower* (2d Ed.) 163. The same author says elsewhere: "Nor will a fraudulent mortgage of the husband be sustained as against the wife. This was determined in *Killinger v. Reidenhauer*, 6 Serg. & R. 531. 'In Pennsylvania,' said the court in that case, 'where lands are considered as chattels for payment of debts, the husband's lands may be levied on and sold, and the wife loses her dower. So here, a mortgage given by the husband will bind the dower right. All the interest may be levied on and sold on a *levari facias* without regard to the wife's right of dower; but a mere voluntary mortgage (much less a fraudulent one, made for the purpose of defeating the inchoate right of the wife) cannot bind her, for this would be in fraud of the law, and in fraud of the right accrued directly on the marriage, initiate on the moment of marriage, consummate on the death of the husband; a right much respected in law; highly favored, next to liberty ar

life.'" 1 Scrib. Dower, p. 628. So, too, in Georgia, there is no statute inhibiting the sale of land by the husband to defeat his wife's right of dower, and yet it is there held that, while the husband may make an actual and bona fide conveyance whereby the dower of the wife in his land is actually defeated, still a mere colorable sale and conveyance, not made by the parties with intent to be real and operative, but only as a means of dividing the lands among the children of the husband after his death, he meanwhile being the real, while the grantee in the conveyance is the nominal and formal, owner, will leave the husband seised, so far as concerns the dower right, and his widow may claim and have assigned dower notwithstanding the colorable conveyance aforesaid. *Flowers v. Flowers* (Ga.) 15 S. E. 834, 18 L. R. A. 75. So that it will be seen that the ability or inability of a husband to defeat dower by conveying away his lands is not the basis, in either instance, for equitable interference. The only basis for that consists in the animus which prompts the conveyance. If fraudulent in such circumstances as recited in the present petition, then equity, properly invoked, takes charge of the affair. In this case the petition alleges, and the demurrer confesses the truth of the allegation, that the husband died seised and possessed of the property in suit. Concession is made by counsel for defendant—what, indeed, had been previously settled by the pleadings and adjudication thereon—that plaintiff, by her election under the provisions of section 4518, Rev. St. 1889, became entitled to "one-half of the real and personal estate belonging to the husband at the time of his death absolutely, subject to the payment of the husband's debts." Stress is laid by counsel on the words which they have italicized, as above, of those quoted. Touching this point and those words, Judge McGirk said in *Davis v. Davis*, 5 Mo. 183: "I then hold that, if the slaves contained in the deed to Thomas Davis were the property of Davis at the time of his death, the dower arises on them. But it is argued that they were not his at the time of his death by reason of the deed. I admit that, so far as the mere form of right is concerned, they were not his. Here the form hides the substance, and was intended to do it. But in a court of chancery, no matter how cunningly and deeply covered and concealed the right may be, the deep searching justice of the chancellor with his argus eyes will uncover it. The chancery commands the right to remain where it should have been till all the purposes of justice are accomplished." And it will not escape observation that what the widow takes by election is neither more nor less than dower. Thus section 4520 provides, when the husband shall die without a child or other descendant living, capable of inherit-

ing, the widow shall have her election to take her dower, as provided in section 4513, discharged of debts, or the provisions of section 4518, as therein provided. And section 4522, after pointing out the mode of making the election mentioned and provided for in preceding sections, gives expression to the same idea, by saying that if the widow do not file her declaration in 12 months, and have it filed in the recorder's office in 15 months, after grant of letters, she shall be "endowed" under the provisions of sections 4513, 4515, and 4518. And the initial section of the chapter (section 4513) also employs the term "endowed," which, as already seen, is indiscriminately employed in the cognate sections whether relating to dower from choice or dower without choice. In other words, it is as much out of the power of the husband, in the circumstances set forth in the petition, to defraud his wife out of her election dower, as to thus deprive her of her ordinary common-law dower, as represented by section 4513. Speaking of dower in personal property, Judge Scott, in *Stone v. Stone*, says: "Although dower is given in personal estate by our statute, yet it was not thereby intended to restrain the husband's absolute control of it during his life, to give and dispose of as he wills, provided it be not done in expectation of death, and with a view to defeat the widow's dower. The husband may do as he pleases with his personal property, subject to this restriction. After the enjoyment of the property in the most absolute manner during his entire life, the law will not permit him, at the approach of death, and with a view to defeat his wife's right of dower, to give it away. If such a disposition was allowed, the efficacy of the statute conferring dower in personalty would depend on the whim or caprice of the husband." 18 Mo. 392 et seq. In *Hornsey v. Casey*, 21 Mo. 545, no such element of fraud was present as in *Stone's Case*. And in the case at bar plaintiff no more ratified by her election dower the fraudulent deeds and conveyances here complained of than had she pretermitted her right of choice of dowers, and fallen back on the provisions of section 4513.

It is well enough to say in conclusion that that portion of the petition is bad which relates to filing her election under section 4522, and to filing declaration in the recorder's office, since it is not shown that the declaration was filed in 12 months after grant of letters, nor that such declaration was filed within 15 months, etc. But this defect is cured by the statement that decedent died on December 22, 1896, and the petition on its face shows that the suit was made returnable to the September term, 1897, and this necessarily shows that the papers aforesaid were filed in time. For these reasons, the judgment should be affirmed. All concur.

LYNN et al. v. HOCKADAY.

(Supreme Court of Missouri, Division No. 1.
March 12, 1901.)

**DOWER—HUSBAND AND WIFE—WITNESSES—
MARRIED WOMAN — STATEMENTS BY HUS-
BAND—ADMISSIONS—ADOPTION—PAROL CON-
TRACT—EXECUTED AGREEMENT—DESCENT
AND DISTRIBUTION — RIGHTS OF ADOPTED
CHILD.**

1. Where, in a suit for the admeasurement of dower, a widow withdrew her answer, and elected in open court to take dower, she had no interest in a controversy between the heirs as to the share of an adopted child which would render her incompetent to testify to the adoption.

2. Rev. St. 1889, § 4656, provides that no married woman shall be disqualified to testify in civil suits by or against her husband in certain cases, provided that the section shall not be construed to authorize or prevent her from testifying to admissions or conversations of her husband. *Held*, that the proviso was limited to the provisions of the section, and did not extend to the right of a married woman to testify generally in suits against others than her husband, and hence it did not prohibit a widow from testifying to conversations of her husband with the person from whom a child was adopted by him, in an action by such child to recover a child's share in the husband's estate.

3. An orphan's grandmother gave the child to decedent, believing it would be raised as his own child, refusing to surrender the child on any other condition. The child was taken by decedent, given his name, and raised as his own child. He called her his daughter, and concealed the fact that she was not his daughter from her until she was 18 years of age. She passed in society as decedent's daughter, and lived with them until her marriage, but was never adopted by deed as required by statute. *Held*, that such facts showed an executed agreement, to adopt which was not avoidable for lack of a deed, and hence the adopted child was entitled to a child's share in decedent's estate.

Appeal from circuit court, Cass county;
W. W. Wood, Judge.

Suit by James F. Lynn for admeasurement of dower in the estate of James Lynn, deceased. Lillie Hockaday intervened by answer and cross bill, alleging adoption by decedent, and claiming a child's share in the estate. After trial, plaintiff died, and Sarah Lynn, his administratrix, and his heirs, were substituted as parties. From a judgment dismissing the cross bill, intervener appeals. Reversed.

Wallace & Wallace and Chas. W. Sloan, for appellant. Noah M. Givan and Allen Glenn, for respondent.

VALLIANT, J. This suit was for the admeasurement of dower of the widow of James Lynn, intestate, in which his son James F. Lynn claimed to be the only heir, but by leave Lillie Hockaday was made a party, and filed an answer and cross bill showing that she was in fact the adopted daughter of the intestate, although no deed of adoption had been executed, and claiming a child's share in the estate. Issue was joined on the case made in her cross bill, and upon the trial by the court there was a finding and decree against her, from which decree this appeal is taken.

The testimony on behalf of Lillie Hockaday showed that in 1875 she was an infant between 3 and 4 years old. Her name was then Julia Pettie. Both of her parents were dead, and she was left to the care of her maternal grandmother, who was old, and in poor circumstances, being herself dependent on her son for maintenance. She was the youngest of several children, who, at the death of their parents without any estate, were left dependent on relatives who were unable to provide comfortably for them. At that time James Lynn was a farmer in good circumstances, living on his farm with his wife, the widow in this case. They had been married about five years, and had had no child, but he had a son by a former marriage, James F. Lynn, who was the original plaintiff in this case, but who has died since the trial of the suit, and his heirs and administratrix have been substituted as parties. Mr. and Mrs. Lynn, hearing of the little orphan, went together to the old grandmother, who lived about eight miles from them, to see the child, and learn if the grandmother would give her to them. That was in March or April, 1875, and for just what was said between the parties interested on that visit we have to depend upon the memory of Mrs. Lynn and Mrs. William Cook, an aunt of the child's; the grandmother and Mr. Lynn, the real parties to the alleged contract, both being dead. When Mrs. Lynn was offered as a witness, the plaintiff objected on the ground that she had been the wife of James Lynn, and for that reason was incompetent to testify in the case. The court overruled that objection, but on further objection ruled that she would not be allowed to testify to conversations with her husband when they were alone. Her testimony as to the agreement was that when they went to see the grandmother they had a talk with her about the child in which the grandmother told them that the child's mother on her deathbed had given the child to her, and that it was very dear to her, but, to get the child a good home, she would make a sacrifice of her own feelings. She said that she had had two or three opportunities to give her to parties to raise, but that was not what she wanted. She wanted some one to take the child, and raise her for their own child, and where there were no other children. On those terms she would let her go. Mr. and Mrs. Lynn did not decide then to take her, but went home, and considered the matter for several days, and, after so considering it, returned together to the grandmother, who gave the child to them, and they brought her home. Under the ruling of the court this witness was not permitted to testify as to what her husband said to her on the subject. She was asked: "Q. When you were talking to Mrs. Cook [the grandmother], what did she say, and how did she say she wanted a person to take her? A. Take her for their own child. To adopt her. Q. That is what she said her-

self? A. Yes, sir. Q. Did you all agree to that? A. Yes, sir; we agreed to it." Upon cross-examination plaintiff showed this witness a letter, which she acknowledged to have written, and which was addressed to one of plaintiff's witnesses, Thomas Collins, asking him what he knew about the case, and soliciting his interest in behalf of the adopted child, appealing to him as an old friend of the family, etc. In the letter she said: "You were the one who told us about the child. Advised us to take her, and sent us to Grandma Cook's to see about it, which we did. Was pleased with the little child, and took her as our own. Mr. Lynn agreed to take her, adopt her as our own, as fairly as he ever did anything in his life. We was busy that summer, and did not attend to having it recorded just then." Mrs. William Cook was present when Mr. and Mrs. Lynn came to take the child, and she undertook to testify as to the agreement. But, though she seemed to be an intelligent woman, she became confused in endeavoring to give the substance of the conversation, and was unable to understand the technical distinction between giving the substance of the conversation and drawing a conclusion therefrom. When asked to state the conversation, she said it was so many years ago she would not remember the words that were used. Then, when asked to state the substance of the conversation, she said that the substance was the child was to be adopted. Upon motion of plaintiff, that was ruled out as the statement of a conclusion. After being piled with like questions several times, she seemed to grow a little impatient; for example: "Q. Now, can you give the exact conversation, if so, do so? A. No, sir; I cannot. Q. What was the substance of the conversation? Mr. Jarrott: State what was said. The Court: Take up what each one said, and tell as near what they said as you can. A. I cannot take up anything, for I do not remember it; and I am not going to do it either. * * * Q. I want you to give what you know about it. You were there. A. I have told you they were there, but I cannot tell you any of the conversation; only the agreement." The court ruled that that was a conclusion, and again told her not to state her conclusion, but to state the substance, to which she replied: "A. I told you the run of the substance. Q. What was it? A. They were to adopt that child." The court again ruled that that was but a conclusion. There was a good deal of such examination and cross-examination, with the result as above indicated. When the grandmother gave the child to Mr. and Mrs. Lynn,—which was on their second visit,—they took her home in their buggy, and, passing through the town of Pleasant Hill, called on Mrs. Shortridge, a friend of theirs. Mrs. Shortridge testified that when Mr. and Mrs. Lynn came in Mrs. Lynn said, "See our little girl," and Mr. Lynn said that her grandmother had

given her to them to raise as their own child. When they took her home, Mr. and Mrs. Lynn immediately changed the child's name to Lillie Lynn, and thereafter she bore that name, and none other, until she was married. She was reared in the family of Mr. and Mrs. Lynn in all respects as if she was their own child, and she herself was taught to believe that they were her own father and mother, and she was never informed to the contrary until she was 17 or 18 years old. She addressed them as "papa" and "mama," and they called her "daughter." A letter from Mr. Lynn to her when she was about 13 years old was in evidence, in which he addressed her as his "dear daughter," and referred to Mrs. Lynn as her mother. She was as a dutiful loving daughter to both of them, and they were as kind and affectionate parents to her. She was never allowed to see her own brothers or sisters, or any of her blood relations, or to know that she had any such. In the home circle, among neighbors, in school, in society, wherever she went, she was known as the daughter of Mr. and Mrs. Lynn, and she believed so herself until she was grown. She was married at home, in the presence of both her adopted parents, with their approval, and she was married under the name of Lillie Lynn. There was never any deed of adoption as the statute in such case provides. Thomas Collins, a witness for plaintiff, the person to whom the letter of Mrs. Lynn above referred to was addressed, testified that he had known the parents of the child; that they had died very poor, leaving several children, who were placed in different homes; and the youngest (Julia) was left with her old grandmother, who the witness had heard wanted to get a home for her, and he tried to find her one, and told Mrs. Lynn about her. Mrs. Lynn came to his house, and at her request he went with her to the grandmother's. Mr. Lynn was not with them. "Q. You may state, in substance, what arrangements were made, if any, by Mrs. Lu A. Lynn and Mrs. Susan Cook, about Mrs. Lynn taking Julia Pettie at the time that you went with Mrs. Lynn to see Susan Cook in the spring of 1875. A. We went there to see the old lady, Mrs. Cook, and she consented to give Mrs. Lynn the girl, Julia Pettie. The girl was not in a condition to go home with Mrs. Lynn, and she was to go back in a few days. Q. You may state whether or not anything was said at that time by Mrs. Lynn taking Julia Pettie to adopt. A. The adopting part I heard nothing of, but Mrs. Cook gave her the child to keep as her own child. * * * She said that she wanted to take the child and raise her so that she would never know who her kinfolks' name were." The plaintiff's effort was to show that it was Mrs. Lynn, and not Mr. Lynn, who was responsible for taking the child from the grandmother; and to this purpose, in addition to the testimony of Collins, called Mrs. Wear

as a witness, who testified, in effect, that Mrs. Lynn had said: "I went after Lillie, and could not get her the first time. The second time I went after her I got her. Mrs. Cook told me when I was there the first time that I could not take her if she cried, but, if she did not cry, I could take her; and I took some trinkets along with me to please her, and she took up with me, and I brought her home; and that is all there is about it." Mrs. Frank Lynn and Mrs. Webster testified to similar conversations with Mrs. Lynn. There was also testimony received over the objection of defendant to the effect that Mr. Lynn, in his lifetime, at various times, but several years after he had taken the child into his family, had said in casual conversations, when asked about it, that he had not adopted her, and was not going to do so; that that was his wife's affair, or words to that effect. But these statements were not made in the presence of the girl or of Mrs. Lynn. After hearing this evidence, the court concluded that it was incompetent, and ruled it out. Mrs. Lynn, in her testimony, had said that she first heard of the child through Mrs. Buckner, who informed her about it. The letter of Mrs. Lynn, above mentioned, was introduced to contradict her on that point. In the letter she said to Collins that he had first informed her. When shown the letter on cross-examination, she testified on that point: "That is a mistake. After I recalled it, he was not the first. We asked him something about it. When I wrote that I thought he was the first that told us about it. But he was not, after I reflected over it a little." She had also testified that she never went to the grandmother's with Collins, but in this she was contradicted by Collins, who testified that he went there with her the first time; and a niece of his testified to the same effect. But whether she first heard of the child through Mrs. Buckner or Mr. Collins, and whether or not she first went to see the grandmother with Collins, the fact that she went twice with her husband, and the second time they brought away the child with them, is supported by the testimony of several other witnesses, and is not in conflict with the testimony of Mr. Collins and his niece. There was no conflict in the testimony as to the status of the child after she was brought into the family.

1. It is insisted for respondents that the testimony of Mrs. Lynn was incompetent, and the argument is that without her testimony there was no proof of a contract to adopt. The objection to her testimony was in two forms,—general and specific. The general objection that she was incompetent to testify at all, because she was the widow of the intestate, was overruled; the specific objection that she could not testify to conversations with her husband when they were alone was sustained, and she gave no such evidence. There were other specific objec-

tions to parts of her evidence, which were sustained. But the testimony above quoted as to what the grandmother said in regard to the conditions upon which she would give them the child, and that Mr. and Mrs. Lynn agreed to those terms, was introduced without objection, unless it was covered by the general objection going to the total incompetency of the witness. And the letter of Mrs. Lynn to Collins, in which she said that Mr. Lynn had agreed to adopt the child as fairly as he had ever agreed to anything in his life, was introduced by respondents on cross-examination. At the time Mrs. Lynn was first offered as a witness she had an answer on file in the case in which she had pleaded the adoption of the child by her husband and herself, and claimed to be entitled to a child's share of the real estate, under section 4523, Rev. St. 1889, now section 2944, Rev. St. 1899, which provides that, if the husband dies leaving a child or children, the widow, if she has a child by such husband, may, at her election, take a child's share in lieu of dower. But, in view of the objection to her as a witness, under the advice of counsel she withdrew that answer, and elected to take only her dower. Passing over the question of whether an adopted child fills the requirement of that statute, we see that by its terms the widow's right to a child's share depends on her own election, and that election must be in writing in the form prescribed in the next succeeding section, which, it does not appear from the record, was observed. Therefore, when she withdrew her answer, which had claimed a child's share on that account, and in open court elected to take only her dower, she had then no interest in the controversy, even if she had ever had. But there was no objection made to her competency as a witness on the ground that she was a party in interest to the contract alleged to have been made by the deceased, but it was only on the ground that she was the wife of the deceased, and the argument in the brief of counsel is that she was disqualified by the terms of the proviso in section 8922, Rev. St. 1889, now section 4656, Rev. St. 1899. That section declares that no married woman shall be disqualified as a witness in a civil suit prosecuted in the name of or against her husband in certain cases, and specifies the cases; but this is not one of them. Then it adds: "Provided, that nothing in this section shall be construed to authorize or prevent any married woman, while the relation exists or subsequently, to testify to any admission or conversations of her husband, whether made to herself or to third parties." That proviso, by its very terms, is only a restriction of the right in that section conferred. The section enables a married woman to testify in certain kinds of cases, in which, by the common law, she was disqualified; but, having qualified her as a witness in those cases, it adds, in effect, that in exercising the right there conferred

she is not to speak of what her husband may have said to her or to any one else. It is, on the whole, an enabling, and not a disabling, statute. *Bates v. Forcht*, 89 Mo. 121, 1 S. W. 120. The restriction in the proviso is not on a capacity she had before, but only on the privilege there conferred. At common law, in a suit between strangers, in which neither the interest of herself nor that of her husband was affected, she was a competent witness to testify to a conversation between her husband and a third person. 1 Greenl. Ev. (16th Ed.) §§ 341, 342. Such a case would not come within the purview of that statute. In *Moore v. Wingate*, 53 Mo. 308, loc. cit. 409, concerning the proviso now under discussion, it was said, "This provision of the statute was intended to apply to all cases, whether the husband was a party to the action or not." The language is broader there than necessary. It would have been sufficient if it said that the provision applied to the facts of that case. And perhaps all that was there intended was that it applied as well to a case in which her husband or his estate was interested as it did to a case in which he was a party. That it was not intended to construe the statute as imposing a new disqualification on a wife, is shown by the words immediately following: "It was intended to leave the disabilities of a married woman in reference to these matters just as they were at common law." In *Holman v. Backus*, 73 Mo. 49, a similar broad expression is found, but the same idea prevails through the opinion that the statute only dealt with existing common-law disabilities. In that case the estate of the deceased husband, though not sued, was interested. There is nothing in *Willis v. Gam-mill*, 67 Mo. 730, *McFadin v. Catron*, 120 Mo. 263, 25 S. W. 506, or *Shanklin v. McCracken*, 140 Mo. 356, 41 S. W. 898, to which we are referred, contrary to this view. If, therefore, Mrs. Lynn was not disqualified at common law, she was not disqualified by the statute. In *Spradling v. Conway*, 51 Mo. 51, it was held that, where it was simply a controversy between distributees of the estate, the widow of the intestate was not disqualified at common law, and was a "competent witness to testify to what her husband said to third parties." This was followed by our St. Louis court of appeals, in an opinion by Thompson, J., in *Hoyt v. Davis*, 30 Mo. App. 309, 314, and is in harmony with the reasoning in *Garvin's Adm'r v. Williams*, 50 Mo. 206. The case at bar presents no claim against the estate of the deceased. It is simply a question between parties claiming to be heirs at law of the intestate, and affects only the partition of the estate between them. The estate itself is not to be augmented or diminished by the result. Suppose, instead of a question of adoption, it was a question of identification of one claiming to be an heir, could there be any doubt that the widow would be a competent witness? If so, then the court

committed no error in overruling the general objection that went to the entire exclusion of the witness. Nor did the court commit error in receiving the testimony that was given by Mrs. Lynn relating to what passed between the grandmother and her husband and herself, even if there had been specific objection to that, which was not the case. All there was of her testimony was to the effect that, when she and her husband first went for the child, the grandmother stated the terms on which she would let her go. They returned home to consider the proposition, and in a few days returned, and bore the child away. The nearest she came to stating what her husband said was, "We agreed to it," and her testimony would have been in all things as effective if that had been omitted. It was a case in which acts spoke louder than words. All the subsequent acts of Mr. Lynn were not only consistent with the theory of adoption, but were inconsistent with any other theory, and those acts testify to what the agreement was more surely than witnesses who attempt to repeat the substance of conversations which they listened to 20 years before. To Mrs. Shortridge Mr. Lynn said, on the day he received the child, and while he was on the way carrying her to his house, that the grandmother had given her to them to raise as their own child. Even Mr. Collins, the chief witness for respondents, said, "The adopting part I heard nothing of, but Mrs. Cook gave her the child to keep as her own child." When we consider who the old grandmother who dictated the terms was, and her condition in life, we cannot expect her to have been posted as to the technical requirements of the statute in regard to adoption, but we see that she did understand the difference between merely giving the child out to service or to rear and giving her to one who would take her for his own child. Her words were as descriptive of the condition as if she had used the technical word "adoption."

2. The main argument in resistance to the claim of adoption is that the agreement relied on is within the statute of frauds, and, there being no deed of adoption, the claim fails. The agreement is not, strictly speaking, within the statute of frauds; that is, it is not embraced within the provisions of the ancient statute of frauds. *Browne, St. Frauds*, §§ 275-276a; *Rodg. Dom. Rel.* § 459. Yet it bears a resemblance to cases within that statute, for the reason that the statute authorizing the adopting of a child provides that it may be done by deed in writing, and indicates no other method; and, as there was no common-law adoption, the argument is that it must be done as the statute requires, or it cannot be done at all. But since the statute has made the adoption of a child lawful, the law, for the same reasons that it sometimes enforces oral contracts affecting real estate, will not allow the mere failure

of one party to do his duty to work an irreparable wrong to one who has fully performed his part. This court, for that reason, has not only held an oral contract for adoption valid, but has also required fulfillment of a collateral agreement of the adopting parent to leave the adopted child his estate at his death. *Sharkey v. McDermott*, 91 Mo. 647, 4 S. W. 107. Under the evidence in this case we cannot shut out from our minds the conviction that Mr. and Mrs. Lynn both agreed with the grandmother to adopt this child; that on the faith of that agreement the child was given to them, and thus the agreement was performed on the part of the grandmother; and that it has been fully performed on the part of both the adopting parents and the adopted child, save only the deed has not been executed; and that was through no fault of the child's. The life of that whole family in reference to this child from the time she was first taken into it until the death of Mr. Lynn would have to be construed to be a deception and a fraud if we would give to it the effect that respondents claim for it. It is argued that her relatives were poor, and that she has had in the family of Mr. Lynn a better home, and more refined rearing, than she would have had if he had not taken her. That may be; but it does not follow as a legal conclusion that the reward was all on her side, or even that it was her gain at all. That she took the place of an only daughter in the lives of Mr. and Mrs. Lynn, and performed her part as such, is the cold fact which the law regards as a sufficient consideration to support the contract. How much she added to their happiness the law does not undertake to estimate. What her life would have been if it had been left to flow on in the channels that nature had given her, whether happier or better or the contrary, no one can tell. But the evidence shows that by no will of hers, and not primarily for her pleasure, she was taken away from her own relatives, and was as completely deprived of the affection that comes from natural family ties as if nature had provided her none. Who can estimate the value of that of which she was deprived, and who can say she was compensated by what she received? Taken at an age when she was too young to know who she was, advantage was taken of her very helplessness in that respect; her mind was obscured to the truth, and forced to believe in the fictitious condition. She was taken possession of, mind and body, and molded as her adopting parents desired. Like a bud that has been cut from its natural stem and grafted into a foreign tree, she grew into the family, and became a part of its very life. Everything that adoption contemplates was accomplished. It became a contract fully performed on her part, and the statute of frauds cannot be invoked to her injury. The judgment of the circuit court is reversed, and the cause remanded to that court, with direc-

tions to enter a decree upon the issues made by the cross bill declaring Lillie Hockaday a duly-adopted child and heir at law of James Lynn, deceased, and as such entitled to a child's share of his estate. All concur, except MARSHALL, J., absent.

SCANNELL v. AMERICAN SODA-FOUNTAIN CO.

(Supreme Court of Missouri, Division No. 1.
March 12, 1901.)

SPECIFIC PERFORMANCE — EXCHANGE OF PROPERTY — TITLE — REFUSAL — ADVERSE POSSESSION — EASEMENT — NONUSER — TIME — ESSENCE OF CONTRACT — LAPSED AGREEMENT — ESTOPPEL.

1. Plaintiff and defendant contracted to exchange real estate, and agreed that if any defect should be found in the title to either of the properties, so that the trade could not be made, then the party whose title was defective should pay the other \$250, and that if the titles were found to be perfect the deeds should be delivered by a certain day. Plaintiff showed title by adverse possession for 52 years. *Held*, that the fact that the record title showed a transfer of the property by the French government in 1700, which was recorded in 1841, and a devise of the property by a subsequent grantee in 1878 did not justify the defendant in refusing to perform the contract, since plaintiff's title was unassailable under Rev. St. 1899, § 4265, providing that no action shall be maintained for the recovery of real property after 24 years after the cause of action or right of entry shall have accrued, and section 4268, making the lawful possession of property and the payment of taxes thereon for 30 years a bar to any claim therefor emanating from the government.

2. Where an alley had been fenced and not used since 1876, its existence constituted no ground for defendant's refusal to perform a contract for the purchase of a lot, since the easement had been extinguished by nonuser.

3. Plaintiff and defendant exchanged property, and agreed that plaintiff should take a two-years lease of the property, to be conveyed to defendant as soon as the deeds were exchanged, and that, if the titles proved perfect, the deeds should be delivered by July 1, 1897, which time was twice extended to allow time to examine the respective titles. Defendant objected to plaintiff's title on other grounds, without mentioning that a 9½-inch strip had been sold off from one side of the lot, until after several months' negotiations in reference to the other objections. Plaintiff purchased the 9½-inch strip in March, 1898, after he had instituted a suit for specific performance, and at the time of the rendition of the decree was able to furnish a perfect title. *Held*, that the contention that plaintiff was not entitled to specific performance, because time was of the essence of the contract, could not be sustained, since it was defendant's duty to have notified plaintiff of the defect, and the agreement to lease the property to plaintiff showed that defendant was not prejudiced by the failure to get immediate possession of that particular property.

4. An agreement that plaintiff should accept a lease in the "usual form" was not so indefinite as to be unenforceable.

5. Plaintiff and defendant agreed to exchange real property; that the deeds should be exchanged July 1, 1897; and that plaintiff should accept a two-years lease of the property, to be conveyed to defendant at a certain monthly rental. Defendant refused, after several months' negotiations, to make the exchange because of alleged defects in plaintiff's title, and plaintiff, in an action for specific performance, proved a

marketable title. *Held*, that plaintiff's agreement to accept a lease lapsed through defendant's refusal to perform the contract.

6. Plaintiff and defendant agreed to exchange real property, and that the deeds should be delivered by a certain date if the titles were perfect. Defendant objected to plaintiff's title, and demanded a guaranty of title from a trust company. *Held*, that a letter from plaintiff's attorney during the negotiations as to plaintiff's title, stating that plaintiff ought not to be required to give a guaranty, because defendant's title was more defective than plaintiff's, did not estop plaintiff from demanding specific performance of the contract, since the letter did not amount to a refusal to accept defendant's title.

Appeal from St. Louis circuit court; H. D. Wood, Judge.

Action by Alfred Scannell against the American Soda-Fountain Company. From a judgment in favor of defendant, plaintiff appeals. Reversed.

This is a suit in equity to enforce specific performance of a contract for the exchange of lands. By written agreement between the parties, in June, 1897, defendant agreed to convey to plaintiff certain real estate on Pine street, in St. Louis, particularly described in the petition, for which plaintiff agreed to pay \$10,000, and convey to defendant certain real estate on Market street, in that city, also particularly described in the petition. The contract provided "that if any defect should be found in the title to either of said properties, so that this contemplated trade cannot be made, then the party whose title proves defective hereby agrees to pay to the other party the sum of two hundred and fifty dollars as full compensation for the failure to consummate this contract; and, in the event and upon such failure being made, this contract shall be absolutely void, as if the same had never been made, and the two hundred and fifty dollars hereby receipted for shall be returned to said Scannell. If, however, said titles are found to be perfect, said deeds and lease shall be delivered without delay, not later than the 1st of July next." There was a stipulation in the agreement for the plaintiff to take a lease from defendant for two years on the Market street property, the terms of which will be noted later, when we come to discuss that feature of the agreement. The parties immediately began investigations of the titles of their respective contemplated purchases, in the course of which the defendant discovered that the plaintiff's record title to the Market street property went back no further than 1829, although the title had emanated from the French government in 1769, and for that reason refused to carry out the agreement for exchange. The subject was discussed between the respective representatives of the parties, and, pending the discussion, the time for exchange of deeds was extended, first to July 10th, and again to July 17th. A suggestion was made that the objection might be overcome by obtaining a guaranty of the title by the St. Louis Trust Company, and

while that matter was under consideration the agent of the plaintiff wrote defendant's attorney a note, saying: "Mr. Scannell has just called to say that his attorney advises that the title to the Pine street lot is not as it should be, inasmuch as the alleys have never been dedicated, and that he ought to have a guaranty against that; in other words, his attorney thinks your defect is more serious than the defect to the Scannell property, and Mr. Scannell thinks he ought not to be required to furnish a guaranty." Several meetings were had between the respective representatives, but the defendant's objection to the plaintiff's title was not satisfied, and no adjustment of the difficulty was arrived at. On July 12th or 14th the defendant's agent informed plaintiff that defendant would not carry out the contract. On July 17th, the last day for the fulfillment of the agreement, the plaintiff's agent wrote a note to defendant's agent, saying that plaintiff's deed was ready to deliver, and the money ready to be paid, and he desired to close up the matter. That note was sent either by mail or special message, and the deed and money were in the agent's hands as stated. After the writing of the note, the agent of the defendant informed the agent of the plaintiff that the defendant would not proceed further in the matter, and all negotiations ceased. Up to that time the only objection defendant had made to the plaintiff's title was that the record did not carry it further back than 1829. Afterwards, before suit was brought, plaintiff made formal tender of his deed and the money required by the contract, and demanded a deed to the Pine street property, which defendant refused; and at the same time defendant tendered to plaintiff \$250, which plaintiff had paid as earnest money on the signing of the contract, and plaintiff refused it. Then this suit was begun.

On the trial, the plaintiff showed title to the Market street property by deeds duly recorded, beginning May 5, 1829, from Robert Wash to Robert Rankin, and running, through regular succession, down to 1881 and 1887, when the title carried by those deeds was conveyed to the plaintiff. And the evidence showed that the plaintiff and his grantors in those deeds had been in open, unbroken adverse possession of the property for a period beginning in 1845, and that the plaintiff and his grantors in those deeds had paid all the taxes on the property, from and including 1862, down to and including 1897. The defendant introduced deeds showing—First, a concession from the French government to Jacques Denis, dated July 17, 1769; second, Jacques Denis to Francis Denaux, dated June 21, 1771, recorded February 26, 1841; then the testimony of Otto Schmitz, a surveyor, who testified that he had surveyed the property, and was familiar with the land covered by the concession to Jacques Denis, and that it covered the land in question; he derived

his information from a certified copy of the confirmations by the United States to various owners in the old city, in the office of Julius Pitzman; then a quitclaim deed from the heirs of Francis Denaux to Alexis Denaux, July 10, 1841; deed from Alexis Denaux to Francis A. Quinette, 14th September, 1843; Quinette and wife to Aspasie Des Ilets, August 14, 1844; the will of Aspasie Des Ilets, probated February, 1878, directing her executor to sell her real estate (not described), and pay numerous legacies out of the proceeds; then a deed from plaintiff to Suitzer, June 2, 1887, conveying a strip of 9 inches off the east side of the lot in question. The deeds under which plaintiff acquired the lots contain a reservation of a 3-foot strip along the rear end for a private alley for the use of the occupants of the lot east, to go west to a public alley. In rebuttal, plaintiff showed a deed from Suitzer to him of the lot on the east, including the 9-inch strip he had sold. This deed was dated March, 1896, which was after the suit had begun. The explanation of the sale of the 9 inches to Suitzer, and its repurchase, which plaintiff gives, is that, when he came to build the house that now occupies the 40 foot 7½ inch lot in question, he found that the east wall of the old house was a partition wall, one-half of which was the west wall of Suitzer's house, and he was about to have some trouble about it, which was avoided by selling his 9 inches that the partition wall covered to Suitzer, and building a new east wall for the new house against the old wall. The repurchase was made to enable the plaintiff to obviate the objection to his title in consequence of the condition of that 9-inch strip. Plaintiff also showed, in rebuttal, that the 3-foot private alley had been fenced up as early as 1876, and had not been used as such since that date. The finding and judgment were for the defendant, and the plaintiff appeals.

Wm. O. & Jas. C. Jones and McKeighan, Barclay & Watts, for appellant. Stewart, Cunningham & Elliot, for respondent.

VALLIANT, J. (after stating the facts).

1. The first question we encounter is, was the defendant justified in refusing to perform the contract because the plaintiff's paper title went back no further than 1829, and did not connect with the concession from the French government subsequently confirmed by the United States? Up to the time defendant positively refused to carry out the agreement, the points in relation to the 9-inch strip and the 3-foot easement had not been discovered,—at least, no mention of them had been made in the discussions; but, so far as could be learned from what was said by defendant's agent, the gap in the record from 1769 to 1829 was the only objection. It is insisted for the respondent that the contract in question demands, not only a reasonably good, but an absolutely perfect, title. The learned cir-

cuit judge who tried the case notes in his opinion that the contract was not written by a lawyer, and on that ground accounts for some indefinite language employed. That fact may also account for the form of expression on this point. The language is, "if any defect should be found in the title," etc. The argument for respondent places the emphasis on the adjective,—if "any" defect should be found the contract should end. In their brief the learned counsel say that the parties "meant just what those words express,—any defect whatsoever in the record title,—notwithstanding that, by evidence of possession or other facts not of record, the defect in the record title might be so far supplied as to make the title good and marketable." Of course, if the parties had seen fit, they might have contracted in those words or to that effect, and, if they had, the court would not enforce upon either of them different terms. But a contract calling for an absolutely perfect record title, and which would be satisfied with such, does not call for a perfect, or even a marketable, title,—does not in fact call for as good title as this contract calls for. A man may have an absolutely perfect record title, yet it will avail him nothing if his adversary in possession has been there for such a period and under such conditions that the law will not allow him to be disturbed. But that is not the language of this contract. It is, "if any defect should be found in the title to either of said properties so that this contemplated trade cannot be made, then," etc. That form of expression neither condemns a title for lack of record evidence, nor requires a party to take a record title if it is overshadowed by a title outside the record. And it will be noticed that the word "perfect" is not used in that sentence, though it occurs in the sentence following: "If, however, the titles are found to be perfect, said deeds and lease are to be delivered without delay, not later than the 1st of July next." The only office that sentence serves is to fix the date for the performance of the agreement.

A title acquired by adverse possession, under our statute, is in every respect as good, for purposes of attack or defense, as a title by deeds running back to the government. *Bank v. Evans*, 51 Mo. 335; *Shepley v. Cowan*, 52 Mo. 559; *Bledsoe v. Simms*, 53 Mo. 305; *Dalton v. Bank*, 54 Mo. 105; *Barry v. Otto*, 56 Mo. 177; *Ridgeway v. Holliday*, 59 Mo. 444; *Hamilton v. Boggess*, 63 Mo. 233; *Ekey v. Inge*, 87 Mo. 493; *Sherwood v. Baker*, 105 Mo. 472, 16 S. W. 938; *Long v. Stock-Yards Co.*, 107 Mo. 298, 17 S. W. 656.

Titles by deed often have to be helped out by parol evidence; as, for example, the record title shown by defendant in this case (the concession of the French government to Jacques Denis) had to depend on the oral testimony of a witness who had made a study of old city maps. If plaintiff had shown a direct derivation of that title, it would not have come up to the requirement demanded by respondent in his

brief, because "it was not a title good beyond all reasonable doubt; it was open to possibility of attack." The testimony in support of that title was admissible, because it was the best that the circumstances of the case could afford, but it was far less satisfactory than the proof of plaintiff's adverse possession for 52 years. That period of time would seem, of itself, to put the plaintiff's title at peace, under the first section in our statute of limitations. And it covers also the period of 24 years wherein the disabilities which would suspend the statute are allowed to operate by section 4265, Rev. St. 1890. And, if there was even a possibility of claim arising in behalf of the legatees under the will of Aspasie Des Ilets, that would be quieted by the 30-years limitation contained in section 4268, which no disability will affect. *Collins v. Pease*, 146 Mo. 135, 47 S. W. 925; *Fairbanks v. Long*, 91 Mo. 628, 4 S. W. 499. A court of equity would not force upon a defendant a title in which there was any real defect, but it will not hesitate to require him to stand up to his contract when the title offered him is good beyond all reasonable apprehension. *Mastin v. Grimes*, 88 Mo. 478; *Greffet v. Willman*, 114 Mo. 107, 21 S. W. 459; *Mitchner v. Holmes*, 117 Mo. 185, 22 S. W. 1070; *Rozier v. Graham*, 146 Mo. 352, 48 S. W. 470. We conclude that the defendant was not justified in refusing to perform his contract when he did, and upon the ground he did.

2. But, after that, certain other alleged defects in the plaintiff's title were brought forward, one relating to the 9-inch strip sold to Sultzer, and the other to the 3-foot easement. When this contract was made, this 40 foot 7½ inch lot was covered by a three-story store building, the east wall of which was against the Sultzer wall. That building was mentioned in the contract, and it constituted a conspicuous monument covering the property. Under those conditions, if the contract had called for the land containing the building, and had then undertaken to describe the lot by metes and bounds, and in doing so had fallen 9 inches short, and the plaintiff had attempted to force upon the defendant a deed conveying only what was embraced in the metes and bounds expressed, reserving to himself the strip omitted, is there any doubt but that the court, at the suit of the defendant, would have compelled the plaintiff to convey all that the monument called for? The converse of the proposition is equally true. *McGill v. Somers*, 15 Mo. 80; *Grandy v. Casey*, 93 Mo. 595, 6 S. W. 376; *Smith v. Improvement Co.*, 117 Mo. 438, 22 S. W. 1083; *Harding v. Wright*, 119 Mo. 1, 24 S. W. 211; *Ryland v. Banks*, 151 Mo. 1, 51 S. W. 720.

But the plaintiff's record title shows that there is an easement, for the benefit of the occupants of the lot east and the lot west over 3 feet of the rear of the east 20 feet called for by the contract. The defendant, becoming, as he does, under this contract, the owner of the west 20 feet, is, of course, in

no danger of himself, but his apprehension is that that easement might be insisted on by the man on the Sultzer lot to the east. The evidence on this point went back no further than 1876, but it showed that at that date there was a fence that closed that 3-foot space, and it had never been used as an alley by any one, or otherwise than as a backyard by the occupant of the premises. The authorities cited by appellant on this point sustain his position that nonuser of an easement for 20 years, united with an adverse use of the servient estate, inconsistent with the existence of that easement, will extinguish it. *Roanoke Inv. Co. v. Kansas City & S. E. Ry. Co.*, 108 Mo. 50, loc. cit. 62, 12 S. W. 1000; *Chandler v. Aqueduct Corp.*, 175 Mass. 549; 6 Am. & Eng. Enc. Law (1st Ed.) 146; *Jones, Easem.* § 866; *Ten Broeck v. Livingston*, 1 Johns. Ch. 361. It would be impossible, under the condition shown by the evidence, for the owner of the lot east to maintain a right to that easement.

3. Since the institution of this suit, however, the plaintiff, for the purpose, has purchased the Sultzer lot, and therefore his deed will not only convey to the defendant the 9 inches in question, but will extinguish the easement. As a general rule, specific performance of such a contract will be enforced if the party seeking it is able, when the decree is rendered, to make his title good. *Lockett v. Williamson*, 37 Mo. 388; *Isaacs v. Skrainka*, 95 Mo. 524, 8 S. W. 427. But that is not a universal rule, and it is claimed by defendant that it should not be applied in this case, because time was of the essence of this contract. In *Mastin v. Grimes*, supra, which was a case of this kind, it was said by Sherwood, J., for the court: "Time is not generally deemed in equity to be of the essence of the contract. And even if, by the express terms of the contract, a day of payment be fixed, and time declared to be of the essence of the contract, still this is no bar to the time of payment being postponed, or to this essential element being altogether waived." And, after showing that it is the duty of the court to see that the matter of time is not abused by either party, a quotation is made in that opinion from 2 Pars. Cont. (5th Ed.) 662: "That is a reasonable time which preserves to each party the rights and advantages he possesses, and protects each party from losses that he ought not to suffer." The United States supreme court has also so held. *Cheney v. Libby*, 134 U. S. 79, 10 Sup. Ct. 498, 33 L. Ed. 818. Courts of equity treat this like they treat every subject that demands their judicial discretion. If right and justice demand that the time limit be enforced, it will be so decreed; but equity courts will not stick in the letter of the contract in such a case, if it is to prevent them from doing complete justice. By the terms of this contract, when the titles were examined and found perfect, the deeds were to be delivered "without delay, and not

later than the 1st of July next." That is all there is in the contract on that subject. And, if we should say that time is of the essence of the contract, we should so say only because it is so nominated in the bond. There is nothing in the circumstances of the case that would have made a few days' delay injurious to the interests of either party. In fact, by agreement, they did extend the time twice, and it was during the period covered by the last extension that the defendant unconditionally declared that he would not perform the contract. The time involved had nothing to do with his determination,—at least, he gave no intimation to that effect, but rather excluded that idea, but giving the reason that he did give. The plaintiff was obligated to take a two-years lease of the premises as soon as the deeds were exchanged. That shows that the defendant was not in any strained condition to get into the property. If defendant had been out of shelter for his business, and needed immediate possession to save him from loss, or if there had been any condition indicating an emergency for a consummation of the transaction, a court of equity might conclude that time was of the essence of the contract; but there was nothing to give such an idea, except the bare letter of the contract, and, if it was written by a real-estate agent, we might even conjecture that it was inserted at his own suggestion, to hasten the day of payment of his commissions. Plaintiff has shown disposition to do everything that could be done to give the defendant a clear title. If the defendant knew of this 9-inch strip and of this 3-foot easement, it was his duty to have notified plaintiff of them before refusing to carry out his agreement, to the end that plaintiff might have done as he has done,—clear up the title. On this point the authorities are also with the plaintiff. *Stevenson v. Polk*, 71 Iowa, 292, 32 N. W. 340; *McWhorter v. McMahan*, 10 Paige, 391; 22 Am. & Eng. Enc. Law, 990. Under the circumstances of this case, the plaintiff, being able at the time of the trial to make his title good, was entitled to a decree for a specific performance of the contract.

4. The contract contains this clause: "Said Scannell also further agrees that he will accept a lease in usual form for said Market street property for a term of two years, beginning on the 1st day of July, 1897, at a monthly rental of one hundred and fifty dollars, payable on the last day of each and every month during said term, said building to be used for commercial purposes only." It is contended that the words "in usual form" render that part of the agreement so indefinite that it cannot be enforced. There is nothing indefinite as to the terms and conditions of the lease. The contract is as explicit in all the essential parts as it could be. It is argued by the learned counsel for respondent that "it is common knowledge that leases of business property in St. Louis

often, if not usually, contain special provisions about destruction of the building by fire, keeping roof in repair, payment of taxes, special assessments, privilege or restrictions concerning subletting and the like, and that there is no form of lease so constantly adopted or usual as to make the usual form." Those matters mentioned by counsel do not relate to the form in which the terms of a lease may be expressed, but are themselves terms and conditions of the contract. No other terms or conditions, privileges or restrictions, could be added to the lease called for in this agreement than those mentioned, and, if a lease is drawn embodying in it those terms and conditions and nothing else, the mere form in which they are expressed is immaterial. But that part of the contract, in so far as it required plaintiff to accept a lease, has now lapsed by fault of the defendant, and is not in this case.

5. The answer pleads that plaintiff is estopped from claiming under this contract, because he notified defendant that he had found defects in defendant's title, and that he would therefore not accept it if a deed was offered. There is no evidence to sustain that plea. It is aimed at the letter from Mr. Boeck to Mr. Elliot, in which Boeck says that the plaintiff is advised that the alleys adjacent to the Pine street property have not been dedicated, and he thinks plaintiff ought to have a guaranty against that; "in other words, his attorney thinks your defect is more serious than the defect to the Scannell property, and Mr. Scannell thinks he ought not to be required to furnish a guaranty." That letter was written while the proposition to have the St. Louis Trust Company guaranty the title to the Market street property was being considered. It only means that plaintiff thought he ought not to be required to furnish such a guaranty, but it did not amount even to a refusal to do that. The judgment is reversed, and the cause remanded to the circuit court of the city of St. Louis, with directions to take an account of the rental value of the Pine street property from July 17, 1897, to date, deducting from the amount of such rents the amount of taxes, if any, the defendant has paid on that property, and of the rental value of the Market street property for the same period, less the taxes, if any, paid by plaintiff thereon, and upon the coming in of said account enter a decree requiring a specific performance of the contract in suit according to the prayer of the plaintiff's petition, except that the lease called for by the contract be not required, and give judgment for the plaintiff against the defendant for the amount, if any, of the rents, less taxes of the Pine street property over and above the rents, less taxes of the Market street property; or, if the balance should be the other way, give judgment for the defendant against the plaintiff for the amount of the rents of the Mar-

ket street property, less taxes over and above the amount of rents, less taxes of the Pine street property, and render judgment for plaintiff for costs. All concur, except MARSHALL, J., absent.

STATE ex rel. WHEELER v. ADAMS, County Treasurer.

(Supreme Court of Missouri. March 26, 1901.)

COUNTIES—WARRANTS—PAYMENT—REFUSAL—MANDAMUS—PLEADING—ESTOPPEL—SWAMP-LAND FUND—MAINTENANCE—RIGHT OF COUNTY—SWAMP LAND—SALE—CONTRACT—RESCISSION—SUIT FOR BREACH—COMPROMISE—COUNTY COURT—AUTHORITY—REFUNDING PAYMENTS—SCHOOL FUND—DIVERSION.

1. Relator alleged that on the 29th of June, 1899, when he presented a warrant to defendant, who was county treasurer, for payment, there was money in the treasury available for its discharge and all warrants issued prior thereto. Defendant denied that there was "now" any money in the treasury available for the payment of the warrant. *Held*, that defendant's failure to deny that there were funds available when the warrant was presented estopped him from showing that he now had no funds available for such payment.

2. The county treasurer being merely a ministerial officer, mandamus will lie to compel him to pay a properly audited warrant.

3. Rev. St. 1899, § 8190, provides that the net proceeds arising from the sale of swamp lands, after deducting the expenses of draining and reclaiming the same, shall be paid into the county treasury, and become a part of the public-school fund. Relator alleged that for many years both prior and subsequent to the issuance of a warrant to him by the county court against the swamp-land fund the county had kept and maintained in the hands of the county treasurer a fund known as the "Swamp-Land Fund," and the allegation was not denied by defendant's answer. *Held*, that defendant could not maintain that there was no such fund known to the law as a swamp-land fund, since by his failure to deny plaintiff's allegation he admitted its existence.

4. Rev. St. 1899, § 8190, providing that the net proceeds arising from the sale of swamp lands, after deducting the expenses of draining and reclaiming the same, shall be paid into the county treasury, and become a part of the public-school fund of the county, does not prevent the county from maintaining a fund in its treasury known as a "swamp-land fund," since the money paid in on account of such land does not become a part of the school fund prior to the payment of draining and reclaiming expenses.

5. Rev. St. 1899, § 8213, provides that in every case where persons have become purchasers of swamp lands on credit, and become unable to pay for the same, the county court, on application of such a purchaser, may cancel the contract, and shall not in any case pay back any money or interest that has been paid thereon, and section 8215 authorizes county courts, in case they are unable to make a good title to swamp lands, to cancel a contract for the purchase thereof, with the consent of the purchaser. Relator contracted to purchase swamp land, and agreed to make payments within a certain time, and the parties subsequently entered into a new agreement extending the time of payments until the county's title to the land could be determined; and prior to such determination the county court, without the consent of relator, rescinded the contract, and relator sued for damages. It did not appear that relator was unable to carry out his contract. *Held*, that the

cancellation of the contract was unauthorized, and hence the payments made by relator were not forfeited.

6. There is nothing in the statutes prohibiting the county from settling relator's suit by agreeing to refund the money already paid by relator on the contract, and issuing warrants therefor on the county treasurer.

7. Rev. St. 1899, § 8190, provides that the net proceeds arising from the sale of swamp lands, after deducting the expenses of draining and reclaiming the same, shall be paid into the county treasury, and become a part of the public-school fund. The county unlawfully canceled a contract to sell swamp land to relator, and compromised relator's suit for damages by issuing warrants on the swamp-land fund for the amount paid by relator on the contract. *Held*, that the county was not prevented from issuing the warrants by the fact that the money paid into the treasury constituted a trust fund for the benefit of the public schools, since prior to the payment of reclaiming and draining expenses the money did not become a part of the school fund.

8. Where the county court unlawfully rescinded a contract to sell swamp land to relator, and compromised a suit by relator for damages by agreeing to refund the amount paid by him on his contract, with interest, the contention that warrants for such sum were invalid, on the ground that it was beyond the power of the county court to compromise a general claim for damages, cannot be sustained, since, having unlawfully canceled the contract, it was the duty of the county to refund relator's payments, and hence relator's right to a warrant did not depend on the compromise.

In banc. Application by the state, on relation of George B. Wheeler, for a peremptory writ of mandamus to compel W. B. Adams, treasurer of Butler county, to pay a warrant drawn in favor of relator. Writ granted.

E. R. Lentz, for relator. Johnson, Houts, Marlatt & Hawes, for respondent.

ROBINSON, J. This is an original proceeding instituted in this court on the relation of George B. Wheeler for a peremptory mandamus to compel respondent, as treasurer of Butler county, to pay relator the amount of a certain county warrant drawn by the county court of said county upon the swamp-land fund. The allegations of the alternative writ are as follows: "That on and prior to the 29th day of June, 1899, Geo. B. Wheeler held a claim against the county of Butler, in the state of Missouri, for the sum of \$3,000, together with interest thereon for several years, for money paid by him to the county of Butler on account of swamp lands of said county, and which said sum of money was by the order and direction of the county court of said county paid into the treasury of said county, and placed to the credit of the swamp-land fund of said county; and thereby said sum of money so paid by this relator into the treasury of said county became and was a part of the swamp-land fund of said county. That on the 29th day of June, 1899, he presented said claim to the county court, and that said county court on said 29th day of June duly audited said account, and, by an order of the county court duly entered of record in the records of said court, did find and determine that the relator herein was entitled

to have said sum of money, with interest thereon, returned and refunded to him, and, by order duly entered in its records, did order and direct the clerk of said court to issue and deliver to the relator a warrant in due form directing the treasurer of said county to pay to the said Geo. B. Wheeler for the sum of \$3,900 out of any money in his hands appropriated for swamp-land purposes; and on the 29th day of June, 1899, the clerk of said county court did, in pursuance of said order of the county court, issue and deliver to the relator herein said warrant, as he was ordered and directed by said county court to do, which said warrant is as follows: 'No. 454. \$3,900.00. Treasurer of Butler County: Pay to Geo. B. Wheeler three thousand nine hundred dollars out of any money in the treasury appropriated for swamp-land fund. Given at the court house in Poplar Bluff, Missouri, this 29th day of June, 1899. By order of the County Court. H. S. Baker, President. Attest: Geo. C. Orchard, Clerk.' That subsequent thereto, and about the 1st day of July, 1899, this relator duly presented said warrant to the treasurer of said county, and that the respondent, as such treasurer, refused to pay the same, alleging as a reason therefor that he did not know whether he had to pay the same or not, and saying that he wanted to take further counsel in relation thereto. That thereupon the relator herein demanded of respondent, as such county treasurer, that he register said warrant, and indorse thereon the fact of such presentment, and that payment thereof was refused because he had no money in his hands with which to pay the same. That respondent, as such county treasurer, refused to comply with the demand to have said warrant registered, giving as a reason thereof that he could not do that, because he had the money with which to pay said warrant, should he decide to do so. And this relator says that he has at divers times since the 1st day of July, 1899, demanded of respondent, as such treasurer, that he pay said warrant, but that he has at all times refused to comply with such demand, or pay said warrant. Relator says that for many years both prior and subsequent to the issuing of said warrant as aforesaid the county court of said county has, in the exercise of its discretion, kept and maintained a fund in the hands of the treasurer of the said county known and designated as the 'Swamp-Land Fund,' upon which warrants were drawn in payment of all accounts due and owing by said county on account of its swamp lands; that on the 29th day of June, 1899, and at all times since, and now, there was and is in the hands of the respondent, as such treasurer, money belonging to swamp-land fund sufficient to pay said warrant, as well as all other warrants of prior issue and presentation drawn on said swamp-land fund, and it becomes and was the duty of the respondent, as such treasurer, to pay said warrant when presented to him for payment, and that his

said acts in so refusing to pay said warrant were wrongful and illegal, and in violation of the duties of respondent as such county treasurer; that, by reason of said wrongful and illegal acts of said respondent as such county treasurer, this relator has been prevented from collecting and receiving the said sum of money so due from said county of Butler to him; that this relator is wholly without remedy, except by the writ of mandamus."

The return of respondent to the alternative writ, after admitting that he is, and ever since the 1st day of January, 1899, has been, treasurer of Butler county, proceeds as follows: "That on the 21st day of June, 1894, the county court of Butler county accepted a bid therefor made by relator to the said county court to purchase of said county all of the swamp and what is known as the 'Railroad Lands of Butler County' at the sum and price of \$1.65 per acre, and that said bid was accepted on the express conditions that the said Wheeler pay the sum of \$3,000 to the county treasurer of Butler county within five days of said date, as a partial payment on said lands, which said sum should be forfeited to the county if said Wheeler should fail or refuse to pay the full or entire amount for all of said lands, thereafter to be ascertained according to a proposition made by Wheeler, and filed by him with the county clerk on the 16th day of June, 1894. It was thereupon ordered by the said county court that said Wheeler entered into a written contract with the county of Butler for the faithful performance of the contract as set forth in the proposition of June 16, 1894, and that said written contract, together with the receipt of the treasurer of Butler county for the sum of \$3,000, be filed with the clerk of said county court within sixty days thereafter. That afterwards, at the August term, 1894, of said court, and on the 17th day of August, 1894, the county court of said county ordered that W. C. Graddy be appointed agent for and in behalf of said Butler county to enter into and sign in duplicate a contract for the sale of Butler county swamp and overflow lands to Geo. B. Wheeler, of Poplar Bluff, Mo., and, in connection with H. M. Phillips, the county attorney, make an examination and comparison of abstracts of said lands. And afterwards, at said August term, 1894, of said court, and on the 2d day of October, 1894, there was filed in said court articles of agreement purporting to have been made and entered into by and between said W. C. Graddy and Geo. B. Wheeler on the 15th day of August, 1894, reciting that said Wheeler did on the 16th day of June, 1894, propose in writing to said court to purchase all lands owned by said county commonly known as 'swamp lands,' and did propose to pay for said lands the sum of \$1.65 an acre, and, should his proposition be accepted, to pay into the county treasury the sum of \$3,000 as first payment on said

lands, and to pay the balance of the purchase price in ninety days thereafter, or sooner, if abstract of said land be made by said Wheeler by an abstractor, and that the abstract could be examined by said court, and did propose to include in said proposition all lands known as 'railroad lands' in said county, and that the county court of said county had accepted said proposition with the express condition that the said Wheeler should pay the sum of \$3,000 to the county treasurer within five days from the date of order, as a partial payment on said lands, which sum was to be forfeited by said Wheeler should he fail or refuse to pay the amount ascertained to be 'due according to his contract of June 16, 1894; and it was ordered by said court on the 20th day of June that said Wheeler enter into a written contract with said county for the faithful performance of his contract of June 16, 1894. That Wheeler had paid said sum to the treasurer, and filed his receipt with the clerk of said court. It then purported to sell to the said Wheeler, for the price of \$1.65 per acre, all the swamp and wet or overflowed lands now owned by Butler county, and heretofore pretended to be conveyed by Chas. W. Addy, as commissioner of Butler county, to the St. Louis, Iron Mountain & Southern Railroad Company, by certain commissioners' deed recorded in the office of recorder of deeds within and for the county of Butler, in Deed Book J, pages 612, 613, 614, wherein is set forth and described 53,977 ²³/₁₀₀ acres of land; also by certain commissioners' deed bearing date December 22, 1874, and recorded in the office of the recorder of deeds of said Butler county, in Deed Record J, at pages 611, 612, wherein is set forth and described 3,959 ²⁷/₁₀₀ acres of land, and also all the lands owned by said Butler county, and commonly known as the swamp or overflow lands; and it was further recited in said articles of agreement that said Wheeler was to furnish at his expense a perfect and complete set of abstracts of all the lands, within ninety days from the 15th day of September, 1894, to the county of Butler, and also pay said county whatever reasonable expenses said county should incur in the examination of abstracts and in ascertaining the exact number of acres of land owned by said county, and that said Wheeler was to pay the treasurer within five months from the 21st day of July, 1894, the full amount of the balance of the purchase price of said lands. It is further set forth that upon the fulfillment of this agreement, and the performance of the conditions set forth by the said Wheeler at the time and in the manner, and the full payment of purchase price of the land, then said court, through its proper officers, should make and deliver to said Wheeler a patent to the lands, and that on failure of said Wheeler to do and perform said agreement the county might elect to consider itself released and d'scharged from all liability on

any of the covenants specified to be done on its part, and that the said partial payment of \$3,000 already paid by said Wheeler into the county treasury should be deemed forfeited, without further notice, as liquidated damages for the nonperformance of the contract. On the 21st day of December, 1894, another and further agreement between Graddy and Wheeler was filed in the court, which provided that the compliance with the agreement heretofore made be postponed until such time as the title to the lands be judicially determined. At the February term, 1895, of the said county court, and on the 9th day of April, 1895, said contract was by the county court of said county canceled for the reason that said Wheeler had failed and neglected to comply with his said contract, and it was declared that the contract was canceled and rescinded. That afterwards, on the 29th day of June, 1899, the said Wheeler submitted to the county court of said county a proposition to compromise a suit which he had instituted against said county of Butler to recover \$50,000 as damages which he alleged he had sustained by reason of the cancellation of said contract, set out as having been entered into between himself and said county on the 15th day of July, 1894, in which he agrees to release the county from all claims and demands which he had against it for such damages for the sum of \$25,000, and the return to him of \$3,000, as partial payment on the lands which he had paid, and further agreed to purchase certain swamp lands, aggregating 19,987 ²³/₁₀₀ acres, at the price of \$1.25 an acre, and the amount thereof to be deducted from the \$25,000; and on the same day the county court accepted said proposition, and spread upon the record of said court an order to that effect, and selling the said lands to said Wheeler on such terms, and directing the clerk to issue a patent therefor to said Wheeler, and afterwards, on the same date, caused the following to be entered of record. 'In the Matter of Geo. B. Wheeler Warrant for \$3,900. It is ordered by the court that the clerk issue to Geo. B. Wheeler a warrant on the treasurer, payable out of the swamp-land fund, for the sum of \$3,900.' All of which will more fully appear from a certified copy of the record herewith filed, and asked to be taken as a part of this return. Respondent further says that there is no money in the treasury of said county out of which said warrant could be paid; that said warrant was issued without authority of law and is void; that there is no such fund known to the law as the 'Swamp-Land Fund.' Respondent, having fully answered, asks to be discharged, with his costs."

The relator thereupon moved for a peremptory writ notwithstanding the respondent's return. For the purpose of considering the motion, which may be regarded somewhat in the nature of a demurrer, all averments of facts sufficiently well pleaded in

the return will, under our practice, be taken as admitted. Eliminating the conclusions of law and matters not well pleaded the correctness of which the motion does not admit, and eliminating also all redundant, immaterial, and irrelevant averments, with which the return abounds, the material facts set up in the return to justify respondent's action in refusing to pay the warrant in question when the same was presented to him for payment, the truth of which the motion concedes, are in substance: That on August 15, 1894, the relator entered into a contract with the county court of Butler county for the purchase of certain swamp lands, and paid the sum of \$3,000 to apply on the purchase price thereof: that by the terms of said contract the relator was to forfeit the amount so paid in case he failed to comply with his contract; that in December following the county court and relator made a supplemental contract in reference to the sale of these lands, whereby, in view of certain litigation and other complications which had arisen in the meantime touching the title of such land, and the consequent uncertainty as to just what land the county court did own, it was mutually agreed between the relator and the county court that the performance of the contract of August 15th should be postponed till such time as the title thereto should be judicially determined; and that on April 9, 1895, the county court canceled and rescinded the contract, without, however, having the title to these lands judicially settled or determined. Afterwards the relator commenced an action against Butler county to recover damages by reason of the rescission and cancellation of said contract, which resulted in the relator accepting a conveyance from said county of certain swamp lands, and the promise of a warrant for the return of the purchase money so paid by him. Thereupon the county court made an order of record directing the county clerk to issue a warrant to relator for \$3,900, being the amount of money paid into the county treasury by the relator in 1894 in compliance with the contract, together with interest thereon at the rate of 6 per cent. per annum from the time of such payment. It will be observed that the return does not deny the issuing of the warrant against the swamp-land fund, nor that at the time the same was presented to respondent for payment there was not money enough in such fund to have paid said warrant and all other unpaid warrants presented for payment. It is true, the return alleges that there is no money in the treasury out of which the warrant could be paid, but this is not a denial of the distinct affirmative allegation of the alternative writ "that on the 29th day of June, 1899, and at all times since and now, there was and is in the hands of the said W. B. Adams, as such treasurer of said county, money belonging to the said swamp-land fund amply sufficient to pay the said war-

rant, as well as all other warrants of prior issue and presentation drawn on said swamp-land fund." These were all averments of fact upon which respondent could have tendered an issue by his return. Under our practice act, every material allegation of the alternative writ not controverted by the return must be taken as true. Where, as in the case at bar, the allegations of the alternative writ are not specifically denied, but the respondent states other facts inconsistent with those set up by the relator, this will not be deemed a denial. Merely making a counter statement, or giving a different version of the matter from that contained in the alternative writ, is not specifically denying such allegations. *Knapp, Stout & Co. v. City of St. Louis*, 156 Mo., loc. cit. 352, 56 S. W. 1102; *Green & M. Pl. & Prac.* §§ 390-791. Having failed to deny the allegations of the writ with respect to the availability of funds, respondent cannot, therefore, now say there are no funds in his hands applicable to the payment of the warrant in question.

Respondent is also in error in his contention that relator has another remedy, and therefore mandamus will not lie. It is the well-settled doctrine of this state that county treasurers are simply ministerial officers, and can be compelled to perform their duties. As was said by Judge Bliss in *State v. Treasurer of Callaway Co.*, 43 Mo., loc. cit. 230, "There is no doubt of the jurisdiction of this court by mandamus against county treasurers who refuse to pay claims properly audited." To the same effect are the cases of *State v. Haynes*, 72 Mo. 378; *People v. Lawrence*, 6 Hill, 244; *Baker v. Johnson*, 41 Me. 15. It is not perceived wherein the case of *Andrew Co. v. Schell*, 135 Mo. 81, 36 S. W. 206, cited by respondent, applies to the altered facts of this case. The rule announced in that case is without application here. If, therefore, the issuing of the warrant described in the alternative writ was within the scope and authority of the county court, the respondent, being simply a ministerial officer of the county, confessedly having money enough in his hands belonging to the swamp-land fund with which to pay said warrant and all unpaid warrants of prior presentation drawn against such fund, then it was his plain duty to have paid the same. Before discussing this branch of the case, however, we will notice the suggestion contained in respondent's brief that there is no such fund as the swamp-land fund known to the law. In support of his position counsel cites section 8199, Rev. St. 1899, which provides that the net proceeds arising from the sale of swamp lands, after deducting the expenses of draining and reclaiming the same, should be paid into the county treasury, and become a part of the public-school fund of the county. We fail to discover any application of that section to this point. The allegation of the alternative writ is that for many years both prior and subsequent to the

issuing of the warrant the county court of Butler county has kept and maintained a fund in the hands of the treasurer of the said county known as the "Swamp-Land Fund," against which warrants were drawn in payment of all accounts due and owing by said county on account of its swamp lands. As already seen, in failing to deny these affirmative allegations the return clearly operates as an implied admission of the truth thereof. Apart, however, from any question of the sufficiency of the pleadings, this point is settled adversely to respondent in *State v. Bollinger Co. Ct.*, 48 Mo. 475, which was a proceeding by mandamus to compel the county court to provide for the payment of certain warrants drawn upon the swamp-land fund. This court in that case not only recognized the right to maintain a swamp-land fund, but ordered a peremptory writ to compel the county court to provide funds for the payment of warrants legally drawn against such special fund. This opinion was written after the enactment of the section above referred to.

Looking, then, at the nature of the relator's claim, can it be said, as contended by respondent, that the action of the county court in issuing the warrant here under consideration was beyond the authority of the county court, or, to put it differently, does the return disclose any reason whatever why this warrant should not be paid? Under our statute prescribing the conditions upon which county courts may cancel contracts for the sale of swamp lands, it is provided as follows: Section 8213, Rev. St. 1899: "In every case where persons have become purchasers of swamp and overflowed lands, in the several counties in this state, on credit, * * * and shall, by death or otherwise, become unable to pay for the same, the county court of such county, on the application of such purchaser, or, in case of death, of his or her legal representatives, is hereby authorized to cancel the contract, in whole or in part, upon these conditions: Said court shall not in any case pay back any money or interest that has been paid upon said contract. * * *" By section 8214 it is provided: "If the purchaser of any swamp lands has absented himself from the state, so that no process of law can be served upon him, the county court of the county where the swamp land lies, may upon the application of any one who may have become surety for the purchase of the said land cancel the contract on such terms as may be deemed equitable. * * *" By the terms of section 8215 it is provided: "Whenever the county courts of this state shall have sold swamp or overflow lands to which they are unable to make good and sufficient title, the said courts are hereby authorized and empowered, with the consent of the purchaser, or, in case of his or her death or absence from the state, then with the consent of his or her sureties or legal representatives, to cancel said contract." These sec-

tions prescribe all the conditions under which the county court is authorized to cancel contracts for the sale of swamp lands. Counsel for respondent contends that the contract was canceled under the authority of section 8213, which precludes the repayment of the purchase money paid upon the contract. In order to authorize the court to proceed under that section, it must appear affirmatively: First, that relator was unable to carry out his contract and pay the balance of the purchase money; second, that the contract was rescinded on application of relator. It does not appear from the return that either of these prerequisites has been complied with in this case. No sufficient showing is made here of any conditions which would authorize the county court to cancel the contract under that section. Manifestly, there is nothing in the statute prohibiting the county court from refunding payment of \$3,000 made by relator, where the contract has been canceled under circumstances like the present. It is conceded that relator did not apply to the county court for a cancellation of his contract; nor was it shown that he was dead, and the application, therefore, made by his legal representatives. Neither is it averred that he was insolvent, or had in any wise become unable to comply with his contract to pay for the land. So far as the return shows, the relator seems to have been in the strict performance of the original contract, as modified and extended by the supplemental agreement of December 31, 1894, when the county court arbitrarily stepped in and canceled the contract of its own motion. While it is true that the return set up that the contract was canceled because relator failed to comply with its terms, this allegation, however, is a conclusion of law, pure and simple, which is not admitted by the motion. It will not do to permit the respondent to say that the contract "was canceled for the reason that the relator had failed to comply with his contract," etc., without specifying what relator did or omitted to do in that regard. Such a procedure would be violative of every principle of good pleading, and substitute the pleader's judgment for that of the court. In speaking of this precise question in *Knapp, Stout & Co. v. City of St. Louis*, 156 Mo., loc. cit. 353, 56 S. W. 1104, it was said, "Under our practice act the pleader is required to make a simple statement of the facts constituting his grievance, to which he then prays an application of law,—not his conclusion from these facts, or his judgment on the result." The return shows, however, that in December, 1894, another contract was entered into between relator and the county court, whereby the performance of the contract of August 15th was postponed until such time as the title to the land could be judicially determined; but there is no averment in the return, or from which it could be inferred, that the title to these lands had been judicially de-

terminated in June, 1893, when the rescinding order was made. In view of the contract of December 31st, extending the time for the performance of relator's original contract until the title to the land had been judicially determined, and the absence of any showing that the title to these lands had been judicially determined as provided by the latter contract, it is clear that there was no breach of the contract on the part of the relator. The action of the county court, therefore, in cancelling the contract before a judicial ascertainment of the title was had, cannot, we think, be justified. Consequently there was no forfeiture of the purchase money, and the county court was not prohibited from refunding the same. The county having failed to comply with its contract in reference to the sale of these lands, we do not see any good reason why the purchase money paid by relator, with interest thereon, should not, in the circumstances of this case, be refunded. On respondent's own showing, it appears that, by reason of certain litigation and other complications touching the title, the county could not give a good title. Indeed, it was not known at the time the rescinding order was made just what land the county did own. It would be a remarkable proposition that, while relator was in the performance of his contract as extended and modified by the agreement of December 31st, the county court could spread upon its records a solemn order canceling the contract, and convey the same land to other parties, thus rendering it impossible for the county to comply with its contract, without refunding the money received from the relator thereon. Having canceled the contract without fault on the part of the relator, the county, under every principle of right and justice, was bound to refund the purchase money received thereon.

It is next insisted that, as the money was derived from the sale of swamp lands, the county court had no authority to order the same paid to relator in settlement of a general claim against the county for damages growing out of the breach of a contract for the sale of those lands, because such money constituted a trust fund for the benefit of the public schools, and therefore could not lawfully be diverted to any other purpose. This is a clear misapprehension of the statute, as said in the case of *Brown Estate Co. v. Wayne Co.*, 123 Mo. 464, 27 S. W. 322. Primarily these lands are held for the purpose of drainage and reclamation, and all the interest the common schools could have therein would be to such of the proceeds thereof as may be left after the payment of the expenses of such reclamation. For the purpose of this case it is wholly immaterial what fund the proceeds arising from the sale of these lands belonged to. The fact is that the county received relator's money and placed it to the credit of the swamp-land fund. Certainly there is nothing in the stat-

ute to prevent the county court, in refunding this money, to draw a warrant against the fund that received it. If the relator is entitled to a return of his purchase money, it would be perfectly proper that the fund receiving same should be drawn upon for that purpose; otherwise, the county court, through inadvertence, might so place funds as to put it beyond its power to return the same. We have examined the authorities cited by respondent, and do not find that they militate against the views herein expressed.

Counsel for respondent also contends that the warrant in question was the result of a compromise between relator and Butler county in June, 1890, of a general claim for damages against the county, which was clearly beyond the power of the court, or, in other words, that the warrant was not based upon a right to the money existing prior to June 29, 1894, but was based upon rights growing out of a compromise between relator and the county court on June 29, 1890, and that the relator's right to this money does not therefore, rest upon any of the transactions of 1894, but must stand or fall by the compromise agreement. The error of this position is manifest when we take into consideration the fact that the money paid by relator to the county was paid under the contract of August 16, 1894, as modified and extended by the supplemental agreement of December 31st of that year. The county court, having of its own volition canceled the contract before the title to the lands had been settled, was at least bound to refund the purchase money received thereon, which, however, it declined to do until after the relator commenced a suit against the county for \$50,000 damages growing out of the rescission of the contract. During the pendency of this action relator made a proposition to the county court to settle his claim against the county touching the partial payment made on the contract, and also the damages alleged to have been sustained by reason of the cancellation thereof. This proposition was in two parts: First, that the sum of \$3,000 paid by relator under the contract, together with interest thereon, should be refunded to him; second, relator then proposed to take \$25,000 in satisfaction of his claim for damages, and to accept a conveyance of certain swamp lands at \$1.25 per acre in payment thereof. Afterwards, on June 29, 1890, the county court accepted both propositions, and spread upon its records an order directing the county clerk to issue the relator the warrant in question for the \$3,000 so paid by him, together with interest thereon from the date of such payment at the rate of 6 per cent. per annum, and issued relator a patent for such land. The facts above detailed make it clear that there is no merit in respondent's contention, and show beyond question that the warrant was properly issued in payment of an indebtedness existing prior to the 29th of June, 1890. It is unne-

essary to discuss the question as to whether or not the county court was acting beyond its power in conveying these lands to the relator in settlement of his claim for damages. That question has nothing whatever to do with relator's right to have the money paid upon the contract returned to him, and does not affect his right to payment of the warrant in question. We are of the opinion that the action of the county court in issuing the warrant was clearly within the scope of its powers, and shall therefore direct the issue of a peremptory writ.

BURGESS, C. J., and SHERWOOD, BRACE, VALLIANT, and GANTT, JJ., concur. MARSHALL, J., absent.

STATE v. HUFF.

(Supreme Court of Missouri, Division No. 2.
March 26, 1901.)

RAPE—SUFFICIENCY OF EVIDENCE—APPEAL— GENERAL OBJECTION—SUBPŒNA— PROCESS—RETURN.

1. Prosecuting witness in a trial for rape testified that accused, her stepfather, came home at night and ordered her and her sister, a child of 9, to dress and mount a horse with him to go to the nearby village, where he intended to shoot her mother and sister; that after proceeding part way he returned and took witness into the barn; that afterwards he took her into the house and sent her and her sister upstairs, and shortly after, while they were screaming, by means of threats, and in the presence of her sister, ravished witness; that he had done the same in the barn; that the next day she made complaint; that a month later she was married, and the next day she and her husband started overland in a wagon, and were later joined by accused, who traveled with them in the wagon for some time, and finally she wrote to the sheriff, and he came and arrested accused. Witness contradicted herself in many ways. The alleged offense occurred in a thickly-peopled village, and next door to an inhabited house. Two neighbors testified to hearing screams of children on the night in question, but neither investigated the matter. Physical examination of prosecuting witness by physicians revealed that the crime might have been committed. The witness was impeached by several witnesses, most of them relatives of accused, who testified that she stated to them that accused had never committed the crime, but that her sister had concocted the scheme to cause a separation between accused and their mother. An attorney testified that she had admitted to him that accused had not committed the offense. *Held*, that a conviction was not justified.

2. Testimony of prosecuting witness that a person "representing accused" attempted to induce her not to testify is incompetent, as being a legal conclusion and hearsay.

3. Where evidence is incompetent and hearsay, its admission can be reviewed on appeal under general objections.

4. A subpoena is inadmissible where its return shows service in a county in another state.

5. A return of service of a subpoena signed by a special deputy in his own name is invalid.

6. Where an attachment for contempt was issued against a witness on the 14th of the month, and on the 16th, the day of the trial, the sheriff made a return of due and diligent search, not only in his own county, but on the

very same day in another county, the return, failing to show that the sheriff went at least once to the residence of the witness, is not sufficient to show any real effort on the part of the state to obtain the witness mentioned in the attachment.

7. Testimony of a witness that he saw a certain state's witness at his home a few days before the trial is admissible to show the state's lack of diligence in securing his attendance.

8. Accused not being charged with eluding the prosecuting witness, it was error to admit evidence that accused owned the team and wagon in which the witness left the neighborhood.

9. It is irrelevant to show whether accused or his wife owned the farm occupied by them, how much it sold for, and whether the wife had not mortgaged her property to secure the fees of accused's counsel.

10. Evidence that a prosecuting witness was made to leave the neighborhood by persons other than accused is incompetent.

11. Conceding that it was competent for prosecuting witness to testify that she was made to leave the neighborhood, it was error to exclude further questions eliciting the names of those who made her go.

12. Evidence of prosecuting witness that she made no objection to being placed under bond for her appearance at court, and that she was glad, because she was afraid to leave the jail, is incompetent.

13. Objection cannot be considered on appeal that the jury were not instructed as to certain points, there being no exception saved to such failure to instruct.

Gantt, J., dissenting. See 61 S. W. 1104.

Appeal from circuit court, Pike county; D. H. Eby, Judge.

William Huff was convicted of rape, and appeals. Reversed.

James O. Barrow and Pearson & Pearson, for appellant. Sam B. Jeffries, Atty. Gen., and Geo. W. Emerson, for the State.

SHERWOOD, P. J. Ten years in the penitentiary was the term of punishment which the jury awarded to defendant on a charge of having ravished his stepdaughter Hattie Kent, a girl of 15 years of age, on the 6th day of October, 1898, and judgment went according to the verdict. One of the grounds of the motion for a new trial is that there is no evidence to support the verdict. The evidence has, in consequence, been most thoroughly examined. Numerous errors are also assigned as reasons for reversing the judgment rendered. The statements made by counsel on either side are far from satisfactory,—especially so because of the assertion that "there is no evidence," etc. Adopting such portions of defendant's abstract as will answer my purpose, I will make such additions thereto and emendations thereof as may be requisite.

Hattie Hopkins, the prosecutrix, testified: "My father's name was Richard Kent. He died April 9, 1894, and my mother married the defendant about three years ago. My mother had four children by her first marriage, and the defendant had three by his first marriage. Their names are Frankie, who is nine years old, Johnnie, and Lena Huff. On the night this offense was alleged-

to have been committed, I was at my home, in Prairieville, with my little brother Fadie, twelve years old, and the defendant's three children. We were all downstairs, in the front room. My mother and older sister were at the drug store in Eolia, about one mile south from Prairieville. We were all asleep in the front room downstairs; that is, myself, Frankie Huff, Johnnie Huff, Lena Huff, and Fadie Kent. Between nine and ten o'clock defendant came and broke a window. That waked me, and I hollowed to Frankie to get up and see who it was. She let him in. He made Frankie and I dress and get on the horse with him, saying he was going down to the store and kill my sister and mother. We went down part of the way to Eolia; then turned and came back. He put the little girl down and told her to run into the house. I jumped off the horse and started to run, but he held me and said if I did not stay there he would kill me. The horse was left in the yard that night. He took me around to the barn. Then we went to the house and he drew his pistol on us, told us if we did not go upstairs he would kill us, and went on upstairs. I went upstairs. He stayed downstairs. Frankie and I were both in the front room upstairs. In about one-half hour he came upstairs in his underclothes. His little girl and myself were screaming, and he took me into the back room and threw me down. He got all my undergarments off, but one foot, and forced my legs apart. Frankie came in and begged her papa not to do me that way, and hollowed for Dick Henry, the nearest neighbor, and he drew his pistol on her and made her go back into the front room." Prosecutrix then stated, in response to the prosecuting attorney's questions: "Well, he threw me down and fucked me." The two last words the prosecutrix repeated at the instance of the prosecutor. "The next morning I told my mother and sister Oney, who returned that morning, and we went over to Mr. Smith's and had him arrested. With reference to the time we were at the barn, he tore my underclothes off of me before he threw me down; then he threw me down and did the same to me he did upstairs." This answer was made to a direct question by the state's attorney as to what defendant did at the barn, and this was permitted notwithstanding the witness had exhibited no unwillingness to testify, and at the barn she said she was screaming, and defendant threatened her with the "knucks" and pistol. Such direct and leading questions as that just mentioned are a striking feature of this case, all through the examination in chief of prosecutrix. Thus: "Did he say anything else he was going to do, that you remember of?" "Then what was done?" "Where did you go then?" "What did he do when he came up there?" "What did he do then?" "State what he did then." Such questions were vainly objected to by defendant as leading and suggestive; the court remarking in

overruling the objections, "What the defendant did or said at the time would be competent," which was not the ground of the objections made, but that the witness was being led step by step, and not allowed to tell her own story in her own way. The prosecutrix then stated that she remained at Mr. Smith's that day, then went to Bowling Green, and then to Sheriff Hopke's, where she remained about 20 days, when her mother went up after her and sent her home; that after reaching home she went to William Huff's, father of defendant, and from there she went with her mother and him to Troy, to R. H. Norton's office; that she was married to Hopkins 1st day of November, 1898. "Last saw Hopkins at Hopke's, the sheriff's. Don't know where Hopkins is now. Was married at Jim Huff's, defendant's uncle." Was examined by three doctors three or four days after alleged offense.

On cross-examination witness testified: Oney never had lived with the family since defendant married her mother. She was living out. Never lived as a member of the family "since her and him has been married." But she testifies: That Oney did come with the family from their old residence when they moved from there to within a mile and a half of Eolia, defendant's present place of residence, and had just gotten back home when the supposed offense was perpetrated. That "my stepfather and her [Oney] never got along good together." That stepfather was never kind and good to witness; mistreated her, and she did not like him. Dick Henry's house, a frame, adjoined where defendant and his family lived. Rock road in front of house, 60 feet wide. When defendant got home that night, first thing he did was to ask where his wife was. Then witness corrects this by saying: "Q. When he came home, you say you were downstairs, and Mr. Huff came into the room where you say you were? A. Yes, sir. Q. And asked you where your mother was? A. Yes, sir. Q. And you told him up at the store? A. He didn't ask me where she was. I was mistaken there. He didn't ask where she was. He came by the store, he said, and went into the store to kill them, and they went over to the hotel that night and stayed until he came home. Q. You say now that he came in and told you that he had gone by the store to kill them? A. He had come by the store. Q. To kill them? A. Yes, sir. Q. Did he tell you he saw them there? A. Yes, sir. Q. I thought you said a minute ago that they had gone over to the hotel and gone to bed. A. They hadn't gone over to the hotel and went to bed. When he went to kill them they went over to the hotel. Q. Then he came on back up there to the house where you were, within a mile and a half, and told you that he had been in the store to kill your mother and your sister? A. Yes, sir; he did. * * * A. He came in and he said to me: 'Hattie, you and

Frankie get up and put your clothes on. I am going down, and you got to go with me down to Eolia. I am going to kill Oney and your ma.' Q. He said that? A. Yes, sir; he did. Q. He had already told you that he had come by the store to kill them? A. He told us that after we started. Q. Do you mean to tell this jury that Bud Huff came up there and told you and his little girl to get up and go down to the store with him for the purpose of killing his wife and his stepdaughter? Is that what you say? A. Yes, sir. Q. He had just told you that he came by the store to kill them? A. He told us that after we started. Q. He told you to get up, and 'let's go and kill them,' and after you started he said he had already been there to kill them? Is that right? A. Yes, sir. * * * Q. He made you get up and dress, and he made his little girl Frankie get up and dress? Is that right? A. Yes, sir. Q. Fadle was there in the house, wasn't he? A. Yes, sir. Q. He didn't make him get up and dress? A. No, sir. Q. Then there were those other two little children of Mr. Huff's that are sitting back there. They were there, were they not? A. Yes, sir; they were there. Q. He didn't make them get up and dress? A. Yes, sir. Q. They were all asleep? A. Yes, sir; except Fadle. He was not asleep. Q. He left Fadle there? A. Yes, sir. * * * Q. How old is Fadle? A. He is 12 years old. Q. How old is Oney? A. She is 20. * * * Q. You say that he tore your undergarments, out at the barn? A. Yes, sir. Q. How did he tear them? A. He tore them down at the side and in front, —across the front. Q. May I ask, were they open in front, or at the side? A. At the side. Q. He tore them in front and tore them at the side? A. Yes, sir. Q. Did he tear them with his hands? A. Yes, sir. Q. Did he take them off there, all except one foot? A. At the barn? No, sir. Q. Did he take them off there? A. No, sir. Q. Then you wore those garments on back upstairs? A. Yes, sir."

The witness, it will be remembered, had previously stated in reference to what was done at the barn that "he tore my underclothes off of me before he threw me down." Continuing to testify on cross-examination, witness stated: After she was married in Lincoln county, at Jim Huff's, she and Will Hopkins, her husband, went in a wagon from Jim Huff's, in Lincoln county, down to the Missouri river, crossed it into Gasconade county, and went through that county into Crawford and Dent counties; that Will Hopkins and herself were the ones that first started in the wagon, and were all that ever were in the wagon until they got "close to Cuba." Other testimony showed that Cuba, in Crawford county, is 200 miles from Lincoln county. Proceeding, the witness, after making answer as last above indicated, in response to this question, "Then who came?" answered: "Bud Huff and his uncle Bart

Huff, from Eolia." Pressed with questions, witness was forced to admit that defendant (called Bud Huff) and Bart Huff joined them before crossing the Missouri river, and witness, her husband, and defendant from that time on—all three—slept in the wagon as they journeyed on; that when close to Cuba they stopped in a little grove near Ben Willard's house, and slept in the wagon part of the time, and part of the time in Willard's house. Then all three of them went on down to Salem, in Dent county, being two days on the road. When they reached Salem, defendant rented a house there, and all three of them lived together in the same house till defendant was arrested.

Witness was asked the following questions, and made thereto the following answers: "Q. Now, I will ask you if you did not go to Bud Huff, at Salem, in Dent county, and tell him that, if he didn't give you and your husband enough money to buy a barber shop with, that you were going to write back here to these officers. A. No, sir; I didn't tell him that. I wrote back here to Mr. Hopke the next day after we got there. Q. You wrote back the next day, and in two or three days after that Mr. Hopke was down there? A. Yes, sir. Q. You wrote the letter yourself? A. Yes, sir; I did. Q. You didn't ask Mr. Huff for any money before you wrote? A. No, sir. Q. You deny that? A. No, sir; I did not. Q. Mr. Hopke came down there and got Mr. Huff, and you folks started back in the wagon? A. Yes, sir. Q. You didn't see Bud Huff any more, then, along on the road, did you? A. No, sir. Q. You came straight on back to where? A. Came back to Tom Huff's then. Q. And you stayed there for a while? A. Yes, sir. Q. Where did you go from there? A. To Foley. Q. Then you came up here, and have been in the county jail ever since, haven't you? A. Yes, sir. Q. I will ask you if you did not tell Ben Willard, at or near Cuba, in Crawford county, some time during the month of November, 1898, that Bud Huff never had mistreated you. A. No, sir; I did not tell him that. Q. I will ask you if you did not tell Ben Willard, at the time and place referred to in my former question, that Bud Huff had been better to you than your own father. A. No, sir. Q. I will ask you if you did not tell Ben Willard that your sister Oney caused you to put up this story on Bud Huff, and that you did not know that it was going to lead to what it did, and that you would get out of it now if you were not afraid you had gone so far you could not. A. No, sir; I never told Ben Willard nothing about this trouble." Witness then stated that they came back to Jim Huff's, in Lincoln county, the place where she was married, and then was asked whether she did not tell Lavina Huff, defendant's grandmother, that there was no truth in the charges against Bud Huff, when she replied that she did not. Then witness was asked these questions, and

made these answers: "Q. I will ask you if you did not tell her [Lavina Huff] that Oney caused you to make up this story, and that you didn't know now how you could get out of it without sticking to it. A. No, sir; nobody never told me to put up this story. It is the truth. Q. You know John Huff, don't you? A. I have seen him. I don't know whether I would know him if I saw him again. Q. You have talked to him, haven't you? A. No, sir; I never talked to him. Q. I will ask you if you did not tell him, at Jim Huff's, in Lincoln county, in January, 1899, that, if he would go and get Bud Huff to give you one hundred dollars, that you would not appear against him. A. No, sir; I never seen John Huff there. I never seen him there. Q. I will ask you if John Huff did not tell you there that, if there was any truth in these charges against Bud Huff, that it was your duty to prosecute him, and not desist from prosecuting him. A. No, sir; he did not. Q. I will ask you if you did not tell him that there was no truth in it, and that Oney was to blame for this whole business. A. No, sir; I never seen John Huff there." Witness said she saw Jim C. Huff, and she and her husband lived in the same house with him at Foley, and was then asked these questions, and made to them the answers following: "Q. I will ask you if, after he told you it was your duty to prosecute him (Bud Huff) if he was guilty, if you did not tell him that Bud Huff had never done anything more to you than your own father, and that Oney caused you to put up this scheme. A. No, sir; I never told nobody that. Q. Did you tell him in substance that? A. No, sir. * * * Q. You know Miss Josie Sitton, don't you? A. I have seen her. * * * Q. You went over there some time in the month of January, 1899, didn't you? A. Yes, sir. Q. I will ask you if, sitting in a room in that house at the time you went over there, if you did not tell her that Bud Huff had been good and kind to you, that he never had mistreated you, and that Oney caused you to put up this job. A. No, sir; I told you I never told nobody about it. Q. I will ask you if, in that same conversation, if you did not say to Miss Josie Sitton that you and Oney had made it up to shoot Bud Huff first. A. No, sir; I never thought of such a thing. Q. And that, when the time came, that some little child came into the room, and you could not dispose of him in that way, and you then adopted this plan. Did you tell her that? A. No, sir. Q. Didn't you further tell her that there was no truth in the charges, and that Oney had put you up to it? A. No, sir; I did not. Q. And in the same conversation that you had with Effie Sitton, the young lady that stood up with you when you were married, I will ask you if at the same time, and at the same place alleged in my former question, if you did not tell Effie Sitton that there was no truth in the charges against Bud Huff. A.

No, sir; I did not. Q. That Oney Kent, your sister, had put up this job, first to kill your stepfather; that failing, then you adopted this plan at her suggestion? A. No, sir; I did not. Q. Didn't you tell Mrs. James C. Huff, at the same place, in Lincoln county, that there was no truth in these charges, and that Oney had caused you to put it up? A. No, sir. Q. Didn't you tell them in that conversation that you and Oney had been devising some scheme by which you could effect a separation between your stepfather and your mother? A. No, sir; I did not. Q. And that you believed, and Oney believed that you so stated, that, if they would charge your father with this offense, that there would not be anything of it, but it would produce a separation between your mother and your stepfather? A. No, sir. Q. Do you know Tom Huff? A. Yes, sir. Q. Didn't you tell him that there was no truth in these charges, in the month of January, 1899, in the county of Lincoln? A. No, sir; I did not. I never had no talk with him. * * * Q. I will ask you if, in Eolia, prior to your marriage, and in the month of October, 1898, in a conversation with Bart Huff, if you did not tell him that there was no truth in these charges; that Bud Huff had always been kind and good to you, but that he and Oney didn't get along, and you were trying to separate your mother and your stepfather. A. No, sir; I did not. Q. Did you tell him the same thing when he came to you at the wagon, wherever that was, when Bud Huff got in the wagon and went away with you and William Hopkins? A. No, sir; I did not. * * * Q. While you were riding along on horseback, didn't you have the conversation with Bart Huff which I have just detailed, in which you told him that there was no truth in the charges that you had preferred against William Huff, but that your sister Oney had caused you to do it in order that you might produce a separation between your father and your mother, and that Mr. Huff had always been kind and good to you? A. No, sir. Q. Didn't you have a conversation with Tom Huff to the same effect? A. No, sir."

On redirect examination, witness, asked where she first saw Bud Huff, when she was in the wagon, replied, "I first saw him this side of Cuba," and that Bart Huff, his uncle, was with him. She gave as a reason for going on with Bud Huff to Salem that she had "no way to get back, didn't have no money to go back on, and couldn't go back." But, as shown by a former portion of her testimony, when defendant was arrested she and her husband started and went home in the wagon in which they had reached Salem, and, it seems, had no difficulty in doing so. Then in her redirect examination this passage occurred, which, like the proverbial fly in amber, will be here preserved, as a legal curio: "Q. I will ask you whether or not any one representing the defendant at that

place asked you to testify, when the trial was called, that Oney had put up the job, and there was nothing in it. (Objected to by defendant. Objection by the court overruled. To which ruling of the court defendant then and there, at the time, excepted.)

Q. Did any one that was representing the defendant try to get you to testify that way?

A. Yes, sir. The Court: Unless it should appear that such person did represent the defendant, the evidence would be stricken out. Plaintiff's Counsel: Q. I will ask you if in that same conversation the party did not try to get you to go off to Illinois, or some other place, and not appear. A. Yes, sir; they asked me, didn't I think it would be best." On her recross-examination witness was again given opportunity to tell where she met defendant, by being asked if she did not meet defendant and Bart Huff just a little beyond Sillex. This question she tried to evade by saying she "didn't know where she met them; didn't know where the county line was." Asked if she knew where Sillex is, she gave no direct answer, but said, "I know it was further than that." Asked again if it was very far from Sillex where she met defendant, she replied, "I think it was a right smart ways from Sillex." Pressed with other questions, she was finally asked if it was more than two days' drive beyond Sillex where she met them, when she answered, "Yes, sir." On the re-redirect examination of witness she was asked and answered when she had seen her husband last, and then, in singular contrast with the curio above noted, occurs this passage: "Q. I will ask you if he brought any word from this defendant, or any proposition from him, in reference to your testifying or not testifying in this case. (Objected to by defendant. Objection sustained.)"

The prosecutrix was flatly contradicted in many material points and particulars. Thus, S. B. Nykirk testified that Hopkins and Hattie were married at the old Huff homestead on November 1, 1896; that on the next day (November 2d) they left the old homestead in a wagon, and he went with them to meet Bud Huff, and they met him a little west of south of Sillex,—about $1\frac{1}{4}$ or $1\frac{1}{2}$ miles. And it was perfectly competent, though ruled to the contrary by the trial court, if prosecutrix said at the time where she was going, to offer such utterance in evidence, because the declarations of intent of a party on a journey or leaving home, being made at the time of the transaction, and expressive of its character, motive, or object, are regarded as "verbal acts," original evidence, a part of the *res gestæ*, and therefore admitted in evidence like any other material facts. 1 Greenl. Ev. (16th Ed.) § 108. This witness stated that Sillex was in Lincoln county. Another witness stated that the Huff homestead was about 7 miles from Sillex, and that Lincoln county was some 200 miles from Cuba.

Bart Huff, a blacksmith and uncle of de-

fendant, testifies to having met Hopkins and Hattie about a mile or a mile and a half from Sillex; that Bud Huff and Nykirk were with them at the time, and that witness went to the other side of the Missouri river with Hopkins, Hattie, and defendant, and that on the way Hattie told him that Oney had more to do with the prosecution of defendant than she had, and that defendant was kind and good to her; that witness went over to the point already mentioned to meet Hopkins and take him across the river, and that it was not a fact that Bud Huff got with Hopkins and Hattie just this side of Cuba; that witness went across the Missouri river with Hopkins, Hattie, and Bud Huff, and went 3 or 4 miles with them on the other side after crossing.

Mrs. Lavina Huff, nearly 80 years old, grandmother of defendant, testifies that Hattie and Hopkins came to her house, in Lincoln county, after their return from Dent county, and had stayed at her house several days, and witness asked Hattie what there was in these charges about Bud Huff, and she answered, "Nothing, no more than her own born father."

Miss Jessie Sitton testifies: That at her mother's house, in Foley, Lincoln county, Mo., in January, 1899, her sister Effie Sitton was present, and also Hattie Hopkins, when a conversation sprang up between witness and Hattie. Hattie Hopkins told witness "that she and her sister Oney had first fixed it up to shoot her stepfather," and in that conversation she told witness that "the plan failed because defendant's little daughter, Frankie, came into the room"; and she also stated to witness in that conversation that Oney afterwards suggested the present plan. That in conversation Hattie told witness "that there was no truth in the charge that Bud Huff had assaulted her." That in the same conversation Hattie told witness "that she had no idea that it was as serious as it was, and that she only wanted to separate her mother and her father"; that "she would back out of it now if she could"; that "her stepfather had never laid his hands on her in violence"; that "he was just as kind to her as he could be, and she never wanted for nothing." On cross-examination it developed that witness was a sister-in-law of Tom Huff, uncle of defendant. Miss Effie Sitton fully confirms the statements made by her sister as already related. The latter witness was bridesmaid for Hattie at her wedding, and had never seen Bud Huff until the day before she testified.

Tom Huff testifies: That he lived at the old homestead place, in Lincoln county. That he is uncle of defendant. That after Hopkins and Hattie returned from Southeast Missouri he had a conversation with Hattie in regard to the charges against Bud Huff, and in that conversation Hattie told him that there was no truth in the charges against defendant; that her oldest sister,

Oney, had planned the present prosecution for the purpose of separating her mother from defendant; that she didn't have any idea that the charge was as serious as it was, when she made it, or she would not have done it; that all she wanted to do was to make defendant run off and leave.

John Huff, a cousin of defendant, testifies: That at the old home place, in Lincoln county, between the 20th and last of January, 1898, he had a conversation with Hattie, and she said that there was no truth in the charges made against Bud Huff; that her older sister, Oney, had suggested the scheme and put her up to it. The court here refused to let witness answer whether Hattie had told witness that, if he would go and get Bud Huff to give her \$100, she would not appear against him. That witness told Hattie that, if Bud Huff were guilty of this offense, it was her duty to prosecute him.

Ben Willard testifies: That he lives three-fourths of a mile south of Cuba, in Crawford county. "I know Bud Huff, Hattie Hopkins, and Will Hopkins. I met them the first time about the latter part of November or first of December. They were traveling in a wagon, and camped on my place about one month. During their stay there I had a talk with Hattie Hopkins, in which she stated to me there was no truth in the charges made against Bud Huff, and that he was not guilty of any offense committed against her. And in another conversation with her and her husband, together, they said they were going to have some money out of Bud Huff, or put him behind the bars."

Mrs. James C. Huff testifies that she had a conversation with Hattie the last day of October, 1898, which was the day before the wedding, when Hattie came to her and asked for advice, and in that conversation Hattie told her that there was no truth in the charge that had been preferred against Bud Huff; that Oney had put her up to it; that she had already made it, and she did not know how to get out of it; that she did not think it would cause any trouble, and she would get rid of her stepfather.

Frankie Huff, the 9 year old daughter of defendant, who rode in front of her father and in his arms on the night in question, while Hattie rode behind on the same horse, testifies in direct contradiction of every material thing testified to by Hattie, and gives as a reason for telling a different story that Hattie told her next morning that unless she did so "she would whip her." This witness denies the statement of the negro woman about saying, "Oh, papa, don't do that," and, "Papa, don't."

Col. R. H. Norton testified: "I live at Troy, and am an attorney practicing law there. I know Hattie Hopkins, who was said to be prosecuting witness against Huff. I had a conversation with her in my office, in Troy, about the month of October, 1898. She told me, in effect, that Bud Huff had not ravished

her. I don't know that she said it in those particular words. I asked the girl if he had succeeded in accomplishing his purpose, and she said, 'No; he had not.'"

Defendant, testifying in his own behalf, stated: "Am 32 years old. Was first married in 1889, and have three children by that marriage." That he married the widow Kent in 1894. She had four children. That the two sets of children lived with him and his wife on a farm in the Mississippi bottom until the spring of 1898, when he moved with them to Eolia, where he farmed and ran a drug store until this alleged offense. That the family relations were of the pleasantest. That the only one that ever caused any trouble was Oney Kent. That his children thought as much of his wife as they ever did of their mother. "The day before the night of the alleged offense, I went down in Lincoln county. As I returned home that night, through Eolia, I stopped at the drug store and got a bottle of whisky. There was nobody at the store. When I got home everybody was asleep. The front door was locked, and, as is my custom, I went around to the window and knocked on the window. My little daughter came to the door and let me in. I asked where her mother was. They said she and Oney were at the store. I told them I was going down there, and they could go along too, if they wanted to. They got ready, and we got on my horse, which was hitched at the fence,—Frankie on my lap in front of me, and Hattie on behind. We had not gone far until I got sick, and then turned around and went back to the house. I helped Frankie down, and Hattie slid down. They both went into the house, and I took the saddle and bridle off my horse and tied him in the yard with a rope. I was sick and threw up before I got into the house. When I got into the house I pulled my shoes off, and went to bed with my clothes on. Frankie and my little daughter awoke me for breakfast, and I told them I was sick and did not want any. In the meantime my little daughter Frankie came in and told me Mr. Hardin and Mr. Yeager were there to arrest me. After a short time Mr. Yeager came to the window, and I asked him to come in. He said he wanted to see me. We talked quite a bit, and I told him what my little daughter said, and asked him if he had a warrant. He said 'Yes.' He did not tell me what it was for, nor wouldn't tell me. I asked him to come in, but he would not come in, and then Hardin came up, and I said I did not want him to come in. He then left and went out into the road. I then went to the front door and opened it, and saw some thirty men out there. I picked up a 32 rifle in my hand, and walked out there in my sock feet. Somebody hollowed for me to throw up my hands, and a Mr. Brown jumped off a wagon and got a pistol and shot at me. Nobody had read a warrant to me, nor told me what they wanted. I had never made any demonstration

with my rifle. Was just holding it on my arm. I had a talk with Squire Smith, and told him I would go with him, and asked him what the charge was, and he said he would tell me after he got to Holla. The crowd was excited, and running up and down, and riding on horses, and running after guns and pistols. Len Bibb walked over and told me, 'You get away from here, and do it quick.' I put on my shoes, and my wife laced them up, while I stood facing the crowd. She then saddled my horse, and my brother-in-law rode up and told me to get on that horse and go with him. I rode a mile and a half before I ever knew what was up. I met Hattie Hopkins and her husband on the 2d day of November about one mile and a half from Sillex, and went with them down into Southeast Missouri." Recurring to the night of October 6th, witness testified that he never did have sexual intercourse with Hattie Hopkins; that he never did have a pair of brass "knucks." Witness further stated: That on the morning of the 8th of October, 1898, he met his father, William H. Huff, and had on the same clothes that he left home with. "Slept in my clothes, pants and all." Had on the same overshirt and same undershirt that he had on on the night of October 6th, when the offense is said to have occurred. Did not have a change of undershirt till he sent by his aunt and bought a new shirt in order to change. He showed his clothes to his father, and he examined them. That he met Hopkins and Hattie, who were in a wagon, about a mile and a quarter to a mile and a half from Sillex, about half past 8 o'clock, "when we met. They said they had come from Grandma Huff's old place." That witness got in wagon and drove, and Hattie and Hopkins got in and lay down on the bed and covered up in the back end of the wagon. That he drove the other side of Troy and stopped, and, after putting the wagon sheet on, drove that night two miles the other side of Wright, stopped, camped a couple of hours, and fed. Next day crossed river at Washington, and next Uncle Bart left them, after they crossed the river. Until Uncle Bart left, he and witness slept under the wagon, and Hattie and Will in the wagon, in which were two feather beds; but, after Bart left, Hopkins and Hattie slept in back part of wagon, and witness in front part. Landed at Willard 21st of November. Wife of witness came to him at Cuba, 17th or 18th of November, 1898, when defendant and Hopkins and Hattie were at Willard. Landed in Salem 22d December, having left Willard 2 days before that. Defendant rented a house that evening, and they all (Hopkins, Hattie, and defendant and wife) moved into it the next morning, and remained there until defendant was arrested on the 8th day of January, 1899.

William H. Huff, father of defendant, testified: "I saw my son the second morning after the night of the alleged offense, and

examined his clothes, and found no stain or anything. I examined his drawers, undershirt, and overshirt."

Prosecutrix, being recalled, denied ever having any conversation with Col. R. H. Norton, of Troy, Mo.; then confessed to having a conversation with him, and denied that she told him that "he did not ravish her," but testified that she did tell Col. Norton that defendant did ravish her.

Mrs. Patterson testified: That she lived just one block south of defendant's house. That she heard a peculiar noise, like children screaming, on the night the offense is charged to have been committed. It was between 9 and 10 o'clock.

America Dewey, a negress, testified: She lived just north of the Huff house, in the next block. That about 10 o'clock of the night in question she heard a child screaming. She went out to the fence, and heard the little child say, "Oh, papa, don't do that. Papa, don't." And then she heard another scream, and then she heard low talking that she could not understand, in the Huff house, and did not hear anything else, but she gave no alarm and made no further inquiry.

When Ben Willard was concluding his testimony, and on cross-examination, this question was asked him by the state, and this answer given: "Q. Didn't you, just about the time they started off, and you came up and bade Bud good-by, didn't you say: 'Good-by. If you need me, let me know, and by God! I will come up and help you out,'—there in January of 1899 at Cuba, Missouri, in the presence of Mr. Hopke? A. No, sir." The evident purpose of this question was to break down Willard's testimony, or else to neutralize its damaging and damning effect; and so Hopke was again brought forward, and then was asked this question: "Q. I will ask you if, about the time you were leaving Cuba, if Mr. Willard did not come up to Huff, close, and say: 'Good-by. If you need me, let me know, and by God! I will help you out?'" A. Yes, sir; something to that extent. It was when we were going in to dinner. Dinner was ready. We were in the hotel. * * * Q. Did he say that? A. I don't know about the 'Good-by,' but it was to that extent. Q. Leaving out 'Good-by,' did he say the other part? * * * A. As well as I remember, words to that extent." On objection being again raised by defendant, and on witness being reminded by the court that the answer must be "Yes" or "No," he said, "I will say yes." And this answer was made notwithstanding Hopke subsequently admitted that Willard and Huff talked in such a low tone that he "couldn't hear only once in a while." But it is wholly immaterial whether Willard made use to Huff of the words mentioned or not. If he did, and he heard Hopkins and Hattie make the remarks he had testified to, then the language he used to Huff was only such (barring, perhaps, expletives) as any honest,

generous hearted man might utter to one whom he believed to be foully assailed. Because one man tells another who is in distress, "I will help you out," is no indication of dishonest help, and will arouse no suspicion of intentional wrong, in a heart that beats with honest impulses. The questions and answers mentioned were therefore obnoxious to the objections made to them by defendant's counsel, and those objections should have prevailed.

I have thus given the substance of the evidence, except some minor portions which will be mentioned and discussed hereafter. Reading over the evidence as above set down, it will readily be noticed in what a variety of ways the prosecutrix was contradicted. She evidently and intuitively knew when she went on the stand, or else had been carefully informed prior thereto, that it would present a bad appearance should it become known that on the next day after her marriage, at the old Huff homestead, where the nuptial ceremony was performed and the epithalamium sung, she and her husband went with Nykirk "to meet Bud," her erstwhile ravisher, and did meet him, only $8\frac{1}{2}$ miles from the point of starting, and thence journeyed on, sleeping with him in the same wagon and under the same wagon sheet, for weeks and weeks together; and so she endeavored to conceal the point where the meeting occurred by saying of that point that it was "this side of Cuba"; that "it was close to Cuba"; that "I don't know where we met them. I don't know where the county line was,"—and finally winding up by saying that it was more than two days' drive. These statements were directly opposed by the testimony of Nykirk, Bart Huff, and defendant. And that the state's attorney appreciated the position of prosecutrix, and its liability to excite unfavorable comment, because of meeting defendant and journeying with him in the wagon to the point ultimately reached, is palpably shown by the following question propounded by that official to prosecutrix, and her answer to it: Q. I will ask you why, after Bud Huff came there, that you went along in the same company with him to Salem. A. Well, because I didn't have no way to get back. Didn't have no money to go back on, and couldn't go back." Inasmuch as it had been shown by several witnesses that it was only 7 miles from the old Huff homestead to Silex, and that Bud Huff had joined Hopkins and Hattie only $1\frac{1}{2}$ miles from Silex, the false and deceptive character of the answer given is only too apparent. No money was required to travel $8\frac{1}{2}$ miles. Besides, by a former portion of Hattie's testimony it was shown that, upon defendant's being arrested, Hattie and Hopkins found no difficulty in making their way back home in the same wagon they went out in. And, more than all that, Nykirk, who accompanied Hopkins and Hattie from the old Huff homestead until they met

defendant, and whose testimony on the point is undisputed, says, "I went with them to meet Bud." So that Hattie on the morning she started knew she was going to meet Bud Huff. And the further thought suggests itself that, if Hattie could write and mail a letter to Hopke on the next day after reaching Salem, she could easily have parted company with defendant at an earlier period by mailing a similar letter at Knob View, Cuba, or other point, to Hopke, of defendant's whereabouts; or at any point on the road she had but to direct attention to defendant as an escaped felon, and his arrest would have been accomplished. The only reason which can be given why she did not sooner cause the arrest of her ravisher, "while she was in the way with him," is a reason strongly confirmatory of Willard's testimony. Finding she could not extort money from him, she resolved on reaching Salem to use the alternative, and accordingly wrote Hopke. And such arrest certainly went to further the scheme which she and Oney had long entertained, and which at one time led them to plan the murder of their stepfather by shooting him, and which murder was only prevented, as she confessed to the Misses Sitton, by little Frankie coming into the room. Not only was the prosecutrix's testimony opposed as just related, and in the different and various ways heretofore set forth, but portions of her own testimony are self-contradictory. Thus she stated that defendant "tore my underclothes off me at the barn before he threw me down," and yet on cross-examination she stated that he did not take them off at the barn; that at the barn he tore them down the side and in front,—across the front,—but did not take them off there, but that she wore them back upstairs; and still, in her examination in chief, when testifying as to what transpired at the house, when in half an hour defendant went upstairs, that "when he threw me down he forced my legs apart, and got off all but one foot," etc. Now, if the undergarments were as thoroughly torn as she says they were down at the barn, so as to constitute no obstruction to defendant's successful efforts down there, then there was no call whatever to get her "undergarments off all but one foot" when he made his second endeavor at the house. There are also elsewhere in her story impossibilities and improbabilities too gross for belief, to wit, that with pistol in hand he forced her to get up on the horse, and then afterwards he got up. Now, as any horseman knows, he could not, in mounting the horse, throw his leg across the saddle while another person sat sideways on the horse behind the saddle, unless such person were to sit away back on the horse's crupper; but thus sitting back shows a willingness for the rider to mount,—something which prosecutrix denies. And it is highly improbable, if not impossible, that defendant could have held his little daughter in his arms be-

fore him on the horse, guided the horse, and still with his left hand have reached back, and so gripped the left leg of prosecutrix, who sat sideways on the horse, as to hold her unwillingly on the horse, as she states he did. Again, prosecutrix asserts that when defendant came home that night, and his little daughter went and let him in, he told them to get on their clothes; that he was going down to the store at Eolia, and they had got to go with him; that he was going there to kill prosecutrix's sister and mother; and that he had previously come by the store for that purpose, but they were not there. This statement is too improbable for rational human belief. It is contrary to the experience of common life. No motive or reason can be assigned for such a threat by defendant. Besides, it is denied both by Frankie and her father. Moreover, evidence of such a threat on part of defendant was wholly foreign to the case and charge then being tried, shed no light on the then pending accusation, and should have been promptly excluded by the court of its own motion. The evident purpose of the introduction of such threat in evidence was simply and only to prejudice the jury against defendant. Another statement made by prosecutrix—that defendant was so lost to all sense of decency and shame as to ravish her in a thickly-peopled village, and next door to an inhabited house, while she was screaming, and in the presence and amid the pleadings of his little daughter—is something requiring far more than ordinary credulity to believe.

After a thoroughly careful examination in this case, I am abundantly satisfied that the prosecutrix has been plainly and clearly impeached,—impeached both by disproving the facts stated by her, and also by proof that she has made statements out of court contrary to what she has testified to at the trial (1 Greenl. Ev. [14th Ed.] §§ 461, 462), as well as by the intrinsic improbability of some of her statements, and the evident evasiveness and falsity of others. And no conviction based on conclusively impeached testimony should be permitted to stand, when called in question in an appellate court. *People v. Lyons*, 51 Mich. 215, 16 N. W. 380. Testimony completely impeached is no testimony at all, and rests on the same basis, in legal contemplation, as though no testimony had been introduced; and, when such a case occurs, relief will be granted by this court. *State v. Packwood*, 26 Mo. 340; *State v. Primm*, 98 Mo., loc. cit. 373, 11 S. W. 732, and cases cited. And the force and effect of the impeachment accomplished as aforesaid is not at all abated or diminished by the testimony of the physicians who examined prosecutrix, since they could only speak of the congested condition of her genitals and of the absence of the hymen. Neither one of them would say that a rape had been committed on prosecutrix. Indeed, one of them said he would not say a rape had been

perpetrated on her unless he had seen it. And relative to the testimony of Mrs. Patterson and the negress, Dewey, they testify to no crime having been committed; and their testimony, if true, as to the night they speak to, is entirely consistent with the idea that three children (the oldest only 12), left in the house by themselves at night, might, in the absence of their father and older sisters, indulge in outcries, which ceased on the return of those who had left. For the reasons aforesaid, the judgment should be reversed and defendant discharged.

There are other points, however, in this record which seem to demand attention. I refer now to the legal curio before noted and quoted. Such testimony, so called, was most flagrant hearsay. The words "representing the defendant" were but the statement of a legal conclusion, and, of course, nontraversable. Who was it that represented the defendant? Certainly the latter was entitled to know who it was that assumed to speak for him. But even had the party been named, and even had he stated to prosecutrix that he did represent the defendant, still such statement, though repeated by prosecutrix when testifying, would be none the less and nevertheless flat hearsay, since it would be the sworn statement of an unsworn statement. Whart. Cr. Ev. (9th Ed.) § 223; 1 Whart. Ev. (3d Ed.) §§ 172, 173. Wharton says: "By the general rule of law, nothing that is said by any person can be used as evidence between contending parties unless it is delivered upon oath in the presence of those parties. * * * If material witnesses happen to die before the trial, the person whose cause they would have established may fail in the suit. But although all the bishops on the bench should be ready to swear to what they heard those witnesses declare, and add their own implicit belief of the truth of the declarations, the evidence would not be received. * * * A., a witness not produced on trial, says he saw B. do a particular thing. C., a witness produced on trial, says he heard A. say that he saw B. do this thing. A. is really the witness, yet he is not responsible for what he says. He is not subjected to the probe of a cross-examination. He is not indictable for perjury. No recourse can be had to him to make him, ordinarily, liable, either civilly or criminally, for an error. But the rule that a party put on trial is entitled to have his case tried on the evidence of responsible witnesses is essential to the fair determination of the issue in litigation. In many of our constitutions we find one aspect of this rule given in the maxim that a party accused has a right to meet the witnesses against him face to face. To dispense with these witnesses, and permit their testimony to be given by those who claim to have heard such witnesses speak, would be to evade this important sanction, and to put a party on trial on evidence whose falsity he would be precluded from either de-

tecting or punishing. Hearsay, however, in its legal sense, is not confined to that which is said. Men may express themselves by conduct as well as by words, and to repeat what they said by words is no more hearsay than to repeat what they said by conduct." Greenleaf says: "The law requires * * * the testimony of those who can speak from their own personal knowledge. * * * It is requisite that, whatever facts the witness may speak to, he should be confined to those lying in his own knowledge,—whether they be things said or done,—and should not testify from information given by others, however worthy of credit they may be. For it is found indispensable, as a test of truth, and to the proper administration of justice, that every living witness should, if possible, be subjected to the ordeal of a cross-examination, that it may appear what were his powers of perception, his opportunities for observation, his attentiveness in observing, the strength of his recollection, and his disposition to speak the truth." 1 Greenl. Ev. (14th Ed.) § 98. Here the incognitus (provided, always, there were any such person) must have represented to prosecutrix that he was representing defendant, which testimony, to dignify it by any such appellation, falls under the condemnation of the authorities above quoted. And it was not at all necessary, as has been suggested by the prosecuting attorney, for defendant to enter a "denial of the statement that the party was representing defendant." Criminal causes are not ordinarily conducted in this way. In *State v. Rothschild*, 68 Mo. 52, this case was presented: On the trial of a criminal case a witness for the prosecution testified that he had been induced to leave the state, and had received money for that purpose. The evidence failed to connect the defendant with the transaction. But the judge and the prosecuting attorney instituted an inquiry for the purpose of showing by the witness that the parties implicated were certain officers of the law. The defendant having interposed frequent objections to the prosecution of this inquiry, the judge remarked in the presence of the jury: "If the defendant is not connected with it, it can be withdrawn from the jury by instruction." But the evidence was not so withdrawn. Held, that the conduct of the court was error, requiring the reversal of the judgment. In *State v. Jaeger*, 66 Mo. 173, Mrs. Wahl was allowed, against the objection of defendant, to testify in regard to his wife having called on her the morning following the alleged assault, and, in the absence of defendant, making proposals to have "the matter hushed up." And the nonadmissibility of such so-called "evidence" was there sharply animadverted upon. See, also, *State v. Patrick*, 107 Mo. 147, 17 S. W. 666; *Marvin v. Schilling*, 8 Mich. 357. In concluding his ruling on the point in the case at bar the learned judge remarked: "Unless it should appear that such person did represent the

defendant, the evidence would be stricken out." But the evidence was not stricken out, and so the jury properly and not unnaturally inferred that it was competent evidence, and that defendant was trying to suborn prosecutrix to swear falsely, or to induce her to leave the country and not appear against him. See *Rothschild's Case*, supra. And, although the objections of defendant were general, yet the evidence being of no account, such general objections were good. *State v. Meyers*, 99 Mo. 107, 12 S. W. 516, and subsequent cases.

In the midst of the trial the prosecuting attorney offered in evidence the following paper, to wit, a subpoena in usual form, in the case of the *State v. Wm. Huff*, issued by the clerk of the Pike circuit court to Ona Kent, Fadle Kent, and William Kent. This writ bears date June 5, 1899, and requires the parties named to appear before that court on June 26, 1899. Fadle Kent's name was indorsed on the indictment as a witness. On that subpoena was made the following return: "Return. I hereby certify that I served the within writ in the county of Calhoun the 27th day of June, 1899, by reading to Ona Kent, Fadle Kent, William Kent. G. E. Clowers, Spec. Deputy." At the same time the prosecuting attorney offered also in evidence an attachment issued in the same cause and by the same court for Fadle Kent, dated August 14, 1899, for a contempt in failing to appear and testify, etc., and stating that he had been summoned on the part of the state. This writ was directed to the sheriff of Pike county, and had indorsed on it the following return: "Return. Served the within writ by making due and diligent search in Pike and Lincoln counties, and not being able to find the within-named witness. All done this 16th day of August, 1899. H. M. Hopke, Sheriff of Pike County, by R. T. Hopke, Deputy." When these papers were introduced in evidence the court, on admitting them, remarked: "The writ is admissible simply on one point,—as showing the effort upon the state to produce the witness." And the prosecuting attorney has remarked in his brief: "Plaintiff offered in evidence subpoena and writ of attachment for Fadle Kent, 12 year old brother of prosecuting witness, showing that Fadle was duly served with subpoena, but could not be found with attachment." It seems a singular statement, indeed, to make, that "Fadle was duly served with subpoena." The opinion has generally prevailed that the process of any court was valueless and void when served outside of the state in which process issued. *State v. Butler*, 67 Mo. 59; *Wilson v. Railroad Co.*, 108 Mo. 588, 18 S. W. 286, and cases cited; *Murfree, Sher.* §§ 114a, 849. And mere notice, not according to law, is no notice at all. *Wilson's Case*, 108 Mo., loc. cit. 593, 18 S. W. 286; *Murfree, Sher.* § 849. You will observe that this return on the subpoena does not mention any state in which the service was

had, but it does say it was served in "Calhoun county." As judicial notice will be taken of the fact that we have no such county in this state, we must presume that service was had either in Arkansas or in some other state; and this, under the authorities, renders such service of the subpoena a nullity. And you will also observe that the service is made by "Spec. Deputy," in his own name, which, had the service been otherwise good, would have made it bad. Murfree, Sher. §§ 843, 856. The invalidity of such a return has been thus held in this state. This being the case, no attachment was authorized to issue. But look at the return of service on the attachment. The writ of attachment dated August 14th only issued to the sheriff of Pike county; and yet we find the sheriff of that county on the 16th day of August, the very day the trial began, not only making "due and diligent search" in his own county, but on the very same day he extends his jurisdiction and makes due and diligent search in Lincoln county also. Pretty good day's work, that! In case a subpoena is to be served, it is held that the sheriff should go at least once to the place of residence of such witness to seek him; and, if he cannot find the witness, appropriate return should be made, setting forth that fact. Murfree, Sher. § 359. And the same rule holds about going to the dwelling house when the service of a summons is to be made. *State v. Finn*, 87 Mo. 310. And a fortiori should there be at least an equal particularity used in stating the facts in the return made on an attachment for contempt in failing to obey a subpoena. But why was that subpoena sent away down to Calhoun county, Ark., or over to Illinois, and service attempted down there? I must confess it has to me very much the appearance of attempting to imitate the "Great Circumlocution Office" mentioned by Dickens; that is, how not to do it. If Fadie Kent et al. were taken clear down to Arkansas or over into Illinois, just in order to be served, in order to make a show of great diligence to summon Fadie Kent, and then make a great exhibition of the worthless return in court, then that matter, taken in connection with the peculiar return made on the writ of attachment, certainly has a very suspicious appearance. And although, under our rulings, the state cannot be compelled to place certain witnesses on the stand whom she has summoned, yet, having a witness, as in this case, necessarily conversant with the main facts at issue, and failing to serve him with process or to put him on the stand, is certainly open to very grave observation and unfavorable inferences. *Henderson v. Henderson*, 55 Mo. 534; *Cass Co. v. Greene*, 66 Mo. 498; *Bump, Fraud. Conv.* 53, and cases cited. And this is especially the case in circumstances such as here present themselves, for "when the part is overacted the delusion is broken, and the fiction appears." Baldwin

v. Whitcomb, 71 Mo. loc. cit. 650. Here there is neither showing nor pretense in the return that the sheriff ever visited the residence of Fadie Kent's mother, nor does it appear that such residence in Prairieville has been changed; so that the only diligence displayed by the sheriff in the matter has been by writing the word "diligent" in his return. But, more than that, W. H. Smith, the "squire" who lived in Prairieville, Pike county, "right opposite to defendant,—across the road right west from him,"—when asked if he had seen Fadie Kent about the place, and when, answered, "I saw him last Sunday evening, on horseback with his mother." This was August 13th. Strange to say, this testimony was objected to by defendant, and was by the court excluded. But the contention of the prosecuting attorney, then made, that he had a right to show that this boy was "with the defendant's wife on Sunday, after he was subpoenaed," is without support, as the boy was supposed to be subpoenaed on the 27th of June, 1890. The court should not have excluded Smith's testimony, since it strongly tended to show lack of diligence in serving the witness either with subpoena or attachment. It is unnecessary to say what the proper ruling would be, and what the status of this case, had the subpoena been served by a proper officer within the limits of his territorial authority, and proper return of such service been indorsed upon the writ; and the same theory controls the attachment. Saying that Smith's testimony should not have been excluded, although not objected to by defendant's counsel, is only to say that it is the right and duty of the trial court to see that the facts bearing on the case are fully developed, no matter whom it helps or whom it hurts. *State v. Pagels*, 92 Mo., loc. cit. 310, 4 S. W. 931. Of course, it is not intended by this remark that counsel trying a cause are to be ousted of their appropriate functions; only that omissions and inadvertencies may, when necessary, be supplied and corrected by the court.

There is a great deal of trash in this record. A friend in Ft. Smith, W. M. C., substitutes for this term a more apt bucolic expression. Thus it was attempted to be shown over objections of defendant by the prosecuting attorney that Bud Huff owned the wagon and team that bore Hattie and Hopkins away from the old Huff homestead, and finally succeeded in showing that Bud Huff did own one of the four horses that were along with the outfit. This testimony was wholly irrelevant, since Bud Huff was not accused of eluding the witness, and the only tendency of such testimony was to multiply the issues, confuse the jury, and prejudice defendant by leading it to be supposed that he was engaged in taking away an important witness. Similar irrelevant matter was introduced by the state seeking to discover from defendant who owned the farm that was sold,—he or his wife; how much

it sold for; whether his wife owned the drug store at Eolia; whether she had not mortgaged it to secure the fees of defendant's counsel, etc. Over the objection of defendant, the prosecuting attorney was permitted to ask these questions and to receive these answers: "Q. I will ask you why you went to Cuba, in Dent county. A. I was made to go. Q. Who made you? A. Ma. Q. Who else, if anybody? A. Will Hopkins and ma." The court excluded the latter portion of the answer, as to who made her go, leaving it stand in the words, "I was made to go." This answer is but the statement of a legal conclusion. For what purpose she was made to go, and how she was made to go, were certainly important, if the first answer was. But, at all events, what connection had defendant with the matter? Equally incompetent was the question asked by the state, over objection of defendant, whether prosecutrix made any objection in June to being placed under bond for her appearance at court; and her answer that she "was glad it was done, and wanted it done." Being asked why glad, she replied, "Because I was afraid to leave the jail." How giving bond could affect her fears of leaving the jail is not very apparent. But, however that may be, what did it concern defendant? How did it touch the issue joined? Defendant's counsel, not to be outdone in irrelevancy, also endeavored to show that prosecutrix got drunk when at Willard's, fired off a pistol, and was told she would be arrested, etc., ad nauseam.

As to the instructions given by the court of its own motion, no objection can be made to them in this court, because in the lower court the objection to such instructions was as to "instructions numbered — of said instructions given," which, of course, amounts to nothing. Nor can any complaint be heard here about the jury not being instructed on certain points, since there was no exception saved as to failure to instruct, etc. *State v. Cantlin*, 118 Mo. 100, 23 S. W. 1091, and numerous subsequent cases. For the reasons heretofore given, the judgment will be reversed, and the defendant discharged.

GANTT, J., dissenting. See 61 S. W. 1104. BURGESS, J., concurs in reversal and discharge, but does not concur in sheriff's return having to show he visited residence, etc., and he does not concur in the "legal curio" expression.

ST. LOUIS S. W. RY. CO. v. HARPER.
(Supreme Court of Arkansas. March 23, 1901.)
CARRIERS—EJECTING PASSENGERS—
DAMAGES.

1. One carelessly entering a train, which he should have known did not stop at his destination, but which he hoped would stop either there or near there, and who has a ticket to

such destination, which he offers to the conductor, is a passenger, within Sand. & H. Dig. § 6192, providing that if any passenger shall refuse to pay his fare the conductor may put him out of the cars at any "usual stopping place" he shall select, and is entitled to damages where he is ejected for nonpayment of fare at a place other than a usual stopping place.

2. A passenger suffering from a slight fever was ejected from a train a mile or two from a station, in the nighttime, while a slight rain was falling. *Held*, that a judgment for \$25 was not excessive.

Appeal from circuit court, Columbia county; Charles W. Smith, Judge.

Action by James B. Harper, by next friend, against the St. Louis Southwestern Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

James B. Harper got on the "Cannon Ball" passenger train on defendant's railroad at McNeil for the purpose of going to Milner, another station on defendant's road. Milner was not one of the stations at which that train stopped, and when Harper offered a ticket to McNeil he was informed of this fact by the conductor, and told that he must pay 15 cents more, and go on to Stephens; that being the next stopping place for that train. Harper refused to pay, and was thereupon ejected from the train at a point about a mile and a half from the station. He brought this action for being put off at a place other than a usual stopping place for trains. There was a verdict in favor of plaintiff for \$125, but the court required a remittitur of \$100, which having been done, the court gave judgment for the remaining \$25 and costs against defendant. From this judgment defendant appealed.

Sam H. West and John T. Sifford, for appellant.

RIDDICK, J. (after stating the facts). This is an action for damages alleged to have been caused the plaintiff by being ejected from one of defendant's passenger trains. Our statute provides that, "if any passenger shall refuse to pay his fare or toll, it shall be lawful for the conductor of the train and the servants of the corporation to put him out of the cars at any usual stopping place the conductor shall select." Sand. & H. Dig. § 6192. Counsel for the defendant company contend that this statute does not apply here, for the reason that the plaintiff knew, or by the exercise of ordinary care could have known, that the train which he entered did not stop at Milner, and that, as he refused to pay his fare to any station at which the train did stop, he was not a passenger. It is doubtless true that one who enters a railway train, and afterwards wrongfully and persistently refuses to pay his fare, is not entitled to the high degree of care which the law exacts of railroads for the protection of passengers. Within the meaning of the rules requiring such care, it has been often held that such a person is not a passenger.

Condran v. Railway Co., 67 Fed. 522, 14 C. C. A. 506, 28 L. R. A. 749; 2 Wood, R. R. (Minor's Ed.) p. 1213; 5 Am. & Eng. Enc. Law (2d Ed.) 496, and cases cited. We do not controvert the soundness of these decisions, but it is evident that the reasons upon which they are based do not apply here; for the object of this statute was to prevent railroad companies from ejecting a passenger, for refusal to pay fare, at other than a usual stopping place. If those refusing to pay fare are not passengers, within the meaning of this act, then the statute can have no application, and is meaningless. It is therefore very evident, we think, that the refusal to pay by one traveling on a train does not, within the meaning of this statute, show that he is not a passenger. It may, of course, be doubted whether one who enters a train, intending not to pay his fare and to defraud the company, would be protected by this statute; but we need not determine that question, for the evidence here, we think, does not show such a state of facts. The plaintiff carelessly entered a train which he should have known did not stop at Milner, but he did so hoping that it would stop either at Milner or at a water tank near there, and thus afford him the opportunity to reach his destination. He had a ticket to Milner, which he gave to the conductor, but the ticket was returned, and the plaintiff ejected, because he refused to pay the additional fare to the first regular stopping place for that train. The company could have excluded him from the train or ejected him at the place he entered, but, having carried him away from that point, was, under the statute, required to carry him to some other usual stopping place before ejecting him. The plaintiff may not have desired to go to Stephens, the next stopping place, but, as he had carelessly entered a train that was not required to stop before reaching that place, he could have been carried there, whether he wished to go or not; for the company in such a case was not required to stop the train sooner for his convenience. As the place at which he was ejected was not a usual stopping place for trains, and as he was not given the option of being carried to Stephens instead of being put off, the ejection was unlawful. The injury to plaintiff was small, but it was night, a slight rain was falling, and plaintiff was suffering some from fever. He was put off a mile or two from a station. Under these circumstances, the sum for which the court gave judgment was not excessive. Affirmed.

**ST. FRANCIS ELECTRIC LIGHT CO. v.
ELECTRIC SUPPLY CO.**

(Supreme Court of Arkansas. March 23, 1901.)
CORPORATIONS—REORGANIZATION—PARTIES—
INTEREST IN CAUSE OF ACTION.

A judgment having been obtained against a corporation before its reorganization, a note

given by the new stockholders in purchase of the old company's property was placed with a trustee to indemnify the new company against any loss it might sustain in contemplated litigation with the judgment creditor; the old company having a demand against the judgment creditor, which it was contemplated should be sued on by the new company, and it being agreed that whatever sum the new company should recover against the judgment creditor in excess of the claim of the latter against the old company should go to the old stockholders. *Held*, that the new company had an interest in the suit brought on such demand, and was entitled to prosecute it in its own name, and it was not necessary that the stockholders should be made parties.

Appeal from circuit court, St. Francis county; Hance N. Hutton, Judge.

Action by the St. Francis Electric Light Company against the Electric Supply Company. From a judgment for defendant, plaintiff appeals. Reversed.

The appellant brought this action against the appellee for damages for failing to erect an electric light plant according to contract. Upon motion of the appellee the action was dismissed on the ground that the plaintiff had no interest in the controversy, and from this judgment it appealed. It appears that the electric light company had bought the stock of its predecessor, bearing the same name, and reorganized, by election of a board of directors and other necessary officers. The electric supply company, it seems, had a claim against the electric light company, and had obtained a judgment against it before the sale and reorganization of the electric light company. When the present stockholders bought the property, they gave several notes for deferred payments. One of these notes, for \$500, was deposited with Mr. Gatling, the attorney for the incoming stockholders, to be held by him as indemnity for his clients, the new company, against any loss the company might sustain in contemplated litigation with the electric supply company. It seems that the electric light company before sale to the present stockholders had a demand against the electric supply company, which it contended was a set-off or counterclaim against the claim of the electric supply company against it, which it had offered to interpose in the suit of the electric supply company against it, which was stricken out and not permitted by the court. This is the same demand upon which this action is based. It was agreed and understood between the old and new stockholders of the electric light stockholders at the time of the sale of the electric light plant that, to protect the company against the claim of the electric supply company against it, the \$500 note was deposited with Gatling, and that whatever amount the company might recover against the electric supply company in excess of the demand of the latter against the electric light company should belong and go to the stockholders of the electric light company before the sale. It is shown that at the time of the sale and de-

posit of this \$500 note it was in contemplation that suit should be brought by the electric light company against the electric supply company on the claim or demand of the electric light company against the electric supply company. The facts in this case conclusively show that this was the understanding of the parties.

Norton & Prewitt, for appellant. R. J. Williams, for appellee.

HUGHES, J. (after stating the facts). We are of the opinion that the facts in this case show that the appellant did have an interest in this suit, and that it was really its duty to prosecute the claim of the electric light company against the electric supply company. Its authority to bring the suit arose from the facts in the case, and no order of its board of directors was necessary to authorize it to bring this suit. 1 Beach, Priv. Corp. § 360. The electric light company was still bound for the debts of the company existing before the purchase of the stock of the company; and the prosecution of this suit was primarily a means of protection to it against the debts of the company existing before the purchase and reorganization, and it was for the benefit of the old stockholders of the electric light company, inasmuch as it was, in effect, to indemnify them against loss. The agreement and arrangement was, in effect, an authority to sue for the benefit of the old stockholders of the electric light company. It was not necessary that the outgoing stockholders of the electric light company should have been made parties on motion, which was refused. The judgment is reversed and the cause is remanded, with directions to overrule the motion to dismiss, to reinstate the cause, and proceed according to law.

ALLEN WEST COMMISSION CO. v. BROWN.

(Supreme Court of Arkansas. March 23, 1901.)

MORTGAGES—RECITALS—ESTOPPEL.

The warranty clause of a mortgage recited that a portion of the land had been conveyed to A. as trustee to secure a debt, and another portion to B. as trustee to secure a debt, but that the reference to the B. trust deed was not intended to estop the mortgagees from contesting the validity of the B. trust deed if they should so desire, and that the only object of such recital was to give notice to the mortgagees of the existence of the A. and B. trust deeds. *Held*, that the only object of the mortgageors in making the recital was to protect themselves in their warranty, and, the A. trust deed being defectively acknowledged, the mortgagees could take the advantage of such fact.

Appeal from St. Francis chancery court; Edward D. Robertson, Chancellor.

Foreclosure by James P. Brown, trustee, and others, against the Allen West Commission Company. From a decree for plaintiffs, defendant appeals. Reversed.

61 S.W.—58

J. M. Moore and W. B. Smith, for appellant. Norton & Prewett, for appellees.

BUNN, C. J. This is a bill in equity in the Fifth chancery district, comprising Lee and St. Francis counties, to foreclose a mortgage or deed of trust executed by W. S. Brooks and wife on the 23d day of May, 1894, to James P. Brown, as trustee, to secure a note of \$1,030 given by them to Mrs. Lou M. Latham, of the same date, bearing interest at the rate of 10 per cent. per annum from date until paid, and due May 23, 1895, which, with accrued interest, less credits, amounted to the sum of \$1,030, the said credits being equal to the interest. On a portion of the lands mentioned in the complaint, it is alleged in defendant's answer that Brooks and wife had executed a deed of trust to M. H. Johnson to secure their note to one Norman H. Thompson, which was the subject of litigation in the United States district court of the Helena district. This is the only explanation we have of the reference to the Johnson trust deed. The complaint alleged some mistake of description in the first-named deed of trust, which plaintiffs asked to be corrected. The plaintiffs in their complaint further state that the Allen West Commission Company, subsequent to the execution of said first deed of trust, to wit, on the 15th November, 1894, took from Brooks and wife another mortgage or deed of trust on the same land, except the N. E. $\frac{1}{4}$ of S. W. $\frac{1}{4}$ of section 22, township 4 N., range 1 W., to secure the payment of a note of \$4,689.40; and that on the 10th March, 1897, the said Brooks and wife, by warranty and absolute deed, conveyed said lands in said deed of trust named to the Allen West Commission Company for and in consideration of the cancellation and surrender of their said note and security, which was done. In their answer the defendants say that while their said deed of trust from Brooks and wife, in point of time, was junior to the deed of trust sought to be foreclosed, yet that the latter deed or trust was for the wife's lands, and that she only acknowledged the relinquishment of her dower right in the same, and that the record of the same was no notice to the defendants of the mortgage or deed of trust sought to be foreclosed, and that their deed from Brooks and wife gave them an indefeasible title to the lands involved. But the mortgage or deed of trust to the Allen West Commission Company, in which James P. Brown was trustee also, contained the following provision, explanatory of the warranty clause therein, to wit: "And the parties of the first part covenant and agree with the parties of the second part and third parts [Brooks and wife, with Johnson, trustee, and Allen West Commission Company], their heirs, assigns, and successors, that no part of said real estate is mortgaged, held in trust, or in any wise incumbered, except that a part thereof is conveyed in trust to one

M. H. Johnson, as trustee, and a part thereof is conveyed to the said James P. Brown, as trustee, to secure certain indebtedness set out and described in said conveyances, which are duly recorded in the office of the recorder of deeds and mortgages for said Lee county; the one to said Johnson being so recorded in Book 12, pages 547 and 554, of the records of said recorder's office. But this reference to said Johnson's deed of trust is not intended to and shall not have the effect of in any way estopping the parties of the second and third parts of this deed, or in any way interfering with them, in contesting the validity of said Johnson's trust deed, if they, or either of them, hereafter so desire; the only object of said exceptions as to incumbrances in this warranty clause being to give notice to said second and third parties of the existence of said Johnson and Brown trust deed. And the said parties of the first part covenant and agree with the said second and third parties that they have a good, lawful, and perfect right to sell and convey said lands as hereinbefore set out, with the exceptions as aforesaid, and that they will, and their heirs, executors, administrators, and assigns shall, forever warrant and defend the title to said lands to said grantee, his heirs and successors, in this trust, against the lawful claims of all persons whatsoever."

Some time after the execution and delivery of this trust deed Brooks and wife satisfied the same by executing to the Allen West Commission Company the absolute deed to the lands therein described, about which there is no special contention here. In their statement contained in the transcript on page 16, the plaintiffs say: "As an argument arising on this clause (or provision), we contend that the care taken to provide that the Allen West Commission Company should not be estopped to assail the trust deed to Johnson, and the failure of any such provision as to the trust deed to Jas. P. Brown, indicate that there was no intention that the Allen West Commission Company should even claim, except as subject to the trust deed in favor of Brown, in which Mrs. Latham is beneficiary." On the contrary, the defendants, in their corresponding statement, say that "they deny there is any limitation of their right to contest the Latham deed of trust by virtue of the recital mentioned in the brief of attorneys for plaintiffs, because they say that said recital says in express terms 'that the only object of said exception as to incumbrances in this warranty clause is to give notice to said second and third parties of the existence of said Johnson and Brown trust deeds,' and, furthermore, because the grantors in said Brown trust deed could not thus limit the legal rights of the grantees." These extracts define the only essential issue in this case. Being properly construed, does the provision in the Allen West deed of trust give security to the Latham deed of trust, notwithstanding its

defective acknowledgment by Mrs. Brooks, and consequently its ineffectiveness as a record as against third parties?

It is not contended that the rule in *Main v. Alexander*, 9 Ark. 112, is not still the rule in this state; but it is, in effect, contended by the plaintiffs that a recital in a mortgage, junior in point of time, of the existence of a prior mortgage, is notice to the mortgagee of the junior mortgage of the existence of the prior mortgage. That all depends, of course, upon whether or not the recital is a condition upon which, as part of the consideration, the mortgage junior in point of time is executed and accepted. In the recital referred to the mortgagors state, by way of covenant and agreement with the other parties, that no part of said real estate is mortgaged, held in trust, or otherwise incumbered, except that one part is conveyed to James P. Brown as trustee to secure an indebtedness, and another portion to W. C. Johnson as trustee to secure another indebtedness, both of which conveyances are of record. The recital is: "But this reference to said Johnson trust deed is not intended to and shall not have the effect of in any way estopping the parties of the second and third parts, or in any way interfering with them, in contesting the validity of said Johnson trust deed, if they or either of them hereafter so desire."

It is contended by the plaintiffs that there is no immunity extended by the mortgagors, Brooks and wife, to the mortgagees, the Allen West Commission Company and their trustee, by which, notwithstanding they are thus notified of the existence of the Johnson mortgage, they nevertheless may contest the validity of the latter mortgage if they think proper to do so, and, in granting this immunity to the mortgagees as to the Johnson mortgage, by implication they withhold it from them as against the Latham mortgage. Now, it is plain that the only object the mortgagors had in making this recital was to protect themselves in their warranty; that, whatever the mortgagees might choose to do in the premises, they, the mortgagors, by giving this timely notice and warning of prior incumbrances, would not be bound on their warranty, if the mortgagees should be unsuccessful in contesting this prior incumbrance or might fail to contest at all. And so it is not a question of the mortgagors' granting privileges and immunities to contest prior mortgages at all; for, unless affirmatively prohibited by the instrument under which he claims or otherwise, the mortgagee can contest all conflicting claims. But it contains this recital of the condition: "The only object of said exceptions as to incumbrances in this warranty clause being to give notice to said second and third parties of the existence of said Johnson and Brown trust deed." There was no duty nor obligation imposed upon the mortgagees or trustee with reference to either of the prior mortgages. What

follows shows clearly that the mortgagors' warranty was not intended to cover the prior incumbrances named. If the mortgagees elected to contest the validity of these prior mortgages, and could show them invalid, all well and good, but if they failed in making such showing, and lost, they were debarred from seeking relief on the warranty, and if they failed to contest at all the same result should follow. There was no record notice to the Allen West Commission Company, at the time they took the mortgage and their subsequent deed, that the lands of Mrs. Brooks had been previously mortgaged to secure the Latham debt; the Latham mortgage being improperly on record. Reversed, and the bill dismissed.

WOOD and RIDDICK, JJ., not participating.

STATE v. HELM.

(Supreme Court of Arkansas. March 23, 1901.
CRIMINAL LAW—INSANITY AS GROUND FOR
NOT PRONOUNCING JUDGMENT
—INSTRUCTIONS.

1. Under a statute providing that one convicted of a crime may show his insanity as a reason why judgment should not be pronounced against him, and requiring the court, if it is of the opinion that there is reasonable ground for believing that the accused is insane, to impanel a jury to determine the question, such insanity may be shown orally, and without any formal plea.

2. In a proceeding to ascertain whether one adjudged guilty of a crime is insane, a charge authorizing the jury to find him insane if he could not "intelligently reason," is incorrect, as calculated to lead the jury to believe that accused should be possessed of more intelligence and mental capacity than is necessary, since he is insane, only where, by reason of disease of the mind, he is unable to understand the nature of the indictment on which he was convicted, his plea thereto, and the verdict thereon when explained to him by the court, and is unable to comprehend his own condition in reference to such proceedings by reason thereof.

Appeal from circuit court, Independence county; F. D. Fulkerson, Judge.

P. B. Helm, being convicted of forgery, interposed insanity as a reason why judgment should not be pronounced against him, and from a judgment pronouncing him insane the state appeals. Reversed.

Jeff Davis, Atty. Gen., Chas. Jacobson, and S. D. Campbell, for the State.

BATTLE, J. P. B. Helm was indicted, in the Independence circuit court, for the crimes of forgery and uttering a forged instrument. He waived arraignment, and pleaded not guilty. The jury who were impaneled to try him found him guilty of forgery, and left his punishment to the court, who assessed the same at two years' imprisonment in the state penitentiary. In due time he was brought before the court to hear the judgment, and, being informed of the nature of the indictment

against him, his plea to the same, and the verdict of the jury, the punishment assessed, and the effect and consequences thereof, and being asked by the court if he had any legal cause to show why judgment should not be pronounced against him, he said, by his counsel, he was insane. After inquiring into his mental condition, the court ordered a jury to be impaneled to determine whether he be insane, which was done, and they, after hearing the evidence adduced before them, found him to be insane; and the court ordered that he be confined in the lunatic asylum "until discharged therefrom as well," and that he be then confined in the jail of Independence county until, in the opinion of the court, he is sane, when judgment will be pronounced against him; and the state appealed.

The following was, substantially, the testimony before the jury: Dr. Kennerly testified: "That defendant had been addicted to the morphine habit for the last five years. That morphine has different effects upon different persons. Its excessive use is detrimental,—affects the digestion, assimilation, and later the brain. That morphine has demoralized defendant's mental and physical condition. He had examined defendant two or three weeks ago, and again about an hour or two ago.

"Q. I'll ask you whether or not, in your opinion, from your examination and your knowledge of this man, P. B. Helm, whether he has sufficient mental capacity to rationally comprehend his own condition with reference to the proceedings here in court? A. As compared to a rational man, he has not. He has no conception as a rational and sane man would.

"Q. Then, in your opinion, he does not rationally comprehend his own condition with reference to these proceedings? A. As a rational man, no, sir."

Cross-Examination.

"The last stage of the morphine habit is dementia. Defendant has not reached that stage; has not lost his understanding; has memory, reason, and will; and is able to exercise those faculties to some extent. Have talked to defendant to-day in reference to this action, and he knew what I was talking about.

"Q. If the court should call the defendant up now, and inform him of the nature of the indictment which he was tried on, and of the verdict of guilty against him, and then explain the effect and consequences of that verdict, in your opinion, would he understand the explanation of the court? A. I think he would, but he could not appreciate the extent of it as a well-balanced brain would.

"I take the ordinary human being as the standard of a well-balanced brain. It is a rare thing to find a perfectly unbalanced brain.

"Q. By the Court: Has he sufficient mental capacity to intelligently comprehend, and intelligently reason, and intelligently understand what is going on now? A. No, sir."

Dr. Dorr testified: "Examined defendant in 1895 or 1896, and also within the last month. He has used morphine to the extent that his nervous system is impaired. From my knowledge of defendant, and examination of him, in my opinion, defendant has not sufficient mental capacity to rationally comprehend his own condition with reference to the present proceedings as a sane man would."

Cross-Examination.

"From examination of defendant, think defendant knows something of what is going on now. He understands what is said; has use of the senses; has the power of perception to a certain extent. If the court should bring defendant up now, and explain the nature of the indictment, he would understand that explanation in a way; but don't think he would understand it as a sane person, take the average human being as the standard of a sane person. If the court explained to the defendant the nature of the indictment; that he had been tried by a jury, and found guilty on the charge; and the nature and effect of the judgment,—defendant would have some understanding of it.

"Q. By the Court: In your opinion, from your knowledge and examination of the defendant, has he sufficient mental capacity to intelligently comprehend what is going on now with reference to this proceeding? A. I do not think he does to the extent of a sane person."

On Part of State.

John A. Hinkle testified that he was sheriff, and brought defendant back from Neosho, Mo. Had conversation with defendant yesterday, and defendant understood all that was said to him.

Upon this testimony the court, over the objections of the state, instructed the jury as follows:

No. 1. "Gentlemen of the jury, this is an inquiry as to the sanity or insanity of P. B. Helm. You are instructed that if you find, from a preponderance of the evidence in this case, that the defendant is now so afflicted with mental disease that when informed by the court of the nature of the indictment, his plea, and the verdict of conviction thereon, and of the effect and consequences thereof, that he would not intelligently understand, intelligently reason, and intelligently comprehend such matters, you would be authorized to find him insane. On the other hand, unless you believe, by a preponderance of the evidence, that he is so afflicted by mental disease, when informed by the court of the indictment, the plea, the effect of a conviction thereon, and the consequences thereof,

he would not intelligently understand, intelligently reason, or intelligently comprehend the matters, you would be authorized to find him sane."

Were the proceedings of the court in accordance with law, and was the jury correctly instructed?

The statutes of this state provide as follows: "When the defendant appears for judgment, he must be informed by the court of the nature of the indictment, his plea, and verdict thereon, if any, and he must be asked if he has any legal cause to show why judgment should not be pronounced against him. He may show for cause against the judgment any sufficient ground for a new trial, or for arrest of judgment. He may also show that he is insane. If the court is of opinion that there is reasonable ground for believing he is insane, the question of his insanity shall be determined by a jury of twelve qualified jurors, to be summoned and impaneled as directed by the court. If the jury do not find him insane, judgment shall be pronounced. If they find him insane, he must be kept in confinement, either in the county jail or lunatic asylum, until, in the opinion of the court, he becomes sane, when judgment shall be pronounced."

These statutes do not require that insanity shall be shown by any formal plea; and we can see no good reason why it may not, and think it may, be adequately shown orally. *State v. Reed*, 41 La. Ann. 581, 583, 7 South. 132; *State v. Peacock*, 50 N. J. Law, 34, 11 Atl. 270. Upon it being shown it is the duty of the court to inquire into the truth of the allegation, and, if it finds that there is reasonable ground for believing it, to order a jury to be impaneled to determine the question. The manner and extent of the inquiry are left to the sound discretion of the court. The record fails to show any error committed by the court in the submission of the question to a jury.

Did the court instruct the jury correctly?

In *Freeman v. People*, 4 Denio, 9, Justice Beardsley, in delivering the opinion of the court, said: "The statute declares that 'no insane person can be tried, sentenced to any punishment, or punished for any crime or offense, while he continues in that state.' 2 Rev. St. p. 697, § 2. This, although new as a legislative enactment in this state (3 Rev. St. p. 832), was not introductory of a new rule, for it is in strict conformity with the common law on the subject. 'If a man,' says Sir William Blackstone, 'in his sound memory, commits a capital offense, and before arraignment for it he becomes mad, he ought not to be arraigned for it, because he is not able to plead to it with that advice and caution that he ought. And if, after he has pleaded, the prisoner becomes mad, he shall not be tried; for how can he make his defense? If, after he be tried and found guilty, he loses his senses before judgment, judgment shall not be pronounced; and if, after

the prisoner been of sound memory, he might have alleged something in stay of judgment or execution. Indeed, it is added, in the bloody reign of Henry VIII. a statute was made which enacted that if a person, being compos mentis, should commit high treason, and after fall into madness, he might be tried in his absence, and should suffer death, as if he were of perfect memory. But this savage and inhuman law was repealed by the statute of 1 & 2 Philip & M. c. 10. For, as observed by Sir Edward Coke, 'the execution of an offender is, for example, "ut poena ad paucos, ad omnes permeneat"; but so it is not when a madman is executed, but should be a miserable spectacle, both against law, and of extreme humanity, and cruelty, and can be no example to others.' 4 Bl. Comm. 24. The true reason why an insane person should not be tried is that he is disabled by an act of God to make a just defense, if he have one. As is said in Harg. State Trials, 205: 'There may be circumstances lying in his private knowledge which would prove his innocence, of which he can have no advantage, because not known to the persons who shall take upon them his defense.' The most distinguished writers on criminal jurisprudence concur in these humane views, and all agree that no person in a state of insanity should ever be put upon his trial for an alleged crime, or be made to suffer the judgment of the law. A madman cannot make a rational defense, and, as to punishment, 'furiosus solo furore punitur.' 1 Hale, P. C. 34, 35; 4 Bl. Comm. 395, 396; 1 Chit. Cr. Law (Ed. 1841) p. 761; 1 Russ. Crimes (Ed. 1845) p. 14; Shelf, Lun. 467, 468; Stock, Non Comp. 35, 36."

Again, he says: "The statute before cited is emphatic that no insane person can be tried. In its terms the prohibition is broad enough to reach every possible state of insanity; so that, if the words are to be taken literally, no person, while laboring under insanity in any form, however partial and limited it may be, can be put upon his trial. But this the legislature could not have intended; for, although a person totally bereft of reason cannot be a fit subject for trial and punishment, it by no means follows that one whose insanity is limited to one particular object or conceit, his mind in other respects being free from disease, can justly claim the like exemption. This clause of the statute should receive a reasonable interpretation, avoiding on the one hand what would tend to give impunity to crime, and on the other seeking to attain the humane object of the legislature in its enactment. The common law, equally with this statute, forbids the trial of any person in a state of insanity. This is clearly shown by authorities which have been referred to, and which also show the reason for the rule, to wit, the incapacity

which the rule rests furnishes a key to what must have been the intention of the legislature. If, therefore, a person arraigned for a crime is capable of understanding the nature and object of the proceedings going on against him; if he rightly comprehends his own condition in reference to such proceedings, and can conduct his defense in a rational manner,—he is, for the purpose of being tried, to be deemed sane, although on some other subjects his mind may be deranged or unsound. This, as it seems to me, is the true meaning of the statute, and such is the construction put by the English courts on a similar clause in an act of parliament."

The intention of the statutes of this state and of New York is the same. What was said of the New York statute in *Freeman v. People* can be truthfully said of the statute of this state. The statutes of both states, so far as they severally extend, are enactments of the common-law rule which forbids the trial of any person, or the pronouncement of judgment against him, while he is in a state of insanity. The reason of the rule for prohibiting the trial while he is insane is the incapacity of one who is insane to make a rational defense, and for prohibiting the pronouncement of judgment against him while he is insane is, if sane, he might be able to show cause why judgment should not be pronounced against him, but, being insane, though having a sufficient cause, he might not make it known. The statute being an affirmation of the common-law rule, the reason on which the rule rests furnishes a key to what must have been the intention of the legislature in adopting it. We therefore conclude and decide that, if a person convicted of a crime is, by reason of a disease of the mind, unable to understand the nature of the indictment upon which he was convicted, his plea thereto, and the verdict thereon, when explained to him by the court, and is unable to comprehend his own condition in reference to such proceeding, and by reason thereof might not make known to the court or the attorneys in charge of his defense the facts within his knowledge, if any, which would show that judgment should not be pronounced against him, he is, as to the pronouncing of such judgment, to be deemed insane, within the meaning of the statute. Ignorance of the law is not competent or sufficient to show such incapacity. The requirement of the statute which makes it the duty of the court to inform him of the nature of the indictment, his plea, and the verdict, sustains this view. This information could not subserve its purpose, and the giving of it would be a useless formality, if he is insane to the extent he must be to come within the meaning of the statute, as we have indicated; but, if not insane to such extent, it would accomplish its purpose, and he would be com-

petent to hear the judgment of the court pronounced against him.

The instruction given to the jury by the court is ambiguous, and is not in full accord with this opinion. It authorized the jury to find the defendant insane if they found from the preponderance of the evidence that he could not "intelligently reason." Under the evidence adduced, it was reasonably calculated to induce the jury to believe that he should be possessed of more intelligence and mental capacity at the time judgment is pronounced against him, as a prerequisite to such proceeding, than is necessary; and it should not have been given.

The judgment of the court upon the verdict of the jury as to the sanity of the prisoner is, therefore, set aside, and the circuit court is directed to pronounce judgment against him upon the verdict finding him guilty of forgery, unless, in the opinion of the court, there is reasonable ground for believing he is insane, and, in that event, to proceed according to this opinion.

WEST v. STATE, to Use of GRIGGS.

(Supreme Court of Arkansas. March 10, 1901.)

TAX SALE—PUBLICATION OF NOTICE—AFFIDAVIT—VALIDITY OF SALE.

Where the affidavit of publication of notice of proceedings under the overdue tax act does not show that publication has been made in a newspaper printed in the county, and having a bona fide circulation therein for a period of one month before the first publication, as required by Mansf. Dig. § 4356, a sale of land thereunder is invalid.

Appeal from circuit court, Conway county; Jeremiah G. Wallace, Judge.

Ejectment by the state, for the use of W. J. Griggs, against Laura West. From a judgment in favor of plaintiff, defendant appeals. Reversed.

S. A. Allen, for appellant.

PER CURIAM. This is an action of ejectment. The plaintiff, W. J. Griggs, derived title to the land from the state, and the title of the state rested upon a sale by virtue of proceedings had under the overdue tax statute. The warning order made in the overdue tax proceedings was not found to have been published as required by law, in this: that the affidavit of the publisher does not show that it was published in "a newspaper printed in the county and having a bona fide circulation therein for a period of one month next before the date of the first publication." Mansf. Dig. § 4356; *Gallagher v. Johnson*, 65 Ark. 90, 44 S. W. 1041. This defect in the proof of publication, as previously decided by this court, rendered the sale in the overdue tax suit void. *Gallagher v. Johnson*, supra. It follows, therefore, that the state obtained no title by such sale, and could convey none to Griggs. For this reason the

judgment in favor of Griggs was not sustained by the evidence. Judgment reversed and case dismissed.

BELL v. STATE.

(Supreme Court of Arkansas. March 16, 1901.)

CRIMINAL LAW—HOMICIDE—EVIDENCE—THREATS BY DECEASED—IMPROPERLY EXCLUDED.

On a prosecution for murder, where the defense was justifiable homicide, it was error for the court to exclude evidence of threats and former assaults made by deceased on the defendant.

Appeal from circuit court, Desha county; Antonio B. Grace, Judge.

Jordan Bell was convicted of murder in the first degree, and appeals. Reversed.

Roy D. Campbell and X. O. Pindall, for appellant. Jeff Davis, Atty. Gen., and Chas. Jacobson, for the State.

BUNN, C. J. This is an indictment for murder in the first degree, upon which the defendant was tried and convicted in the Watson district of the Desha circuit court, at its August term, 1900, and verdict pronounced accordingly, and defendant appeals. The motion for new trial, which was overruled by the court, contains 11 assignments of error; but it is only necessary to consider such as pertain to the exclusion of threats against the defendant on the part of the deceased, and her conduct of deadly violence against him on one or more occasions a little time before the killing. The defendant and the deceased, husband and wife, had not been living together in harmony for some time, and at the time of the killing the deceased had left the defendant, and was living with her mother on the occasion of the homicide. On the morning of that day the defendant, as he states in his testimony, went to the mother-in-law's house, to have a talk with the deceased about their domestic affairs and for the purpose of reconciliation. When he reached the house, the deceased, the mother, and one Ben Davis were present. The latter two soon after left, leaving the deceased and the defendant alone,—except the presence of their nine months' old baby. When thus alone the encounter between the two took place, resulting in the death of the wife at the hands of the husband. The defendant, in his testimony, says that without warning the deceased went out of the house, procured an ax, and returned through the only open door in the house, and began the assault on him with the ax, and that, having no way of escape, what he did was purely to save his own life. He was the only living witness to the killing, and the question is, who was the aggressor? The defendant offered to prove previous threats by the deceased against his life, and instances of deadly assaults by her upon him; but this testimony the court excluded, and

he excepted. In *Palmore v. State*, 29 Ark. 248, this court said: "Threats and the character of the deceased [evidence of which last also was excluded in this case] are admissible when they tend to explain or palliate the conduct of the accused. They are circumstantial facts, and a part of the *res gestae*, when so connected with the conduct of the parties as to explain their motives." The same rule is approved in *People v. Arnold*, 15 Cal. 478 (see *Holler v. State*, 87 Ind. 57; *King v. State*, 55 Ark. 604, 19 S. W. 110; *Brown v. State*, 55 Ark. 503, 18 S. W. 1051); and in *People v. Alvire*, 65 Cal. 283, the rule is maintained, even when the threats have not been communicated to the defendant before the killing. The rule appears to be that, to determine in such case who was the probable aggressor, any testimony, otherwise unobjectionable, is admissible; otherwise, it would be impossible to solve the question, where, as in this case, no other testimony could be had. This is all that is necessary to consider now. The judgment is reversed, and the cause remanded for new trial.

BATTLE, J., not participating.

KANSAS CITY, P. & G. R. CO. v. BARNETT.
(Supreme Court of Arkansas. March 16, 1901.)
CARRIERS—RAILROADS—ESCAPE OF CATTLE
FROM PENS—DELIVERY TO CARRIER
—INSTRUCTIONS—ERROR.

1. In an action against a carrier for the escape of cattle from pens into which the cattle had been put for the purpose of shipment, an instruction that the liability of the carrier for the safe-keeping and damages to the cattle began when the same were put into its stock pens at the place of shipment, and received by the carrier for shipment, provided the carrier or its agent knew that the cattle were put therein for shipment over its line of railroad, was erroneous, where there was evidence that the cattle were not delivered or accepted for immediate shipment, and that the carrier refused to accept the cattle for shipment until the consignor loaded the cars with them.

2. A second instruction, based on the former, that if the cattle had been delivered to the carrier, and a delay in delivering them at their destination had occurred, the measure of damages for such delay was the difference in the market value of the cattle at the time they were delivered at their destination and the time when they should have been delivered, with interest from the date of delivery to the company, was erroneous, since it was affected with the error of the first instruction, as to the time when the cattle were delivered to the carrier.

3. Plaintiff put about 100 head of cattle in defendant carrier's pens at a station for the purpose of shipment, but before the cattle were loaded they broke through the pen and escaped. Plaintiff thereupon went to T., another station, and tried to induce defendant's agent to collect his cattle for him, which the agent refused. Plaintiff remained at T. three days, and when the cattle were collected they were held a number of days before shipment, to get them in proper condition to ship. In an action for damages for the escape, the court charged that if plaintiff recovered he was entitled to the necessary expenses incurred in

gathering the stock and holding them preparatory to shipment, including compensation for time lost and necessary money expended in and about the collection and shipment of the same. Held, that the instruction was erroneous, as under it the jury may have included recovery for the time and expense in going to T., and for holding the cattle longer than was reasonably necessary after their recovery, preparatory to shipment, for which the plaintiff was not entitled to recover.

Appeal from circuit court, Little River county; Will P. Feazel, Judge.

Action by R. L. Barnett against the Kansas City, Pittsburg & Gulf Railroad Company. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Read & McDonough, for appellant. Oscar D. Scott and F. H. Taylor, for appellee.

BATTLE, J. R. L. Barnett brought this action against the Kansas City, Pittsburg & Gulf Railroad Company to recover damages on account of the loss and escapement of, and injuries to, cattle delivered to and received by the defendant for transportation over its line of railroad. Plaintiff states his cause of action as follows:

"On the 29th day of March, 1898, the plaintiff was the owner of one hundred and four head of cattle, which he had gathered at Wilton, in Little River county, in the state of Arkansas, on the defendant's line of railway, for the purpose of shipping them to Bonham, Texas, to be delivered and placed on the market at said last-mentioned place by the 30th day of March, 1898. That said Wilton then and is now a station kept up and maintained by the defendant on its said line of railroad, where it receives cattle and freight generally for shipment, and that on said first-mentioned date the plaintiff applied to defendant at said station for cars and transportation over its said road for the purpose of shipping his cattle over the defendant's road to Texarkana, Texas, and from there to Bonham, Texas, over another road; and said defendant company, through its authorized agent, contracted and agreed with plaintiff to receive and ship his cattle as desired by him, and directed the plaintiff to deliver said cattle in its stock pen at said station, which stock pen it had erected and did then maintain for the purpose of receiving cattle and other stock for shipment. That plaintiff then and there delivered all of said cattle in said pen to the defendant, and that defendant did then and there receive said cattle for the purpose of transporting the same for him to Texarkana, and on to Bonham, Texas. That said defendant company had carelessly and negligently permitted said pens to become out of repair, and that the fence around the same was weak and partly rotten, and said company had negligently and carelessly failed to keep the same in repair and strong and in good condition, suitable for holding stock while in said pen, and of all of which said company had full knowledge.

"That after said defendant company had received from the plaintiff all of his said cattle, and while it had them in said pen and in its possession for shipment, it carelessly and negligently permitted all of said cattle to escape from said pen and from its possession, by reason of the unfitness of said pen to hold cattle, and by reason of its negligence in leaving the gates of said pen unfastened, and by reason of said carelessness and negligence on the part of the defendant said cattle scattered out over the country, off and away from said station, and beyond the reach and control of the plaintiff, and that the defendant negligently, carelessly, and willfully failed and refused to regather said cattle, or any part of them. That, by reason of the escapement of the said cattle, plaintiff was compelled to pay out the sum of two hundred and thirty dollars (\$230) to have them regathered and fed during the time they were being regathered and delivered at Wilton station for the purpose of shipping the same. That plaintiff was and has been unable to find and regather five (5) head of said cattle that escaped from said stock pen, and the escape of the said five (5) head or cattle was a total loss to the plaintiff, and that they were worth upon the market at said station of Wilton the sum of \$67; three head being grown cows, and being worth fifteen dollars (\$15) per head, and two (2) head being yearlings, worth eleven dollars (\$11). That he recovered ninety-nine (99) head of said cattle that escaped from said stock pen, and that while they were out they became gaunted and fell off in flesh, and by reason of not having any feed, and being scattered out in a country where there was not sufficient range at that time to keep them up, and said cattle were bruised and otherwise injured by reason of said escapement, and that when recovered were in such bad condition generally as to considerably decrease their value upon the market from what it was before the escapement, which amounted to \$2.50 per head less in value than what they were just before said escapement, aggregating a damage to said cattle of \$247.50. That by reason of the escapement of said cattle as aforesaid the plaintiff was delayed sixteen days in delivering said cattle at Bonham, Texas, and that during that time the market price on cattle decreased, and by reason thereof plaintiff received \$4 per head for said cattle less than he would have received for them had they not been permitted to escape from defendant's pen at Wilton, Arkansas, and had they been shipped in at the time and on the terms agreed upon by the defendant and delivered at Bonham, Texas, in as good condition as they were when they were delivered to the defendant for shipment, which item of damage to plaintiff, by reason of the decrease in value of said cattle upon the market, aggregating the sum of (\$232) two hundred and thirty-two dollars. That when said cattle escaped the

plaintiff, R. L. Barnett, devoted sixteen days of his time in looking after the recovery of said cattle, and lost said time from his other business, which said time was reasonably worth the sum of eighty dollars (\$80), and that he paid out his railroad fare and necessary expense in looking after the recovery of said cattle after their escapement the sum of twenty dollars (\$20), by reason of which he was damaged in the aggregate sum of one hundred dollars (\$100)."

The defendant answered and denied the allegations in the complaint. The issues thus formed were tried by a jury, and a verdict was rendered in favor of the plaintiff for the sum of \$845, and 6 per cent. interest thereon from the 1st day of April, 1898; and judgment was rendered upon this verdict for \$844.40, and the defendant appealed.

R. L. Barnett, the plaintiff, testified, substantially, as follows: On the 29th of March, 1898, at Little River county, in this state, he purchased from Gus Palmer 104 head of cattle, consisting of cows, yearlings, and one bull. The stock were delivered on the day of the purchase, between 2 and 4 o'clock in the evening, at Wilton, a station on defendant's railroad, in this state, in the pens of the defendant, which were made in the manner pens for loading and unloading cattle on and off trains are ordinarily constructed. As soon as the cattle were delivered in the pen he saw the agent of the railroad about their shipment, and told him that he had put one hundred and four head of cattle in the pens, to be shipped to Bonham, Texas, and asked him about what time the railroad company would pull the cattle out, and the agent replied that he did not know. There was no agreement between the plaintiff and the agent about loading the cattle. The agent said he would do so. (It is usual and the rule for railroad companies to put cattle on their trains.) About sundown the plaintiff put 12 of the cattle on the cars provided by the defendant for that purpose. He delayed putting the remainder in the cars, "because putting them into the cars jammed them around and would damage them." He applied to the agent the second time to know when the cattle would be hauled away, and he said he thought it would be about 10 o'clock that night, and later in the night said it would be some time. Finally the agent advised the plaintiff to go to bed, and promised, if he would do so, to wake him up when the train came and the cattle were put on the cars. About 12 o'clock in the night the agent came and woke him up, and told him that his cattle were out and gone. The next morning plaintiff found all the cattle, except those in the cars and the bull, were gone. They had made their escape by breaking the fence of the pen near the gate. After this he went to Texarkana, and saw Mr. Snooks, an agent of the railroad company, and the company refused to collect the cattle for him. He then employed Goolsby,

Goldsmith, and Gardner, who knew the cattle, to do so, and they found and collected 99 head. While they were doing so, he carried on negotiations with Mr. Snooks, which continued three or four days. He then returned to Wilton. He spent \$20 in railroad fare and other traveling expenses on account of the temporary loss of the cattle. All the cattle, except 2, were finally recovered, and returned to Wilton on the 14th of April, 1898, and were on that day shipped to Bonham, Texas; plaintiff having paid the expense of putting them on the cars, because there were no pens at Wilton to hold them. When the cattle were recovered they were in bad condition on account of the loss of flesh. They were worth at Bonham, Tex., on the 29th of March, 1898, \$14 and \$18.50. The freight on two cars of cattle from Wilton to Bonham was \$63.40. Plaintiff held the cattle until July, 1898, when he sold them for \$9 and \$10. They were worth that in Bonham on the 14th of April, 1898. The two which were lost were worth \$14, less the freight. Plaintiff paid for the finding and collecting and return to Wilton of those which were recovered \$230.

Goolsby testified that the pens of the railroad at Wilton were "ordinary pens for penning and loading cattle into railroad cars"; that the plaintiff agreed to pay "two dollars a head for getting up the cattle"; that they were worth \$1.50 or \$1.75 less per head on the 14th of April, 1898, than they were on the 29th of March preceding.

S. T. Gordon testified: "The cattle pens of the railroad at Wilton were in bad condition on the 29th of March, 1898. The main posts were rotten, and the planks were nailed on from the outside."

Gardner testified: "We gathered ninety-nine head, including the twelve that remained on the cars. I cannot tell how many cattle we found on each day. We kept the cattle three or four days before we delivered them on the cars."

Goldsmith testified: "We fed the cattle nine or ten days. On the fifth day after these cattle got out, we had up over two-thirds of them."

Harry Dunkerton testified: There was no contract made between him, as agent of the Kansas City, Pittsburg & Gulf Railroad Company, and the plaintiff. He wanted two cars. Witness had them placed convenient for him to load with cattle. He said he wanted to ship his cattle somewhere in Texas. Plaintiff was to load the cars. The defendant refused to execute a bill of lading for the cattle before they were put on the cars, and to receive them in the pens.

Upon this testimony, at the request of the plaintiff, over the objection of the defendant, the court instructed the jury as follows:

"(1) The court instructs the jury that if they believe from the evidence in this case that the defendant, Kansas City, Pittsburg & Gulf Railroad Company, is a railroad cor-

poration and a common carrier for hire, and that said defendant received into its stock pen at Wilton the cattle mentioned in plaintiff's complaint, of the plaintiff, for the purpose for shipping the same over its line of road to Texarkana or to any other point, the liability of the defendant for the safe-keeping of and damages to said cattle began when said cattle were put into its said stock pen at Wilton for shipment, and received by the defendant, provided the defendant or its agent knew that said cattle were put therein for the purpose of shipping same over its line of railroad; and, to render defendant liable, it is not necessary that a bill of lading for said cattle should have been signed by defendant.

"(2) The jury are instructed that where cattle have been delivered to a common carrier for transportation, and they are not delivered to their destination within a reasonable time, the damages recoverable on account of the delay, if the cattle of the particular kind shipped have fallen in market value during the delay, is the difference between the value of the cattle at the time and place they should have been delivered and their value when they were in fact delivered, with six per cent. interest, after deducting the cost of transportation; the value at the time when they were in fact delivered being computed at the place of destination. So, in this case, if you find from the preponderance of evidence that plaintiff delivered to defendant the cattle named in the complaint, to be by defendant transported from Wilton to Bonham, Texas, and that said cattle were not delivered at their destination in a reasonable time after such delivery, and that cattle of the particular kind shipped had fallen in market value during the delay, and your verdict is for plaintiff, the measure of damages on account of such delay is the difference between the market value of the cattle so delivered to defendant at Bonham, Texas, at the time they should have been delivered, and their value at Bonham, Texas, when they were in fact delivered, with interest from date of the delivery at the rate of 6 per cent. per annum.

"(3) If you find for the plaintiff, in estimating his damages you may include in your verdict the necessary expense incurred by the plaintiff, if any be proven, in gathering said stock and in holding them preparatory to reshipment, including a reasonable compensation to plaintiff for time lost and money expended by him, if any be proved, in and about the collection and shipment of said cattle which was necessary." Are these instructions correct?

In the absence of a contract limiting the liability of a common carrier, he is liable for all losses except those caused by the act of God, by the public enemy, by the inherent defect, quality, or vice of the thing carried, by the seizure of goods or chattels in his hands under legal process, or by some act or omission of the owner of the goods. When he undertakes to carry live stock, he is liable

as an insurer to the same extent as when engaged in the transportation of general merchandise, except as to injuries caused by the animals themselves and to each other,—losses that are caused by their inherent vicious propensities. He cannot, however, be considered as having assumed this liability until the goods or live stock have been delivered to and accepted by him for immediate transportation in the usual course of business. *Railway Co. v. Hunter*, 42 Ark. 203.

In *Railway Co. v. Murphy*, 60 Ark. 338, 30 S. W. 420, it is said: "When the shipper surrenders the entire custody of his goods to the carrier for immediate transportation, and the carrier so accepts them, eo instante the liability of the common carrier commences. When this occurs, the delivery is complete; and, it matters not how long or for what cause the carrier may delay putting the goods in transitu, if a loss is sustained, not occasioned by the act of God or the public enemy, the carrier is responsible. But, on the contrary, as there is no divided duty of safe-keeping, and no apportionment, in the event of loss, between the owner and the carrier, the surrender of control over the goods by the shipper must be such as to give the carrier the unqualified right to put at once in itinere, and the carrier must have received them for that purpose. So that when goods are delivered to the carrier that are not yet ready for shipment, awaiting further orders from the owner, or the happening of some contingency or compliance with some condition before they are ready to be moved, the liability of the carrier in the meanwhile can be no greater than that of an ordinary depositary or bailee."

In the first instruction given by the court at the instance of the plaintiff the court ignored the question of fact presented by the evidence. One witness testified that the cattle were not delivered to or received by the defendant for immediate transportation, that the plaintiff was to load the cars with the cattle, and that the defendant refused to receive the cattle for shipment until they were on the cars. The court nevertheless told the jury, "The liability of the defendant for the safe-keeping of and damages to said cattle began when said cattle were put into its said stock pen at Wilton for shipment, and received by the defendant, provided the defendant or its agent knew that said cattle were put therein for the purpose of shipping same over its line of railroad." In instructing as to the tests of the liability of the defendant as a common carrier, and what would be sufficient to render it liable as such, it withheld from the consideration of the jury the evidence to the effect that, although the cattle were received in the pens for the purpose of shipment, the plaintiff was to put them on the cars, and that until that was done the defendant refused to undertake to ship them. The instruction was calculated to convey the idea, and may have done so, that the defendant became liable to

the plaintiff as a common carrier when it ascertained that the cattle were put in the pens for the purpose of shipment, regardless of the evidence that it refused to accept the cattle for shipment until the plaintiff loaded the cars with them according to agreement. The instruction is clearly erroneous, and should not have been given.

The second instruction given to the jury at the instance of the plaintiff is based upon the first, and, to be understood, must be read and construed in connection with it. After telling the jury when the liability of the defendant, as a common carrier, for the safe-keeping of and damages to the cattle began, it told them that if they found from the preponderance of the evidence that "plaintiff delivered to defendant the cattle named in the complaint, to be by defendant transported from Wilton to Bonham, Texas, and that said cattle were not delivered at their destination in a reasonable time after such delivery, and that cattle of the particular kind shipped had fallen in market value during the delay, and your verdict is for plaintiff, the measure of damages on account of such delay is the difference between the market value of the cattle so delivered to defendant at Bonham, Texas, at the time they should have been delivered, and their value at Bonham, Texas, when they were in fact delivered, with interest from date of the delivery at the rate of 6 per cent. per annum." This reasonably meant that, if the cattle were delivered and received in a way to render the defendant liable according to the first instruction, the defendant was liable for their depreciation in value if they were not delivered in a reasonable time after such delivery. Under the first instruction the jury might have found, and probably did, that the duty to ship arose on the 29th of March, 1898, when the cattle were first placed in the pens, and under the second instruction were authorized to find that the defendant was liable for the depreciation in value because the cattle were not delivered at their destination within a reasonable time after that date, when, under a correct instruction, they could and might have found, under the evidence, that the cattle were not delivered and received for transportation until the 14th of April, 1898, and were delivered at their place of destination within a reasonable time thereafter. The second instruction was affected with the vice of the first, and in that connection should not have been given.

The third instruction given at the instance of the plaintiff is likewise erroneous. He was not entitled to recover anything on account of expenses incurred in going from Wilton to Texarkana and returning, and for time spent in negotiating with Mr. Snooks, or for expenses in holding the cattle longer than was reasonably necessary, after their recovery, preparatory to shipment. Under the third instruction the jury may have included such expenses in the amount of the

-damages for which they returned a verdict. It should not have been given.

In confining what we have said to the liability of the defendant as a common carrier, we do not mean to make the impression that it was not liable in any other way.

Reversed and remanded for a new trial.

WOOD, J., did not participate.

TURNER et al. v. COCHRAN et al.

(Supreme Court of Texas. April 15, 1901.)

DEEDS—MORTGAGES—REGISTRATION — DEED OF TRUST—SALE—PURCHASER—UNRECORDED DEED—BURDEN OF PROOF—CONSTRUCTIVE NOTICE.

1. Where land which had previously been conveyed by a warranty deed which had not been recorded was sold by a trustee under a power in a deed of trust to secure payment of a note, the grantee in the trustee's deed stands on the footing of a junior purchaser, and not a lien creditor; and, in an action by the heir of the grantee in the trustee's deed to recover the land from the devise of the grantee in the prior warranty deed, the burden is on plaintiff to show that the grantee in the trust deed had no notice of the senior unrecorded deed.

2. Pasch. Dig. art. 4985, requiring mortgages to be recorded in 90 days from their date, and providing that "no mortgage shall take lien" unless so recorded, was superseded by the fourth, fifth, and thirteenth sections of the amendatory act of February 5, 1840, providing that the lien should not be lost if the mortgage failed to have it recorded within the prescribed time, and that clerks should admit "conveyances" to record at any time, so that the record of a mortgage made after 1840, and not recorded within 90 days, is constructive notice to purchasers after the date of record.

Certified questions from court of civil appeals, First supreme judicial district.

Action by William Baker Turner and others against M. A. Cochran and others. On certified questions from court of civil appeals, First district.

H. & A. R. Masterson, for appellants. L. B. Moody, for appellees.

WILLIAMS, J. This case comes up on the following certified statement and questions from the court of civil appeals for the First district:

"On August 12, 1856, J. A. Thompson was the owner of 1,476 acres of land in Montgomery county. On that date he executed and delivered to Wm. R. Baker a conveyance to the land, in the form of a general warranty deed, reciting a cash consideration of \$1,600. This deed was not placed of record until April 6, 1858. On November 14, 1856, J. A. Thompson executed and delivered to one J. W. Henderson, as trustee, a deed of trust upon the land in question for the purpose of securing to one B. A. Shepherd the payment of a promissory note for \$905.87. The power of sale was conferred upon the trustee in case of default in the payment of the note. Under this deed of trust the land was regularly

sold by the trustee on April 6, 1858, for the purpose of paying the note, and B. A. Shepherd became the purchaser. The trustee in pursuance of such sale executed and delivered to Shepherd a deed to the land so sold. The deed of trust and trustee's deed to Shepherd were not placed of record until 1870. On April 6, 1858, the day of the sale by the trustee, Baker placed his deed of record in Montgomery county, but the transcript does not disclose whether it was filed with the county clerk for registration before or after the consummation of the sale by the trustee. As to whether Shepherd took the deed of trust to secure an antecedent debt, or was a purchaser for value, the record is silent, except in so far as the instruments themselves may be proof of the truth of the declarations contained in them. The record is also silent as to whether B. A. Shepherd had actual notice of Baker's senior unrecorded deed either at the date of the note and deed of trust or at the date of the sale. So far as the record shows, the land has never been occupied by any of the claimants. B. A. Shepherd is dead, and the appellee Mrs. M. A. Cochran is his sole heir. Wm. R. Baker is dead, and Wm. Baker Turner is his sole devisee. Mrs. Cochran brought two suits against Turner for the recovery of the land,—one in Montgomery county and one in Harris county. By agreement, both suits were consolidated in Harris county, and there tried. Hamman, the intervener, bought from Turner after the suits were instituted, but before service of citation was had in either, and the testimony does not show that either the intervener or Turner had actual notice of their pendency at the date of Turner's purchase. The record is silent as to whether Hamman was a purchaser for value, without actual notice of the claim of appellee Mrs. Cochran.

"(1) Having shown the execution of the deed of trust, sale thereunder, and deed from the trustee to her ancestor Shepherd, the death of Shepherd, and her sole heirship, did it further devolve upon appellee to show affirmatively that Shepherd was a bona fide creditor, and took the note and deed of trust without actual notice of Baker's senior unrecorded deed, or was the burden of proof upon Turner to show notice to Shepherd, or that he was not a bona fide creditor?"

"(2) In view of articles 4985, 4986, 4988, Pasch. Dig.—the first-mentioned article requiring deeds of trust upon lands to be recorded within ninety days of their date,—did the failure to record the deed of trust within the time prescribed render its subsequent record in 1870 ineffective as constructive notice to the intervener?"

In a supplemental certificate it is stated that the deed from Thompson to Baker was filed for record April 5, 1858.

1. The first question seems to assume that, in determining where the burden of proof rested, Shepherd is to be treated as a creditor, and not merely as a purchaser, as

those terms are used in the registration laws. Pasch. Dig. art. 4988; Rev. St. art. 4640. The decisions of this court have settled two propositions respecting the burden of proof in such cases: First. That a junior purchaser of land, attempting to defeat the title of the holder of a prior unrecorded deed from the same grantor for the same land, has the burden to show, by evidence outside the recitals in his conveyance, that he purchased for valuable consideration, and without notice of the previous conveyance. *Watkins v. Edwards*, 23 Tex. 443; *Hawley v. Bullock*, 29 Tex. 217; *Rogers v. Pettus*, 80 Tex. 425, 15 S. W. 1003. Second. That, as against a creditor whose lien has been fixed upon land by legal process against his debtor, the holder of a prior unrecorded deed from such debtor has the burden of proving notice of his right to such creditor at the time of or before the attaching of the lien. *Linn v. Le Compte*, 47 Tex. 442; *Wright v. Lassiter*, 71 Tex. 644, 10 S. W. 205. These cases were followed in *Barnett v. Squyres*, 93 Tex. 183, 54 S. W. 241. The contention that the burden was on those claiming under the unrecorded deed now in question is based upon the latter class of decisions; the subsequent mortgagee being treated as a creditor, and not as a purchaser only. Whether or not a junior mortgagee is to be properly so classed, under the law regulating registration of instruments affecting titles to lands (Rev. St. art. 4640), for any purpose, is a question which admits of doubt, under the decisions. In the case of *McKeen v. Sultenfuss*, 61 Tex. 325, the question was whether or not the holder of a junior mortgage given to secure an antecedent debt, who could not, therefore, be protected as a purchaser, was to be regarded as a lien creditor, and to be protected as such, although he had parted with no consideration on faith of the security; and it was held that he was. In the subsequent case of *Overstreet v. Manning*, 67 Tex. 657, 4 S. W. 248, it was held that the term "creditor," as used in the chattel mortgage statute, means only such creditors as have acquired liens by proceedings at law, and that mortgagees and other lienholders by contract or act of the parties are on a different footing, and must show some consideration other than an antecedent debt, in order to postpone the prior unrecorded deed. This was so modified in *Berkey & Gay Furniture Co. v. Sherman Hotel Co.*, 81 Tex. 141, 16 S. W. 807, as to include within the statute, as creditors, landlords whose liens arise by operation of law. The holding in *Overstreet v. Manning* was based upon a statute which made unregistered chattel mortgages void as against creditors, and also as against "subsequent purchasers and mortgagees or lienholders in good faith," thus expressly classifying mortgagees with purchasers and distinguishing them from creditors; and it might be said that this decision does not impair the force of that in *McKeen v. Sultenfuss*, which construed the statute

concerning registration of instruments affecting the titles to land, in which the protected classes are mentioned merely as "creditors and subsequent purchasers for valuable consideration without notice." But the question suggests itself, does not the term "purchasers" include mortgagees, and does not the statute so classify them? In a later case a like question arose under the act of 1885 (article 3327, Rev. St.) concerning reservations of title in the sale and delivery of chattels, such as had before been known as "conditional sales," and converting them into chattel mortgages, and making them, unless registered, void "as to creditors and bona fide purchasers." It was held that such instruments, although unregistered, created valid liens as between the parties, and that subsequent mortgagees were not lien creditors, within the sense of the statute, but were to be classed as purchasers, and, in order to postpone the prior lien to their mortgage, antecedent debts, to secure which the mortgage had been given, were not a sufficient consideration. *Bowen v. Wagon Works*, 91 Tex. 385, 43 S. W. 872. Justice Denman, after reviewing previous decisions, said: "The logic of these decisions would seem to include within the term 'creditors' all persons whose claims are, upon certain conditions, charged by law as specific liens upon certain property, such as holders of attachment, execution, judgment, landlord, and mechanic's liens, and to exclude therefrom all others." The language of the statute here construed, so far as it influences the immediate question, is in effect the same as that construed in *McKeen v. Sultenfuss*. Neither of these cases involved the question as to the burden of proof, but all of them treated of the substantive rights of the parties where all of the facts were made to appear. The questions so decided are not now before us, and it is not intended to express any opinion as to the effect of the later decisions upon the case of *McKeen v. Sultenfuss*. The only bearing which these cases have upon the question of the burden of proof arises from the distinctions which the two classes of cases first cited have made between creditors and purchasers. Whether or not there is solid ground for this distinction is a question about which differences of opinion might exist, and which we are not called upon to discuss. The second rule stated as to burden of proof has not been applied to any cases arising under the statute, except those in which the right opposed to the claim under the unrecorded deed was that of a creditor who had established, as against the grantor in such deed, a lien upon the property by process of law; and, since we can discover no reason why a junior mortgagee in this respect should be regarded as holding a stronger position than that of the holder of a junior deed, we cannot assent to the contention that a different rule as to burden of proof applies to them. The reason of the rule, as between two holders of deeds

from the same party, is that the first deed has passed the legal title to the grantee therein, and upon this he is entitled to stand and to recover until the facts prescribed by law to defeat it have been made to appear (*McAlpin v. Burnett*, 23 Tex. 652); and this reason certainly operates with as much force against a junior mortgagee as against a junior vendee. This would hardly be questioned were it not for the difference made by the decisions referred to between purchasers and creditors with liens fixed by law. If there is any reason which distinguishes the case of the junior purchaser from the classes of creditors mentioned, it equally distinguishes from them the case of a junior mortgagee. We therefore conclude that the burden of proof was upon those claiming under the junior mortgage to show the facts which would give it precedence over the prior deed.

2. Article 4985, Pasch. Dig., which was the third section of the act of May 15, 1838, "to provide for the foreclosure of mortgages," was not in force when the mortgage in question was given. It was superseded by the amendatory act of February 5, 1840, on the same subject, and by the fourth, fifth, and thirteenth sections of the act of same date "concerning conveyances." The third section of the act of 1838 required that mortgages be recorded within 90 days from the passage of the act or from the date of the mortgage, and provided that "no mortgage shall take lien" unless so recorded. The amendatory act provided a different rule, viz. "that all mortgages shall be recorded as heretofore, but the lien created by the making of mortgages shall not be lost nor destroyed as between the parties to it if the mortgagee shall fail to have it recorded within the time prescribed by law." If it could be held that this, by itself, left in force the requirement that the record be made within 90 days, and that if made afterwards it would be ineffectual as notice, such holding is excluded by the other statute referred to. The fifth section of the latter act required clerks to admit to record "at any time" any "conveyances"; and the conveyances meant are defined in the fourth section, which is the same as article 4988, Pasch. Dig., and includes mortgages, and provides that such as are not recorded shall be void as to the classes of persons named, but valid as between the parties and their heirs, and as to all subsequent purchasers with notice or without valuable consideration. Section 13 makes the delivery of such instruments to the clerk notice from the time of such delivery. These various provisions left no part of section 3 of the act of 1838 affecting this case in force, and the law as fixed by them has been in substance the same ever since. Pasch. Dig. arts. 5004, 5012-5014. The same decision of this question was made in *Price v. Cole*, 35 Tex. 471, and *Gregg v. Gregg*, 38 Tex. 462, and upon this point we think those decisions are correct. The failure to record the mortgage

within 90 days does not impair the effect of the record as notice from the time it was made.

REED v. STATE.

(Court of Criminal Appeals of Texas. March 20, 1901.)

CRIMINAL LAW—TRIAL—LOST INFORMATION—SUBSTITUTION—APPEAL—EFFECT—EVIDENCE.

1. Proceedings on a substituted information, without a motion by the prosecuting attorney alleging the loss of the information and seeking permission to substitute the same, are irregular and invalid.

2. Under White's Ann. Code Cr. Proc. art. 884, declaring that an appeal suspends further proceedings in the court in which conviction was had until the judgment is reversed, except, where any portion of the record is lost after notice of appeal is given, the same may be substituted in the lower court, it was error for the court to allow an information which had been lost before trial to be substituted *nunc pro tunc* after a recognizance for appeal had been entered, though the recognizance was set aside before the substitution was allowed.

3. On trial for an aggravated assault on a certain woman, it was error to allow the prosecution to prove on cross-examination of defendant's witness that he was in a wine room drinking with a woman when a certain murder occurred; the time and place of the two crimes being different, and there being no connection.

4. On trial of defendant for an aggravated assault on a certain woman, it was error to allow the state, while cross-examining defendant, to prove that a certain person told him that the woman was of bad character, and that he believed it.

Appeal from Tarrant county court; M. B. Harris, Judge.

W. J. Reed was convicted of aggravated assault, and appeals. Reversed.

Armstrong & Hanger, for appellant. D. E. Simmons, Acting Asst. Atty. Gen., for the State.

DAVIDSON, J. Appellant was fined \$25 under a conviction for aggravated assault. He was tried upon what purports to be a substituted information. The prosecution failed to present a motion alleging the loss of the information, and asking permission to substitute the same. This was necessary. *Burrage v. State* (Tex. Cr. App.) 44 S. W. 169. For collation of authorities, see subdivision 3, § 409, White's Ann. Code Cr. Proc.

Motion for new trial was overruled and recognizance entered into on the 17th of September. In the latter part of October these matters were set aside by the court, and the state then filed a motion to substitute *nunc pro tunc* the lost information. Exception was also reserved to this. This could not be done. See White's Ann. Code Cr. Proc. art. 884, which provides, "The effect of an appeal is to suspend and arrest all further proceedings in the case in the court in which the conviction was had until the judgment of the appellate court is received by the court from which the appeal is taken: provided, that in

case where, after notice of appeal has been given, the record or any portion thereof is lost or destroyed it may be substituted in the lower court," etc. This loss occurred before the trial, and the substitution subsequent to the trial could not be had in the manner done here. *Quarles v. State*, 37 Tex. Cr. R. 363, 39 S. W. 668; *Lewis v. State*, 34 Tex. Cr. R. 126, 29 S. W. 384, 774, 30 S. W. 282, and, for collation of authorities, see *White's Ann. Code Cr. Proc.* § 1236.

The state was permitted on cross-examination of the defendant's witness Smith to prove by him that he was in the wine room drinking beer with a woman when E. L. Thellman killed George Swift. The objection to this testimony was well taken. Appellant was indicted for making an aggravated assault upon the woman at a different time and place, and with which this killing had no connection. This was not the proper mode of impeachment.

On cross-examination of appellant the prosecuting attorney was permitted to prove by him that Ed Ridley told him that Lizzie Ridings was a bitch and a whore, and that he believed it, and went to Jessie Henderson's to take her to a musical at a neighbor's residence. Lizzie Ridings was the assaulted party. We do not believe this testimony was admissible. For the errors discussed, the judgment is reversed and the cause remanded.

WISDOM v. STATE.

(Court of Criminal Appeals of Texas. March 20, 1901.)

BURGLARY — NONCONSENT OF OWNER — CONFESSIONS BEFORE GRAND JURY.

1. Where, on a trial for burglary from a firm, one of the firm testifies to his want of consent to the taking of the property, but the other partner, though a witness, fails to give direct and positive testimony to his want of consent, it will not be inferred from other circumstances.

2. The admissions or confessions of accused, made before the grand jury, after being warned, in regard to the crime charged, are competent evidence against him on the trial.

Henderson, J., dissenting.

Appeal from district court, Hunt county; L. A. Clark, Judge.

O. C. Wisdom was convicted of burglary, and he appeals. Reversed.

J. O. Roberts, for appellant. D. E. Simmons, Acting Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of burglary, and his punishment assessed at two years' confinement in the penitentiary.

The indictment charged the burglarious entry of the storehouse of Frost & Campbell, with intent to commit theft, without the consent of both as to the taking of property. On the trial the state proved the want of consent of Campbell to the taking of the property, but did not prove the want of con-

sent of Frost. This is urged as a ground for reversal. Campbell and Frost testified; Campbell fully as to his want of consent to the taking of the goods, but Frost testified only as to his nonconsent to the entry. This latter was not necessary. *Treadwell v. State*, 16 Tex. App. 643; *Taylor v. State*, 23 Tex. App. 639, 5 S. W. 141. Nor is it sufficient, under the facts of this case, that the want of consent to the taking might be inferred from circumstances. Where the alleged owner is a witness, and fails to give direct and positive testimony to his want of consent to the taking of the property, such want of consent will not be inferred from other circumstances in evidence. *Good v. State*, 30 Tex. App. 276, 17 S. W. 409. While it is true the want of consent may be proved by circumstantial evidence, as said in *Willson's Case*, 45 Tex. 76; *Kemp's Case*, 38 Tex. 110; *McMahon's Case*, 1 Tex. App. 102; *Welsh's Case*, 3 Tex. App. 422; *Trafton's Case*, 5 Tex. App. 480; *Clanton's Case*, 15 Tex. App. 448; *Schultz's Case*, 20 Tex. App. 308; *Mackey's Case*, 20 Tex. App. 603,—yet this character of evidence cannot be resorted to where direct evidence of the fact is attainable. *Jackson v. State*, 7 Tex. App. 363; *Stewart v. State*, 9 Tex. App. 321; *Willson v. State*, 12 Tex. App. 481; *Bowling v. State*, 13 Tex. App. 338; *Williamson v. State*, 19 Tex. App. 514; *Anderson v. State*, 14 Tex. App. 49; *Love v. State*, 15 Tex. App. 563; *Clayton v. State*, Id. 348; *Miller v. State*, 18 Tex. App. 34; *Pratt v. State*, 19 Tex. App. 276; *Scott v. State*, Id. 325; *Schultz v. State*, 20 Tex. App. 308. It is a familiar rule that the best evidence attainable must be adduced.

The admissions or confessions of appellant, made before the grand jury, after being warned, in regard to the burglary charged in the indictment, were introduced in evidence. He reserved an exception, and assigns error. The ruling of the court is correct. *Thomas v. State*, 35 Tex. Cr. R. 178, 32 S. W. 771; *Jones v. State*, 33 Tex. Cr. R. 7, 23 S. W. 793; *Paris v. State*, 35 Tex. Cr. R. 82, 31 S. W. 865; *Thompson v. State*, 19 Tex. App. 598; *Nicks v. State*, 40 Tex. Cr. R. 1, 48 S. W. 188. It is claimed that these authorities are in contravention of *Gutgesell v. State* (Tex. Cr. App.) 43 S. W. 1016. That case seems to indicate that testimony before a grand jury can be used for two purposes only: First, where perjury is assigned upon evidence adduced before the grand jury; and, second, where witnesses testifying before the court made different statements before the grand jury in regard to the same matter,—in other words, for impeachment purposes. The cases cited above in support of the foregoing proposition as to confessions made by a defendant before the grand jury in regard to the matter for which he is being tried were not discussed in *Gutgesell's Case*, and no reference was made to the decisions cited. If it was intended to

overrule those cases, certainly it should have been mentioned, or the propositions discussed in the Gutgesell Case. Nor is the Gutgesell Case correct in stating that the testimony given before the grand jury could only be used for impeachment purposes, for the authorities above cited are directly to the contrary. There are other instances in which such testimony can be used. Where an attack is made upon an indictment by reason of the fact that some person other than those authorized were present before the grand jury when the indictment was considered, the secrecy hanging around the grand jury can be unvelled, and testimony introduced showing that fact. *Rothschild v. State*, 7 Tex. App. 519; *Stuart v. State*, 35 Tex. Cr. R. 440, 34 S. W. 118; *Sims v. State* (Tex. Cr. App.) 45 S. W. 705. So the question may be investigated as to whether the grand jury is a full and complete grand jury. *Drake v. State*, 25 Tex. App. 293, 7 S. W. 368; *Jackson v. State*, 25 Tex. App. 314, 7 S. W. 872; *Smith v. State*, 19 Tex. App. 95; *Watts v. State*, 22 Tex. App. 572, 3 S. W. 769; *Woods v. State*, 26 Tex. App. 490, 10 S. W. 108; *Trevino v. State*, 27 Tex. App. 372, 11 S. W. 447; *Mays v. State*, 28 Tex. App. 185, 13 S. W. 787. "Neither the rule of secrecy nor the oath of secrecy which grand jurors are required to take prevents the public or an individual from proving by one or more of the grand jurors in a court of justice what passed before the grand jury, where, after the purpose of secrecy has been effected, it becomes necessary to the attainment of justice and the vindication of truth and right, in a judicial tribunal, that the conduct and testimony of prosecutors and witnesses shall be inquired into." 17 Am. & Eng. Enc. Law (2d Ed.) p. 1294; *Jenkins v. State*, 35 Fla. 787, 18 South. 182; *Hinshaw v. State*, 147 Ind. 334, 47 N. E. 157; *State v. Buskirk*, 59 Ind. 384; *Burdick v. Hunt*, 43 Ind. 381; *Shattuck v. State*, 11 Ind. 475; *Burnham v. Hatfield*, 5 Blackf. 21; *Hunter v. Randall*, 68 Me. 183; *State v. Banner*, 64 Me. 267; *Sands v. Robison*, 12 Smedes & M. 704; *State v. Broughton*, 29 N. C. 96, 45 Am. Dec. 507; *State v. Moran*, 15 Or. 262, 14 Pac. 419; *Jones v. Turpin*, 6 Helsk. 181; *U. S. v. Kirkwood*, 5 Utah, 123, 13 Pac. 234. And the refusal of a grand juror to testify is contempt. *Ex parte Schmidt*, 71 Cal. 212, 12 Pac. 55. Nor can witnesses before a grand jury invoke the rule of secrecy, after the hearing before that body has been terminated; nor can witnesses rely upon such rule in criminal proceedings against them, or where it is sought subsequently to impeach their credibility as witnesses, or to take advantage of admissions made by them. *People v. Northey*, 77 Cal. 518, 19 Pac. 865, 20 Pac. 129; *People v. Kelley*, 47 Cal. 125, 126; *People v. Young*, 31 Cal. 564; *State v. Broughton*, 45 Am. Dec. 507; *U. S. v. Kirkwood*, 5 Utah, 123, 13 Pac. 234; *People v. Reggel*, 8 Utah, 21, 28 Pac.

955. So it is held that testimony given by a witness before the grand jury can be used to refresh his memory on the trial of the case. *Spangler v. State* (Tex. Cr. App.) 55 S. W. 326.

Where a person is being tried for crime, a confession voluntarily made by him before a grand jury may be proved by members of that body, and it has been held in civil actions a grand juror may testify to admissions made by a person against his interests before the grand jury. In support of the proposition that grand jurors may testify as to a defendant's confession, see *Sikes v. Dunbar*, 2 Selw. N. P. (13th Ed.) 1015. This case was decided by Lord Kenyon, and was cited in *State v. Broughton*, 29 N. C. 96, being reported in 45 Am. Dec. 507. See, also, *U. S. v. Porter*, 2 Cranch, C. C. 60, 27 Fed. Cas. 595 (No. 16,072); *U. S. v. Charles*, 2 Cranch, C. C. 76, Fed. Cas. No. 14,786; *Hinshaw v. State*, 147 Ind. 344, 47 N. E. 157; *State v. Broughton*, 45 Am. Dec. 507; and the cases above cited in 5 Utah, 13 Pac., and 8 Utah, 28 Pac. As to the use of admissions made before the grand jury in civil cases, see 5 Blackf. 21; *Kirk v. Garrett*, 84 Md. 386, 35 Atl. 1089; 17 Am. & Eng. Enc. Law, p. 1296, and notes 3-6. So the evidence of the witness given before the grand jury may be introduced against him under a charge of perjury, through the mouth or mouths of the grand jurors. So, such testimony may be used for impeachment purposes. See *Id.* p. 1297, note 1, for collation of authorities. The authorities cited in support of the proposition that confessions made by a defendant before a grand jury can be subsequently used on his trial are in line with the decisions of our state.

The judgment of the county court of Dallas county was introduced, which adjudged appellant insane. Error is assigned upon the court's charge in relation to this matter, and special charges were asked to cover the alleged defects. Upon another trial a charge should be given in accordance with the rules announced in *Hunt v. State*, 33 Tex. Cr. R. 252, 26 S. W. 206. For the error discussed, the judgment is reversed, and the cause remanded.

HENDERSON, J. (dissenting). I do not agree to that portion of the opinion of the presiding judge which holds that the trial court committed no error in admitting, over objections of appellant, his confessions made before the grand jury, after being warned in regard to the burglary charged in the indictment. In support of the opinion, *Thomas v. State*, 35 Tex. Cr. R. 178, 32 S. W. 771; *Jones v. State*, 33 Tex. Cr. R. 7, 23 S. W. 793; *Paris v. State*, 35 Tex. Cr. R. 82, 31 S. W. 856; *Thompson v. State*, 19 Tex. App. 593; *Nicks v. State*, 40 Tex. Cr. R. 1, 48 S. W. 186,—are referred to; and *Gutgesell v. State* (Tex. Cr. App.) 48 S. W. 1016, is overruled. It is remarked as strange that in *Gutgesell's Case*

no reference was made to the above decisions. In *Thompson's Case*, supra, this character of evidence was rejected. In *Jones' Case* the question was not raised. Nor was the point raised in *Paris' Case*; it being merely insisted in that case that the testimony was not freely and voluntarily made, but given under the promise of immunity. In *Nicks' Case* it does not appear that the testimony introduced was a confession before the grand jury. The opinion suggests that the confession of appellant had been made outside the jury room to the county attorney, and was used in the grand jury room to indict other persons, and the objection urged was that the testimony was inadmissible because used before the grand jury to indict others. *Spangler's Case* (Tex. Cr. App.) 55 S. W. 326, is also referred to; but here the grand jury's testimony was only used by the witness to refresh his memory, and was not used as evidence before the petit jury. In *Thomas' Case*, however, evidence of a confession made by defendant before the grand jury was admitted as original testimony. Reference was here made to *Clanton's Case*, which overruled *Ruby's Case*, 9 Tex. App. 358. Now, it appears all these cases, so far as any question was made as to this character of testimony, were based on *Clanton's Case*. All that was decided in that case was that a witness could be impeached by contradictory testimony adduced by him before the grand jury. In that case, however, Mr. Wharton was referred to, and some expressions of his were quoted with seeming approval, to wit: "Of course, a prudent discretion should be exercised by the court in the admission of such testimony. It is not properly admissible for all purposes, nor in reference to all the proceedings of the grand jury. It is only when, in the judgment of the court, it becomes material to the administration of justice, that it should be allowed." This expression, and not the decision itself, seems to have furnished the key-note for subsequent decisions on the subject; that is, such testimony was admissible when, in the judgment of the court, it becomes material to the administration of justice that it should be allowed,—thus leaving the rule of law as to the admissibility of the evidence to be determined by the trial judge. See *Thompson v. State*, supra, and *Scott v. State*, 23 Tex. App. 521, 5 S. W. 142. So that the effect of the decision in *Gutgesell's Case* was really to explain what was said in *Clanton's Case*, and to indicate the point decided, and, while the other decisions were not expressly overruled by name, so far as they followed the dicta used in *Clanton's Case* they were overruled. All of said cases, except the *Nicks Case* and *Spangler Case*, were decided before the *Gutgesell Case*. In the latter case (rendered by Judge Hurt) the admissibility of testimony taken before the grand jury as original evidence, and not in contradiction of the testimony of the witness testifying in

the case on trial, came squarely before this court, and our statutes on the subject were thoroughly discussed; and it was there held to be the declared policy of our law "to make secret all of the proceedings before the grand jury, except as provided in said article 404, Code Cr. Proc., which authorizes a disclosure of such proceeding whenever the truth or falsity of evidence given in the grand jury room in a criminal case shall be under investigation." Before that case was decided, the same doctrine was announced in *Hines v. State*, 37 Tex. Cr. R. 339, 39 S. W. 935 (an opinion rendered by our present presiding judge), and has since been followed in *Christian v. State*, 40 Tex. Cr. R. 669, 51 S. W. 903. So it would seem, if any question could be settled by decisions, that this should be considered res adjudicata. I notice in the opinion a great number of cases from other states are referred to, but it occurs to me it would be an unprofitable task to review them. They only serve to indicate in those states a relaxation of the general rule which came down to us from the common law, that the proceedings before the grand jury were to be kept secret. But certainly these decisions cannot be invoked as an interpretation of our own statutes on the subject. That is plain enough, and when the language requires a grand juror to swear that he will keep secret all the proceedings had before the grand jury, unless required to disclose same in the course of a judicial proceeding, in which the truth or falsity of evidence given in the grand jury room in a criminal case shall be under investigation, this oath requires no judicial interpretation. It prescribes the only contingency in which the grand jury room can be gone into for evidence; and for this court to require a member of the grand jury to disclose something beyond his oath, it occurs to me, would be doing violence to his conscience. In regard to cases cited authorizing the indictment to be set aside on evidence that the indictment was not found by at least nine grand jurors, or that some person not authorized by law was present when the grand jury were deliberating or voting upon the indictment, this is authorized by statute (article 559, Code Cr. Proc.); and, besides, it does not require a disclosure of the proceedings or testimony taken before the grand jury. For the reasons given, I do not concur in that part of the opinion which I have discussed.

CHAPPELL v. STATE.¹

(Court of Criminal Appeals of Texas. March 13, 1901.)

CRIMINAL LAW—APPEAL—DEFECTIVE RECOGNIZANCE.

A recognizance to the court of appeals, stating that appellant was convicted in the county court, is defective; the fact being that

¹ Rehearing denied April 14, 1901.

accused was convicted in justice court, and her appeal to the county court was dismissed.

Appeal from Kaufman county court; C. M. Crumbaugh, Judge.

Lulu Chappell was convicted of a crime, and she appeals. Appeal dismissed.

Jack & Cosnahan, for appellant. D. E. Simmons, Acting Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant appealed from a conviction in the justice court to the county court, where, upon motion of the county attorney, the appeal was dismissed. This action of the court is assigned as error. The recognizance in support of the appeal to this court is fatally defective. After reciting the offense, the recognizance states that appellant has been convicted in the county court, but does not state the amount of the punishment. As a matter of fact, the appeal was dismissed, and there was no conviction. We have frequently dismissed appeals in this character of cases where the recognizance was the same as here. This recognizance should have stated that the party stood charged with a misdemeanor, had been convicted in the justice court and appealed to the county court, and the appeal was there dismissed, and from this judgment the appeal was prosecuted. However, we are not prescribing any form of recognizance, simply stating that the recognizance should be in accordance with the judgment. The appeal is dismissed.

RUPE v. STATE.¹

(Court of Criminal Appeals of Texas. Feb. 6, 1901.)

HOMICIDE—EVIDENCE—MATERIALITY—MORPHINE HABIT—PROOF—REPUTATION—WITNESS—EXPERT TESTIMONY—EXCLUSION—BILL OF EXCEPTIONS—SUFFICIENCY—EXPERIMENTS—ADMISSIBILITY—POISON—ADMINISTRATION—PERPETRATION OF THEFT—CRIMINAL INTENT—DEGREE OF CRIME.

1. Where defendant and C. entered into a conspiracy to give deceased morphine and chloral for the purpose of producing sleep so they could rob him, and C. admitted on cross-examination that the second day after the crime he hid in a certain river bottom, the exclusion of evidence that C. went to the river bottom the next day after the crime was not prejudicial to defendant, since the event occurred after the accomplishment of the conspiracy, and it was immaterial whether it was the first or second day.

2. Defendant, a saloon keeper, was charged with killing deceased by putting morphine and chloral into his drinks for the purpose of robbery. Several laymen, none of whom had seen the deceased more than a few days, testified that the deceased was stupid at times, and sat around the house, nodding, and was morose and sullen and muttered to himself; but none of them ever saw the deceased take morphine, or knew the effect of the drug on the facial expression, or that deceased's condition could not

have been caused by drunkenness. *Held*, that the testimony was not admissible to show that deceased was addicted to the morphine habit, since, in the absence of direct testimony that deceased ate morphine, that fact could not be proven by reputation, and the witnesses were not sufficiently conversant with the deceased's reputation to give an opinion.

3. Where the evidence on which a hypothetical question was based was inadmissible, the opinion of the expert was properly excluded.

4. Defendant was charged with poisoning deceased in defendant's saloon, and C. swore that a few minutes after the death of deceased he found deceased's cap wedged in under the door from the inside. Evidence was admitted of subsequent experiments in which the cap was wedged under the door as testified to by C., to which defendant objected as not performed under the same conditions, as the cap was not in its original state. *Held*, that where the bill of exceptions failed to show what kind of a cap it was, and its condition at the time, and the kind of door, and the condition of the cap at the time of the experiment, the objection could not be considered, since the bill must show in itself that the evidence was not admissible.

5. Where experiments were performed by the state to show that the cap of the deceased could be wedged under the saloon door where he was murdered, as testified to by the state's witness, proof that the conditions were nearly similar was sufficient to admit the evidence, without showing that the exact conditions existed.

6. Pen. Code, art. 711, provides that all murder committed by poisoning or in the perpetration or an attempt to commit robbery is murder in the first degree. Articles 647-649 declare that if any person mingles a noxious potion with any drink of any person, with intent to kill or injure such person, or causes another to swallow any substance injurious to health, with intent to injure him, and by reason thereof death ensues within one year, the offender shall be deemed guilty of murder. *Held*, that the killing of deceased by administering morphine and chloral with deceased's drinks for the purpose of robbing him constituted murder in the first degree, since article 711, making all killing by poisoning murder in the first degree, embraces the crime specified in articles 647-649.

7. Where the jury found that defendant had administered morphine and chloral to deceased in sufficient quantity to produce death, for the purpose of robbing deceased, and that death ensued from that cause, the fact that morphine and chloral, when administered in small doses, are not poisonous, and were not given with an intent to kill deceased, did not prevent the killing from constituting murder in the first degree, since the criminal intent to commit a theft was sufficient evidence of a malicious purpose; and hence a charge that defendant was only guilty of murder in the second degree was properly refused.

8. Where defendant (a saloon keeper) and another entered into a conspiracy to put drugs into deceased's drinks to produce sleep, for the purpose of robbery, and they gave deceased a dose of morphine, and later some chloral, and the evidence of the state showed that defendant was present and participated in the entire transaction, the fact that defendant offered evidence tending to show that he was not present when the chloral was administered did not entitle him to a charge that he could be held responsible only in case the jury should believe that death occurred from the administration of the morphine.

Appeal from district court, Dallas county, Charles F. Clint, Judge.

C. A. Rupe was convicted of murder, and he appeals. Affirmed.

¹ Rehearing denied April 10, 1901.

E. B. Muse and Jos. E. Cockrell, for appellant. D. E. Simmons, Acting Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of murder in the first degree, and his punishment assessed at confinement in the penitentiary for life, and prosecutes this appeal.

The indictment contained five counts. The conviction, however, was applied to the fifth count, so it will only be necessary to notice the points arising under said count. The theory of the state, which was supported by evidence, was that appellant and one Bob Coleman, acting together, poisoned deceased, A. T. Randall, by giving him morphine and chloral (one or both) in beer, which caused his death, and that this was done for the purpose of committing a felony, to wit, theft from the person. This occurred at the appellant's saloon. The accomplice, Bob Coleman, was the main witness for the state. By his testimony the actual administration of the morphine and chloral was proven. Morphine was administered first, some time between 6 and 7 o'clock in the evening. About 8 o'clock chloral was procured at a drug store near by on two occasions,—120 grains each time. It is not clear whether the first chloral procured was given, as the testimony suggests it may have been all or partially spilled. A short while thereafter a like quantity was procured, and deceased appears to have drunk some of this in beer, and remarked it was too bitter and he could not drink it. Somewhere about 8 o'clock, or shortly afterwards, deceased appears to have been affected by the drugs administered. He was in a comatose condition, and appellant and Coleman put him out of the saloon, where he was shortly afterwards found dead. The testimony of the state also shows the administration of the drugs was for the purpose of stupefying and rendering deceased unconscious, so that the parties might steal money from him which he exhibited in the saloon. A post mortem of the body of deceased showed that about a half grain of morphine was discovered in the stomach. The expert could not state accurately how much had been taken in the stomach, as he could not tell how much had been absorbed. The testimony of this expert showed: That a lethal dose for an ordinary man was about two grains. That how much it would take to kill in particular cases would depend upon the constitution, habits, etc., of the person. That morphine was not necessarily poison, and need not necessarily produce death. That it depended upon the manner of its use and the quantity, as well as the habits of the individual and his condition. It had its effect in ordinary cases in 15 or 20 minutes, sometimes longer. No chloral was discovered, and no tests were made for the same. That chloral is also a hypnotic. He could not tell how much it would take to kill. In

exceptional cases as much as 900 grains had been given without fatal results. The state also introduced other evidence tending to corroborate the accomplice as to some of his testimony,—among others, the testimony of Lillian Graves. As to her, some of the testimony suggested that she might have been an accomplice. In defense appellant insisted on the weakness of the state's case. It is particularly insisted that under the evidence chloral was the cause of the death, and that the testimony showed defendant was not present when the chloral was administered, and that he was in no wise responsible therefor. Defendant asked charges covering these phases of the case. He also urged that the testimony showed morphine and chloral were not necessarily poisons; that they were administered with no intent to take life, but merely for the purpose of stupefying or putting deceased to sleep so that they might take his money; and that, if appellant was responsible for the death at all, he was entitled to a charge on murder in the second degree; and he excepted to the refusal of the court to give such a charge. Enough of the facts have been stated to present and discuss the bills of exceptions reserved.

On the cross-examination of Bob Coleman, he was asked, if on the next day after the homicide, which occurred at night, he did not go to the Trinity river bottom, and on the evening of that day if he did not meet Sam Spears, and give Spears a silver dollar, and ask him to go to town and get him (Coleman) something to eat, and if Spears did not subsequently return to the bottom where Coleman was, and tell him that his brother, Jim Coleman, sent word for him to come to town. The witness at first denied this, but subsequently stated it was the second day after the killing of the deceased that he was in the bottom, and the occurrence inquired about happened. Appellant then proposed to introduce Sam Spears, and prove by him that it was on the next day after the homicide, or the next succeeding day after the homicide, that he met Bob Coleman in the Trinity bottom, and the events inquired about happened. In this connection it was further proposed to prove by one Lowe, who accompanied Sam Spears to the Trinity bottom, where said Spears met Bob Coleman, that it occurred on the day immediately succeeding the homicide. This testimony was refused to be admitted by the court, and appellant assigns this as error. Now, it will be noted that the witness Coleman did not deny going to the Trinity bottom, and what occurred between him and Spears. He merely denies that it occurred on the next day, and appellant proposed to contradict him as to time. We do not consider this matter material, so as to afford the basis of a contradiction. It was something that happened after the accomplishment of the conspiracy, and not before its consummation or during its accomplish-

ment. If the guilt of Coleman, the accomplice, was a disputed fact, and by his testimony he was endeavoring to lay the whole transaction on appellant, then his flight might become a very material circumstance. But here he admits his connection, and admits his flight and concealment in the Trinity bottom; and whether it was the next day or the day after, it occurs to us, is immaterial.

Appellant offered to prove by the witnesses Duncan, Pendleton, and Day that they were acquainted with deceased, and that he bore the reputation of a morphine eater. Duncan stated: That deceased had been a school-teacher near Meridian, and that deceased stayed at the hotel kept by witness for several days a short while before his death. During this period he observed the conduct of deceased, and that it was peculiar. That he appeared to be in stupor when in the house, and at times would sit around seemingly in a stupor. That he appeared to have no appetite, and that he had a peculiar expression out of his eyes, and that he was sullen and morose, and from his manner and conduct it was the opinion of the witness that Randall was addicted to the morphine habit. That he had observed during 30 years past other persons addicted to that habit, and he judged from the manner of deceased he was addicted to it. On cross-examination this witness indicated: That he had noticed three persons during 30 years, and one of them he saw for several years about once a month. Another one he saw in a store in the town where he went to trade. That the last two, he did not know whether they used morphine. Witness could not tell how morphine affected the appearance of a person,—whether it dilated or contracted the pupils of the eyes, and what effect it had upon the complexion or facial expression. He was simply judging from general appearances and stupor. That whisky produced the same stupor, as far as appearances, as morphine. That he did not know whether or not Randall had been drinking whisky. Did not know whether his condition was produced by whisky or morphine. By Pendleton he proposed to prove merely that the reputation of deceased in the community was that he was addicted to the habit of using morphine, or an opiate of some kind; that before appellant came to his house he was on a spree in town; that the conduct of deceased was peculiar, as he observed it, and that he appeared to have no appetite, and was of a sullen or morose disposition, stayed about the house nodding in the daytime, even when he arose in the morning, talked and muttered to himself, and at night would cry out in his sleep, and that his eyes had a peculiar look, and the school children complained about his peculiar muttering to himself and other unusual conduct; that he inquired in order to ascertain whether deceased was a morphine eater, and went to

the doctor and asked him about it, and the doctor told him he did not sell him any and did not know of his using any; that he was a nervous and feeble man. This witness further stated he did not know the effects of morphine or opiates; that there were only three or four Americans in the community where deceased was teaching school at the time, and his reputation was confined to them. By the witness Day it was proposed to prove: That deceased was in his house for a day or two. That his conduct was very peculiar, and in the nighttime he acted like a crazy man. Waked witness after he had been asleep, raving and hollering. He might have been drunk. Witness could not say he had not been drinking, and that his acts would not be produced by drinking, but he acted differently from any other drunken man. None of these witnesses testify that they had ever seen or known of deceased using any opiates or morphine. As stated, the court refused to permit the introduction of this testimony, which appellant insists was admissible for the purpose of accounting for the morphine found in the stomach of deceased after death. In support of his contention appellant cites us to several authorities which authorize the introduction of the character of the deceased in certain cases of homicide, as being a dangerous man, etc., and contends that by analogy this sort of testimony is admissible. If this was a matter provable by character, as that appellant had the reputation of being a morphine eater, we do not believe the witnesses show themselves sufficiently conversant with the reputation of deceased in that respect. But we do not believe this is a matter provable by reputation, independent of any testimony at all showing that deceased actually ate or used morphine or other opiates. If we recur to the record, there is no testimony tending to show that at the time or shortly before the death of deceased he took any morphine voluntarily,—much less, that he took any with suicidal intent. The evidence does not even suggest this. In connection with this testimony appellant also proposed to show by Dr. Thomson, a physician, that from the testimony of said witnesses it was his opinion deceased was a morphine eater. It appears, however, this witness was not in court at the time. Waiving that, still, if the testimony on which the hypothetical opinion was to be based was not admissible in evidence, then the opinion could not be given, because there was nothing in the case upon which to found it.

As an inculpatory fact against appellant, the state proved by Jack Cabell: That a few minutes after deceased died he went to the body, lying close to the door of the saloon. Found the cap of deceased in the north corner of the door, wedged in under the door. That he pulled it out. It was wedged in tight. It was not in loose. It was in tight. That he examined the door,

and the cap could not have been pushed in from the outside. Subsequently the state was permitted to prove, over the objections of defendant, by witnesses Carson and Miller: That they went to the saloon in question, and took the cap of deceased with them. That it was mashed flat, caused by being shut in under the door of the saloon kept by defendant, in which the poison was thought to be administered to deceased. That witnesses put the cap down within the door of the saloon at which it was said to have been found, same being mashed down behind, and that witnesses then jerked the door to, and the cap caught under the door at the place and in the manner as state's witness Jack Cabell had stated he had found it on the night of the homicide. This experiment was repeated as many as four times, and every time the cap caught under the door in the manner aforesaid. Appellant objected to all of said testimony for the reason that it was incompetent to bind defendant by the aforesaid tests, and that the conditions were not proved to have been the same as at the time of the murder, nor was the door shown to have been in the same condition, nor did the evidence of the state show how the cap was lying, or where it was with reference to the door, on the night of the homicide, when it was claimed to have been caught under the door. Nor was it shown that the cap was then mashed down behind as it was at the time of the said experiments, but, on the other hand, the proof showed it was mashed down by reason of its having been caught under the door. And said experiments did not show whether the cap, in its natural condition, would have caught under the door or not, and in fact no experiment was made with the cap as it would have been in its natural condition when worn on the head. Defendant further objected to said testimony because it was purely conjectural, and defendant was not present at said experiments, and he in no manner could be bound thereby. In explanation the court says: "Defendant swore that he closed the door and no cap was under it, and he further swore that nothing could get under the door, thicker than a sheet of paper." It will be noted, as to this bill, it is stated as a ground of objection to the admissibility of this testimony that the experiment was not performed under the same conditions with reference to the door and cap as when the same was first found by the witness Cabell. To have been a good bill, we think it should have distinctly shown, as a matter of fact, the character of cap, its condition at the time, the kind of door, and its condition at the time, and then shown the condition of the cap at the time the experiment was made, and the condition of the door, so as to have shown by the facts that the experiment was not performed under the same or nearly similar conditions, as we understand the rule to be; that is, the bill must

show in itself that the testimony was not admissible. Now, as far as we are advised, we do not know what kind of cap this was. There are various kinds of caps,—some stiff, and some soft, which, when not worn on the head, fall flat. For aught that we know, the cap in question may have been of this character. The witnesses merely say the cap was mashed down, and not in the condition as when worn on the head. In our opinion, the bill does not disclose that the experiment was not made under similar or nearly similar conditions as existed at the time of the homicide. As has been frequently held, the ground of objection stated, that the facts were not similar, is not a certificate by the judge to that effect. It further occurs to us that the rule invoked by appellant, that the conditions must be similar or exactly similar, is not the correct one. They must be similar or nearly so. See *Clark v. State*, 38 Tex. Cr. R. 30, 40 S. W. 992. Appellant says this testimony was admitted for the purpose of corroborating Jack Cabell as to finding the cap wedged under the door, and was materially injurious to him. Cabell was not an accomplice, and required no corroboration; and, as far as the record discloses, no witness controverted his testimony as to finding the cap wedged under the door. However, the court did not err in admitting the testimony. At least, error is not shown by the bill of exceptions.

The court only instructed the jury as to murder in the first degree. Appellant insists: "The court erred in instructing the jury that if the death of deceased was produced by morphine or chloral, or both, administered by appellant, and if said substances were poisonous or constituted a noxious drink when mixed with beer, and were administered for the purpose of enabling appellant to steal from the person of deceased, appellant would be guilty of murder in the first degree, although the quantity and manner of the use of said drugs may have been an accident or mistake. And the court further erred with respect to said matters in refusing to give special charges requested by appellant presenting the theory, and supported by the evidence, that morphine and chloral are not poisons, and that the homicide might be murder of the second degree." In his brief he has subdivided his objections under four heads, as follows: "(1) All murder of the first degree must come under article 711, Pen. Code, and the offense with which appellant is charged, if murder in the first degree, must come under the subdivision 'Poison' of said article. If not under that head, the offense cannot be per se murder of the first degree. (2) If appellant's offense be brought within the provisions of articles 647-649, Pen. Code, it is no longer murder in the first degree per se, but it would be murder of the first or second degree, to be determined by the jury under proper instructions. (3) Murder accomplished by the ad-

ministration of a noxious potion is not per se of the first degree, but to constitute it such the noxious potion must have been a poison. (4) The statute making murder by poison murder of the first degree refers to poison intentionally used as a poison, and does not include murder by a noxious substance not used for the purpose of poisoning, or to harmless drugs that by accident or mistake in the manner of their use may have produced death."

Appellant insists that articles 647-649, Pen. Code, do not make a murder by poison murder of the first degree; nor does it follow that if one intending to commit a felony shall, through accident or mistake, do another act which, if voluntarily done, would be a murder, it would necessarily be murder in the first degree, and the statute making a murder by poison does not apply to this character of case (see article 711); his insistence being that article 711 does not apply to this transaction, and that the court should have given a charge on murder in the second degree. In *Tooney v. State*, 5 Tex. App. 163, all these articles of our statute came up before the court for construction; and there it was held that the article, which is now 711, which makes all murder committed by poison murder in the first degree, also embraces articles 647-649; this being construed also to mean a murder by poison to be murder in the first degree. The court, in speaking of these last articles, say: "Evidently the object of this statute was to reach a class of cases about which doubts might arise when the general statute of murder was sought to be applied to them. Such doubts were more imaginary than real, in our construction of both statutes. It is to be noted that under these latter statutes 'the intent to kill' or 'the intent to injure' are made to stand in lieu of and must be proven just as 'malice aforethought' under the general law, which, as we have seen, when explained, means nothing more nor less than the taking of life with intention to do so, or when death results from an intention to do serious bodily harm. In either case, and under this latter as under the former statute, the malicious intent and its proof are not only the same, but are also the very gist of the offense. So utterly revolting to every sense of humanity is the use of poisons as means of injury to and for the destruction of human life, because of the cool, calculating fiendishness, the deliberate craftiness, with which they are administered, and the unsuspecting confidence with which they are necessarily taken by the innocent victim, that the law, in its efforts to suppress it entirely as one of the foulest of all crimes, denounces no halfway penalties against it after it has accomplished the destruction of a reasonable creature in being. Under these last statutes, if death ensues within one year it is murder; and it is murder in the first degree under the express

terms of our statutes, because committed by poison." And see *Hedrick v. State*, 40 Tex. Cr. R. 532, 51 S. W. 252. No language could be clearer or more emphatic than this, and it accords entirely with our view in the construction of these statutes. Of course, the statute does not seek to create any new offense of murder, but merely to make all murder, whether of the first or second degree, when it is done by poison, murder of the first degree. Therefore it must be alleged in a case of murder by poison that the killing was done with malice aforethought, and this must be proven; and, whether the proof shows that the killing was done either upon express or implied malice, it is made by the statute then equally murder of the first degree. The intentional administration of poison with intent to kill or inflict serious bodily injury is itself evidence from which malice can be inferred. *Whart. Hom.* p. 627. But, more than this, at common law, as well as under our statute, one intending to commit a felony, and in its commission, through accident or mistake, and beside his original intention, commits another felony, is as guilty of the last offense as if he had voluntarily done that felony. The intention to commit the original felony supplies the malicious intent as to the one actually committed. *Mr. Wharton* and *Mr. Bishop* both appear to concede this to be the rule at common law. *Whart. Hom.* pp. 58-60; 2 *Bish. Cr. Law*, p. 418, § 727, subd. 2. Both, however, appear to doubt the correctness and deplore the hardship in the application of this principle in special cases, but they concede that whenever this matter is regulated by statute the question is settled, as it is competent for the legislature to do this. Now, we think it follows from our statutes with reference to homicide committed by poison, whenever it is shown that the poison was administered with malice aforethought,—that is, intentionally and with intent to take life or to inflict injury, the probable consequence of which might end in death, which malice is to be proved as in other cases by circumstances, whether it be express or implied malice,—that it will be murder; and, being murder, our statute makes it murder in the first degree. Moreover, when we superadd to this the further proposition that the administration of the poison was with intent to perpetrate the crime of theft from the person (that is, to stupefy the party, and so to inflict injury upon him, in order the more easily to consummate the theft); that the party so engaging is perpetrating a felony; and if, in the consummation thereof, he takes the life of the person he is so attempting to stupefy, by the accident or mistake of giving too much poison,—this is the perpetration of murder in the commission of another felony, the original felony itself evidencing the malicious purpose, and so, being murder of any degree, it being accomplished by poison it is made by our law murder in the first de-

gree. However, appellant says that morphine and chloral are not poisons; that small doses may be given, and are frequently given, as medicines and to ease pain, and they only become poisons when given in large doses. Grant it; this matter as to whether or not they were poisons as administered was submitted to the jury, and they found that as administered they were poisons and produced death. Again he says: Grant that appellant administered the morphine and chloral, one or both; he did not intend to kill upon malice at all; that he administered them merely as soporifics, in order to lull his victim to sleep, so that he might steal from him. In other words, he insists there must be an intent to kill, before there can be murder of any kind. He asked a number of charges on this subject, contravening the charge given by the court. If there was any question of innocent intention here, as where defendant was in pursuit of a lawful purpose, and having negligently administered too much morphine or chloral, a very different question would present itself. Here he was not in the pursuit of a lawful purpose. He was in the pursuit of an unlawful purpose, to wit, theft from the person,—a felony. His intention was mischievous in itself, and was done deliberately. He was disregarding of the result, and he used means calculated in themselves to inflict great bodily injury, the natural and probable consequences of which might result in death. This would have been murder at common law, and much more under our statute, which makes the intent to injure by poison supply the malicious purpose to kill. In other jurisdictions, under statutes similar to our own, it has been held, where poison is knowingly administered with intent of mischief and to accomplish some unlawful purpose, if death ensue it will be murder, although death was not intended. And these statutes, like our own, make it murder in the first degree. *State v. Wagner*, 78 Mo. 644, 47 Am. Rep. 131; *State v. Wells*, 61 Iowa, 629, 17 N. W. 90, 47 Am. Rep. 822; *Ann v. State*, 11 Humph. 159; *State v. Dowd*, 19 Conn. 387. As we understand the law in this state, the intent to constitute murder must be to take life or inflict such injury, the natural consequences of which may cause death. Here, although the testimony indicates that the parties did not directly intend the death of deceased, yet the natural and probable consequences of the poison administered, if in large doses, would be to cause death. We are not informed as to the quantity of morphine actually administered, but more than a half grain was found in the stomach. How much may have been absorbed or eliminated is a matter of pure speculation; but the purpose of injuring the deceased is further manifest from the quantum of chloral given, and the rapidity with which these doses, both of morphine and chloral, were administered. Without any evidence of skill on their part,

or knowledge of the quantity of the poisons necessary to produce sleep only, they proceeded to the consummation of their purpose in a manner that manifests to our minds, and doubtless did to the jury, an utter disregard of the effect that the medicines might produce; their purpose being, as they stated, to stupefy so they might rob deceased. As Coleman terms it, they desired to "dope" deceased, merely. That their purpose was malicious, in that it involved the commission of a felony, and in that it involved the administration of poison, there can be no doubt; that they were inflicting an injury in disregard of the real effect it might produce on the deceased is clearly evident. Therefore we do not believe the court was called upon or authorized to give appellant's requested charges to the effect that if appellant's purpose was only to stupefy he would not be guilty of murder.

Appellant also contends that certain requested charges asked by him should have been given, instructing the jury that appellant could only be held responsible in case they believed death occurred from the administration of the morphine, and he would not be responsible if it occurred on account of the administration of the chloral alone or of the chloral and morphine combined. We fail to see anything in the testimony as disclosed by the record that raises an issue of this character. The testimony is of that character that, if appellant is responsible for the death by morphine, he is equally responsible for the death of deceased by the chloral or by the morphine and chloral combined. The conspiracy was for one object and purpose, to wit, to steal the money from the person of deceased which he had incautiously exhibited in appellant's saloon. The state's testimony shows that appellant was present and participated in the entire transaction; and the fact that he introduced testimony tending to show that he may have been present when the morphine was administered, but was absent from the saloon at the time the chloral was given, does not present to our minds any reason why the court should have given appellant's requested charge on the subject. More than this, we think it is manifest that deceased died from the morphine. Nor can we agree with appellant's insistence that this could not be true, because he did not die earlier. According to the state's testimony, he died within two or three hours of the first administration of the morphine. The fact that the physician testified morphine took effect in ordinary cases within from 15 to 20 minutes, we think, has no particular significance. The evidence shows that a good while before the death of deceased he showed signs of becoming sleepy. The books teach that in ordinary cases death usually ensues in from 6 to 12 hours. *Mann*, Forensic Med. p. 553; 4 *Witthaus & B. Med. Jur.* p. 729.

We have examined the record carefully,

and think the charge of the court a fair one, presenting every essential phase of the case, both for the state and defendant. The evidence, in our opinion, fully sustains the verdict of the jury. The judgment is affirmed.

TRUEDELL v. STATE.¹

(Court of Criminal Appeals of Texas. March 6, 1901.)

INTOXICATING LIQUORS — LOCAL OPTION — ELECTION — RESULT — DECLARATION — ORDER — EXCEPTIONS — FAILURE TO STATE — ELECTION CONTEST — JUDGE — QUALIFICATION — PUBLICATION OF ORDER — EXCUSE — INJUNCTION — ADMISSIBILITY.

1. The fact that an order of the commissioners' court declaring the result of an election on the question of local option absolutely prohibited the sale of intoxicating liquor, without reciting the exceptions as to sales for medicinal and sacramental purposes, did not invalidate the order, since the law ingrafts these exceptions on the order, and it is not necessary to mention them, and the use of the word "absolutely" will be treated as surplusage.

2. The fact that the judge who presided at defendant's trial for violating the local option law was a formal party to an application to contest the validity of the election on the question of local option, under which the prosecution was maintained, did not disqualify the judge from sitting in the case.

3. The fact that the judge who presided at defendant's trial for violating the local option law was a formal party to an application to contest the validity of the election on the question of local option, under which the prosecution was maintained, did not render the order of the commissioners' court declaring the result of the election, and prohibiting the sale of intoxicating liquors, inadmissible in evidence.

4. In a prosecution for a violation of the local option law, an order by the district court granting a temporary injunction prohibiting the publication of an order of the commissioners' court declaring the result of the election on the question of local option, and an order dissolving the injunction, were admissible as an excuse for not publishing the order declaring the result of the election as required by law.

5. Where, in a prosecution for a violation of the local option law, the state introduced in evidence an order of the district court granting a temporary injunction prohibiting the publication of an order of the commissioners' court declaring the result of an election on the question of local option, the pleadings on which the order for the injunction was granted were properly excluded as immaterial.

Appeal from Midland county court; E. R. Bryan, Judge.

W. E. Truesdell was convicted of violating the local option law, and he appeals. Affirmed.

Finley, Etheridge & Knight, for appellant. D. E. Simmons, Acting Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted for violating the local option law, and his punishment assessed at a fine of \$25 and 20 days' confinement in the county jail.

In his brief, appellant contends that the court should have quashed the complaint

and information because it alleges "that the commissioners' court of said county had duly made * * * its order declaring the result of such election, and absolutely prohibiting the sale of intoxicating liquors within said commissioners' precinct, as required by law," etc.; appellant's contention being that the commissioners' court had no authority to absolutely prohibit the sale of intoxicating liquor in their order of prohibition and declaration of the result. We have heretofore held that it does not invalidate the order putting local option in force if it fails to recite the exceptions under which intoxicants might be sold, to wit, for medicinal and sacramental purposes. The law ingrafts these exceptions, and it is not necessary that the order should allude to the matter. *Chapman v. State*, 37 Tex. Cr. R. 167, 39 S. W. 113; *Bruce v. State*, 36 Tex. Cr. R. 53 89 S. W. 683. Nor do we think that the mere fact that the order absolutely prohibits the sale of intoxicating liquor invalidates the order, since the legislature did not authorize the commissioners' court to absolutely prohibit the sale of intoxicating liquors, and the word "absolutely" will be treated as surplusage; and the order, being within the purview and authority of the statute, will be upheld. It follows, therefore, that the information is good, and the court properly overruled the motion to quash. Appellant's contention is that the case of *Steele v. State*, 19 Tex. App. 425, is decisive of this question. In that case we held that the commissioners' court had no power under the law to order an election to determine whether or not the gift or exchange of intoxicating liquors should be prohibited. That is a very different question from the one here. The constitution authorizes the local option law to prohibit a sale, and the legislature passed laws in compliance with the constitutional provision authorizing counties and subdivisions of counties by direct vote of the people to prohibit the sale of intoxicating liquor; and the commissioners' court would not have authority, as indicated above, to order an election other than as provided by the legislature. Clearly, where the election is properly held, and the quashal of the information is urged because it contains the word "absolutely" prohibit, the same must be construed in the light of the statute, and legislative object and intent of the law. The regularity of the local option election, the publication of the orders, etc., were discussed in *Truesdell v. Bryan* (Tex. Civ. App.) 60 S. W. 60, and it correctly holds that this local option election is valid.

In bill No. 1 appellant complains "that Hon. E. R. Bryan, the county judge of Midland county, who tried this case, is disqualified from sitting in or trying this case, on account of being one of the contestees in the contest proceeding now pending in the district court of Midland county, Texas, to contest the validity of the local option election

¹ Rehearing denied April 10, 1901.

under and by virtue of which election this prosecution is being had and maintained." In *Clark v. State*, 23 Tex. App. 260, 5 S. W. 115, we held, "The fact that the title to a school house was vested in the county judge in his official capacity, for the use of the county, could not disqualify him to preside over a trial for defacing the school house; hence the motion to transfer this case to the district court was properly overruled." Nor do we think that the county judge, as a mere formal party to an application to contest the validity of a local option law under the statute regulating such matters, would per se disqualify him from trying appellant, who is charged with violating the law which is being contested. See article 606, Code Cr. Proc., and White's Ann. Code Cr. Proc. § 649.

Bill No. 2 complains that the court permitted the orders for the local option law to be introduced in evidence in the trial of this case. The gravamen of the objection seems to be, as indicated in the bill, that appellant and various other parties had filed an application to contest the validity of the election, and had given written notice to the county judge and to two of the commissioners of their intention to contest said election, and had delivered to said commissioners and county judge a written statement of the grounds on which they relied to sustain said contest. These matters would not be any legal objection to the admissibility of the orders in this case.

In bill No. 3 complaint is made that the state offered in evidence, for the purpose of showing why the order declaring the result of the local option election was not published for four successive weeks after the date of said order, the order of the district judge granting a temporary injunction restraining the publication of said order, and the order of said judge dissolving said temporary injunction. To the introduction of this evidence defendant objected for the reason that the granting of said temporary injunction was illegal, and afforded no legal excuse for the failure to publish the order declaring the result of said election for four successive weeks, as required by law, and further objected to the introduction of said orders without introducing the pleadings upon which they were based, for the reason that said orders were unintelligible without said pleadings to explain them; and for the purpose of explaining said orders, and as a part of the record in connection with said orders, defendant offered in evidence the pleadings upon which said orders were based. The court overruled defendant's objection to the introduction of said orders, and permitted them to go to the jury, and refused to permit defendant to introduce in evidence the pleadings upon which the orders were based. There was no error in the ruling of the court. The state had a right to introduce the order granting the temporary injunction

restraining the publication of said local option election, and also had a legal right to introduce the order of the judge dissolving said temporary injunction. The pleadings upon which these orders were predicated were not material evidence, nor calculated to throw any light upon the proceedings, and hence the court did not err in refusing to admit the same. In *McDaniel v. State*, 32 Tex. Cr. R. 16, 21 S. W. 684, 23 S. W. 989, we held that on a trial for violating the local option law, where it appeared that after the order declaring the result of the election had been published for three successive weeks an injunction was sued out, restraining and prohibiting its further publication, and after the dissolution of said injunction the order was published for another week, held, that the publication was sufficient, and for four successive weeks, in contemplation of the statute. Then it follows that the state would have the right, as indicated above, to introduce the reason for failing to publish the order for four successive weeks, as contemplated by the statute, and the injunction would be sufficient legal reason for not so doing.

We have carefully reviewed appellant's other assignments, and find no error authorizing a reversal, and the judgment is affirmed.

TAFFINDER et al. v. MERRILL et al.
(Court of Civil Appeals of Texas. April 10, 1901.)

PARTITION—DECREE—DESCRIPTION—SUFFICIENCY—ESTOPPEL—EVIDENCE.

1. Where certain parties to a decree of partition took possession of the property allotted to them in trespass to try title by the parties against one claiming under a deed of the guardian, they could not be heard to say that the decree of partition was void for insufficiency of description of the allotments.

2. Where, in trespass to try title, a deed was not embraced in the abstract of title filed in the case, the admission of the record of the deed in evidence was not improper, the record having been discovered only a short time before it was offered.

Appeal from district court, Hamilton county; J. W. Parker, Special Judge.

Trespass to try title by L. P. Taffinder and others against W. M. Merrill and others. From a judgment in favor of defendants, plaintiffs appeal. Affirmed.

C. E. Spalding, G. R. Freeman, and M. Logan, for appellants.

FISHER, C. J. This is an action of trespass to try title brought by the appellants to recover from appellees an undivided interest in lot 5, block 5, in the town of Hamilton, Hamilton county, Tex. The heirs of Mrs. Mary J. Carden, a deceased sister of the plaintiffs, intervened in the suit, setting up a joint interest with the plaintiffs in the property sued for. The children of Mrs.

Martha A. Bivens also intervened, claiming a joint interest with the plaintiffs in the property. Judgment below was in favor of the appellees.

We find the following facts: James C. Taffinder and Martha C. Taffinder, both deceased, were the parents of the plaintiffs and Mrs. Mary J. Carden, and at the time of their death were the owners of the property in controversy, and it is agreed that they are the common source of title. After the death of James C. Taffinder, his wife, Martha C., married A. Bivens, and they are the parents of the interveners, the Bivens children. We find from the evidence that in 1878 the probate court of Coryell county partitioned and divided the property belonging to the estate of Taffinder and Mrs. Bivens among the plaintiffs and interveners, and that estate at that time, according to the evidence of A. Bivens, only owned the lot in controversy, with another lot in the town of Hamilton, Hamilton county, Tex.; and these two lots, one of which is the property in controversy, were set apart to William, America, and Amanda Bivens, interveners, the children by the second marriage,—other property being set apart to the Taffinder children. There is evidence in the record which warrants the conclusion that the parties to the decree of partition recognized the same, and took possession of the property allotted to each, and exercised rights of ownership over the same. We find that A. Bivens, as guardian of the estate of the interveners, the Bivens children, by an order of the probate court of Comanche county, by deeds, sold and conveyed the property in controversy to Thomas Emmett, which sale was by proper order of the court confirmed. We find that the appellees hold the property in controversy by conveyances from Emmett.

We do not think there is any merit in the objections urged by the appellants concerning the evidence of facts constituting the title offered by the appellees, or of the charge of the court submitting to the jury the question whether the plaintiffs and the interveners took possession of the property mentioned in the decree of partition, and had recognized the same as an equitable partition and division of the property. There is evidence which tends to show that the Taffinder children recognized this decree, in that they took possession and asserted ownership of the property allotted to them by virtue of it; and the same may be said of the Bivens heirs. There is no testimony directly to the point that the Bivens children, who were minors at the time, recognized the decree of partition; but there is testimony which tends to show that their father, A. Bivens, the guardian of their estate, recognized and acted under the decree of partition, and there is testimony which tends to show that the same was never questioned until recent years. So far as the Bivens children are concerned, they are concluded by the deeds

executed by their guardian under the orders of the probate court of Comanche county, which, in our opinion, sufficiently describe the property in controversy. We are not prepared to hold that the decree of partition entered by the probate court of Coryell county in the estate of Taffinder and Bivens is void on account of insufficient description of the property allotted to the two sets of children. But, however this may be, we are satisfied from the evidence in the record that that decree was acted upon by the Taffinder children and by the guardian of the estate of the Bivens children in such a way as to conclude them, so far as a recovery in this particular case is concerned. There is an objection offered to one of the deeds offered by the appellees, executed by Bivens as guardian of the estate of his minor children, on the ground that it was not embraced in the abstract of title filed with the papers in the case. The explanation to the bill of exceptions shows that the record of this deed was not discovered until a short time before it was offered in evidence; and the explanation given by the trial court is sufficient, in our opinion, to authorize its admission. As said before, those assignments that complain of the admission of evidence are not, in our opinion, well taken. Nor is there any merit in the contention that the pleadings of the appellees were not sufficient to authorize the admission of testimony tending to show that the plaintiffs and the interveners acted upon and recognized the distribution of the estate under the decree of partition. The pleadings, in our opinion, were sufficient to authorize the admission of such testimony. Nor was there error in the court's refusing the charges requested by appellants. The general charge of the court submitted to the jury was sufficient to present the issues raised in the case. These are all of the questions that we desire to specially notice, but, however, will in a general way state that a patient and careful examination of all the questions raised leads to the conclusion that none of the assignments are well taken. We find no error in the record, and the judgment is affirmed. Affirmed.

ABEEL v. LEVY et al.

(Court of Civil Appeals of Texas. April 10, 1901.)

WRITTEN CONTRACT—BEST AND SECONDARY EVIDENCE.

Where the duplicate contract delivered to defendants was traced to the possession of one of the defendants' attorneys, and it was not shown that any search was made for it, or that it could not be produced, the admission of parol evidence that such duplicate did not contain certain stipulations was erroneous.

Appeal from Navarro county court; J. F. Stout, Judge.

Action by Alfred Abeel against I. P. Levy

and others. From a judgment in favor of defendants, plaintiff appeals. Reversed.

Boynton & Boynton and Ballew & Ballew, for appellant. Simkins & Mays, for appellees.

KEY, J. Appellant, as plaintiff, sued I. P. Levy and N. J. Garitty, as defendants, to recover 136 pair of shoes, alleged to be the property of appellant, and then in possession of the defendant N. J. Garitty. The trial resulted in a judgment against the plaintiff, and he has appealed. The defendant Garitty bought the shoes from the defendant Levy. Levy obtained possession of them under a written contract, which, in effect, stipulated that title to the property should remain in the plaintiff until it was paid for. The instrument referred to in effect reserved title in the plaintiff, and was not, upon its face, a mortgage; and whether or not the plaintiff had, by his conduct, vested title to the property in Levy, and waived his right to repossess it, was a question of fact to be determined by consideration of all the testimony bearing thereon. We sustain the fifth assignment of error, and reverse the judgment, because the court excluded material evidence, which should have been admitted upon the question referred to. On the other issue in the case—that of mutual mistake in embodying certain stipulations in the contract—we think the court erred, as pointed out in the fourth assignment, in permitting the defendants to testify that the duplicate contract delivered to the defendant Levy did not contain the stipulations referred to. The duplicate itself was traced to the possession of one of the defendants' attorneys, and it was not shown that he had made search for and could not produce it. In fact, he did not testify at all, and, for aught that appears in the record, may still have the instrument in his possession. There was no sufficient predicate for the introduction of secondary evidence. *Dunn v. Choate*, 4 Tex. 17; *Vandergriff v. Piercy*, 59 Tex. 371. Except as shown by this opinion, we overrule all the assignments raising other questions. For the errors pointed out, the judgment is reversed, and the cause remanded. Reversed and remanded.

GILLUM v. FUQUA et al.

(Court of Civil Appeals of Texas. March 20, 1901.)

ADVERSE POSSESSION—COLOR OF TITLE.

1. All the incidents mentioned in the statute, conferring title by five years' adverse possession under a registered deed and payment of taxes, must concur and be continued for the time prescribed in order to complete the bar of the statute.

2. If a grantee in possession of land fails to record his deed in a reasonable time, the adverse possession of his grantor under a registered deed is lost, and the grantee's adverse

possession will not begin until his own deed is registered.

3. A question as to the minority of plaintiffs remote grantors should not be made an issue in an action of trespass to try title, when it can bring no advantage.

Error from district court, Hopkins county: Howard Templeton, Judge.

Action by Byron Hill and wife against M. B. Fuqua and others, and Henry Gillum, intervenor. From a judgment for plaintiffs and a judgment that the intervenor take nothing by his intervention, the intervenor brings error. Reversed as to plaintiff in error.

B. W. Foster, W. H. Clark, and Henry & Henry, for plaintiff in error.

FLY, J. On the 7th day of April, 1898, Byron Hill and his wife, L. L. Hill, instituted an action of trespass to try title to blocks 20 and 21 off the L. P. Dike survey, against M. B. Fuqua and Julia Fuqua, his wife. Defendants pleaded not guilty, and three, five, and ten years' limitations. On August 11, 1898, Henry Gillum, plaintiff in error herein, filed his plea in intervention, claiming one-third of the land in controversy. In a joint pleading afterwards filed by the plaintiffs and intervenor, it was alleged that plaintiffs owned two-thirds of the land and intervenor one-third. Defendants in error renewed their pleas of not guilty and limitations and improvements in good faith. The cause was submitted to the jury on numerous special issues, and the court rendered a judgment in favor of the plaintiffs for two-thirds of the land, and against them in favor of defendants for \$179.98, being two-thirds of the value of the improvements, and judgment that the intervenor take nothing by his intervention, and pay all costs incurred by reason of such intervention. The intervenor alone prosecutes this writ of error. In 1888, in a certain suit styled "C. M. and Nancy Houston v. W. T. Blythe et al.," the land in controversy was set apart to L. R. Knox, James A. Knox, J. M. Harrison, L. L. Harrison, A. M. Harrison, M. N. Harrison, S. T. Harrison, A. A. Harrison, J. E. Harrison, and A. C. Harrison. Mrs. Hill was L. L. Harrison, and she and her husband claim through deeds from a part of the other heirs or privies. Intervenor claimed his title through deeds from J. A. Knox, J. M. Harrison, L. L. Harrison, A. M. Harrison, M. N. Harrison, S. T. Harrison, A. A. Harrison, J. E. Harrison, and A. C. Harrison to J. L. Henry, and from Henry to Gillum. The first deed was dated August, 1884; the latter, July 22, 1899. In 1890 a tax deed to the land in controversy was executed by T. S. Christian, tax collector, to J. A. Weaver, who on April 17, 1895, conveyed it to C. M. Houston. On September 12, 1894, Houston conveyed block 20 to Julia Fuqua, by a deed which was recorded on March 11, 1896. On September 12, 1894, Houston conveyed block 21 to Rutilda Jacobs, and her deed was

recorded on November 1, 1895. On May 29, 1897, Rutilda Jacobs, joined by her husband, conveyed block 21 to Julia Fuqua, and the deed was recorded on August 23, 1898. Houston took possession of the land in controversy in 1898, and held possession until he placed Fuqua and wife and Jacobs and wife in possession, in 1894, presumably at the time of execution of his deeds to them. The Jacobses remained in possession until 1897, when they placed Fuqua and wife in possession, who held all the land up to time of intervention, paying taxes and using and cultivating the same. Under the facts in this case, it does not matter whether the suit instituted by Hill and wife stopped the running of the statute or not as to Gillum, but we will consider it as though his rights must be based on his plea of intervention, which was filed on August 11, 1899.

The trial court held the tax deed from Weaver to C. M. Houston invalid, and the judgment against intervenor can be sustained only on the ground that appellees had perfected their title to the part of the land claimed by him, by five years' limitation. To sustain the judgment, therefore, it must appear from the answers of the jury, there being no statement of facts, that appellees had held peaceable and adverse possession of the land claimed by plaintiff in error, cultivating, using, or enjoying the same, and paying taxes thereon, claiming under a deed or deeds duly registered for five years prior to August 11, 1899. All of the incidents mentioned in the statute must concur and be continued for the time prescribed, in order to complete the bar of the statute.

In order to make out the title by limitations, it was not sufficient to show that the deed to Houston, under whom appellees claim, was duly registered for the required time, but it was necessary to prove that deeds from Houston to Julia Fuqua and Rutilda Jacobs had also been duly registered within a reasonable time, so as to cause no material break in the incidents necessary to complete the five-years limitation. If the deeds from Houston had been duly registered within a reasonable time after being executed, then his adverse possession of the land could be claimed as their adverse possession, by his vendees, but not so where there is a failure to file the deeds for record within a reasonable time. *Porter v. Chronister*, 58 Tex. 53; *Medlin v. Wilkins*, 60 Tex. 409; *Cook v. Dennis*, 61 Tex. 246; *Van Sickle v. Catlett*, 75 Tex. 404, 13 S. W. 31; *Sorley v. Matlock*, 79 Tex. 304, 15 S. W. 261.

The Fuquas and Jacobses went into possession of the land, not under the deed of Weaver to Houston, but under the deed from Houston to them, and when they failed to register their deeds within a reasonable time it destroyed the adverse possession of Houston under a registered deed, and their adverse possession would begin at the time of the registration of their deeds. Mrs. Fuqua's

deed to lot 20 having been filed for record on March 11, 1896, only three years and six months had elapsed when the plea in intervention was filed. When the Jacobses conveyed to Mrs. Fuqua they had been holding block 21 under a registered deed for only about a year and a half, and this time was lost by a failure to record their deed to the Fuquas until August 23, 1898. *Sorley v. Matlock*, above cited. It is clear, therefore, that defendants in error had not acquired a title by limitations.

It appears from the responses to the issues submitted by the court that some of the remote vendors of plaintiff in error were minors when they executed the deed to J. L. Henry, but that they had never repudiated the conveyance. The question of minority should not have been made an issue in the case, as it was a matter that could bring no advantage to defendants in error. The judgment as to plaintiff in error, Henry Gillum, is reversed, and judgment here rendered that he recover of defendants in error one-third of blocks 20 and 21, described in the pleadings, and defendants in error recover of him \$89.00, being one-third of the value of the improvements, and defendants in error pay all costs of this and the lower court.

SILCOCK et al. v. BAKER et al.

(Court of Civil Appeals of Texas. March 13, 1901.)

HUSBAND AND WIFE—WIFE'S SEPARATE ESTATE—CONVEYANCE—ACKNOWLEDGMENT—REQUISITES—CONSIDERATION—INVALIDITY OF CONVEYANCE—RECOVERY.

1. Under Rev. St. arts. 635, 4618, declaring the conveyance of a married woman of her separate property shall not pass any title unless the deed is acknowledged before an officer authorized to take the same, no title passes where the acknowledgment of a married woman's deed to her separate estate is taken by the husband of the grantee.

2. Where a married woman seeks to recover her separate estate illegally conveyed, because her acknowledgment to the conveyance was not taken as prescribed by law, she is not required to refund the consideration received as a condition of recovery.

3. Since a conveyance by a married woman of her separate real estate, unless made in the form prescribed by law, passes neither a legal nor equitable title, where a married woman's deed is not acknowledged as required, the grantees have neither a title, nor color of title, which can protect them under the three-years statute of limitations.

Appeal from district court, Bexar county; J. L. Camp, Judge.

Trespass to try title by Ellen Silcock and others against Mary H. Baker and others. From a judgment in favor of defendants, plaintiffs appeal. Affirmed.

Jay Minter and J. M. Eckford, for appellants. Lewis Maverick, for appellees.

NEILL, J. The appellant Ellen Silcock, joined by her husband, brought this suit against Mary H. Baker, who was joined by

her husband, in the form of an action of trespass to try title to recover certain parcels of land. Appellees, defendants below, answered by a plea of not guilty, and pleaded that the deed under which Mrs. Silcock claims the property was made by Mary H. Baker to her separate property, and that her pretended acknowledgment thereto was taken by Andrew Silcock, the husband of Ellen, and for that reason the deed was void, and a cancellation thereof prayed for. The case was tried by the court without a jury, and judgment rendered that the plaintiffs take nothing by their suit, and in favor of the defendants on their plea of reconvention for a cancellation of the deed.

Conclusions of Fact.

The appellee Mary H. Baker is the common source of title under which both parties claim, the property being upon the 28th day of August her separate estate; she then being, and is now, a married woman. On the 28th day of August, 1894, she, with her husband, John F. Baker, signed an instrument purporting upon its face to be a deed conveying the premises in controversy to Ellen Silcock. On the same day the instrument was acknowledged by Mary H. Baker before Andrew Silcock, a notary public in and for Bexar county, Tex., who was at the time of the execution of the purported conveyance and of such acknowledgment the husband of the grantee, Ellen Silcock. The instrument was afterwards, on the 31st day of August, 1894, acknowledged by J. F. Baker, the husband of the grantor, before a notary public of Travis county, Tex. The evidence shows that it was agreed between the parties that, as a consideration for the conveyance to Ellen Silcock, Mary H. Baker should receive the boarding-house furniture contained in a certain boarding house conducted by the appellants, together with the supposed good will of the boarding-house business. The furniture was never delivered to appellees, but was all taken away by appellants upon leaving said premises, except a small part thereof, which was offset by certain furniture transferred by appellees to appellants in the same transaction. The supposed good will of the business was of no value.

Conclusions of Law.

The following counter propositions taken from appellees' brief, in our opinion, state the law applicable to the facts in this case: "(1) The deed of a married woman to her separate property, though absolutely free and voluntary, unless acknowledged as prescribed by law, will not pass to the parties claiming under it either a legal or equitable title. It is the statutory acknowledgment which gives her deed validity, her signature being a nullity without her privy examination, acknowledgment, and declaration before some officer authorized to take the same." Rev. St. arts. 635. 4618; Berry v. Donley, 26 Tex. 745; and

approved by an unbroken chain of decisions. "(2) It is essential to the validity of an acknowledgment that it should be taken before some officer authorized by law to take acknowledgments, and who is not disqualified to take the particular acknowledgment. 'A party to a deed, or identified with the transaction, or one having a pecuniary interest in the subject, is not competent to take the acknowledgment of the instrument.' Rothschild v. Daugher, 85 Tex. 333, 20 S. W. 142, 16 L. R. A. 719; Association v. Heady (Tex. Civ. App.) 50 S. W. 1079, and cases cited; Id., 57 S. W. 583, and cases cited. "(3) Although in a case where, as a matter of fact, an acknowledgment has been taken by an officer authorized and qualified to take it, and he has failed to properly certify the fact, the court may hear proof and correct the certificate, yet, where there has never been an acknowledgment before an officer qualified to take it, there is no basis for action on the part of the court. There is nothing to correct or which can be corrected." Association v. Heady (Tex. Civ. App.) 50 S. W. 1079; Johnson v. Taylor, 60 Tex. 360. "(4) But, had appellee Mary H. Baker received the value of the land as purchase money, she would not be estopped in asserting her title. A married woman who seeks to recover her separate estate, illegally conveyed without her acknowledgment, as prescribed by law, is not required to refund the consideration received as a condition of recovery." Johnson v. Bryan, 62 Tex. 625; Owens v. Land Co. (Tex. Civ. App.) 32 S. W. 1060, and cases cited. "(5) The pretended conveyance from Mary H. Baker, under which appellants claim, passed neither a legal nor equitable title, and could certainly, therefore, constitute neither a title, nor color of title, which would protect the appellants under the three-years statute of limitation." Berry v. Donley, 26 Tex. 747. The judgment is affirmed.

PARKER et al. v. WOOD.¹

(Court of Civil Appeals of Texas. March 6, 1901.)

WIFE'S SEPARATE ESTATE—DEBTS CHARGEABLE THERETO—AUTHORITY OF HUSBAND.

Rev. St. arts. 2970, 2971, authorizing a wife to contract debts for the benefit of her separate property, and providing for their enforcement against her separate estate, do not authorize a judgment against a wife's separate estate in an action by an attorney employed by the husband to defend a suit affecting her personal estate, in the absence of evidence that she authorized such employment.

Appeal from Grayson county court; A. L. Beaty, Judge.

Action by J. D. Wood against Ann Parker and others to recover attorney's fees for services performed in protecting the separate estate of the defendant Ann Parker. From a

¹ Rehearing denied April 10, 1901.

judgment in favor of plaintiff, defendant Ann Parker appeals. Reversed.

M. T. Jones, for appellant.

NEILL, J. This suit was brought in the justice's court by J. D. Wood against Ann Parker and her husband, T. H. Parker, to recover \$141.25, alleged to be due for legal services rendered by the appellee for the benefit of Ann's separate property. In the justice's court a judgment was rendered in Wood's favor, from which Mrs. Parker appealed to the county court. Upon the trial there, which was without a jury, judgment was rendered in favor of appellee against Mrs. Parker as a debt against her separate estate, the sureties on her appeal bond, and T. H. Parker for the sum of \$147.50, together with a foreclosure of an attachment lien on certain real property. The judgment provides that no execution shall issue against T. H. Parker after the attached property is levied on and sold. From this judgment Mrs. Parker has alone appealed to this court.

It appears from the evidence: That Ann Parker, while the wife of T. H. Parker, signed a subscription list payable to the Cotton Belt Railroad for \$500. That one O. T. Lyon brought suit against her and her husband on said subscription, procured an attachment, and caused it to be levied on land the separate property of Mrs. Parker. That her husband employed J. D. Wood, an attorney at law, to represent him and his wife in the defense of said suit. That the defense of the suit was for the purpose of protecting her separate property. That there was at the same time pending a suit styled "O. T. Lyon v. McFarland," which was agreed on as a test case, it being the understanding that the case against the Parkers should abide the result of that case. To carry out this agreement, T. H. Parker and his wife, Ann, both executed a bond in favor of O. T. Lyon, conditioned that Ann Parker should abide the action of the court in the McFarland case, and that, if that case was adjudged against the defendant, she should pay the amount of her subscriptions. That the McFarland suit was defeated, and, consequently, Mrs. Parker did not have to pay anything. It does not appear from the evidence who represented the defendant in the McFarland suit. No authority is shown from the evidence to have been given by Mrs. Parker to her husband to employ appellee or counsel to defend her in the suit brought by Lyon in which appellee represented her. Nor is there anything to show that she knew that Wood was representing her in that suit when she made the bond to Lyon obligating herself to abide the decision in the McFarland case. The question is, can the judgment against Mrs. Parker, subjecting her separate estate to the debt, be upheld by these facts? The wife may contract debts for the benefit of her separate property (Rev. St. art. 2970), and when it shall appear upon the trial

of a suit therefor to the satisfaction of the court and jury that she contracted such debt for that purpose, and that the debt so contracted was reasonable and proper, the court is required to decree that execution may be levied upon either the common property or the separate property of the wife, at the discretion of the plaintiff. Rev. St. art. 2971. The debt which will authorize such a decree must be contracted by the wife, or by her authority. *Christmas v. Smith*, 10 Tex. 123; *Milburn v. Walker*, 11 Tex. 329; *Magee v. White*, 23 Tex. 180; *Menard v. Schneider* (Tex. Civ. App.) 48 S. W. 761. The right conferred by law upon the husband to manage the wife's separate property does not limit the powers of the wife, nor give special authority to the husband with reference to the debts and contracts contemplated by Rev. St. art. 2970. *Milburn v. Walker*, supra; *Magee v. White*, supra; *Warren v. Smith*, 44 Tex. 247; *Owen v. Land Co.* (Tex. Civ. App.) 32 S. W. 1059. Though the debt sued for may have been for the benefit of Mrs. Parker's separate property, yet, as there is no evidence tending to show that it was contracted by herself or her authority, the judgment against her, charging her separate estate therewith, cannot be sustained. Therefore it is reversed, and judgment is here rendered in her favor. Reversed and rendered.

GRIGGS v. GRIGGS.

(Court of Civil Appeals of Texas. March 13, 1901.)

DIVORCE—ANTENUPTIAL INCONTINENCE.

A divorce will not be granted for antenuptial incontinence.

Appeal from district court, Ellis county; J. E. Dillard, Judge.

Suit by W. A. Griggs against Beulah Griggs for a divorce. From a judgment dismissing the petition, plaintiff appeals. Affirmed.

B. F. Marchbanks, for appellant.

FLY, J. This is a suit for divorce, instituted by appellant, which was dismissed by the court because the petition showed no sufficient grounds for a divorce. The only acts of incontinence alleged against the wife were antenuptial ones, and it is the general rule that antenuptial chastity is not so essential to the marriage relation as that a misrepresentation concerning it amounts to a fraud rendering the marriage voidable. *Nels. Div. & Sep.* §§ 380, 604. The rule above announced prevails, except in a few states, where it is provided by statute that antenuptial incontinence shall be ground for divorce. If antenuptial unchastity had been ground for divorce, the petition alleged complete condonation of such acts, and there is no allegation of any postnuptial acts that would form a ground for divorce. The judgment is affirmed.

WESTERN UNION TEL. CO. v. BELL.
(Court of Civil Appeals of Texas. March 13, 1901.)

TELEGRAPHS AND TELEPHONES—NONDELIVERY OF MESSAGE.

A party cannot recover damages from a telegraph company for mental suffering caused by his anger and resentment towards the company over the nondelivery of a death message.

Appeal from district court, Limestone county; L. B. Cobb, Judge.

Action by Cora Williams and others against the Western Union Telegraph Company. From a judgment for plaintiff Bell, defendant appeals. Reversed.

Geo. H. Fearons and N. L. Lindsley, for appellant. Kimbell Bros. & Blackmon and G. A. Bell, for appellee.

JAMES, C. J. This cause was styled "W. U. Tel. Co. vs. Cora Williams et al." in the district court, and likewise upon the transcript. Charles Bell recovered the judgment in the case, and is the appellee; therefore we change the style of the case.

The telegram in question was as follows: "Mt. Calm, Texas, January 11, 1899. To J. Monroe Williams, Mexia: Father died this evening. Bring things at once I told you. Will bury to-morrow. Charles Bell." There was evidence that the things referred to were the coffin and burial clothes, and that, had the message been delivered with reasonable promptness, Williams would have been on hand early on the morning of the 12th; but, by reason of failure to do so, he did not arrive until late in the afternoon of that day, and that thus the burial was delayed until next day, causing a postponement of the funeral for about 24 hours. We shall not discuss all the assignments of error, being of opinion that none of them is well taken except the seventh and eighth, wherein they allege the insufficiency of the evidence of mental suffering as resulting from the postponement of the burial. We place this conclusion upon appellee's own testimony. He testified that it was not until Monroe Williams got there that he found out the telegram had not been delivered, and it was then that he had hard feelings against the company. He suffered on account of the postponement. The rest of his testimony on this subject was as follows: "I believe I am a plaintiff in this suit. I am suing for something like three thousand or thirty-five hundred. I claim three thousand or thirty-five hundred for damages for mental suffering. I was grieved; that is how I suffered. I was grieved. I was hurt with the company. I suffered it after the telegram was not delivered. I had a spite at the company, and felt like they had not treated me right, and I wanted to stick them for every dollar I could. I wanted to spite the company, and get every cent out of them I could. It was not because I cared for the money. I can

work and make a living. I didn't care about the money, but I wanted to stick the company for all I could. They failed to deliver the telegram at the proper time, and didn't carry out their contract, and I wanted to make them pay for it. I experienced mental suffering then when I found out that they had failed to carry out their part of the contract. I knew it before I went to Mexia, several days after the funeral. I knew it when Mr. Williams told me. It was not until I knew this that I suffered. Don't you think that you would have suffered if your father had died? After my father was buried, it was several days before I went to Mexia. I do not recollect now. I might have had business there when I did go there. I suffered this mental anguish when I knew that the company had not done their duty. And I wanted to stick them for all I could. When I found out about the nondelivery of the telegram, then I wanted to stick the company. Mr. Williams told me about the delay in delivering the message before I got to Mexia. I wanted to start with the corpse so early in the morning because it was 25 miles to Hornhill, where he was to be buried, and it took some time to go that distance with a corpse. Certainly, I suffered this mental anguish because the company failed to carry out its contract. I did not care for the money, as I am able to work. I believe my father was buried in 48 hours after he died. He died on the evening of the 11th, and was buried on the evening of the 13th." To us this testimony does not show that appellee's mental suffering, if any, was by reason of the delay of the burial. It shows that what mental distress he suffered was that which he experienced from the death of his father. For anger and resentment towards defendant which he felt over the nondelivery of the message, which appears to have been its effect upon him, he cannot recover. The judgment is reversed, and the cause remanded.

JESSE FRENCH PIANO & ORGAN CO. v. CITY OF DALLAS et al.¹

(Court of Civil Appeals of Texas. Feb. 27, 1901.)

TAXATION OF PERSONALTY—EVIDENCES OF DEBT—SITUS.

A foreign corporation engaged in the manufacture and sale of pianos had an office in this state, from which agents were sent out to sell pianos, and notes were taken in payment. A store was kept in this state, from which pianos were sold, and orders often filled. The notes taken were usually secured by chattel mortgages, and made payable at different points in the state, and were sent to the state manager, who kept them for collection, and from their proceeds paid all expenses; the balance being sent to the home office. *Held*, that under Sayles' Civ. St. art. 5061, subjecting all property to taxation, and section 5067,

¹ Rehearing denied April 3, 1901.

requiring an agent to list all moneys and other personal property controlled by him as agent, and all moneys deposited subject to his order, and credits due from or owing by any person, etc., such notes are liable to taxation in this state, notwithstanding article 5063 provides that personal property shall, for the purpose of taxation, be construed to include goods, moneys, credits, and other evidences of debt "owned by citizens of the state"; this section not being intended to confine such taxation to such property only as belonged to citizens of the state.

Appeal from district court, Dallas county; J. J. Eckford, Judge.

Suit by the Jesse French Piano & Organ Company against the city of Dallas and others. From a judgment for defendants, plaintiff appeals. Affirmed.

U. F. Short, for appellant. W. T. Henry and J. J. Collins, for appellees.

FLY, J. Appellant instituted this suit to restrain the collection of certain taxes levied by the city on certain notes belonging to appellant. Exceptions to the petition were filed by appellee and sustained by the court. The petition, after the formal allegations as to residence, etc., was as follows: "That in the year 1896, after obtaining its permit to do business in the said state of Texas, it established an office or headquarters in the city of Dallas, in said state, from which to direct and manage the business which it at the time undertook to establish and conduct. That it employed a number of solicitors and salesmen to canvass, with the object of selling goods of its manufacture whenever and wherever sales for the same could be found. That it has kept and maintained in charge of its office in the said city of Dallas a manager, bookkeeper, stenographer, and other employes necessary for the dispatch and management of its business. That orders for the sale of its goods are taken in every part of the state, and reported to the manager in charge at the city of Dallas. That a repository or store has been kept and maintained at the said city of Dallas, in which a stock of goods has been kept for sale, and that from such stock orders obtained by its salesmen are often filled. That such orders are frequently forwarded by the manager in charge at the said city of Dallas to the office of plaintiff in the city of St. Louis, where the same are filled, and goods shipped either from the factory in the state of Indiana, or from the warehouse of the plaintiff in the city of St. Louis, to the point of sale in the said state of Texas at which said goods are to be delivered. Plaintiff states: That sales are occasionally made in the city of Dallas, but that the chief trade which the plaintiff has established in the said state has been through the instrumentality and services of its salesmen in the state at large outside the city of Dallas, to which its salesmen are sent for the purpose of disposing of its goods. That the stock in trade has been regularly assessed for the municipal taxes of the city of Dallas since the beginning of

its business in said city in the year 1896, and that its said assessments have been regularly paid as hereinafter stated. That its sales throughout the state are usually made upon credit, and that notes are taken for the purchase of its goods, usually secured by a chattel mortgage upon the instrument sold, and that said notes are always made payable at the bank nearest and most convenient to the makers thereof, for the accommodation both of the plaintiff in collecting the same, and of its customers in making payment. That said notes when so taken have usually been sent to the manager in charge of the plaintiff's business at the said city of Dallas, where they are kept for collection. That schedules of said notes are furnished to the plaintiff's office in the city of St. Louis, from which place directions are always given as to the management and collection thereof, and that in no instance is it the duty or privilege of the manager in the city of Dallas to withhold the proceeds from the collection of said notes, to use for any purpose other than paying the current expenses of the plaintiff's business in said city of Dallas, consisting of rents, clerks' and employes' hire, but the invariable order and instruction has been to remit all sums so collected to the plaintiff's office in the city of St. Louis. That the notes so taken as aforesaid are held, when at all, for collection and remittance only, and never for reinvestment. That no goods are purchased by the plaintiff's branch house or the manager thereof for its stock in trade, but such goods so offered for sale have been supplied from its factories and from the stock purchased by the management and officers in the city of St. Louis, and shipped to Dallas for sale. That it has been the aim and purpose and the business of the plaintiff to establish an agency in the city of Dallas, from which its said goods are in part sold, and from which to manage and conduct its said business in the state of Texas; the object being to sell its goods, and to receive and collect from such sales, and to use the sums derived therefrom in the management of its business in the said city of St. Louis. That in the month of January, 1898, one J. H. Truesdale was its general manager and in charge of its property and effects in the said city of Dallas. That on the 1st day of said month its stock of merchandise, fixtures, and miscellaneous property was reasonably worth \$5,200, and that it was assessed for taxes by the defendant city of Dallas at said sum by its assessor, for municipal purposes. That on said date the plaintiff was the owner of a large number of notes which had been executed by the purchasers of its goods at sales by its agents, solicitors, and traveling salesmen in various sections of the state of Texas, and payable at the banks in the various localities at which its said goods were purchased, amounting to about the sum of \$30,000, and of the probable value of \$22,500. That said notes had

been executed in large part for goods which had been shipped directly from the plaintiff's factory in the state of Indiana and from the plaintiff's warehouses in the city of St. Louis to the purchaser thereof, on orders obtained by its traveling salesmen and solicitors, and in part for goods which had been shipped on such orders from its repository or warehouse in the city of Dallas. That said notes were at the dates aforesaid in the possession of its manager for the purpose of collection and remittance to the plaintiff in said city of St. Louis only, and for no other purpose, except that said manager paid the rents, clerks' hire, and salesmen from such funds, when necessary, and that no part of said notes were kept or retained for any other purpose than collection and remittance. Plaintiff alleges, however, that the defendant city of Dallas, by its assessor, servants, and employes, caused the same to be assessed for the taxes of said city for the said year 1898, and fixed and established as the amount of taxes for the notes aforesaid for said year the sum of \$337.50. Plaintiff avers that the said notes were not liable to be assessed for taxes by said defendant, but that the same were held, owned, and controlled by the plaintiff in the city of St. Louis, and were liable to be assessed for all municipal, state, and other taxes at the home and residence of the plaintiff, to wit, in the said city of St. Louis, state of Missouri, and not elsewhere; that the total assessments for municipal purposes of plaintiff's said property above mentioned by the said defendant city of Dallas for said year was \$415.50; that \$78 of said sum was for the stock of merchandise, fixtures, and miscellaneous property belonging to the plaintiff as above stated, and that \$337.50 of said sum was assessed for the notes belonging to the plaintiff as above stated, and executed by makers largely without the city of Dallas,—few of the same, if any, having been executed by residents of said city, as plaintiff believes and now avers. Plaintiff states that it has always been ready and willing to pay the taxes assessed against its stock of goods, fixtures, etc., and has repeatedly offered to pay that portion of its said assessments, and now brings into court and tenders to the said defendant city of Dallas the said sum of \$78 assessed against its said stock, fixtures, and miscellaneous property; but said defendant, by its collector, Ford House, has refused, and now refuses, to accept the same in payment of its said taxes unless plaintiff will pay the further sum of \$337.50 assessed for its notes aforesaid, which plaintiff avers are not liable to be assessed by the said defendant city of Dallas for any purpose; that it has protested against the assessments of its said notes, and has refused to pay the taxes claimed thereon, and still refuses so to do; that the said defendant Ford House threatens to seize and take into his possession the personal property and stock in trade of the said plaintiff,

or a sufficient amount thereof to pay the entire sum claimed by him for taxes of 1898, including the sum assessed on account of said notes; that great and irreparable injury will be done the plaintiff by the threatened unjust and illegal action of the said defendant Ford House, in seizing and taking said property and selling the same, unless he is enjoined and restrained by the order and direction of this honorable court from so doing." It is provided in the charter of Dallas, under which the assessment was made, that "all persons or corporations owning or holding personal property or real estate in the city of Dallas on the 1st day of January of each year shall be liable for all municipal taxes levied hereon for the fiscal year beginning next following April." It is also provided in the charter that the city shall have power to levy such a tax on the property of corporations as is provided by state law.

There is but one assignment of error, which brings in review the action of the district court in sustaining exceptions to the petition; and the proposition propounded is that "intangible personal property, such as credits, are taxable only at the place of residence of the owner, without regard to where they are kept or deposited, and equally without regard to where they were earned, or the place of the debtor." There has been some confusion among American decisions as to whether intangible property, like promissory notes, is taxable at the domicile of the owner, or at the situs of such property, the general rule being that the domicile of the owner controls. *Ferris v. Kimble*, 75 Tex. 476, 12 S. W. 689. There is, however, an exception to the above rule almost universally recognized, as is done in the case cited, and that is that when a person residing in one state has an agent in another, who conducts the business of his principal, and has notes in his hands for collection or renewal, with a view to keeping up a permanent business, the situs of the notes will be the place of taxation. In the case of *People v. Trustees of Village of Ogdensburg*, 48 N. Y. 390, it is said: "Notes, bonds, and other contracts for the payment of money have always been regarded and treated in law as personal property. They represent the debts secured by them. They are the subject of larceny, and a transfer of them transfers the debt. If this kind of property does not exist where the obligation is held, where does it exist? It certainly does not exist where the debtor may be, and follow his person. And while for some purposes, in the law, by legal fiction, it follows the person of the creditor, and exists where he may be, yet it has been settled that for the purpose of taxation this legal fiction does not, to the full extent, apply, and that such property belonging to a non-resident creditor may be taxed in the place where the obligations are held by his agent. *People v. Commissioners of Taxes of City*

of New York, 23 N. Y. 238; *People v. Gardner*, 51 Barb. 352; *Catlin v. Hull*, 21 Vt. 132." In the case of *Washington Co. v. Jefferson's Estate*, 28 N. W. 256, it was said by the supreme court of Minnesota: "For many purposes the domicile of the owner is deemed the situs of his personal property. This, however, is only a fiction from motives of convenience, and is not of universal application, but yields to the actual situs of the property, when justice requires that it should. It is not allowed to be controlling in matters of taxation. Thus corporeal personal property is conceded to be taxable at the place it is actually situated. A credit which cannot be regarded as situated in a place merely because the debtor resides there must usually be considered as having its situs where it is owned,—at the domicile of the creditor. The creditor, however, may give it a business situs elsewhere, as where he places it in the hands of an agent for collection or renewal, with a view to reloaning the money and keeping it invested as a permanent business." The foregoing language was quoted and approved in the consideration of an appeal of the same case by the supreme court of the United States, and it was further said: "Personal property, as this court has declared again and again, may be taxed either at the domicile of its owner, or at the place where the property is situated, even if the owner is neither a citizen nor a resident of the state which imposes the tax." *Bristol v. Washington Co.*, 177 U. S. 133, 20 Sup. Ct. 746, 44 L. Ed. 701. In the case last cited the power of attorney of the agent had been revoked and the notes sent to New York, but it was held that the Minnesota statute would reach them, and that under the circumstances of the case the mere sending of the notes to New York and the revocation of the power of attorney did not take the investments out of the rule. The facts of that case were that Jefferson, a resident of the state of New York, had an agent in Stillwater, Minn., who loaned money for him, taking mortgages to secure the debts, and collected and reloaned the same, with the exception of what was drawn by Jefferson from time to time to pay his debts. The property was held subject to taxation under a law of Minnesota as follows: "All real and personal property in this state, and all personal property of persons residing therein is subject to taxation." It was said by the supreme court of Minnesota as to that law: "It is to be taken, therefore, as to the intent of the statute, that credits, to whomsoever owing, are taxable here if they can be regarded as personal property in this state; that is, situated in this state. To justify the imposition of tax by any state, it must have jurisdiction over the person taxed or over the property taxed. As Jefferson was not a resident of this state, there was no jurisdiction over him. But, if the property on

61 S.W.—60

account of which these taxes were unpaid was within this state, the state had jurisdiction to impose them, as it might impose a tax upon tangible personal property permanently situated here, and to enforce the taxes against the property." In the case of *City of New Orleans v. Stempel*, 175 U. S. 306, 20 Sup. Ct. 110, 44 L. Ed. 174, the court held that the state had the authority to tax credits within the state belonging to non-residents, and after citing the decisions of Louisiana the following language was used: "If we look to the decisions of other states, we find the frequent ruling that when an indebtedness has taken a concrete form, and become evidenced by note, bill, mortgage, or other written instrument, and that written instrument evidencing the indebtedness is left within the state, in the hands of an agent of the nonresident owner, to be by him used for the purposes of collection or deposit or reinvestment within the state, its taxable situs is in the state." In the same opinion the following language from *Wilcox v. Ellis*, 14 Kan. 588, is adopted: "This maxim is at most only a legal fiction, and Blackstone, speaking of legal fictions, says: 'This maxim is invariably observed: That no fiction shall extend to work an injury; its proper operation being to prevent a mischief or remedy an inconvenience that might result from the general rule of law.' 3 Bl. Comm. 43. Now, as the state of Illinois, and not Kansas, must furnish the plaintiff with all the remedies that he may have for the enforcement of all his rights connected with said notes, debts, etc., it would seem more just, if said debt is to be taxed at all, that the state of Illinois, and not Kansas, should tax it, and we should not resort to legal fictions to give the state of Kansas the right to tax it." According to the allegations of appellant, a corporation chartered in Indiana manufactures pianos and organs in Indiana, stores them in St. Louis, and sells them in Texas. It has an office in Dallas, from which agents are sent out over the state to sell pianos, and notes taken in payment for them. A store is kept by the corporation in Dallas, from which pianos are sold, and from which stock orders are often filled. The notes taken are usually secured by chattel mortgages on the instruments sold, and the notes are made payable at different points in Texas. After the notes are taken they are sent to the manager at Dallas, where they are kept for collection. From the proceeds of the notes sufficient sums are retained to pay all expenses, the balance being sent to St. Louis. The facts alleged bring the case directly within the purview of a decision rendered by the supreme court of Louisiana in the case of *Bluefields Banana Co. v. Board of Assessors (La.)* 21 South. 627. In that case it was said: "The foreign corporation had an agent here, where it received and where it sold fruit, and received the price for the

same., Part of the proceeds were withheld, in the hands of the agents, for purposes incidental to the prosecution of its business, and part deposited to the credit of the company, subject to the check of the local agent; also for the prosecution of its business here, and for such other purposes as the company might direct it to be applied to. The company transacted business in New Orleans precisely as did resident business men and firms. It received all the advantages to be derived from the state and city governments which residents received, and we see no reason why it should not be taxed as claimed in this proceeding, unless there be insuperable legal objections in the way. We find a statute of the state which by its terms brings them under the operation of state and city taxation, and we are bound to give effect to its provisions unless they be in derogation of the constitution. The unconstitutionality of the act is not pleaded, and we, of ourselves, see no unconstitutional features in it. The rule, *Mobilia sequuntur personam*, is a fiction of law, not resting of itself upon any constitutional foundation, and which gives way before express laws destroying it in any given case where constitutional requirements themselves do not stand in the way." The above language was quoted approvingly in the case of *City of New Orleans v. Stempel*, above cited.

From the authorities cited it seems clear that the state of Texas could by law levy taxes upon the property described in the petition. Of course, there must be statutory warrant for the taxation, and the next question to be considered is whether provision has been made by the legislature of Texas for the taxation of credits in this state belonging to foreign corporations. In article 5061, *Sayles' Civ. St.*, it is provided: "All property, real, personal, or mixed, except such as may be hereinafter expressly exempted, is subject to taxation, and the same shall be rendered and listed as herein prescribed." In article 5067, which provides for the rendition of property for taxation, in the second section, applying to agents, it is provided: "He shall also list all lands or other real estate, all moneys and other personal property invested, loaned or otherwise controlled by him as agent or attorney, or on account of any person, company or corporation whatsoever, and all moneys deposited subject to his order, check, or drafts and credits, due from or owing by any person or body, corporate or politic." The language of the statutes above quoted is broad enough to include every species of property held by an agent for any person or corporation that could possibly exist, and it is very similar to, and fully as comprehensive as, the language of the Minnesota statutes, which, as hereinbefore indicated, was held by the state court and by the supreme court of the United States to be comprehensive enough to embrace the credits of a foreign corporation

in the state. Doubtless there would have been no diversity of opinion as to the statute taking within its scope property of every description in the state, had it not been for the language employed in article 5063. In that article it is provided that "personal property shall, for the purposes of taxation, be construed to include all goods, chattels and effects, and all moneys, credits, bonds and other evidences of debt owned by citizens of the state, whether the same be in or out of the state," etc.; and the contention is that the article contains a full definition of "personal property," as used in the preceding article, and that the taxation of credits and other evidences is especially confined to such property belonging to citizens of Texas. We think that the statute setting forth certain kinds of personal property subject to taxation was not intended to limit the broad terms of article 5061, but was passed in order to remove any doubt as to the taxable character of personal property about which contention might probably arise. For instance, it might be contended that credits and other evidences of debts owned by citizens in Texas, but deposited in New York, would not be subject to taxation. The statute says they shall be subject to taxation. So it is in regard to ships, boats, and vessels belonging to inhabitants of Texas, but which are abroad, and money at interest in or out of the state, and stock in certain corporations out of the state owned by inhabitants of the state. The object of article 5063, in other words, was, in our opinion, to amplify and increase the scope, if possible, of article 5061, and not to confine taxation to the property of inhabitants. While it is a rule of statutory construction that tax laws will be construed with some degree of strictness, it is also a rule that legislation for exemption from taxation or any other common burden or liability will be strictly construed, and doubts must be resolved against the exemption. As said by the supreme court of the United States in *Phoenix Fire & Marine Ins. Co. of Memphis v. Tennessee*, 161 U. S. 174, 18 Sup. Ct. 471, 40 L. Ed. 680: "It must always be borne in mind, in construing language of this nature, that the claim for exemption must be made out wholly beyond doubt; for, as stated by Mr. Justice Harlan in *Chicago, B. & K. C. R. Co. v. Missouri*, 120 U. S. 569, 7 Sup. Ct. 693, 30 L. Ed. 732, 'It is the settled doctrine of this court that an immunity from taxation by a state will not be recognized unless granted in terms too plain to be mistaken.'" It cannot be reasonably contended that article 5061 is not broad enough to embrace all kinds of property in Texas, as we have held that it does, and appellant can only claim exemption on the ground of a failure to mention its class in a succeeding article. Take the facts of this case: A corporation with its domicile in Indiana has obtained a permit to do business in Texas, and in furtherance of that business has estab-

lished its headquarters in Dallas, Tex., and has sent forth its agents to sell its manufactures over the state. Its notes are payable in Texas, and it must invoke the aid of Texas courts to collect the debts due it, and is enjoying all the protection extended by the laws of Texas to its own citizens. When the state, or a city thereof, demands that the corporation must bear some of the burdens of government, it is met with the reply that, although it is fully provided that all personal property in the state shall bear its proportion of the taxes, yet in defining "personal property" foreign corporations were not mentioned, and they will enjoy all the benefits of the government, but will bear none of its burdens. We do not believe that any such result was ever contemplated by the legislature, nor that the provisions of article 5063 can be construed to exempt the credits of foreign corporations held in the state under the circumstances of this case. The corporation in this case may be, and doubtless is, doing business in many of the states of the Union, and its manufactures are being shipped from its domicile without the payment of any tax,—at any rate, it does not allege that it has paid taxes in Indiana on the instruments sold in Texas; and for the privileges and protection given it, it would be giving nothing in return. In a similar case the supreme court of the United States, through Mr. Justice Brewer, uses the following apt and forcible language: "In conclusion, let us say that this is eminently a practical age; that courts must recognize things as they are, and as possessing a value which is accorded to them in the markets of the world; and that no finespun theories about situs should interfere to enable these large corporations, whose business is carried through many states, to escape from bearing in each state such burden of taxation as a fair distribution of the actual value of their property among those states requires." *Adams Express Co. v. Ohio State Auditor*, 166 U. S. 185, 17 Sup. Ct. 604, 41 L. Ed. 965.

The only Texas decision cited by appellant is *Ferris v. Kimble*, 75 Tex. 476, 12 S. W. 689. In that case Ferris lived without the limits of the city of Waxahachie, but kept certain credits owned by him in a private portfolio in a vault in Waxahachie. The city of Waxahachie attempted to levy taxes on the notes, but was enjoined by the supreme court on the ground that they were taxable only at the place of residence of the owner. The language used in the proposition of law submitted by appellant is the language of the supreme court in the *Ferris-Kimble* Case. As a general rule, that proposition is, as hereinbefore stated, correct; and it was unnecessary for the court to state the exceptions, although such exceptions are recognized by quoting language used by the supreme courts of Indiana and Illinois, in which such exceptions are specially mentioned. The opinion had no reference to a case

of the character of that before us, but was simply fixing the situs for purposes of taxation of property belonging to citizens of Texas. Another Texas decision, recently rendered by the court of civil appeals of the Third district, has also been considered by us; and, while there are some expressions used therein that might be considered antagonistic to our opinion herein, we believe that such antagonism is more apparent than real. In that case—*Primm v. Fort* (Tex. Civ. App.) 57 S. W. 86, 972—several parties instituted a suit to restrain the collector of taxes of McLennan county from the collection of taxes on certain national bank stock. The case of the plaintiffs rested on the proposition that they had the right, in rendering their property for taxation, to offset the value of their bank stock with their indebtedness. During the course of the opinion, in endeavoring to meet certain evidence to the effect that certain parties had loaned money in Texas without paying taxes, it was held that the mortgagees "would not, under our state statute, be subject to taxation at all in reference to their credits unless they reside within the state, because credits and other choses in action are, as a general rule, taxable only in the state where their owner resides. *Cooley, Tax'n* (2d Ed.) 21, 23, 372." While it may, perhaps, be questionable as to whether the language used was essential to the proper decision in that case, still it is not in conflict with the doctrine herein announced. In the opinion on rehearing (57 S. W. 972) it is held that article 5063 does not in terms include credits of foreign corporations as subjects of taxation, and there is no conflict in that holding with our view of the statute. We think, however, that every species of property belonging to any person or corporation is included in article 5061, and precedents, reason, and justice unite with the statute in demanding that a foreign corporation holding property in Texas under the facts alleged in appellant's petition shall share with the citizens of the state the burdens of government, while being protected by it. The judgment is affirmed.

DAUGHTREY v. NEW YORK & T. LAND CO.¹

(Court of Civil Appeals of Texas. March 18, 1901.)

ADVERSE POSSESSION—POSSESSION UNDER A PARTICULAR SURVEY—SUFFICIENCY—PAROL EVIDENCE—ADMISSIBILITY—SURROUNDING LAND—PRIOR AGREEMENT.

1. Defendant fenced the land in controversy as a part of the Segura survey in 1888, and in 1899 plaintiff sued for its possession, and alleged that it was not part of the Segura survey, and defendant pleaded adverse possession for 10 years. *Held*, that the fact that defendant asserted title to the property as a part of a particular survey, and not otherwise, did not defeat the adverse character of his claim,

¹ Rehearing denied April 10, 1901.

though the property was not in fact a part of that survey, since it did not alter the fact that defendant exercised ownership for the statutory period.

2. Where defendant asserted title to the property in controversy by adverse possession, his testimony that he claimed it as a part of a particular survey was admissible to show the nature of his possession.

3. Rev. St. 1895, art. 3343, declares that any person who has the right of action for the recovery of any land against another having peaceable and adverse possession thereof shall institute his suit therefor within 10 years after his cause of action shall have accrued, and not afterwards, and article 3345 declares that, where a tract of land owned by one person is entirely surrounded by a tract or tracts owned by another, the possession by the owner of the circumscribing land of such interior tract shall not be adverse unless the same be separated from the circumscribing land by a fence. *Held*, that where land had been in the adverse possession of defendant for 10 years, and was claimed by plaintiff, and there was no evidence that it was entirely surrounded by other land owned by defendant, the statute afforded no reason for sustaining a judgment awarding plaintiff possession.

4. Defendant claimed the land lying between La Parita creek and Metat creek on the ground that the west boundary of the Segura survey was La Parita creek, and in 1888 fenced the property, and asserted title by adverse possession as a part of that survey until 1899. *Held*, that the fact that defendant in 1882 signed an agreement that the west boundary of the Segura survey was Metat creek did not defeat his title by adverse possession for 10 years.

Appeal from district court, Atascosa county; M. F. Lowe, Judge.

Action by the New York & Texas Land Company against E. R. Daughtrey. From a judgment in favor of plaintiff, defendant appeals. Reversed and rendered.

N. R. Wallace and W. O. Read, for appellant. Smith & Walton and West & Cochran, for appellee.

FLY, J. Appellee instituted suit against appellant to recover three tracts of land containing in the aggregate 429½ acres. The suit developed into a contest as to the location of the west boundary line of the north part of the Marcellino Segura survey. The contention of appellant was that La Parita creek was the boundary, while the appellee contended that it was Metat creek, which is situated east of La Parita creek. If La Parita was the boundary, there was no vacant land between it and the Metat that was subject to patent to the junior patentee, under whom appellee claims. The court held that the evidence showed that Metat creek was the western boundary, and there is testimony in the record that sustains the finding. Appellant, however, in addition to his plea of not guilty, interposed a plea of limitations of three, five, and ten years; and, while finding that in 1887 or 1888 appellant had, in connection with Benson, fenced off to himself the Segura grant and the lands in suit, and has used the same since that time, it was held by the trial court that his possession was not of such character as to indicate an adverse possession, because he claimed the land as a part

of the Segura grant, and not otherwise. Daughtrey was the only witness as to his possession of the land. He stated that in 1888 he, together with Benson, who owned 230 acres off the Segura grant, fenced the whole of the survey, including the land in controversy, and had undisturbed possession of it from that time to the present. He had paid taxes on the land as a part of the Segura grant. On cross-examination he stated that he did not claim the lands other than as a part of the Segura survey; that he had always claimed, and now claims, the land as a part of the Segura grant. This comprised the whole of the testimony on limitation. The suit was instituted on November 4, 1899, more than 10 years after the land was inclosed by appellant.

It is clear that appellant believed, when he erected his fence along La Parita creek, and still believes, that the land in controversy was and is a portion of the Segura grant, and he claimed and held it for over 10 years as a part of that grant. The fact that it was not a part of that grant would not affect his adverse holding, because he placed his fence along La Parita creek with the intention of claiming and holding all within his inclosure as his own. His statement does not bring his case within the doctrine of *Alexander v. Wheeler*, 69 Ala. 340, cited in the case of *Hand v. Swann* (Tex. Civ. App.) 21 S. W. 282. It might be that if appellant, through inadvertence or ignorance, had placed his line nearly 3000 varas beyond the true boundary line, as found by the court, with no intention to claim except to the true boundary line, wherever it might be, that his possession would not be an adverse one. "But," as said by the Alabama court, "the rule is different where the fence is believed to be the true line, and the claim of ownership is up to the fence as located, even though the established line is erroneous, and the claim of title was the result of the mistake." That the fact that appellant believed and claimed the land to be a part of a certain grant would not of itself strip his possession of its adverse character, is sustained in several Texas decisions. In the case of *Bruce v. Washington*, 80 Tex. 368, 15 S. W. 1104, it was said: "Their possession was certainly an actual and visible appropriation of the land, commenced and continued under a claim of right wholly inconsistent with Bruce's, and hostile to any claim he had. And this is what the statute says shall be sufficient to vest a complete title. The legal effect of the existence of these facts cannot be destroyed or impaired by the mere declaration of the defendant, after the right attaches by virtue of the law, that he was not claiming plaintiff's land by limitation." In that case Washington had on cross-examination stated "that he never intended to claim any land but what he bought, and never intended to get any of plaintiff's [Mr. Bruce's] land by limitation." As in that case, so in this, appellant was claiming the land; and,

whether the source from which he claimed it was the true one or not, he was claiming it in such an adverse manner as to meet the requirements of the statute of 10 years' limitation. In the case of *Jayne v. Hanna* (Tex. Civ. App.) 51 S. W. 296, it was said: "Does the fact that appellee held adverse possession of the land under the belief that it was covered by her deed, and that she had perfect title to it, when in fact it was not embraced within her purchase, deprive her possession of any element necessary to support the plea of limitations? This question we regard as settled in the negative." Several cases were cited in support of the ruling. The testimony of appellant as to his claim was admissible as going to the nature of his possession, and, if there was nothing in his testimony to indicate that he did not intend to claim the land in controversy, we would not disturb the judgment; but there is no word or circumstance revealed by the record that tends to show that he was not holding the particular land against the world, and had been so holding it for over 10 years. None of the cases cited by appellee sustain its contention that the belief of appellant that the land is a part of the Segura survey, and that he was claiming as a part of such survey, prevented possession of it from being adverse. In the case of *Williams v. Rand* (Tex. Civ. App.) 30 S. W. 509, Rand had admitted in writing that he had never claimed title to the land, and it was held that the writing would be admissible in evidence to be considered in connection with other facts to determine the nature of his possession. The same rule was announced by this court in *Cuellar v. Dewitt*, 5 Tex. Civ. App. 568, 24 S. W. 671. In *Satterwhite v. Rosser*, 61 Tex. 166, the original entry on the land was made in subordination to the owner of the title, and the evidence showed breaks in the adverse possession. In the case of *Mhoon v. Cain*, 77 Tex. 316, 14 S. W. 24, it was merely held that an occupant of land who enters it under no claim of right, and ignorant of who the true owner may be, cannot avail himself of 10 years' limitation by calculating the time in which he was seeking the owner with a view of purchasing his title. In the case of *Railway Co. v. Wilson*, 83 Tex. 153, 18 S. W. 325, one of the directors testified: "We went on the land, and have never paid for the right of way. We expected and intended to pay for it when called upon at any time by the owner;" and the court necessarily held that there was no adverse possession. In the cases of *Warren v. Friedrichs*, 83 Tex. 386, 18 S. W. 750, and *Waller v. Leonard*, 89 Tex. 508, 35 S. W. 1045, the admissions of the occupants of the land while in possession, as well as other cogent evidence, clearly established that there was no adverse possession. In the case of *Hartman v. Huntington* (Tex. Civ. App.) 32 S. W. 562, the occupant went into possession of the land with the intention to pre-empt it, believing it to be vacant; and there was no evidence tending to show that

he ever set up a claim to it. The above-mentioned cases have been briefly reviewed in deference to the judgment of the district court and the brief of appellee, in which they are cited, and it is apparent that they lend no aid to the judgment under the facts of this case. Appellant did claim the land, and did intend at all times to assert his right to it; and the fact that he was claiming it as a part of the Segura grant does not do away with the fact that he was claiming it, and exercising over it for 10 years all the rights of ownership.

In 1891 a statute was enacted providing that "a tract of land owned by one person, entirely surrounded by a tract or tracts owned, claimed or fenced by another, shall not be considered inclosed by a fence inclosing the circumscribing tract or tracts, or any part thereof; nor shall the possession by the owner or claimant of such circumscribing land of such interior tract be the peaceable and adverse possession contemplated by article 3343, unless the same be segregated and separated from the circumscribing land by a fence, or unless at least one-tenth thereof be cultivated and used for agricultural purposes." Article 3345, Rev. St. 1895. It is insisted by appellee that the judgment should be sustained under that statute, and the contention would, perhaps, be well founded, as the title by limitation was not perfected at the time of the enactment of the law, if the facts indicated that the land was "entirely surrounded by a tract or tracts owned, claimed, or fenced by another." No such facts, however, are found in the record, the plats attached to the statement of facts tending to establish that the lands in controversy were not entirely surrounded by lands owned, claimed, or fenced by appellant.

It cannot be said that the agreement signed by appellant in 1882, placing the western boundary of the Segura grant at the Metat creek, tends in any manner to break the adverse possession of the land in controversy, because the adverse possession began after that time. The circumstance, if it proved anything, might show that appellant knew the land was not his, but afterwards fenced and set up a claim to it.

The judgment of the district court is reversed, and judgment here rendered that appellee take nothing by its suit, that appellant be quieted in his title to the land, and recover of appellee all costs in this and the lower court expended.

BENNETT v. STRATTON.

(Court of Civil Appeals of Texas. March 20, 1901.)

PLEADING — PLEA IN ABATEMENT — HEARING SET FOR DAY CERTAIN — NO WAIVER OF APPEAL — STATUTE.

The defendant in an action on a written contract filed a plea in abatement setting up his right to have the action tried in the county of his residence, and later filed an answer to the merits of the case. On the appearance day defendant's attorney telephoned plaintiffs'

torney to have the case set for a certain day of the term for the hearing of both the plea and the merits of the case, and plaintiff's attorney said he would, but would insist that that fact would constitute a waiver of defendant's plea to the jurisdiction, and that he set the case in accordance with their agreement for a certain day at defendant's request. Plaintiff thereafter filed a supplemental petition, alleging that defendant "requested, agreed, and consented that the case be set down for trial on the merits as well as on the plea to the jurisdiction." *Held*, that such facts did not constitute a waiver of defendant's plea in abatement, and hence it was error to render judgment on the merits of the case without hearing on such plea.

Appeal from Johnson county court; W. D. McCoy, Judge.

Action by W. H. Stratton against G. E. Bennett. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Wallace Hendricks, for appellant. Henry, Brown & Patton, for appellee.

NEILL, J. This suit was brought in the county court of Johnson county by appellee against appellant on the 4th day of June, 1900, to recover the sum of \$500 alleged to be due upon a written contract, the terms of which, from our view of the case, need not be stated. The appellant (defendant below), on the 30th day of June, 1900, filed a plea in abatement, in which he alleged that he resided in Tarrant county, as was averred in plaintiff's petition, and not in the county of Johnson; and in such plea he made such further necessary allegations as showed his right to be sued in the county of his domicile, which right he claimed in said plea as his privilege. Subject to this plea, the defendant, on the 2d day of July, 1900, filed an answer to the merits. On the 14th day of July, 1900, the plaintiff, by supplemental petition, in replication of defendant's plea in abatement, alleged that on the 3d day of July, 1900, the defendant, by his attorney, appeared in the case, and, without calling the court's attention to the plea of privilege requested, agreed and consented that the case be set for trial on the merits, as well as on said plea to its jurisdiction, upon a particular day. On the 14th day of June, 1900, the case was tried by the court without a jury, who, after hearing the evidence upon the issue of fact thus raised upon the plea in abatement, decided thereon in favor of plaintiff. It then tried the case upon its merits, and rendered judgment in favor of plaintiff for the amount sued for. The action of the court in not sustaining appellant's plea in abatement is assigned as error.

The facts relative to this assignment are as follows: It was admitted upon the trial that the facts stated by defendant in his plea to the jurisdiction are true. The following entry appears on the judge's docket: "By request of defendant's attorney, case

set by agreement for July 14th." The attorney for plaintiff then testified as follows: "About July 2d or 3d, the defendant attorney, Mr. Wallace Hendricks, called me up over the telephone, he then being in Ft. Worth. I was one of the attorneys for the plaintiff in the above case. Tuesday, July 3, 1900, was appearance day in the county court of Johnson county. The following is the substance of the conversation that occurred between me and the defendant's attorney over the 'phone: Mr. Hendricks asked me to have the above case set down for trial at a particular day of the term of the court. I asked whether he meant to have it set down for trial on the merits or on the plea of the jurisdiction. He replied, in both. I told him I would agree to set the case down for a day certain, but would not agree to do so without prejudice to his plea to the jurisdiction, and that I would insist that such appearance by him, and his having the case so set down, would be a waiver of his plea. Then, in accordance with the agreement made over the telephone, I went over the court house, and in open court had the entry above written made on the court docket. Neither the exception or plea to the jurisdiction was called to the attention of the court until the 14th day of July, when the case was called for trial by the court. Mr. Hendricks said he would not agree to waive his plea of privilege." In our opinion, these facts do not bring the case within the provisions of article 1291, Rev. St., nor constitute a waiver of appellant's privilege of being sued in the county of his residence. It clearly appears from them that in his agreement with plaintiff's counsel defendant did not intend to waive his plea in abatement, and that plaintiff's counsel, when he agreed with him to set the case for that time, knew that he did not intend to waive his right to be sued in the county of his residence. Plaintiff's supplemental petition itself avers that defendant's attorney, in having the case set, "requested, agreed, and consented that the case be set down for trial on the merits as well as on said plea to the jurisdiction." This shows the construction of plaintiff's counsel of the agreement to set the case; and in view of it, as well as the facts, it was error to hold that the defendant, by appearing through his counsel, and having the case set for trial at a day of the appearance term of court, had waived his right to be heard upon said plea. Until the defendant, as was his right, was heard on his plea of privilege, which, it seems from the admissions and evidence, should have been sustained, the assignments of error going to the merits of the case, in our opinion, should not be considered. For reason of the error indicated, the judgment of the court is reversed, and the cause remanded.

BARRETT v. BARRETT.

(Court of Civil Appeals of Texas. March 18, 1901.)

DIVORCE—SUFFICIENCY OF EVIDENCE—BILL OF EXCEPTIONS—QUESTIONS CONSIDERED.

1. Where there is no bill of exceptions showing the failure of the trial court to file conclusions of fact, its failure so to do will not be considered on appeal.

2. Where plaintiff's evidence in a suit for divorce is conflicting and irreconcilable, a decree for defendant will not be disturbed on appeal, since the statute requires proof of the grounds of divorce by full and satisfactory evidence.

Appeal from district court, Dallas county; Richard Morgan, Judge.

Suit for divorce by Millie Barrett against Hamilton Barrett. From a decree in favor of the defendant, the plaintiff appeals. Affirmed.

Seay & Seay, for appellant. Jeff Word, for appellee.

JAMES, C. J. The assignment of error that the judge failed to file his conclusions of fact is of no force, for the reasons: (1) There is a statement of facts; and (2) there is no bill of exceptions on the subject.

The other assignment is that under all the testimony the judgment should have been for plaintiff. This is a petition for divorce, and for certain disposition of the community homestead. We have considered the testimony. The witnesses testified in person, and the testimony given by plaintiff's witnesses is in material particulars conflicting and irreconcilable. In this class of cases the statute requires proof of the grounds for divorce by full and satisfactory evidence. It would be an unwarrantable exercise of judicial power on our part, under the above circumstances, to reverse this judgment. Affirmed.

GULF, C. & S. F. RY. CO. v. CLEVELAND.

(Court of Civil Appeals of Texas. March 20, 1901.)

CARRIERS—INJURY TO PASSENGER—NEGLIGENCE OF CARRIER—GETTING OFF TRAIN IN MOTION—EVIDENCE.

1. Where a passenger is injured while attempting to get off defendant's train about 200 yards from its station, and while the train is in motion, and the defendant's servants do nothing to cause such act, and have no notice of the passenger's intention, there is no negligence on the part of defendant which will warrant a recovery by the plaintiff.

2. Where the question of the portion of the train in which a passenger was in, or whether he was attempting to leave the train at the time when he was injured, is in issue in an action against the company therefor, evidence of plaintiff's reason for being in a particular part of the train or for leaving the train is admissible.

Appeal from district court, Johnson county; J. M. Hall, Judge.

Action by Victor Cleveland against the Gulf, Colorado & Santa Fe Railway Company for injuries received while a passenger

on defendant's train. From a judgment in favor of plaintiff, defendant appeals. Reversed.

J. W. Terry and B. K. Goree, for appellant. J. A. Stanford, Cleveland & Haynes, D. M. Watkins, and W. B. Fatherston, for appellee.

JAMES, C. J. The first, second, third, and fourth assignments are, in substance, that the evidence does not support the verdict. These we are unable to sustain.

The following charge is complained of by the fifth assignment: "If you believe from the evidence that the plaintiff had paid his fare as a passenger from Ft. Worth to Cleburne, and was a passenger upon said train, and that before said train reached defendant's depot in the city of Cleburne, and while the same was in motion, plaintiff attempted to jump or alight from the platform of either of said passenger coaches, and that in his attempt so to do he got his foot caught between the parts of said passenger coaches, or otherwise received the injuries of which he complains, and if you believe from the evidence that he was negligent in so doing, you will find for the defendant." One phase of the testimony was that plaintiff received his injury by having his leg caught and crushed between the platforms of two coaches, owing to defective couplings which permitted the platforms to separate a sufficient distance to admit of a passenger falling between them. Another was that plaintiff received his injury in alighting from the train while it was in motion about 200 yards before it reached the station at Cleburne, and by having his leg caught under the wheels. There was testimony supporting each of these theories. The testimony of plaintiff himself was that he was injured while the train was in motion about 200 yards from the station. The decisions in this state hold that the act of a passenger in alighting from a train at a station is not contributory negligence per se, and this issue should be submitted to a jury, except, perhaps, in very exceptional cases. This rule is based on the fact that at stations the carrier owes the passenger certain duties with regard to alighting. But where a passenger undertakes to jump off a train while it is in motion at other than a stopping place, without any act of defendant's servants concurring in or inducing the act, and without any notice or knowledge by its servants that such act was contemplated, as in this case, there is nothing upon which to charge defendant with negligence. If plaintiff, whether a passenger or trespasser, received his injury in jumping from the train before it reached the station, under such circumstances, he cannot recover, whether he was careful in doing so or not. The charge above quoted authorized the jury to find for plaintiff if in jumping off he received his injury by being caught under the wheels, unless he was negligent in so doing. The charge was erro-

neous in this respect. The court gave charges to the effect that if plaintiff was not a passenger, or was riding in the blind baggage car, or between the baggage and mail cars, and was injured in undertaking to alight therefrom, he cannot recover. Defendant had pleaded in general terms the contributory negligence of plaintiff. Plaintiff testified that he was injured about 11 o'clock at night, about 200 yards north of the depot, between two of the passenger coaches. There should not have been anything in the charges that would tend to lead the jury to believe that, if plaintiff was hurt in jumping or alighting at such place while the train was in motion, he could nevertheless recover, if he was not negligent in so doing.

The charge complained of by the eighth assignment was not erroneous from the standpoint of defendant. We think there could be no just complaint concerning this charge if the court had distinctly instructed the jury as to the nonliability of defendant under the evidence in case it should be found that plaintiff met his injury by the act of getting off the train while in motion, before it had arrived at the station.

In regard to the tenth assignment we shall say, in view of another trial, that any testimony showing a reason or motive plaintiff may have had for being in a particular part of the train, or for leaving the train before it reached the station, would be admissible in aiding the determination of such disputed issues of fact.

The charge referred to in the ninth assignment is not subject to the criticism made. Reversed and remanded.

McMAHON et al. v. CITY BANK OF SHERMAN.¹

(Court of Civil Appeals of Texas. March 6, 1901.)

APPEAL—ANTEDATING BOND.

Under Sayles' Civ. St. art. 1670, requiring the party appealing to file a bond within 10 days from judgment, a bond filed after 10 days does not give the appellate court jurisdiction, though it is dated back as within 10 days by consent.

Appeal from Grayson county court; J. D. Woods, Judge.

Action by the City Bank of Sherman against D. T. McMahon and others. From a judgment for plaintiff, defendants appeal. Appeal dismissed.

E. C. McLean, for appellants. Leslie & McReynolds, for appellee.

FLY, J. Appellee instituted suit in a justice's court against V. Gayle, D. T. McMahon, and Pittman & Harrison to recover of the first named the sum of \$150, due for rent of land in Fannin county for the year 1890, and to recover the same sum from the other par-

ties named on the ground that they had purchased certain oats raised on the land from the tenant and converted it to their use; and a landlord's lien was claimed on the property so purchased. McMahon and Pittman & Harrison denied that appellee had any lien on the oats, and asked, in case judgment was rendered against them, that they have judgment over against V. Gayle. Appellee obtained judgment for its debt against all the defendants, and the purchasers of the property recovered judgment over against Gayle for the same amount. The judgment was obtained on November 13, 1899, and on the next day an affidavit was made by McMahon as provided in article 1662, Sayles' Civ. St., and an execution obtained, which was returned at once "No property found." An alias execution was then obtained to Fannin county, where Gayle resided, and the same was levied on horses and mules as the property of V. Gayle, and an affidavit and claim bond was filed by Quincy Gayle to try the right to the property. Pending the disposition of the trial of right to the property, appellee and McMahon and Pittman & Harrison entered into an agreement that an appeal bond in this case need not be filed until after the final disposition of the trial of right of property in Fannin county. Afterwards, on January 10, 1900, nearly two months after the judgment had been rendered in this case, an agreement in writing was made which recited the former agreement as to the filing of an appeal bond, that the Fannin county case had been terminated, and that the original agreement be carried out and the bond filed. On the appeal bond filed after the above agreement, but dated back as within 10 days from the date of judgment, the case was taken to the county court, and the same judgment rendered as in the justice's court. In justice to the county judge, and as evidencing the good faith of attorneys for appellee who made the agreement, we state that no motion was made in the county court to dismiss the appeal on the ground that the appeal bond was filed after the expiration of 10 days from date of the judgment, and the matter has not been called to the attention of this court on this appeal. The transcript from the justice's court, however, which is copied into the record on this appeal, reveals the fact that an attempt has been made to confer appellate jurisdiction upon the county court by means of a bond that was filed long after 10 days from the date of the judgment, upon an agreement to place upon it a date within the statutory time. In article 1670, Sayles' Civ. St., it is provided: "The party appealing, his agent or attorney, shall, within ten days from the date of judgment, file with the justice a bond, with two or more good and sufficient sureties, to be approved by the justice, in double the amount of the judgment, payable to the appellee, conditioned that the appellant shall prosecute his appeal to effect, and shall pay off and sat-

¹ Rehearing denied April 2, 1901.

isfy the judgment which may be rendered against him on such appeal. When such bond has been filed with the justice the appeal shall be held to be thereby perfected." To perfect an appeal, every step required by statute must be complied with, and within the time prescribed. The matter of time is jurisdictional, and the whole appeal must be perfected within the time prescribed, and acts done after that period are null and void. Elliott, App. Proc. §§ 128-247; Bailey, Jur. §§ 52, 53. It will not be controverted that, if the appeal bond had borne a file date more than 10 days from the date of judgment, no appeal would have been perfected to the county court, and placing a false date upon the appeal bond cannot avail to perfect an appeal; and, when the falsity of the file mark is disclosed by the record, it is the duty of this court to dismiss the appeal, for, if the county court had no jurisdiction, none can be obtained by this court. Miller v. Bank, 1 White & W. Civ. Cas. Ct. App. § 1287; Horan v. Wahrenberger, 9 Tex. 313; Wadsworth v. Chick, 55 Tex. 241; Lumpkin v. Smyth, 57 Tex. 489; Timmins v. Bonner, 58 Tex. 554. The act of the justice of the peace in dating back the bond could not vitalize it. Speaking of a like attempt, it was said by the supreme court of the United States: "When the time for taking an appeal has expired, it cannot be arrested or called back by a simple order of court. If it could be, the law which limits the time within which an appeal can be taken would be a dead letter." Credit Co. v. Arkansas Cent. R. Co., 128 U. S. 258, 9 Sup. Ct. 107, 32 L. Ed. 448. It has been held in this state that defects in an appeal bond may be waived, but there is no case in which it has been held that the statutory time may be waived. In the case of Tynberg v. Cohen, 76 Tex. 409, 13 S. W. 315, a defective appeal bond was filed, and the court held that the defect could be waived by the opposite party. But in the case of Smithwick v. Kelly, 79 Tex. 564, 15 S. W. 486, the following language used in the case of Burr v. Lewis, 6 Tex. 76, was cited approvingly: "To constitute an appeal perfected, the appellant must give notice of appeal during the term, and within twenty days after the term he must give bond for the prosecution of the appeal. Until these two constituents of an appeal concur, there is no appeal." To the same effect is McLane v. Russell, 29 Tex. 129. In the case of Lyell v. Guadalupe Co., 28 Tex. 57, it was said: "This case has been submitted on its merits, and no motion made to dismiss the appeal. If no question of jurisdiction were involved, it might well be held that all errors and irregularities committed in taking the appeal bond had been waived. But consent cannot confer jurisdiction." In the case of Smith v. Parks, 55 Tex. 82, the court said: "But consent cannot confer jurisdiction; and though a cause be submitted on its merits, without motion to dismiss the appeal, yet, if it appear by the record that the court does

not possess jurisdiction, it will not attempt to exercise it, and in such case this court will, of its own motion, dismiss the appeal." The cases cited, with the exception of Smithwick v. Kelly, discuss appeals to the supreme court, but we think the same rules would hold good as to time of filing appeal bonds from the justices' to the county or district court. If time is jurisdiction in one case, it would be in another. Following the precedents in this state as to the disposal of such cases (Wadsworth v. Chick, 55 Tex. 241; Lumpkin v. Smyth, 57 Tex. 489; Timmins v. Bonner, 58 Tex. 554), the judgment of the county court is reversed and the appeal dismissed; the costs of this court and the county court being assessed against appellants.

LAGUERENNE et al. v. FARRAR et al.¹

(Court of Civil Appeals of Texas. Feb. 9, 1901.)

DEEDS — PRESUMPTIONS — TRUSTS — ACCOUNTING — SPECIFIC PERFORMANCE — LIMITATIONS.

1. After the death of the parties to a deed absolute in form, and the lapse of nearly 60 years, presumptions in derogation of legal title conveyed thereby cannot be indulged.

2. L., the owner of a survey of land, conveyed it to H., the owner of another survey; and H. executed an instrument by which he conveyed to L. one-third of the proceeds which might be received from the sales of any portion of said surveys, and bound his personal representatives to convey the land remaining unsold at his death to such persons as L. or her heirs might order. Held, that the instrument, so far as it related to the proceeds of sales, was not a completed declaration of an express, executed trust, against which the statute of limitations would not run until after the renunciation of the trust by the trustee and notice thereof to the beneficiary, but the trust created was merely an executory trust, since the interest of the parties depended on contingencies, the happening of which could not have been foretold.

3. The statute of limitations will run against the beneficiary's demand, founded on a completed declaration of an express, executed trust, though there has been no formal renunciation of the trust by the trustee, and actual notice thereof to the beneficiary, when the acts of the trustee are equivalent to a repudiation, and the beneficiary has knowledge thereof.

4. The instrument executed by H., so far as it related to the lands remaining unsold at his death, was insufficient to convey title thereto to L., but was only an executory contract to convey, against which the 10-years statute of limitations (Rev. St. art. 3209) would run.

Appeal from district court, Limestone county; L. B. Cobb, Judge.

Action by Carolina Laguerenne and others against L. J. Farrar, administrator of George L. Hammeken, deceased, and others. From a judgment for defendants, plaintiffs appeal. Affirmed.

Kimball Bros. & Blackman, for appellants. Farrar, Williams & Farrar and Sam B. Frost for appellees.

¹ Writ of error denied by supreme court.

TEMPLETON, J. On July 28, 1840, George L. Hammeken, J. T. Laguerenne, and his wife, Petra Laguerenne, executed an instrument which reads as follows: "Know all men by these presents, that I, Geo. L. Hammeken, a resident citizen of the republic of Texas, do hereby acknowledge to have received from Petra de la Caudra, wife of John Theodore Laguerenne, the sum of one dollar, for which consideration, and the additional consideration of many important services rendered to me by them, I hereby make over, sell, and convey to the said Petra Lopez de la Caudra, her heirs, executors, administrators, and assigns, one-third of all moneys which I may hereafter receive from the sale of any portion or portions of twenty-two leagues of land lying and situate in the aforesaid republic of Texas, which was originally granted in sale by the government of the state of Coahuila and Texas unto Manual Crecencio Rejon and Juan Nepomuceno Acosta, sixteen leagues of which are situated on the right and left banks of the rivulet Navasota. The remaining six leagues are situated on the river Trinity; and, for a more particular description of same, I refer to the authenticated copies of the original deposited by me in the general land office of the republic of Texas. And, should any portion of the aforesaid twenty-two leagues of land remain unsold at my death, I hereby bind my executors, administrators, and assigns to have the same surveyed, and to make titles for the same to such person or persons as the said Petra Lopez de la Caudra, her husband, her heirs or assigns, may order. In witness whereof, we have unto, interchangeably, set our hands and seals in the city of New Orleans this twenty-eighth day of July, A. D. 1840." The said instrument has the following indorsed on the back thereof, viz.: "Deed for one-third of twenty-two leagues of land, Geo. L. Hammeken to Petra L. Laguerenne." The instrument and indorsement were written by Hammeken. The instrument was never recorded. It remained in the custody of Mrs. Laguerenne during her life, and after her death was held by her daughter Carolina Laguerenne, one of the appellants. Hammeken in his lifetime sold 44,138 acres of said lands for \$55,477. He died in 1881, and in 1882 L. J. Farrar qualified as administrator of his estate. The administrator sold 6,199 acres of said lands for \$17,982. Neither Hammeken nor the administrator ever accounted to the Laguerennes or their heirs for any part of the proceeds of the said sales. There are now unsold of said two surveys about 17,500 acres of land. J. T. Laguerenne died in 1868, and Mrs. Laguerenne in 1880. The appellants are their sole heirs, and brought this suit on March 13, 1890, against the administrator and the heirs of Hammeken to recover the unsold portion of the said surveys, and one-third of the proceeds of the sales made by Hammeken. There was a trial by the court

without the intervention of a jury, and judgment was rendered for the defendants, from which judgment this appeal is prosecuted.

The two surveys in question, each of which contains 11 leagues of land, were granted by the government of Coahuila and Texas in 1833 to J. N. Acosta and M. C. Rejon, respectively. On April 11, 1836, M. C. Rejon conveyed the Rejon survey to Mrs. Laguerenne. On the same day Laguerenne executed to Hammeken a power of attorney authorizing him to act for Laguerenne in the sale and management of said survey. On September 27, 1836, Laguerenne and wife, by deed reciting an expressed consideration paid, conveyed the Rejon survey to Hammeken. On July 28, 1840, Hammeken was the owner of the Acosta survey. On that day Laguerenne and wife executed a deed to Hammeken, again conveying to him the Rejon survey. No reason for the making of this second deed is disclosed by the record. Its date is the same as that of the said instrument above set out.

In defense of the suit of appellants for the recovery of one-third of the proceeds of sales made by Hammeken the appellees interposed a plea of limitations. The appellants, in avoidance of the plea, contend that the said instrument is a completed declaration of an express, executed trust, against which limitation will not run until after renunciation of the trust by the trustee, and notice thereof to the beneficiary. On this issue it was shown that Laguerenne and wife and their heirs were citizens of the republic of Mexico, and resided about 1,500 miles distant from the lands in controversy; that the Spanish language prevails in Mexico, and the English language in Texas, where the lands are situated, and where Hammeken resided; that there was little communication between the two countries; that shortly before Mrs. Laguerenne's death Hammeken told her that the lands had been lost by litigation and taxation, and that he had never made any sales, and that this was the reason why he had never accounted to her for anything on sales. The appellees did not actually know that these statements were false until within two years before the bringing of this suit, but they never made any effort to learn the facts, and they could have learned the facts many years sooner had they used reasonable diligence. The circumstances were sufficient to put Laguerenne and wife and their heirs upon inquiry as to the failure of Hammeken to report and account for sales, and the slightest inquiry would have developed the facts, as Hammeken was openly making sales, and notoriously treating the lands and proceeds of sales as his own. The explanation of Hammeken as to why he had never rendered an account of sales was insufficient to impose upon any person of reasonable prudence or to prevent inquiry. Hammeken's acts for nearly 40 years before his death amounted to a repudiation of the trust and

of his obligations under said instrument, and the least care for their own interests would have brought home to the Laguerennes knowledge of that fact. Construed by itself alone, the instrument under consideration, in so far as it relates to proceeds of sales of the lands, appears to be an assignment of one-third of such proceeds. This would be sufficient to create a relation in the nature of a trust between Hammeken and the Laguerennes, but the trust would not be of that character against which limitation would not run. *Phillips v. Holman*, 28 Tex. 276. The appellants contend, however, that the lands in controversy were in fact the property of the Laguerennes, and that the legal title thereto had been placed in Hammeken for the purpose of facilitating sales, and that the instrument should be construed in the light of such facts. At the time of the execution of the instrument Hammeken held the legal title and the apparent equitable title to both surveys. There is nothing in the record to indicate that the Laguerennes ever had any interest whatever in the Acosta survey. They once held the title to the Rejon survey, but had conveyed it to Hammeken about four years before the date of the execution of the said instrument. The only fact in the record which suggests that this conveyance was not absolute in fact as well as in form was the making of the second deed to said survey on the day of the execution of the said instrument. The making of the second deed may have indicated a then existing interest in the Laguerennes in the land, but there may have been other reasons for the act. After the death of the parties and the lapse of nearly 60 years, presumptions in derogation of the legal title cannot be indulged. We are bound to accept only such presumptions as necessarily arise from the facts proven, and we seriously doubt if the bare fact of the making of the second deed contemporaneously with the execution of the instrument demands the presumption that the first deed was not intended to convey title. But even if we construe the second deed and instrument together, and hold that the Laguerennes then had an interest in the Rejon survey, the trust created by the deed and instrument would be, in some sense, executory, since it required action on the part of the trustee (that is, the sale of land and receipt of the purchase money) to vitalize the trust and impose on the trustee an obligation to account to the beneficiary. But the term "executory trust" is not generally used in this sense. It is usually held to refer to the manner and perfection of creating the trust, rather than to the action of the trustee in administering the same. A trust is said to be executed when all its terms and limitations are so clear and certain that the trustee has nothing to do but to carry out all the provisions of the instrument according to its letter. It is not always an easy matter to distinguish

between an executed trust and an executory trust. Without entering upon an extended discussion of the question, we will say that in our opinion the trust under consideration was executory, for the reason that the interest of the parties, under the instrument, depended upon contingencies, the happening of which could not be foretold. The contingencies referred to were the making of sales by Hammeken, and the time of his death. The estate vested in Hammeken was a contingent one. It depended for its extent and limitations upon his opportunities and discretion. His duties were defined and certain, except as limited by the discretion reserved in making sales, but his interest in the trust property was contingent and uncertain. Even if it be conceded that the trust is of the character contended for by the appellants, still we think that the statute of limitations would run against their demand. While there was no formal renunciation of the trust by Hammeken, and actual notice thereof to the Laguerennes, yet the acts of Hammeken were equivalent to a repudiation of the trust, and the Laguerennes morally knew that he had abdicated the functions of his office and was converting the trust property to his own use. If appellants or their ancestors ever had a valid claim against Hammeken, arising out of the transactions concerning the lands in question, they have by their own inexcusable neglect permitted the bar of the statute to accrue against it, and cannot now be heard to complain. Nearly 60 years elapsed between the inception of their alleged right and the assertion of it in court. They have waited too long, and their claim is forever barred.

To the suit of appellants to recover the unsold portions of said surveys the appellees pleaded the 10-years statute of limitations, provided by article 3200, Rev. St.; the contention being that the suit of appellants was in effect a suit for the specific performance of an executory contract for the sale of lands. The appellants insist that the instrument evidences an absolute sale of the unsold portions of said surveys which might be on hand at Hammeken's death, and that they can maintain their action of trespass to try title. The instrument does not purport to convey any lands, or to bind Hammeken at any future time to make conveyance. It binds Hammeken's executors, administrators, and assigns, in case any of the lands should remain unsold at his death, to have the same surveyed, and to make conveyances thereof to such person or persons as Mrs. Laguerenne, her husband, her heirs or assigns, might order. This language manifestly implies an administration upon Hammeken's estate, an ascertainment of the lands unsold, and a formal conveyance made in accordance with the probate laws, before the Laguerennes were entitled to the possession of such lands. This

provision is material, since its application would operate as a protection to the estate. Appellants were entitled to have the contract performed according to its terms, but they cannot be said to have been vested with the title to the lands remaining unsold at Hammeken's death. It was evidently the intention of the parties that all the lands should be disposed of in Hammeken's lifetime, since he was to receive two-thirds of the proceeds of all sales, and no interest was retained for his estate in the unsold lands. The clause in reference to the unsold lands was obviously inserted to protect the Laguerrennes against loss in the event of Hammeken's unexpected death, and the provisions concerning the surveying of such lands and the making of conveyances were incorporated in the instrument to shield the estate of Hammeken against unfounded claims that might be asserted by the Laguerrennes. Even if the representatives of the estate held the title to the land in trust for the Laguerrennes, the fact would not prevent the instrument from being a contract to convey lands, and the statute of limitations would nevertheless apply. *Chamberlain v. Boon*, 74 Tex. 659, 12 S. W. 727; *Boon v. Chamberlain*, 82 Tex. 480, 18 S. W. 655.

We conclude that the trial court did not err in holding that the remedy of appellants was by suit for specific performance, and that such suit was barred under the statute. The nature of the trust established by the instrument and the facts surrounding its creation have become so obscured by the lapse of time and the death of the parties, and the beneficiaries in the trust have been silent for so long, that we are not authorized to declare a trust different from the one shown by the terms of the instrument. Standing by itself alone, the instrument is not a completed declaration of an express, executed trust, in so far as it relates to the proceeds of sales, and is not sufficient to convey to the Laguerrennes the title to the lands remaining unsold at Hammeken's death. We find no error in the record, and the judgment is affirmed.

AMERICAN CENT. INS. CO. v. MURPHY.¹
(Court of Civil Appeals of Texas. Feb. 2, 1901.)

INSURANCE—TOTAL LOSS—APPEAL—TRIAL.

1. A brick building was a total loss, in contemplation of Rev. St. art. 3089, making a fire insurance company liable for the full amount of the policy in case of a total loss, when three of the walls were entirely destroyed by fire, and none of the joists, floor, and window sills were left, though a portion of the fourth wall was used in erecting a new building, against the protest of the architect, who condemned the wall as unfit for use.

2. The appellate court can only look to the transcript in determining the rights of par-

ties, and must be governed thereby, except in cases involving its jurisdiction.

3. Where the defense that the insured was not the sole owner of the building is not pleaded, the trial court may properly ignore it, though established by the evidence, in submitting the issues to the jury.

Appeal from district court, Grayson county; Don. A. Bliss, Judge.

Action by Mary L. Murphy against the American Central Insurance Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Keasby & Muse, for appellant. Mosely & Smith, for appellee.

RAINEY, C. J. Appellee sued to recover on an insurance policy for \$2,000, issued by appellant, which covered a building belonging to her that had been destroyed by fire. A total loss was alleged by plaintiff. This was denied by the insurance company, which contended that the injury to the building was only partial; that an appraisal of the loss was had under the terms of the policy, and the damages awarded were \$1,298.21. The trial court instructed a verdict for plaintiff, and judgment rendered accordingly, from which this appeal is prosecuted.

There is no controversy about the issuance and the amount of the policy or the burning of the building. The main contention arises upon the issue whether or not the evidence showed a total loss, as contemplated by article 3089, Rev. St., which makes a fire insurance policy a liquidated demand for the full amount of the policy in case of total loss by fire of a building insured by such policy. On a former appeal of the case, the evidence being the same, we held that there was a total loss in contemplation of said article of the statutes, and that on another trial, if the evidence was the same, the trial court would be authorized to instruct a verdict. *Murphy v. Insurance Co. (Tex. Civ. App.)* 54 S. W. 407.

The evidence adduced on the trial is, substantially, that the building burned was a one-story brick and stone store building, 80 feet in length, 25 feet wide, and ceiling about 14 feet in the clear; east and north walls brick, and north 20 feet of west wall brick; balance of west wall all rock; front, brick pillars and glass, as is usual in business houses. The east and west walls were division walls, in which appellant owned a half interest. After the fire a two-story brick building was erected on the site of the old building. Leonard, an architect, and who constructed the new building, stated that none of the walls and foundations on the north, east, and south were used in the construction of the new building, nor was any left standing fit for use. A part of the west wall was standing after the fire. A part of this wall was torn down in rebuilding, and a part used. The part used was about from 15 to 25 feet long at the base, and in some places it was 2 feet high, and ran up to a point, and beveled off.

¹ Writ of error denied by supreme court.

He did not think it reached 12 feet in height. The foundation and wall that were used were unfit for use. He condemned the whole of the west wall, and the portion that was used was used over his protest. The portion so used was used by reason of the man who owned half of the west wall insisting on using it. After the building was reconstructed, the west wall was about three inches from a true line. This was caused by the use of the old wall. The foundation under the east wall was taken up entirely. It was not fit for use. The north side was quite as bad, in his opinion. The foundation on the south side was not quite as bad, and not as bad as the two longitudinal walls. The back foundation was not used. It was not fit for use. The back wall of the new building was put in a different place. "There were no joists left that we could use in the reconstruction of the new building, nor any flooring. There were some rocks left that were fit for use. None fit for use were left in place on the rear wall. Two window sills fell from their places. One was cracked, and one very much injured, apparently. These were not used in rebuilding." Zoratto, who acted as umpire in the appraisal, testified that the only foundation used was the foundation of the middle wall, between the east and west walls, which was a good foundation. The piece of wall left standing was not in first-class condition. Dawson testified that he worked as a carpenter in the construction of the new building; that all the walls were new, except on the west side there was a little piece of the old wall used. It was probably 10 or 12 feet high in the center, and tapered down until it was probably 15 or 20 feet long at the base, and in shape of an inverted 'V.' McGowen testified that in the construction of the new building upon the site of the old one that was destroyed by fire there was nothing left of the east wall or foundation upon which to build, and no portion of the north wall or foundation, and no portion of the south wall or foundation. "There was a very little piece of the west wall and a part of the foundation left and used. It was a small piece of wall,—just a few feet high. The wall that was used was not straight; was not on a true line north and south." O'Reilly, witness for defendant, testified as follows: "I came to Denison from Dallas at the request of the adjuster for the insurance company. This is my first appraisal for this insurance company, but have been called upon to appraise for others occasionally. I was selected by the underwriters to make a survey of the property in the city of Dallas. They selected me from the architects and builders of Dallas to discharge duties of that kind. I have served companies occasionally that way, more or less, since then. I came to Denison to serve as an appraiser for the insurance company in making the award. We figured in as sound material the west wall of the building, extending from the front

to the rear, 60 feet long and 22 feet high and some inches. We concluded that the wall was good. We figured on using the foundation of the back wall and the foundation of the east wall, and foundation and sills, and bases of the columns, together with a couple of the columns on the front wall; also we figured on using 57 of the joists on which the flooring was laid; also some window sills, and from 60 to 75 per cent. of the flooring. This is what we figured as sound. Plaintiff was not allowed anything in our estimate for damage or loss to them. The debris had not been cleared away when we did our figuring. We did not figure the east wall, because it was not there, nor the north wall, because it was not there,—only such portions of the south wall that was there; that is, bases or flints. None of the south wall was there except that. The south wall was down, the north wall was down, and the east wall was down. We examined the foundation as far as it was exposed to the eye. We could examine from 10 to 14 inches of the foundation, as well as I can recollect. We determined that the foundation was all right, except that it was damaged to the extent of \$5 to the north end. We examined the wall on the west side, and found no crack. We found the wall plumb on a tangent. We concluded that the foundation was good on all sides except the rear, and that could be repaired for \$5. We found that the west wall was good 60 feet long and 22 feet high. The total length of the west wall was 80 feet, but only the first 60 feet was rock. The back 20 feet was of brick. This back 20 feet was damaged, but the rock portion, 22 feet high and 60 feet long, we concluded to be good. The foundation of the west wall was not damaged. We examined it from observation, and it did not show any indication of damage by fire. This was a short time after the fire."

The evidence shows a total loss of the building, and authorized the trial court to instruct a verdict for plaintiff for the full amount of the policy. In our former disposition of the case (*Murphy v. Insurance Co.*, supra), we expressed our views on this question, which have undergone no change, and a further discussion here is unnecessary.

Appellant's fifth assignment complains of the trial court's failure to present to the jury the issue raised by its answer, which alleged, in substance, that the policy provided, in case of disagreement as to loss, the difference should be submitted to arbitrators, and that this was done. Further than suggested by the answer, the record fails to disclose that the policy sued on contained such a provision. There is, however, an agreement of opposing counsel in the record, in relation to the policy, "that any or all of its conditions may be set forth in brief of counsel, and the original used in argument, if desired by either party." This court can only look to the transcript in determining the rights of the parties, and must be governed thereby, ex-

cept in cases involving its jurisdiction. The agreement of counsel, not showing the terms of the policy, does not warrant this court to conclude that such a provision was shown on the trial to exist. The proof failed to show the existence of such a clause, and we conclude that said assignment is not well taken.

The remaining assignment is to the effect that the evidence shows that plaintiff was not the sole owner of the building destroyed, and that the policy contained a clause rendering it void if plaintiff was not the sole owner, and therefore this issue should have been submitted to the jury. There was no such defense pleaded by the defendant, and the trial court did not err in ignoring it. Besides, the statement of facts does not show that the policy contained such a clause, and it will not be considered, notwithstanding the agreement of counsel above alluded to. The judgment is affirmed.

HAMBURGER et al. v. KOSMINSKY et al.
(Court of Civil Appeals of Texas. March 23, 1901.)

JUDGMENTS—INJUNCTION—DEMURRER—COSTS—INTEREST—ATTACHED PROPERTY—SALE—PROCEEDS—CREDIT ON JUDGMENT—AMOUNT DUE—DEPOSIT—NECESSITY—INJUNCTION BOND—SURETIES—LIABILITY.

1. Where plaintiffs alleged that they had tendered the amount due on a judgment in favor of defendants, and asked an injunction to restrain the collection of a larger sum, the petition was not demurrable as an attack on the validity of the judgment.

2. Where it did not appear that defendants paid the costs in a former action in which they obtained judgment against the present plaintiffs, and the costs were finally paid by plaintiffs, defendants were not entitled to interest on the costs.

3. In a former action by defendants against plaintiffs, defendants obtained judgment for \$1,080, and attached plaintiffs' goods, which were sold for \$925, and the proceeds deposited in court. The clerk paid defendant \$712, and no reason was shown why the whole amount was not paid. *Held*, that the plaintiffs were entitled to a credit on the judgment of \$925, and to an injunction to restrain defendants from collecting any part of that sum out of other property of the plaintiffs.

4. Where plaintiffs applied for an injunction to restrain defendants from levying an execution for a larger sum than was due on a judgment obtained against them by defendants, and tendered the amount due before applying for the injunction, and offered to pay that sum in their petition, it was not necessary for plaintiffs to actually deposit the amount in court, in order to maintain the action, since the court could impose the necessary conditions before granting relief.

5. Where plaintiffs applied for an injunction to restrain the levy of an execution in excess of the amount due on a judgment against them in favor of defendants, defendants were not entitled to a judgment against the sureties on the injunction bond for the amount due, since the object of the suit was not to prevent the collection of the amount due.

Appeal from district court, Bowie county;
J. G. Russell, Judge.

Action by M. Kosminsky and another against Hamburger Bros. & Co. to restrain defendants from enforcing an execution. From a judgment granting a perpetual injunction, defendants appeal. Affirmed.

S. J. Henry, for appellants. P. A. Turner, for appellees.

TEMPLETON, J. Hamburger Bros. & Co. brought suit on debt in the district court of Bowie county against Gus Less, and caused a writ of attachment to be issued and levied on certain goods, etc., as the property of Less, but which were claimed by M. Kosminsky, who was made a party to the suit. The goods, etc., were sold under order of the court for \$925, which sum was paid into court. On March 16, 1898, judgment was rendered in favor of the plaintiffs in said suit against Less for \$1,080, with interest from that date at the rate of 6 per cent. per annum, and for all costs of suit, and for a foreclosure of their lien on the attached property and the proceeds of the sale thereof; and the clerk of the court was directed to pay to them the proceeds of said sale. Judgment also went in their favor against Kosminsky on his claim of ownership of said goods, etc., and he appealed. The judgment was affirmed by the court of civil appeals (51 S. W. 53), and the supreme court refused an application for writ of error. The mandate of the appellate court was duly issued, and was filed in the district court on November 15, 1899. The clerk of said court paid to the plaintiffs in said suit the sum of \$400 on December 22, 1899, and the further sum of \$312.90 on January 23, 1900. Kosminsky paid all the costs, both of the trial court and of the appellate court, and on March 21, 1900, tendered to the plaintiffs in said judgment the sum of \$268.35, which sum he claimed to be the balance due on the judgment. The said plaintiffs refused to receive the money tendered as a satisfaction in full of the judgment, claiming that there was then due on the judgment the sum of \$510, and soon thereafter they caused an execution to be issued on the judgment for said last-named sum. The execution was against Kosminsky and the sureties on his supersedeas appeal bond, and was levied on property belonging to Kosminsky and one of the sureties. Thereupon Kosminsky and one of his sureties applied for a writ of injunction, alleging the aforesaid facts, and offering to pay the sum tendered by Kosminsky in satisfaction of the judgment, and asking that the plaintiffs in execution be restrained from enforcing the execution for any amount in excess of said sum. A temporary injunction was granted, and on a final trial on October 26, 1900, the same was made perpetual, upon condition that the plaintiffs in the injunction suit paid the plaintiffs in execution the sum of \$268.32 within three days; otherwise, the execution should be enforced for that amount. The defendants in the injunction suit have appealed from said judgment.

The appellants assailed the petition for injunction by demurrer on the ground that the same was in effect an attack on the validity and correctness of the judgment in favor of Hamburger Bros. & Co. against Less and Kosminsky. The plea demurred to presented the issue that the defendants in said judgment had paid and tendered the entire amount due on the judgment according to its face and terms, and that the appellants were trying to enforce the collection of a sum in excess of such amount. This did not constitute an attack on the judgment, and the demurrers were properly overruled.

It is insisted by the appellants that Hamburger Bros. & Co. are entitled to interest on the costs recovered by them in their suit against Less and Kosminsky at the legal rate from the date of the judgment to the time the costs were paid. The costs of the suit at the time the judgment was rendered amounted to \$185.90, but it is not shown what part, if any, of the same had been or was thereafter paid by Hamburger Bros. & Co. All the costs were finally paid by Kosminsky, and we think that the trial court correctly held that Hamburger Bros. & Co. were not entitled to execution for interest on the costs.

The material question in the case is whether appellees are entitled to a credit on the judgment of the sum of \$925, the proceeds of the sale of the attached property, or whether they are entitled to credit only for the amounts actually received by Hamburger Bros. & Co. out of said sum. Neither party attempted to show, either by pleading or evidence, any reason why the entire sum of \$925 was not promptly paid on the filing of the mandate. The money is shown to have been in the registry of the court and subject to the attachment lien at the time the judgment was rendered, and the presumption is that like conditions existed at the time of the filing of the mandate. When the mandate was filed, Hamburger Bros. & Co. became entitled, without further action, to demand and receive the sum in court; and their judgment must be held satisfied to the extent of such sum, in the absence of a showing that the same or a part thereof has been lost to them without fault or laches on their part. Where personal property is taken on execution the judgment is satisfied to the extent of the value of the property taken, unless the levy, without fault of the plaintiffs or the sheriff, proves unproductive, or the property is restored to the defendant in execution, or is applied to his use or to other purposes with his consent. *Freem. Ex'ns*, § 209. We see no reason why the rule stated should not be applied to this case. Property of the defendant in attachment has been seized and converted into money, and the money ordered paid to the plaintiffs in that suit. It would be manifestly unjust to permit the plaintiffs to let the money lie in court, and have other property of the defendant seized under execution to satisfy the judgment. We conclude that the trial court did

not err in holding that appellees were entitled to have the judgment credited with the proceeds of the sale of the attached property.

The appellants contend that, as the appellees did not actually tender in court the sum admitted to be owing on the judgment, the injunction should have been dissolved. The appellees sought to restrain the collection only of the amount claimed by Hamburger Bros. & Co. in excess of the sum due, and were therefore under no equitable duty to pay the sum due before they could ask of a court of equity the relief desired. Appellees tendered the sum due before they brought this suit, and even before the execution was issued, and in their petition for injunction again offered to pay the same. The execution was levied before this suit was begun. In such case appellees were not bound to actually produce the money in court, as a prerequisite to the right to be heard, but the court could hear their cause, and impose, as a condition precedent to the granting of the relief sought, such terms as were proper under the circumstances shown. We are not prepared to say that the court should have imposed upon appellees terms more onerous than those set out in the judgment. See *Spann v. Sterns' Adm'rs*, 18 Tex. 556. The object of the injunction not being to prevent the collection of the amount due on the judgment, the appellants were not entitled to judgment for that amount against the sureties on the injunction bond. There is no error in the judgment, and it is affirmed.

GLENN et al. v. SEELEY et al.

(Court of Civil Appeals of Texas. March 23, 1901.)

MORTGAGES — FUTURE ADVANCES — LIEN — FORECLOSURE — PAROL EVIDENCE — ADMISSIBILITY — DESCRIPTION — CERTAINTY.

1. Defendant executed a mortgage, reciting that it secured a certain debt as evidenced by a note of even date. The mortgagor only owed the mortgagee a small part of the sum recited on account, and the note was not executed, the mortgage and note being intended to secure the then indebtedness and future advances up to the sum named. Subsequent to its execution, but before the mortgage became due, the mortgagee took in a partner, and the mortgagor gave a note to the firm for the amount he owed on account, which was less than the amount secured by the mortgage, though the goods purchased on account during that time exceeded the amount of the mortgage, but had been reduced by payments. *Held*, in a suit to foreclose the mortgage, that the firm had a lien on the land for the debt remaining unpaid, intended to be secured by the mortgage.

2. Where a mortgage recited that it secured a debt of a certain amount as evidenced by a note of even date, which was not executed, and the mortgagor did not owe the amount recited, but subsequently, before maturity of the mortgage, the mortgagor executed a note for the balance due on his account to the mortgagee, it was error, in a suit to foreclose, to exclude parol evidence that the mortgage was given to secure future advances, though there was no fraud or mistake in drawing the mortgage.

3. Where a mortgage described the property as all that certain land situated in a certain county, and described as lots 7 and 8, in block 20, in a certain town, as shown by the map or plat of such town on record in a certain place, to which reference was made for a more particular description, such description was sufficiently definite to warrant a foreclosure.

Appeal from district court, Hill county; J. M. Hall, Judge.

Foreclosure of a mortgage by John A. Glenn and another against E. D. Seeley and others. From a judgment in favor of defendants, plaintiffs appeal. Reversed.

D. M. Short, A. G. Walker, and A. C. Prendergast, for appellants. A. P. McKinnon and L. A. Carlton, for appellees.

TEMPLETON, J. On September 21, 1896, E. D. Seeley executed and delivered to J. P. Lewis, trustee for John A. Glenn, a mortgage upon two lots of land situated in Mt. Calm, in Hill county. It was recited in the mortgage that Seeley was indebted to Glenn in the sum of \$300, as evidenced by note of Seeley to Glenn for that sum, of even date with the mortgage, bearing 10 per cent. interest from date, containing the usual attorney's fee clause, and due on November 1, 1897, and it was stated that the mortgage was given to secure said indebtedness. At that time Seeley owed Glenn \$128.75 on account for goods sold and money advanced, but was not otherwise indebted to him, and no note was then given. Shortly thereafter a note similar in terms to the one described in the mortgage was drawn, and Seeley started to sign it, but his attention was called away, and it was never signed, the fact being overlooked. After the mortgage was given, Glenn continued to advance goods and money to Seeley, the amount advanced between that time and January 30, 1897, being \$323.10. During the same period Seeley paid to Glenn \$228.50, leaving a balance due on January 30, 1897, of \$223.35. J. F. Rowe had in the meantime become a partner with Glenn and interested in the account. Seeley owed Glenn & Rowe the further sum of \$23.30, on account made by him with Rowe & Cochran, and on January 30, 1897, he executed and delivered to Glenn & Rowe his note for \$246.65, being the amount of said account and the amount he owed Glenn. The note not being paid when it matured, Glenn & Rowe brought this suit against Seeley and a person to whom he had sold the mortgaged lands. The facts above stated were alleged in their petition, and they further pleaded that, at the time of the execution of the mortgage, it was contemplated and agreed between Glenn and Seeley that Glenn should continue to advance to Seeley goods and cash as demanded until his account amounted to \$300; that the mortgage was given to secure the contemplated advances and the sum then owing on account; that the note for \$300, described in the mortgage, was to be given to cover such account and advances. It was also alleged that the

advances made between the date of the mortgage and time of the giving of the note for \$246.65 were made in reliance on the said agreement and mortgage, and in good faith. The trial court held that the plaintiffs had no lien on the lands in question, and, as the amount of their debt was below the jurisdiction of the district court, their suit in that respect was dismissed. This appeal is prosecuted from said judgment.

On the trial the appellants offered to prove by Judge Marshall Surrat the following facts: "I drew the trust deed in my office in the city of Waco at the time it bears date. Mr. Seeley came in my office, and stated to me, in substance, that he had been dealing with John A. Glenn, and was then indebted to him in some amount, I do not recall just what, and he had made an arrangement with Glenn for future dealing, by which Glenn was to make further advances to him during that and the following year, and that he desired to secure Glenn for what he then owed him and the future advances by a lien upon the two lots described in the trust deed, and he wished me to draw the papers. I discussed the matter of drawing the security with him, and the probable amount of future advances and when he was to pay same, and told him that he must name some amount as a limit, and also a limit of time of payment, and he stated that he did not expect to be at any time indebted to Glenn more than about \$300, and I think stated that he expected to pay all of it before November 1, 1897, but that said date would give him, at all events, ample time. I know he finally told me to draw it so as to secure a note for \$300, due November 1, 1897, and I did so. I do not remember whether he had me to draw the note or not. I explained to him that he could execute a note and trust deed in this way to Mr. Glenn, and deliver to him as collateral to secure any amount up to three hundred dollars which he should be indebted to Glenn, up to the maturity of the note, whether by note or open account, if taken as a collateral to the actual indebtedness, whatever it might be, and he stated that that was what he wanted to do; and the trust deed was so prepared by his instructions, and, as he stated, for that purpose, and he and his wife executed and acknowledged it there, and carried it away. My recollection is that the \$300 note was a suggestion of mine, to be deposited with the trust deed, as collateral for whatever indebtedness should really exist, and that Mr. Seeley adopted this suggestion. The conversation was brought about by Mr. Seeley coming to me to prepare security for Mr. Glenn, as before stated,"—whereupon the appellees objected to the introduction of said testimony upon the following grounds: "(1) Said testimony tends to explain what occurred in connection with the execution of the deed of trust, and it speaks for itself; (2) because the contract or agreement with the parties was reduced to writing, and what occurred is not

admissible under the general rules; (3) because there is no allegation of fraud or mistake in the drawing of the deed of trust, and the testimony is to show that the deed of trust was not to secure the debt as evidenced by the note, but for the future advances to be made." The objections were sustained by the court, and the testimony excluded. Appellants also offered to prove by the witnesses J. P. Lewis and John A. Glenn, respectively and separately, that at the time said trust deed was executed and delivered it was understood and agreed between said Glenn and the said E. D. Seeley and wife that the trust deed was to secure what said Seeleys owed Glenn, amounting to \$128.75, and for what goods, wares, and merchandise said Glenn should from that time to November 1, 1897, sell and deliver to said Seeley, and what money he should at that time advance to him, and that it was estimated between the parties to said trust deed at the time that the sum of \$300 would cover all of these amounts, and that said Glenn, after the execution of said trust deed, and upon the security thereof, from time to time from the date thereof to November 1, 1897, sold to said Seeley goods, wares, and merchandise, and advanced to him money, as shown by the account introduced in evidence in this cause; that said Glenn would not have sold said Seeley goods, etc., nor advanced to him the said money, unless said trust deed had been executed, and that the note for \$300 called for in said trust deed was to be made up of said amounts, to wit, the \$128.75, and for what goods, wares, merchandise, and money said Glenn should sell and advance to said Seeley during said time, and that that was the debt that the said trust deed secured, and that was the way the amount of the \$300 was arrived at; to the introduction of which evidence the appellees objected on the ground that there is no allegation in the pleading of fraud or mistake in drawing the deed of trust, and, there being no ambiguity in the deed of trust, it was incompetent to prove a contemporaneous agreement by oral testimony not incorporated in the deed of trust; which objections were sustained by the court, and said testimony excluded.

We are of opinion that the evidence was admissible. In *Jones, Mortg.* §§ 374-384, the law is stated thus: "It is not necessary that the mortgage should express on its face that it is given to secure future advances. It may be given for a specific sum, and it will then be security for a debt to that amount. * * * The sum expressed by the mortgage may cover a present indebtedness as well as future advances, and it is not necessary that the one should be separated from the other on the face of the mortgage. * * * A mortgage which in terms secures a promissory note for a specified amount may actually be intended to secure future advances to that amount. * * * The omission to state on the face

of the mortgage the time when the first advances are to be made is not material. It is sufficient that they are to be made from time to time as the mortgagor may desire during a specified period. The amounts of the several advances, and the times when they were actually made, and the object of the mortgage, may be shown by extrinsic proof; for in such case the proof does not contradict the mortgage, or alter its legal operation and effect in any way. Although the deed purports to be in consideration of a definite sum in hand paid at the time, it may be shown by parol evidence that the deed was made to secure advances made and to be made to that extent. * * * Parol evidence is admissible to show the true character of a mortgage, and for what purpose and what consideration it was given. Although it is for a definite sum, and secures the payment of notes for definite amounts, it may be shown that it is simply one of indemnity. * * * This language is quoted and approved in *Banking Co. v. Leonard*, 90 Ky. 103, 13 S. W. 521, where the authorities bearing on the question are collated and reviewed. See, also, *Freiberg v. Magale*, 70 Tex. 119, 7 S. W. 684. The rule that the terms of a written contract cannot be varied by parol has no application. The mortgage before us did not express all, but only a part, of the terms of the contract; hence there can be no variance. Besides, parol evidence is always admissible to show the real consideration of a contract, even when the same is different from the expressed consideration. *Johnson v. Elmen* (Tex. Sup.) 59 S. W. 253. It has been frequently held that it is competent to prove by parol that an instrument in form an absolute conveyance was in fact intended as a mortgage. It was not necessary for the appellants to allege and prove that all the purposes for which the mortgage was given were not fully stated in the mortgage because of some fraud or mistake. There was no fraud or mistake. The parties did exactly what they intended to do, except that, by accident, the note was not executed. The failure to give the note could not affect the intention of the parties to secure the debt. The mortgage having been executed with intention to secure the debt, the appellants, if the facts alleged and offered to be proved by them are true, have a valid lien on the lots in controversy for the debt intended to be secured by the mortgage, which is still unpaid. The subsequent change in the form of the evidence of the debt is immaterial. The lien, of course, will not be extended to include any debt not intended at the time of the execution of the mortgage to be covered by it. The lots were thus described in the mortgage: "All that certain land situated in Hill county, state of Texas, and described as follows: Lots seven (7) and eight (8), in block twenty (20), in the town of Mt. Calm

as shown by the map or plat of said town now of record in Hillsboro, to which reference is here made for a more particular description." This description is sufficiently definite, and a foreclosure cannot be denied on the ground of uncertainty of description. The judgment is reversed, and the cause remanded.

FIRE ASS'N OF PHILADELPHIA v. MASTERSON et al.

(Court of Civil Appeals of Texas. March 9, 1901.)

INSURANCE—FIRE POLICY—INVENTORY—INVOICES—SUBSTANTIAL PERFORMANCE—CONDITIONS—WAIVER—EVIDENCE.

1. A stock of goods covered by a fire policy was replenished from time to time by shipments from another store belonging to the insured, who kept a duplicate of the invoices of the goods so shipped, with a description of the same and their value. *Held*, that on destruction of the stock by fire the furnishing of the invoices to the insurer was not a compliance with a clause of the policy requiring an inventory to be taken.

2. Where a fire policy on a stock of goods required that an inventory should be taken, and, on a destruction of the stock by fire, insured claimed that invoices of goods placed in the store constituted a substantial compliance with the condition, a contention that it was not customary or practicable for the manager of the store, when purchasing farm produce, to receive an invoice thereof, was no excuse for not complying with the terms of the condition.

3. Insured in a fire policy, having suffered a loss, wrote the general agents of the company, asking for blanks on which to prepare proofs of loss; and the agents answered that if they were to furnish proofs of loss, and there should be any litigation, such action might be held a waiver of a defense under the policy, and that insured could doubtless procure a blank proof of loss at any book store. Subsequently the adjuster arrived and examined insured's books, but the adjuster did not state whether it would be necessary for insured to get up proofs of loss or not. *Held*, in an action on the policy, that there was no evidence warranting a submission to the jury of the question whether the insurer had waived any conditions of the policy.

Appeal from Hill county court; J. B. Reynolds, Judge.

Action by W. R. Masterson and another against the Fire Association of Philadelphia. From a judgment in favor of plaintiffs, defendant appeals. Reversed.

The appellees, W. R. Masterson and L. E. Miller, as plaintiffs below, instituted this suit in the county court of Hill county, against the appellant (defendant below) on two policies of insurance,—one in the sum of \$500, executed and delivered to L. E. Miller on the 16th day of December, 1899, and the other in the sum of \$400, executed and delivered to L. E. Miller on the 9th day of January, 1900; each of said policies running for one year, and covering a stock of groceries kept in the name of L. E. Miller at the town of Whitney, Hill county, Tex., and each of said policies providing loss, if any, payable to W. R. Masterson as his interest may appear. It was

alleged that the full face of said policies, in the sum of \$900, accrued by virtue of the total destruction of the stock insured on the 4th day of June, 1900. Defendant answered with a denial and a special plea that each of said policies contained a covenant of warranty known as the "iron-safe clause." It was alleged by the defendant that the assured neglected, failed, and refused to comply with said iron-safe clause, and neglected and failed to take the inventory required by the first section thereof either within 12 calendar months preceding the issuance of the policies, or within 30 days thereafter, and in consequence thereof said policies became null and void. Defendant also pleaded a tender, and offered to return the premium paid on said policies. Defendant further pleaded that the assured neglected and failed to keep a set of books showing a complete record of business transacted, and failed and refused to produce the books, records, and inventories called for in the iron-safe clause. Defendant further pleaded that the fire described in plaintiffs' petition was caused or procured by the assured in the policy named. By supplemental petition, plaintiffs alleged that they had complied with the terms of the iron-safe clause, but that, if the court should hold that a strict compliance with same had not been made, the same was substantially complied with, in that the merchandise which was destroyed by fire was shipped by wagon from Hillsboro to Whitney, a distance of about 13 miles, by Masterson, and that Masterson kept in his safe at Hillsboro itemized lists of merchandise so shipped and delivered to said Miller, and that the contract by which said Masterson furnished said Miller said goods as aforesaid began in the latter part of December, 1899, within less than 12 months of the time of the fire. They further alleged that the retail business, as conducted in the sale of groceries and produce or perishable articles, necessitated a constant change in said stock, and that an inventory made 6 or 12 months before the fire would not furnish the safest and best means of ascertaining the amount of the loss, and would be of no practical use in determining the amount of goods on hand at the time of the fire. Plaintiffs further alleged that after the fire defendant's agent investigated the fire, and became advised of all the facts and circumstances attending the fire, and fully informed himself of all the acts and doings of the plaintiffs relating thereto, and failed to deny liability under said policies, and led plaintiffs to believe that liability would not be denied, and that it would be necessary to furnish proofs of loss, and, so believing, and in ignorance of defendant's intention to deny liability, plaintiffs incurred expenses in connection with the proofs of loss within 60 days, provided for in the policies; that after receiving them defendant for the first time denied liability, wherefore plaintiffs say that the defenses pleaded by defendant were waived.

ed. There was a trial with the aid of a jury, resulting in a verdict and judgment in favor of plaintiffs, from which judgment defendant has duly prosecuted an appeal to this court.

Alexander & Thompson, for appellant.
Wear, Morrow & Smithdeal, for appellees.

BOOKHOUT, J. (after stating the facts). W. R. Masterson lived at Hillsboro, where he was engaged in the grocery business. L. E. Miller lived at Whitney, Hill county, Tex., where he was conducting a dry-goods business. In December, 1899, Masterson started a grocery business in Whitney, which business was placed in charge of Miller, with the agreement that Masterson should supply the groceries from his store at Hillsboro, and all the profits over and above invoice cost were to be equally divided between them. Miller had authority to buy produce, consisting of butter, eggs, chickens, etc., from the public generally, as a part of this business. Both the dry goods and groceries were kept in the same storehouse, the stocks being kept separate. Miller bought and sold country produce in connection with the grocery business. On December 16, 1899, Miller took out a policy of insurance in appellant company for \$500 on the stock of groceries, and on January 9, 1900, took out a second policy for \$400; it being stipulated in the face of each of said policies that the loss, if any, was payable to W. R. Masterson as his interest may appear. These policies contained a clause of warranty known as the "iron-safe clause," reading: "(1) The assured will take a complete itemized inventory of stock on hand at least once in each calendar year, and, unless such inventory has been taken within twelve calendar months prior to the date of this policy, one shall be taken in detail within thirty days of issuance of this policy, or this policy shall be null and void from such date. (2) The assured will keep a set of books, which shall clearly and plainly present a complete record of business transacted, including all purchases, sales, and shipments, both for cash and credit, from date of inventory, as provided for in first section of this clause, and also from date of last preceding inventory, if such has been taken, and during the continuance of this policy. (3) The assured will keep such an inventory, and also the last preceding inventory, if such has been taken, securely locked in a fireproof safe at night, and at all times when the building mentioned in this policy is not actually open for business, or, failing in this, the assured will keep such books and inventories in some place not exposed to a fire which would destroy the aforesaid building; and, unless such books and inventories are produced and delivered to this company for examination, this policy shall be null and void, and no suit or action shall be maintained thereon. It is further agreed that the

receipt of such books and inventories, and the examination of the same, shall not be an admission of any liability under the policy, nor a waiver of any defense to the same."

We only deem it necessary to discuss two questions presented by the appellant: (1) Was the warranty contained in the policies breached by the assured? and, (2) if so, did the company waive the forfeiture resulting therefrom?

The property was destroyed by fire on June 4, 1900. The undisputed testimony of the assured, L. E. Miller, and of W. R. Masterson, the beneficiary, is that there never had been an inventory taken of the goods insured. By the first clause of the warranty the assured covenanted to take a complete, itemized inventory of stock on hand at least once in each calendar year, "and, unless such inventory has been taken within twelve months prior to the date of this policy, one shall be taken in detail within thirty days of issuance of this policy, or the policy shall be null and void from such date." We have heretofore held that such a clause embraced in a policy of insurance is a warranty. *Roberts, Willis & Taylor Co. v. Sun Mut. Ins. Co.*, 48 S. W. 559. This holding met the approval of the supreme court, by its refusal of an application for writ of error. The evidence shows that the groceries contained in Miller's store at Whitney were sent by Masterson from his store at Hillsboro, and that Masterson kept a duplicate of the invoices of the goods sent by him to Whitney, with a description of the goods, and the amount that he charged for same. These invoices were tendered to the company to determine the amount of goods on hand at the time of the fire. The contention is that the furnishing of these invoices was a compliance with the warranty above set out, requiring the assured to take and preserve an inventory of his goods on hand. We do not think that this contention is tenable. The invoices did not constitute such an itemized inventory of stock on hand as was contemplated by the terms of the warranty above set out. *Roberts, Willis & Taylor Co. v. Sun Mut. Ins. Co.*, supra; *Assurance Co. v. Kemendo*, 60 S. W. 661, 1 Tex. Ct. Rep. 579; *Insurance Co. v. Knight* (Ga.) 36 S. E. 824.

The contention that it is not customary or practicable to procure from each customer from whom Miller purchased butter, eggs, and chickens a bill or invoice thereof is no excuse for not complying with the terms of the warranty requiring an inventory of the stock on hand to be taken in 30 days, unless one had been taken within the preceding 12 calendar months.

Again, it is contended by appellees that only a substantial compliance with the terms of the warranty is required. While this may be true in this case, the evidence shows that there was no compliance whatever; the undisputed evidence being that

no inventory of the stock on hand had ever been taken. The rule that a substantial compliance meets the terms of the warranty has no application in this case.

It is claimed that, if there was a breach of the warranty, it was waived by appellant. The evidence upon which appellees relied as a waiver of the forfeiture is a letter dated June 21, 1900, written by Trezevant & Cochran, general agents of the insurance company, to A. G. McMahan, at Whitney, in response to a letter by McMahan to them asking that they send blanks for Mr. Miller to prepare proofs of loss. This letter reads as follows: "June 21, 1900. A. G. McMahan, Whitney, Texas—Dear Sir: We have your favor asking us to send you blank proof of loss, so Mr. L. E. Miller may prepare proof and forward it to this office. We regret that we cannot comply with your request, but the proofs of loss which the company furnishes us with are to be used when our adjuster arrives at a satisfactory settlement of the loss, and, out of courtesy to the assured, makes up his proof for him. Then, again, if we were to furnish Mr. Miller with a blank proof of loss, if we got into a litigation with him it might be held that we had waived whatever defense we might have under the policy, by reason of our furnishing the proof of loss. From your letter, Mr. Miller seems to have an attorney, and we have no doubt that he can obtain a blank proof of loss by making application to any first-class book store in the state of Texas. Very truly yours. Trezevant & Cochran." In addition to the letter, it was shown that an agent of the defendant company examined the books with Masterson shortly after the fire. Masterson testified that "he did not tell me whether it was necessary to get up proofs of loss or not." The trial court instructed the jury that: "If you believe from the evidence that the plaintiffs failed to furnish the books, inventories, and data mentioned in the iron-safe clause, quoted above; and shall further believe from the evidence that, after the property insured was destroyed by fire, that the agents of the defendant company having the authority to adjust the loss caused by said fire investigated the same, and obtained from the plaintiffs all the books, inventories, and data which were in plaintiffs' possession, and which they kept, pertaining to said business, and after examining the same became aware of the fact that the plaintiffs had not kept and furnished the inventories, books, and data required by said iron-safe clause, and that with knowledge of said failure the said agents of defendant failed and refused to deny liability on said policies, and by acts, statements, and representations induced plaintiffs to believe that liability would not be denied, and that plaintiffs would be required to furnish the written proofs of loss provided for in the policies of insurance sued on, togeth-

er with the data and magistrate's certificate mentioned in said policies, and that plaintiffs, relying upon said acts and representations, were led to believe that it was necessary for them to prepare and furnish to defendant such proofs of loss; and if you further believe from the evidence that the plaintiffs, so believing, expended time and money and went to great trouble in preparing proofs of loss and in obtaining officers' certificates as provided for in the policies sued on; and if you further believe from the evidence that by such acts, if any, leading plaintiffs to believe that liability would not be denied and that proofs of loss would be required, the defendant waived any non-compliance with the iron-safe clause,—then you will not find for defendant on account of its plea of failure to comply with the iron-safe clause, although you may believe that the same was not in fact complied with." The evidence did not authorize the court to submit to the jury the issue of waiver. The examination of the books of the assured shortly after the fire was not in itself a waiver of the forfeiture. The agent making the examination did not instruct the assured to furnish proofs of loss. The letter from Trezevant & Cochran to McMahan upon its face shows that the general agents were seeking to avoid doing anything that might be regarded as a waiver of any defense they had to the policy. The letter referred to states that, if they were to furnish Mr. Miller with blank proofs, in the event of litigation it might be held the company had waived its defenses. It was to avoid this that the blanks asked for were not furnished. The language clearly conveyed to the assured notice that the company did not intend to waive anything. The charge was not authorized by the evidence, and it was error to give the same. For the same reason, it was error to give the charges complained of in the tenth and twelfth assignments. The court did not err in admitting the testimony complained of in the second, third, and fourth assignments, and they are overruled. Under the case as made, the court should have given the charge requested by appellant instructing a verdict for defendant, the refusal of which is made the ground of the seventh assignment. For the errors indicated, the judgment is reversed and the cause remanded.

GEBHART v. GEBHART.

(Court of Civil Appeals of Texas. Feb. 23, 1901.)

DIVORCE—WIFE'S SEPARATE PROPERTY—ALLOWANCE—APPEAL—QUESTIONS PRESENTED—BRIEFS—ASSIGNMENT OF ERRORS—REVIEW—JUDGMENT—DESCRIPTION OF PROPERTY—DEFINITENESS.

1. A husband purchased property with the intention of vesting the title in his wife as her separate estate, the deed conveying it to her

for her sole and separate use, and reciting that the cash consideration was paid by her out of her separate estate. The deferred payments were secured by notes executed by both husband and wife, and payments were made on them out of the community estate, with the intention of discharging a debt owing to the wife by the husband for money loaned before their marriage. *Held*, in an action for divorce by the wife, that it was proper to award such property to her as her separate estate.

2. Where a wife owned property before her marriage, and had been in peaceable possession under the deed conveying it, and had paid all taxes thereon, for more than five years before her husband purchased an outstanding title for the purpose of bettering her title, paying for it out of community property, at which time he owed her more than the amount paid, her husband acquired no interest in the land by such payment.

3. Where, in a divorce suit by the wife, there was no appeal from the judgment granting the divorce and refusing a divorce on defendant's cross bill, nor that part awarding the custody of their child to plaintiff, exclusion of evidence material only on such issues will not be reviewed on appeal from that part of the judgment awarding property to plaintiff.

4. Under rule 29 for courts of civil appeal (47 S. W. v.), requiring assignments of error to be copied in the brief, each one not so copied to be regarded as abandoned, an assignment of error not copied in the brief will not be considered on appeal.

5. A judgment in a divorce suit by the wife, awarding the husband 13 head of Jersey cattle subject to a certain mortgage, one bureau, one washstand, one rocking-chair, and the medical works and instruments and family heirlooms of defendant, is not indefinite in not specifying the goods and chattels awarded to him.

Appeal from district court, Dallas county; J. J. Eckford, Judge.

Suit for divorce by Bettie Gebhart against J. C. Gebhart. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Carden & Carden, E. G. Senter, and W. H. Clark, for appellant. O. N. Brown and K. R. Craig, for appellee.

BOOKHOUT, J. This is a suit for divorce brought by the appellee against the appellant in the district court for the Fourteenth judicial district of Texas upon allegations of excesses, cruel treatment, and outrages by defendant. The plaintiff asked that the custody of Margaret Myrtle Gebhart, infant daughter of the parties, should be awarded to her; alleged that defendant was indebted to her in the sum of \$2,500 or more, and asked that said indebtedness should be considered in a division of the property; that the homestead in the city of Dallas, Tex., occupied by the parties, and 71 acres of land in Kaufman county, Tex., should be decreed to her as her separate estate; and that all the household and kitchen furniture, horse, carriage, cows, etc., owned by plaintiff and defendant, should be decreed and given to her for her sole and separate use and benefit, and that of her daughter, Margaret Myrtle. The defendant filed a cross bill, praying for divorce from the plaintiff on the ground of cruel treatment by her of him of such a nature as to render their living together in-

supportable. The defendant prayed for the custody of his infant daughter, Margaret Myrtle; alleged that all of the property described in plaintiff's petition was community property; set out a list of community debts amounting to \$3,739.05; asked that the court should set apart property out of the community estate sufficient to pay said debts, to which purpose it should be applied; that the remainder of the property should be equally divided between plaintiff and defendant; and that the name which plaintiff bore before she married the defendant should be restored to her. The cause was tried without a jury, and judgment was rendered by the court granting a divorce to plaintiff; awarding her the custody of the minor child; adjudging the homestead in Dallas, Tex., and the tract of 71 acres of land in Kaufman county, Tex., to be the separate estate of plaintiff; and awarding to her all the personal community property, including all household and kitchen furniture, books, horse, carriage, water tank, etc., except 13 head of Jersey cattle, which were subject to a mortgage of \$600, one bureau, one washstand, one rocking-chair, and the medical works and instruments and family heirlooms of defendant, which were decreed to him. From this judgment the defendant has duly taken his appeal.

The court filed conclusions of fact, the first nine of which are as follows: "(1) I find that the plaintiff, Bettie Gebhart, and the defendant, J. C. Gebhart, were married in Kaufman county, Texas, on the 22d day of December, 1886. (2) I find that plaintiff and defendant were at the time of the filing of this suit actually bona fide inhabitants of this state, and that they have resided in Dallas county, Texas, as husband and wife, continuously from the time of said marriage to the date of the institution of this suit. (3) I find that, during the time plaintiff and defendant lived together as husband and wife, the said defendant was guilty of the excesses, cruel treatment, and outrages towards plaintiff as alleged in her first amended original petition, and that said excesses, cruel treatment, and outrages are and were of such a nature as to render the further living together of plaintiff and defendant as husband and wife insupportable to plaintiff. I find that all the material facts alleged in plaintiff's first amended petition as cause for divorce are true. (4) I find that as the result of said marriage of plaintiff and defendant there is one female child, Margaret Myrtle Gebhart, aged four years. (5) I find that plaintiff is a proper and suitable person to have the care and custody of said minor child, Margaret Myrtle, and that defendant is a wholly unsuitable person, and that it is for the best interest of said child that she should be placed in the custody of her mother, the plaintiff in this case. (6) I find that on the 28th day of August, 1889, Frank Field and Thomas Scurry, by general warrant

deed, conveyed to plaintiff the property on Ross avenue occupied by plaintiff as a homestead, being 150 by 130 feet, and fully described in plaintiff's first amended original petition; that said deed recited the consideration, 'Paid by Bettie Gebhart out of her separate funds, as follows: \$2,880 cash in hand,' and the execution of notes by plaintiff and defendant for the balance of the purchase money, \$2,880; that the said deed conveyed said property to the plaintiff, 'Bettie Gebhart, * * * for her sole and separate use'; that at the time of said conveyance, and prior thereto, the defendant was indebted to plaintiff in the sum of \$4,000 or more. I find that said property was deeded to plaintiff at the request and under direction of the defendant. I find that it was the intention of defendant, in having the said property conveyed to the sole and separate use of his wife, to pay off, discharge, and satisfy the amount of his indebtedness to her, and to make the same her separate estate and property. I further find that defendant agreed with his wife to pay off and discharge the deferred payments due on said homestead, and that it was his intention to vest the title to said property in his wife as her sole and separate estate. I find that \$1,600 of said purchase money is still unpaid. (7) I find, with reference to the 71 acres of land in Kaufman county—First, that, at and prior to the date of the purchase of the alleged outstanding title by the defendant, the title in plaintiff, as her separate estate, had already become vested and complete in her by the statute of five years' limitation, by reason of the fact that the testimony shows that she had held, used, and occupied the same in peaceable possession, under and by virtue of a deed conveying the same, duly recorded, and had paid all taxes thereon for more than five years; second, I further find, from the evidence in the case, that the purchase of the outstanding alleged title made by defendant was made by him for the sole and exclusive use and benefit of his wife, the plaintiff herein, and that such conveyance of such outstanding title was procured by defendant to be made for the purpose of merging such outstanding title in the plaintiff herein as her separate estate, and not as community property. I further find that said 71 acres is subject to a mortgage for \$1,050. (8) I find that plaintiff and defendant have personal community property as follows: Household and kitchen furniture; horse and carriage; water tank; books; one herd Jersey cattle, consisting of about thirteen head, which herd of cattle is subject to a mortgage for about the sum of \$600. (9) I find that all the other personal property is the separate property of plaintiff."

The evidence is sufficient to support the facts as found by the trial court embraced in the above conclusions.

There is no assignment of error presented in the brief of the appellant challenging the

correctness of the judgment decreeing a divorce in favor of plaintiff. Nor is there any complaint made of the court's refusal to decree a divorce in favor of defendant upon his cross bill. No complaint is made to that part of the decree awarding the custody of the minor child to plaintiff.

Appellant contends (1) that the court erred in adjudging the land on Ross avenue to plaintiff as her separate property; (2) in adjudging the 71 acres in Kaufman county to plaintiff as her separate property; (3) that the court erred in excluding certain testimony offered by defendant.

The property on Ross avenue was purchased by defendant for the purpose and with the intention of vesting the title in plaintiff as her separate estate. He caused the same to be conveyed to her. The deed recites that the cash consideration was paid by her out of her separate estate. The deferred payments were secured by notes executed by both plaintiff and defendant, and payments were afterwards made on these out of the community estate. The deed on its face placed the title of the property in Mrs. Bettie Gebhart for her sole and separate use. The status of the title of the property then was fixed by the deed. The fact that the deferred payments were made out of the community fund would not change the status of the title, especially when it was the intention in making such payments to discharge a debt owing to the wife by the husband for money loaned by her to him before their marriage. *Schuster v. Jewelry Co.*, 79 Tex. 179, 15 S. W. 259; *Aultman, Miller & Co. v. George* (Tex. Civ. App.) 34 S. W. 652; *Cavil v. Walker* (Tex. Civ. App.) 26 S. W. 855. We conclude that there is no error in that part of the judgment awarding the property on Ross avenue to plaintiff.

2. The 71 acres of land in Kaufman county was the property of plaintiff before her marriage to the defendant. The title had become fully vested in her under the statute of limitations of five years. The money expended by the defendant in purchasing the title of the Rankin heirs was to perfect plaintiff's title to the land. It is not shown that the plaintiff's title was bettered by the conveyance procured by him. The fact that the defendant expended \$557 out of the community fund for the purpose of acquiring the title of the Rankin heirs gave him no interest in the land. The most that could be claimed by appellant would be that the community had a claim against the separate estate of the wife for the amount so expended. But it appears that defendant was largely indebted to plaintiff for money loaned him by her prior to their marriage, and it does not appear that the amount expended by him, even if the same would be considered a charge against her estate, is more than the amount that he owed her.

3. It is contended that the court erred in excluding certain testimony offered by de-

pendant. As before stated, complaint is not made in any of the assignments of error to that part of the judgment granting plaintiff a divorce, and in refusing a divorce on defendant's cross bill, or to that part awarding the custody of the minor to plaintiff. The evidence excluded, if admissible for any purpose, only became material on the issues raised by the pleadings for a divorce, and upon the question as to whether plaintiff was a proper person to award the custody of the minor. In the absence of an assignment complaining of the judgment in these respects, we are not called upon to determine whether or not the evidence was improperly excluded.

The first assignment of error is not copied in the brief, and hence we are not authorized to consider the same. Rule 29 for Courts of Civil Appeals, 84 Tex. 701, 47 S. W. v.; Chappell v. Railway Co., 75 Tex. 82, 12 S. W. 977; Cooper v. Lee, 1 Tex. Civ. App. 17, 21 S. W. 998.

The second assignment is only partially copied. In the part copied complaint is made to that part of the judgment which awards appellant certain personal property, in that the same is indefinite in not specifying the goods and chattels awarded to him. We have carefully examined the judgment, and do not think it subject to this criticism. Finding no reversible error in the record, the judgment is affirmed.

ROBERTSON v. KIRBY et al.

(Court of Civil Appeals of Texas. March 23, 1901.)

EJECTMENT—FINDINGS—OBJECTIONS—WAIVER—PRIOR POSSESSION—PRESUMPTION OF TITLE—REBUTTAL—EVIDENCE—SUFFICIENCY.

1. Rev. St. art. 1332, provides that a special verdict shall be conclusive as between the parties. Held that, where no complaint was made at the trial or in the motion for a new trial of a verdict of the jury, it was conclusive on appeal.

2. Where a judgment recited that it was entered on the verdict of the jury and the facts found by the court, and the court made a finding to the effect that plaintiff's possession was taken and maintained under a certain title, the fact that such finding was copied in the transcript among the conclusions of law did not prevent it from constituting a finding of fact.

3. Findings that the man named W. to whom the land in controversy was granted was a different person from the W. under whom plaintiff claimed title, and that the certificate sold to plaintiff by the administrator of one W. was never located on the premises in question, and that plaintiff's possession was under such certificate, were sufficient to overcome the presumption of title arising from plaintiff's prior possession.

Error from district court, Taylor county; N. R. Lindsey, Judge.

Ejectment by Hattie C. Robertson against A. H. Kirby and others. From a judgment in favor of defendants, plaintiff brings error. Affirmed.

Felix H. Robertson and L. W. Campbell, for plaintiff in error. J. M. Wagstoff, Kirby & Kirby, and Theodore Mack, for defendants in error.

STEPHENS, J. This writ of error is prosecuted from a judgment denying Hattie C. Robertson recovery of a tract of land situated in Jones county. She sought to eject defendants in error, who were mere intruders, by showing prior possession of the land and a chain of title from the patentee, Henry B. Williams. The case was submitted to the jury on special issues, and, as no complaint was made in motion for new trial or otherwise in the court below of the verdict, it becomes conclusive as to the facts found. Rev. St. art. 1332.

In response to the first and second special issues submitted the jury found that the Henry B. Williams to whom the land was granted was not the Henry B. Williams under whom plaintiff in error claimed, thus establishing that she had no title to the land sued for. There is no room for difference of opinion as to the meaning of this verdict, for upon the second issue it contains an express finding that the certificate sold by the administrator of the estate of Henry B. Williams, deceased,—the sale under which plaintiff in error claimed,—was not the certificate located on the land in controversy, which, according to the verdict upon the first issue, had been granted to a different Henry B. Williams. The case, then, is not one of mere failure to trace the title back to the sovereignty of the soil, but one in which it is established that the plaintiff in an action of trespass to try title is without title to the land sued for; that is to say, the verdict establishes conclusively (1) that the certificate laid on the land in controversy never belonged to the estate of Henry B. Williams, deceased, but was the property of a different Henry B. Williams; and (2) that it was not the certificate sold by the administrator of that estate. The court found—of which no complaint was made, and which there was evidence to sustain—that the prior possession relied on by plaintiff in error was taken and held under the title arising from the administrator's sale. We must accept this finding also. Rev. St. art. 1331. True, it is found in the transcript among the conclusions of law filed by his honor, the trial judge; but it is in reality a finding of fact, and the judgment recites that it was entered upon the "verdict of the jury and the facts found by the court."

The question of law to be determined, then, is, was the presumption of title arising from prior possession rebutted by the facts above stated? The learned district judge held that it was, and we are constrained to adopt the same view. The case is distinguishable, we think, from *House v. Reavis*, 89 Tex. 623, 35 S. W. 1063, *Wat-*

kins v. Smith (Tex. Sup.) 45 S. W. 560, and that line of cases, and seems more analogous to Bates v. Bacon, 66 Tex. 348, 1 S. W. 256. Suits to recover land by showing prior possession and title out of the state have been treated by our supreme court as analogous to those in which proof of superior title under a common source is relied on. In Ferguson v. Ricketts (Tex. Sup.) 57 S. W. 19, which was of the latter class, it was held that recovery might be defeated by showing that the original grantee, who made a deed to the common source, had made a previous conveyance to another, as that was held to rebut the presumption of title in the common source, though it was not otherwise or conclusively shown that the common source had not acquired this title. In the course of the opinion it is said, "No presumption arises that the common source has acquired an independent outstanding title." The case was distinguished from Rice v. Railway Co., 87 Tex. 90, 26 S. W. 1047, "in which the title of the common source was not derived directly from the original grantee." By analogy the same distinction may be made between House v. Reavis and this case. Since the title under which possession was taken by the grantor of plaintiff in error was fully exhibited, and was affirmatively shown, as found by the jury, not to be a title to the land in controversy, the evidence of title which possession unexplained affords was rebutted, and no presumption arose that "an independent outstanding title" had been acquired. As was said by Chief Justice Gaines in Watkins v. Smith, supra, of the effect of possession as evidence of title: "It is not a rule of property. It is a mere rule of evidence, and is founded upon the principle that, since ownership is a usual concomitant of possession, it is a reasonable prima facie inference that the possession of property is the owner of such property." Upon the findings of fact found in the record, the judgment is affirmed.

PHIFER et ux. v. MANSUR & TEBBETTS IMPLEMENT CO.

(Court of Civil Appeals of Texas. March 23, 1901.)

NEW TRIAL—NEWLY-DISCOVERED EVIDENCE—TRIAL COURT'S DISCRETION—APPEAL—ORIGINAL EVIDENCE—AGENT'S STATEMENTS—RES GESTÆ—EVIDENCE TO CONTRADICT WITNESS.

1. Where a new trial was sought on account of newly-discovered evidence, the trial court's refusal to grant same would not be disturbed unless clearly wrong, since the granting of a new trial is in the discretion of the trial court.

2. Where newly-discovered evidence relied on in a motion for a new trial was proof of statements of plaintiff's agent, not shown to have been authorized nor to have been *res gestæ*, the refusal of a new trial was not clearly wrong, since such statements were inadmissible as original evidence, which alone, when

newly discovered, would warrant the granting of a new trial.

3. Where a sale was pending for several days, an affidavit by a stranger to the transaction that on the "occasion" thereof the agent of one of the parties made a statement to him regarding such sale was insufficient to show that such statement was part of the *res gestæ*.

4. Where evidence, newly discovered by defendant and relied on in a motion for a new trial, consisted of statements of one of his own witnesses contrary to the latter's testimony on the trial, the denial of such motion was not an abuse of judicial discretion.

Appeal from district court, Comanche county; N. R. Lindsey, Judge.

Action by Mansur & Tebbetts Implement Company against Mc. A. Phifer and wife. From a judgment for plaintiff, defendants appeal. Affirmed.

E. C. Gaines, for appellants. Russell & Brightman and McCormick & Spence, for appellee.

CONNER, C. J. In a suit in trespass to try title, appellee secured the verdict of a jury and judgment of the court for the title and possession of the south one-half of block No. 63, situated in Comanche, Tex., now claimed by appellants as a homestead. From such judgment appellants have prosecuted this appeal, on the sole ground of alleged error by the trial court in overruling their motion for new trial predicated upon the newly-discovered evidence shown by the affidavits made part of the motion. Appellee claimed by virtue of a certain deed to the premises in controversy, absolute in form, duly executed by Mc. A. Phifer and his wife, Nancy Phifer, on the 3d day of June, 1897. Appellants alleged that this deed, while absolute on its face, was in fact executed and delivered as a mortgage or security for a deferred payment of \$600, to be made by said Mc. A. Phifer on a certain threshing machine purchased from the appellee company through its agent, one T. A. Smith. The evidence was conflicting on the issue stated. That the premises constituted the homestead of Mc. A. Phifer and wife seems clear, and there is evidence also tending to show that the real transaction was one in which said agent, Smith, sold Mc. A. Phifer a steam thrasher for \$1,250, for which the latter's notes for \$650 and said deed to secure the remainder were accepted. But said Smith, whose deposition was read in evidence by appellants, testified that the deed was intended as a "straight sale," and, in effect, that said conveyance had been accepted as payment of the \$600 therein named as the consideration, and not as security. The notary public who took the acknowledgment of Mc. A. Phifer and wife also testified to the same effect, and that it was so explained to, and understood by, appellants. The newly-discovered evidence relied upon is that shown by the affidavits of C. P. St. Clair and H. H. Vaughan and C. M. Davis. The affidavit of the two latter persons is to the effect that in June, 1898 (about one year after the execution of the deed in question), in the course

of a conversation with said Smith, he stated that Mc. A. Phifer had never paid a dollar on the thresher in question, but that he (Smith) "had a cinch" on him for a part of it; "that he had a lien on his place; * * * that he had fixed it so that he considered it safe by taking a 'straight deed,' and then giving Phifer a lease contract providing for the payment of rent, and agreeing to convey the place back to Phifer on payment of the sum the same stood for." C. P. St. Clair stated in his affidavit that on the "occasion" of said sale to Mc. A. Phifer said Smith made his headquarters at affiant's business house, and "that on said occasion * * * Smith stated that he was selling Mc. A. Phifer said separator and engine, * * * and that he was taking as security for part payment on said machinery a mortgage or lien on the residence in which said Phifer lived, and, when asked if such instrument would not be doubtful in its binding force, he said he thought Phifer had another homestead or another place, and that he thought the way he was arranging it would be valid and binding." St. Clair further states that, "while I cannot now remember the exact date [of the conversation], I do remember that it was on the occasion on which he made a sale of a separator and engine to Mc. A. Phifer, and I do not recollect of his being here in Comanche at any time soon after that." The testimony further shows that the negotiations for the sale of the thresher were pending for a number of days, during which Smith went to Dallas to consult with the appellee's attorneys; he (Smith) having been informed that a mortgage could not be legally taken on Mc. A. Phifer's homestead. From Dallas he returned to Comanche with said deed and a lease contract giving Phifer the right to repurchase, which instruments, after some two or three days' further negotiation, were duly executed by the respective parties.

While appellate tribunals will not, in a proper case, hesitate to grant new trials on account of newly-discovered evidence, yet the discretion involved is committed, in the first instance, to the trial court, and the conclusion reached by that court will not be disturbed, except when clearly wrong. *Railway Co. v. Forsyth*, 49 Tex. 178; *Mitchell v. Bass*, 26 Tex. 372; *Railway Co. v. Sciacca*, 80 Tex. 356, 16 S. W. 31.

We feel unable to say that the trial court was clearly wrong in refusing a new trial in this instance. As shown by the record, the evidence of H. H. Vaughan and C. M. Davis is inadmissible as original evidence, and upon this ground alone could the new trial have been granted. The evidence of C. P. St. Clair does not seem to be clearly within the rule. To be admissible as original evidence, the declaration of the agent must be shown to have been authorized by the principal, or to have been made as part of the res gestæ of the act or business committed to,

and performed by, such agent. In other words, the declaration of the agent, to bind the principal, must, generally, not only relate to the business then pending, but must also be such as is made during its continuance, et dum fervet opus. See 2 Whart. Ev. § 1177; *Mechem, Ag. § 715*; *Bernhelm v. Cumby*, 1 White & W. Civ. Cas. Ct. App. § 586. St. Clair's statement does not clearly show the time of the declaration of which he speaks. On the "occasion" when the sale of the thresher took place, in the light of the evidence, is quite indefinite. He does not certainly locate the time of the conversation as on the agent's first or second visit. He states that he does not remember that the agent was there within a week after, and this, as well as other expressions, perhaps indicates that the conversation was on the occasion of the agent's second visit, when the sale of the thresher was consummated; but, if that be admitted, it does not clearly appear whether it was at the time of, before, or after the final agreement or consummation of the sale. The wife refused to act for several days, and it is by no means clear that a casual conversation in this interim with a stranger to the transaction would bind the principal. Besides, the declaration but tended to contradict the sworn statement of the agent introduced by appellants themselves. As stated, there is evidence tending to show that the deed was intended as security only; but there is evidence to the contrary, and there is no assignment questioning the sufficiency of the evidence to support the verdict and judgment, and on the entire record we therefore feel unable to say that the trial court was in error in overruling the motion for new trial. The judgment is affirmed.

GULF, C. & S. F. RY. CO. v. KNOX et ux.¹
(Court of Civil Appeals of Texas. March 2, 1901.)

**DANGEROUS RAILROAD BRIDGE—NEGLIGENCE
—BOOK OF RULES—WARNING TO EMPLOYEES—ASSUMPTION OF RISK.**

1. The maintenance of a railroad bridge having one overhead beam lower than the other beams, and so low that it may strike employes standing on tops of cars passing through the bridge, and which is not protected by tell-tales or whiplashes, is negligence on the part of the company.

2. Giving a brakeman a printed book of rules, when he is first employed, which advises him that it is dangerous to stand erect on the top of cars, and especially on high cars, when passing under a certain bridge, and that there are no tell-tales on the bridge, is not sufficient, as a matter of law, to show that a brakeman killed by striking the bridge when standing erect on a high car assumed the risk thereof.

Appeal from district court, Tarrant county; Irby Dunklin, Judge.

Action by J. E. Knox and wife against the Gulf, Colorado & Santa Fe Railway Company to recover for the wrongful killing of a son of plaintiffs while in the employ

¹ Writ of error denied by supreme court.

of the defendant. From a judgment in favor of plaintiffs, defendant appeals. Affirmed.

West, Smith & Chapman and J. W. Terry, for appellant. Carlock & Gillespie, for appellees.

HUNTER, J. This suit was brought by the father and mother to recover from the railroad company damages occasioned by the death of their minor son, Alvin Knox, a brakeman in appellant's employ, who was killed on December 26, 1899, by a crossbeam on the north end of appellant's steel bridge across the Trinity river at Ft. Worth, while walking back to the rear end of the train on top of a furniture car. There were a verdict and a judgment for the appellees of \$1,000, apportioned equally between the father and mother, and from this judgment the company has appealed.

The evidence was sufficient to establish that the son was a minor about 20 years old, of ordinary intelligence; that he had been in the employ of the company as call boy at Cleburne, and upon his own application made to the company on August 17, 1899, stating that he was over 21 years old, had been employed as a brakeman on a freight train, his run being from Cleburne, Tex., to Purcell, Ind. T.; that he had made 7 or 8 round trips over the portion of the road named, thus having passed through and over the bridge on which he was killed some 14 or 15 times; that in the printed application for the position of brakeman he was made to sign a statement that he understood that every employé of said company whose duties were in any way prescribed by the rules must always have a copy of the rules at hand when on duty, must be conversant with every rule, must render all assistance in his power in carrying them out, and agreed that such rules, including any changes or additions thereto, should be a part of his contract of employment; that he understood that at some points on the line there were platforms, sheds, roofs, water-tank frames, telegraph poles, bridges, and other obstructions which may be dangerous, and that he must inform himself of such obstructions, and use due care to avoid injury thereby; that he understood that it is dangerous to stand erect upon cars, and especially cars of extraordinary height, while passing over, through, or under bridges or viaducts, trolley wires, and other overhead structures, as shown under warnings on time cards, at which are no tell-tales or other warnings; and that necessary caution must be used by all employés to protect themselves from injury from overhead structures at said points while riding on top of cars; that he was furnished with a printed time card and rules, which contained the following: "All employés are expected to protect themselves from personal injury by avoiding risks. Those who

may receive injuries on account of taking risks will have no claim upon the company. Warnings: All employés are hereby notified that it is dangerous to stand erect upon cars, and especially cars of extraordinary height, where passing over, through, or under the following named bridges or viaducts, and necessary precaution must be used by all employés to protect themselves from injury from overhead structures at said points while riding on top of cars." Here follows a list of bridges, 23 being on the main line, and in this list is "bridge No. 3,217, between mile-post 348 and 349, name 'Trinity River.'" Said bridge No. 3,217 is the bridge where Knox was killed. The defendant company has no tell-tales or whiplashes, or anything of that sort, in use for the purpose of warning employés of the approach to these bridges. It further appears from the evidence that all the crossbeams of the bridge in question were 20 feet and 6 inches above the rails, except this one at the north end of the bridge, which was 12 inches lower than the others. It does not appear that Alvin Knox had ever been informed of this fact. At the time he was killed he was walking erect on a furniture car back to his position on the caboose (said car was about 3 feet higher than an ordinary car), when the back of his head struck the said low beam, and his skull was crushed, from which injury he died about 12 hours later. The said beam at the north end of the bridge being a foot lower than the others, and only 19 feet and 6 inches above the rails, made the bridge a dangerous structure for brakemen to pass through, standing or walking on the tops of cars,—especially tall cars,—and one calculated to deceive them, and thus cause them to receive unexpected injuries. And for this reason the bridge seems to have been negligently constructed, and constituted a dangerous menace to life, and a trap in which appellant's brakemen are liable at all times to lose their lives in passing through it, especially as no tell-tales or whiplashes have been erected to warn them of their near approach to the bridge.

There are but two assignments of error, both complaining of the court's action in refusing to give special charges asked. One of the charges was a peremptory one to find for the defendant. The other was as follows: "If you believe from the evidence in this case that Alvin Knox, son of plaintiffs, on the 17th day of August, 1899, made a written or printed, or partly written and partly printed, application to the defendant for employment by it as a brakeman on its railroad, and that said application was signed and executed by him; and if you further believe from the evidence that there is on said application a written or printed statement signed by the said Alvin Knox, by the name of A. Knox, in which statement the said Alvin Knox acknowledged the receipt of a copy of the current time table

and book of rules and regulations for the information and government of employes of defendant, and that he, the said Alvin Knox, carefully read and understood the same; and if you further believe from the evidence that rule 159 in said current time table and book of rules and regulations states that all employes are notified that it is dangerous to stand erect upon cars of defendant, and especially cars of extraordinary height, while passing over or under certain bridges and viaducts named in said rule, and that the bridge of defendant over Trinity river, where Alvin Knox was killed, is mentioned in said rule; and if you further believe that said rule requires all employes of defendant to use all necessary precautions to protect themselves from injury from overhead structures at said points named in said rule, while riding on the top of cars of defendant; and if you further believe from the evidence that Alvin Knox, while passing over the said Trinity River Bridge on the top of a car of defendant of either ordinary or extraordinary height, stood or walked erect; and if you believe that said Alvin Knox was then and there killed while so passing said Trinity River Bridge; and if you further believe from the evidence that the proximate cause of the death of the said Alvin Knox was the result of his so standing or walking erect while so passing over said bridge; and if you further believe from the evidence that the bridge over the said Trinity river was constructed and being used by the defendant when the said Alvin Knox was employed by it, and was in the same condition as to height that it was at the time the said Alvin Knox was killed, and that the risk or danger of going over the same with the cars of defendant had not been increased during the time the said Alvin Knox was employed by the defendant,—then you are instructed that the risk or danger, if any, which the said Alvin Knox incurred when he was killed was assumed by him, and he cannot recover in this case, and you will find for the defendant, and so say by your verdict." Counsel's third proposition under this requested charge raises the only important question in the case, and that proposition is as follows: "Having been advised in writing that it was dangerous to stand under the bridge in question on any cars, and especially on cars of unusual height, and having been also advised that there were no tell-tales or other warnings at said bridge, Alvin Knox, by accepting and continuing in the employment as a brakeman, as a matter of law assumed the risk of injury from such bridge, and, as a matter of law, was guilty of contributory negligence." Judge Redfield, of the supreme court of Vermont, once said, in an opinion delivered by him, that "a great lawyer is master of his case, and presents in an appellate court but few points, and those only upon which his case turns." The able coun-

sel of appellant in this case show themselves to be great lawyers, according to Judge Redfield's rule; for they present only, in effect, but one assignment of error, and raise substantially but one point, and that is the one upon which the case turns. The proposition of appellant is that, if Alvin Knox was advised by the book of rules that it was dangerous to stand erect on the top of the cars while passing through this bridge, he assumed the risk of injury, and, if killed by reason thereof, the parents could not recover. This assumes that the delivery to a brakeman, when he is first employed by the company, of a printed book of rules notifying him that the bridges may be dangerous or are dangerous to pass under standing erect, is sufficient warning for the balance of his life to place the risk on him of injury if he should, under any stress of circumstances, forget the warning and be injured by the dangerous structure. It takes the issue from the jury as to whether such warning was adequate. Many railroad men testify in this case that the best way known of preventing injury to brakemen by low overhanging bridges is to erect "tell-tales" or "whiplashes," as they call them, overhead across the road near the dangerous bridge, so that the man standing or walking on the top of a car, coming in contact with the suspended ropes or strips of leather or wires, will be warned at the very instant the danger becomes imminent, and can stoop or sit down until the bridge is passed. It is said to be a cheap contrivance, quite effectual, and in use on many of the best and modern equipped railroads. The special charge and the proposition ignore these features raised by the evidence in this case, and hence, for this reason, it was properly refused. Mr. Beach, in his work on Contributory Negligence, speaking of these low bridges, says: "The duty of freight-train men requires them, or some of them, to be upon the top of the cars much of the time the train is in motion. They must stand erect and go rapidly from one car to another in the night as well as in the day time. If the roof or overstructure of the bridge is so low that it will strike a brakeman standing erect upon the top of his train, it is essentially a murderous contrivance, and it is not creditable to our jurisprudence that such buildings are not declared a nuisance. There is nothing in the Reports worse than the cases that sustain the corporations in building and maintaining these mantraps." (2d Ed.) § 63; Shear. & R. Neg. (4th Ed.) § 198 et seq.; Railroad Co. v. Cooley's Adm'r (Ky.) 40 S. W. 340. In Cooley's Case, supra, Justice Paynter, speaking for the court of appeals of Kentucky, said: "It was a constant peril to the lives of its employes whose duties called them on top of trains. When a brakeman's life is lost in consequence of such negligence, the company cannot excuse itself by simply showing that he knew be-

fore receiving the injury the bridge was so low that he could not pass under it with safety while standing on top of the cars. Exigencies or other causes may arise in the discharge of his duties which may cause him to forget the danger with which he is threatened, and thus cause his failure to avoid injury. * * * If he failed to measure the exact distance between the top of the car and bridge with his eye, or did so, but failed, after reasonable effort, to get his body in exact position to avoid a collision with the bridge, it seems to us that the appellant should suffer the loss, and not the intestate's estate." *Railway Co. v. Duvall* (Ky.) 54 S. W. 741; *Railway Co. v. Kime* (Tex. Civ. App.) 51 S. W. 559. Finding no error in the judgment, it is affirmed.

MILLER-STONE MACH. CO. et al. v. BALFOUR.¹

(Court of Civil Appeals of Texas. Feb. 9, 1901.)

PURCHASE OF MACHINERY—BREACH OF WARRANTY—RESCISSION—DAMAGES.

1. Where, in an action for rescission of a contract for the purchase of machinery, for breach of warranty, the petition claimed damages for freight, drayage, and damages for putting the machinery in place in the building, an exception to the petition on the ground that such items of damage were remote and speculative was properly overruled.

2. Plaintiff purchased a machine under a warranty that it would, with proper management, perform well, and, if the purchaser was unable to make it do so, he should give notice to the seller, and give a reasonable time to remedy the defects, and, if the fault was in the machine (to be determined by the seller's practical engineer), another should be substituted in its place. The machine did not operate well, and the seller was notified; its engineer determining that the defects were in the fan and seed flue, which could have been remedied at a small expense. At the purchaser's request, on September 28th a new fan was put in, but no demand for any other change was made. The jury found that after October 1st the machinery performed tolerably well. Purchaser on October 9th brought suit to rescind, but continued to operate the machinery until October 18th. It did not appear that the defendant was guilty of fraud. *Held*, that plaintiff was not entitled to a rescission of the contract.

3. In a suit by a purchaser of machinery to rescind a contract for breach of warranty, where the jury found the value of the property at the time it was delivered to be \$2,000, and the court found the value of the same property a year later to be \$2,500, there was such a difference between the findings that a judgment based thereon must be set aside.

4. Where, in a suit for rescission of a contract for the purchase of machinery, for breach of warranty, the rescission was refused, but there was no fraud on the part of the seller, it was error to allow the cost of drayage, and putting the machinery in place, as damages to plaintiff.

Appeal from district court, Grayson county; Don A. Bliss, Judge.

Suit by Thomas Balfour against the Miller-

Stone Machinery Company and others. From a judgment in favor of plaintiff, defendants appeal. Reversed.

Chas. R. Crenshaw, E. F. Brown, and Capps & Canty, for appellants. A. L. Beatty, for appellee.

BOOKHOUT, J. This suit was instituted by Thomas Balfour against the Miller-Stone Machinery Company, William Capps, and G. E. White for the rescission of a contract, and for damages sustained by a breach thereof. Plaintiff alleges: That on the 16th day of July, 1897, plaintiff and defendant Miller-Stone Machinery Company entered into a contract whereby plaintiff purchased, and defendant agreed to deliver to him in Sherman, Tex., certain machinery (a gin outfit) by August 20, 1897, and represented and warranted that the same would, with proper management, perform well, and that said machinery was of superior quality and manufacture, and would gin from 40 to 50 bales of cotton per day, and further represented that said machinery, except the engine and boiler, were manufactured in Birmingham, Ala., and would be shipped from said point, and would be of the Smith manufacture. The consideration was the payment of freight, not over 70 cents per 100, and \$2,975, for which he executed and delivered to said defendant his promissory notes set out in defendant's answer; and, at the time of the execution and delivery of the notes, plaintiff executed a chattel mortgage on said machinery to secure the payment thereof. Plaintiff alleges that, with proper management, said machinery failed to perform well and to do the work as warranted. The plaintiff properly notified defendant of the defects, stating as far as he was able the particular defects, and wherein it failed to conform with the warranty, and furnished all the aid and assistance in his power to remedy the defects; and defendant sent its practical engineer to Sherman several times, and made certain changes in the arrangement of said machinery, but failed to make it conform to its warranty, and wholly failed to take said property back and substitute other machinery. And he alleged specifically certain defects in the machinery, and on or about October 9, 1897, he declined to pay his first note due, and tendered back the machinery and filed suit. That the machinery contracted to be delivered was worth \$4,000, and that delivered not more than \$1,000. As special damages the following items are alleged: Drayage, \$45; cost of placing the machinery in the building, arranging and fitting same up according to instructions of defendant, \$250. Plaintiff, as cause of action against Smith Sons Gin & Machinery Company, William Capps, and G. E. White, alleges that, as soon as this suit was filed, defendant Miller-Stone Machinery Company transferred the note first due to said Smith Sons Gin & Machinery Company, fraudulently and for the purpose

¹ Writ of error dismissed for want of jurisdiction.

of defeating the jurisdiction of this court; that G. E. White is trustee under said deeds of trust, and William Capps, substitute trustee and attorney for defendants Miller-Stone Machinery Company and Smith Sons Gin & Machinery Company, instituted suit in the county court of Tarrant county on said note for said Smith Sons Gin & Machinery Company, and at same time advertised the machinery for sale by substitute trustee to pay all the notes,—and prayed for writ of injunction. Defendants answered by demurrer, exceptions, and general denial, special answer setting up the notes and chattel mortgage, and praying for foreclosure and judgment on the notes; also facts for writ of sequestration; and on 2d day of September, 1898, sequestered the machinery and took it into possession of Miller-Stone Machinery Company. The notes are eight in number, from date August 4, 1897, aggregating \$2,875, bearing 10 per cent. interest from August 15, 1897, and 10 per cent. attorney's fees if placed in the hands of an attorney for collection or sued upon; and failure to pay any one matures all. Defendants also allege that machinery was in all particulars what it was represented to be, and defendant complied with its contract. And then, under the warranty written notice must be given wherein it falls to comply with the warranty, and a reasonable time given to remedy the defect. Then the purchaser is to render all necessary aid, and if it cannot be made to work, and the fault is in the machinery, which fact is to be determined by the practical engineer of defendant, in such case it is to be taken back, and new machinery substituted. Defendant denied that there was any defect in the machinery, and charged that, if the machinery did not perform well, it was the result of bad management on the part of plaintiff and his employes. There was judgment for plaintiff for \$949.13 and costs, and the injunction against the collection of the notes was perpetuated.

Conclusions of Law.

Appellants complain of the action of the court in overruling their special exception to that part of the petition claiming damages for freight and for drayage, and damages for putting the machinery in place in the building. The objection made to these items of damage is that they are remote and speculative. There was no error in overruling this exception. The petition sought a rescission of the contract, and there might have been shown a state of facts that would have authorized a recovery for these items.

The court did not err in overruling the exception to the allegations in the petition in reference to the notice given by plaintiff to the machinery company. The petition alleged that the machinery company acted upon the notice as given, and sent a practical engineer to Sherman to make the necessary changes in the machinery. The case was

tried upon special issues. The jury found, among other things, that the plaintiff was unable to make the machinery perform well, upon starting it, whereupon he notified defendant machinery company of this fact; that defendant sent its engineer, who examined it and determined that there were defects in the fan and seed flue. These defects could be repaired at a cost of \$50 for the seed flue and \$80 for the fan; that the defects could have been remedied in three days at a loss to plaintiff of \$30; that entire pneumatic suction and elevator system, including the fan, could have been put in in about two weeks at a cost of \$375. It was shown in evidence that about the latter part of September there were changes made in the fan and other parts of the elevator system. The jury found that on October 1, 1897, up to the time the machinery was shut down, it performed tolerably well. The jury further found that the machinery, had it come up to the terms of the contract, would have been worth \$3,257; that the machinery delivered was worth \$2,000; that the drayage amounted to \$45; and that the cost of placing the machinery was \$250. The court found that the value of the machinery on September 2, 1898, when sequestered by the company, was \$2,500. The court declined to rescind the contract, but gave judgment for plaintiff for the difference between the value of the machinery had it complied with the contract and the value of the machinery delivered, to wit, \$1,257, and to this added the cost of putting it in place and of drayage, making \$1,552, and deducted this sum from the contract price, \$2,875, and on this difference (\$1,323) allowed interest at 10 per cent. per annum up to September 2, 1898, and added 10 per cent. as attorney's fees, making \$1,612.96, and deducted this amount from the value of the machinery at the time it was sequestered and converted by the company as found by the court, to wit, \$2,500; and for this difference (\$887.04), with interest thereon at 6 per cent. per annum, gave judgment for plaintiff.

Appellee does not agree with the theory upon which the trial court rendered judgment, but insists that he is entitled to have the contract rescinded, and a judgment for such damages as he sustained in the way of expenditures made on the faith of the contract, and, if this is not so, then the judgment should be affirmed. He has cross-assigned error, in which he presents the above contention, and further insists that upon rescission the court should allow appellee the amounts expended for freight, drayage, placing machinery, and the amount expended by him for the construction of a building for the machinery, less the amount the building enhanced the value of the realty. The question raised by the cross assignments logically is the first in order and will be first disposed of. Did the court err in refusing to rescind the contract? The

machinery was sold upon the following warranty: "Miller-Stone Machinery Company warrants that the machinery above described will, with proper management, perform well. Upon starting it, if the purchasers are unable to make it operate, written notice, stating wherein it fails to conform with the warranty, is to be given by the purchasers, and a reasonable time allowed to get it and remedy the defects, if any exist. If they are not able to make it operate well (the purchaser rendering necessary and friendly assistance), and the fault is in the machinery (and this is to be determined by our practical engineer), it is to be taken back, and another substituted in its stead. But, if the purchasers fail to make it perform through improper management or want of skill, the purchasers are to pay all necessary expenses incurred. And the purchasers agree to have a skilled engineer to run it." The machinery upon being started did not perform well. The purchaser notified the machinery company, and the company sent its engineer to remedy its defects. He determined that the defects were in the fan and seed flue, which could have been remedied by the substitution of a new fan and seed flue, at an expense of \$160. On September 28, 1897, the plaintiff wrote a letter to the machinery company, at Ft. Worth, in which he complained of the fan, and called upon the company to put in a new fan at once. A new fan was furnished. No demand was made by the plaintiff on the company to substitute other machinery for that on hand. The jury found that on and after October 1st the machinery performed tolerably well. This suit to rescind was filed October 9th, yet the plaintiff continued to operate the machinery until October 18th. It was not shown that the machinery company was guilty of any fraud in the transaction. We conclude that the plaintiff, under the facts shown, was not entitled to a rescission of the contract. Sedg. Meas. Dam. (8th Ed.) § 759; Wright v. Davenport, 44 Tex. 164; Stark v. Alford, 49 Tex. 275.

Appellant, by proper assignments, challenges the findings of the court as to the value of the machinery when sequestered, and the finding of the jury as to its value when delivered, and the correctness of the judgment rendered. The court found the value of the machinery in September, 1898, to be \$2,500. The jury found its value when delivered, in 1897, to be \$2,000. There is no evidence that it had increased in value from the time it was closed down in October, 1897, and the time it was sequestered. Common experience, in the absence of testimony, would lead us to believe that machinery of this character would not increase in value by lapse of time. There is no evidence that care was used in the keeping of the machinery. Counsel for appellee explains that it may be that machinery of this character increased in value between the

time it was delivered and the time it was sequestered. If such be the case, it would have been easy to make proof of that fact. It is difficult to reconcile the finding of the jury as to the cost of remedying the defects in the machinery and their finding that the difference in the value of the machinery contracted for and that delivered was \$1,257. We think it clear that the value placed upon the machinery by the jury was too low, or that found by the court was too large. In either event there is error in the judgment. By reason of the difference in the value of the machinery as found by the court and that found by the jury, the judgment against the machinery company is increased \$500.

The next question is, did the court err in allowing a recovery for drayage and putting the machinery in place? The general rule for the measure of damages upon the breach of a contract for the sale of personal property is the difference in value of the machinery contracted for and that actually delivered. Wright v. Davenport, and Stark v. Alford, supra; Sedg. Meas. Dam. (8th Ed.) § 762. Does the record present a state of facts that would take this case out of the general rule? The rescission being refused, the purchaser is entitled to the property, and may recoup against the purchase price his damages. The court allowed a recovery by the purchaser for the difference between the value of the machinery contracted for and the value of the machinery delivered; also the cost of drayage, \$45, and the cost of putting the machinery in place, \$250. The last two items must have been incurred by the purchaser in any event. They were not incurred by reason of any defect in the machinery. There being no fraud proven, we conclude, under the facts found by the jury, it was error to allow plaintiff to recover for drayage and for putting the machinery in place. For the errors indicated, the judgment is reversed and the cause remanded.

MILLER v. NEWBAUER.

(Court of Civil Appeals of Texas. March 30, 1901.)

LANDLORD AND TENANT—LANDLORD'S LIEN—FORECLOSURE—VERDICT—JUDGMENT—JUSTICES OF THE PEACE—JURISDICTION—APPEAL—AMENDMENT.

1. Where a claim for wages was incorporated in a suit to foreclose a landlord's lien for rents on a saloon, and a verdict in gross was returned for plaintiff, without specifying how much was for the rent, a judgment on such verdict foreclosing the landlord's lien for the entire sum was erroneous.

2. Where a verdict in a landlord's suit for rent failed to show that property sought to be subjected to a landlord's lien was so situated as to be subject thereto, a judgment subjecting the property to the lien was erroneous.

3. Where an amended petition was filed in a case appealed from a justice to the county court, after the appeal, and the amendment increased the amount claimed beyond the ap-

appellate jurisdiction of the court, such defect was cured by a subsequent amendment reducing the amount to a sum within the justice's jurisdiction.

Error from Callahan county court; B. L. Russell, Judge.

Action by J. C. Newbauer against J. F. Miller. From a judgment in favor of plaintiff, defendant brings error. Reversed.

Otis Bowyer, for plaintiff in error. E. E. Solomon and Theodore Mack, for defendant in error.

STEPHENS, J. This suit, as originally instituted in the justice court, was one to recover rents for a house used by plaintiff in error as a saloon, and to foreclose the landlord's lien on his cigars and bar fixtures. When it was finally tried on appeal in the county court, defendant in error sought a recovery not only for rents, but also for wages due him as bartender for plaintiff in error, who admitted the written contract declared on to pay rents, and also the alleged agreement to pay wages, but who claimed a discount more than sufficient to cover the claim for both rents and wages. The merits of the respective claims were submitted to a jury, who returned a general verdict in favor of defendant in error for \$42.10. Upon this verdict the court entered judgment foreclosing the landlord's lien, and, because this was not warranted by the verdict, error is assigned, upon the authority of the following cases: *Handel v. Elliott*, 60 Tex. 145, and cases there cited, particularly that of *McConkey v. Henderson*, 24 Tex. 212; *Bedford v. Cattle Co.* (Tex. Civ. App.) 35 S. W. 931, and additional cases there cited. On the other hand, counsel for defendant in error rely upon the following cases: *Pearce v. Bell*, 21 Tex. 688; *Day v. Cross*, 59 Tex. 608; and *Morris v. Holland* (Tex. Civ. App.) 31 S. W. 690. But they are not applicable to the facts of this case, for the reason that the verdict, even when read in the light of the pleadings and charge, cannot be construed into a finding that any lien existed to secure the sum found to be due from plaintiff in error to defendant in error. The issues submitted to the jury were such that they may have found that nothing was due for rents, and may have returned a verdict for what was due for wages only, or they may have found that only a part of the \$42.10 was due for rents. In either case the judgment foreclosing the landlord's lien for the full amount was inadmissible. Besides, the verdict fails to show—impliedly, even—that the property upon which the lien was foreclosed was so situated as to be subject to the landlord's lien given by statute or as expressed in the written contract.

As to the alleged want of jurisdiction in the county court to try the case, on the ground that by amendment of the pleadings in the justice court more than \$200 was claimed, we doubt whether this record sus-

tains that contention of plaintiff in error, since it does not contain the transcript from the justice court, or otherwise show, except by the original citation, and what was filed in that court as a supplemental petition in reply to the counterclaim of plaintiff in error, which were read in evidence on the trial in the county court, what issue was tried in the justice court. The amount claimed in the original citation was within the jurisdiction of the justice court, and, for aught that appears, may have been all that was claimed on the trial there. If so, the appeal gave the county court jurisdiction to try the case *de novo*; but if more than \$200 was claimed in the pleadings, oral or written, upon which the case was tried in the justice court, it did not, and the suit should have been dismissed. When the case reached the county court an amended petition was filed, in which the amount claimed exceeded the appellate jurisdiction of that court; but this was cured by a subsequent amendment reducing the amount claimed to \$199, which seems to be sanctioned by the decisions of our supreme court as within the scope of amendment. *Evans v. Wills*, 18 Tex. 197; *Wood County v. Cate*, 75 Tex. 219, 12 S. W. 536; *McDannell v. Cherry*, 64 Tex. 178. For the error in foreclosing lien as indicated above, the judgment is reversed and the cause remanded.

BUTTERWORTH v. CITY OF HENRIETTA.¹

(Court of Civil Appeals of Texas. March 23, 1901.)

MUNICIPAL CORPORATIONS—WATERWORKS—NEGLIGENCE—LIABILITY FOR PROPERTY DESTROYED BY FIRE.

A municipal corporation, owning and operating a system of waterworks erected by taxation and maintained by tolls and rents, is not liable to a patron of the waterworks, paying the usual rents, for the value of his property destroyed by fire, through the negligent failure of the city to furnish the water necessary to extinguish the fire.

Appeal from district court, Clay county; E. H. Carrigan, Judge.

Action by J. M. Butterworth against the city of Henrietta. From a judgment sustaining a demurrer to the petition, plaintiff appeals. Affirmed.

Barrett & Barrett, for appellant. Allen & Wantland, for appellee.

STEPHENS, J. This appeal is from a judgment sustaining a demurrer to the petition of appellant, wherein he sought to recover of appellee damages in the sum of about \$5,000, caused by the burning of property belonging to him situated in the town or city of Henrietta. The petition alleged as a ground of liability that the city of Henrietta owned and operated a system of waterworks "purchased and erected by means of taxation on the property situated" therein, and maintain-

¹ Writ of error denied by supreme court.

ed by "tolls and rents" charged the inhabitants for the use of water; that this was done for the "city's advantage and profit"; that appellant "was a patron of said waterworks, paying the usual and customary rates, and was a taxpayer of said city"; and that said city, by reason of the facts so alleged, "assumed the duty and became bound to supply its public with water" for the general purposes for which water was used and for the extinguishment of fire. The petition further alleged a negligent and willful failure on the part of the city to furnish the water necessary to extinguish the fire which destroyed his property, and that if this duty had been discharged the fire would have been extinguished.

Evidently the pleader undertook to make a case parallel to that of *Lenzen v. City of New Braunfels* (Tex. Civ. App.) 35 S. W. 349, decided by the court of civil appeals for the Third district, and which is mainly relied on here to support the contention that the court erred in sustaining the demurrer to the petition. The question discussed with so much learning and ability in the opinion of Chief Justice Fisher in that case is one which has time and again been considered by courts of the highest authority, and we do not feel inclined, therefore, to again reproduce what has been so often said upon it. We deem it sufficient to state that we understand the decisions to hold, some upon one ground and some upon another, that a municipal corporation undertaking, by the establishment of waterworks, or through other means, to prevent the destruction by fire of the property of its inhabitants, is not liable to them for the burning of such property in consequence of a failure of such municipality, or any agency employed by it, to accomplish that result. *House v. Waterworks Co.*, 88 Tex. 233, 31 S. W. 184, 28 L. R. A. 532; *Shanewerk v. City of Ft. Worth* (Tex. Civ. App.) 32 S. W. 918; and authorities cited in these two cases. The judgment is therefore affirmed.

MISSOURI, K. & T. RY. CO. OF TEXAS v. HUGGINS.

(Court of Civil Appeals of Texas. Feb. 9, 1901.)

TRIAL—MISCONDUCT OF COUNSEL.

1. Where suit is brought against a railroad company for damages by delay in the carriage of cattle, and the company alleges that the plaintiff waived such damages in the contract of carriage, and the evidence is conflicting, and the verdict is for a larger sum than authorized by plaintiff's testimony, and is reduced by the trial court, a statement by counsel, which has no support in the evidence, that the corporation had just such men as those who prepared the contract, who were employed to rob citizens, is reversible error.

2. Expressions of opinion by the counsel in his argument to the jury which reflect upon the honesty and fair dealing of the adverse party, and which have no support in the evidence, may constitute reversible error.

Appeal from Clay county court; H. A. Allen, Judge.

Action by J. L. Huggins against the Missouri, Kansas & Texas Railway Company of Texas. From a judgment in favor of plaintiff, and from an order denying a motion for new trial, defendant appeals. Reversed.

Eldridge & Gardner, for appellant. A. K. Swan and R. E. Taylor, for appellee.

CONNER, C. J. Appellant's statement of the nature and result of this suit is acquiesced in by appellee, and is as follows: "This suit was brought by J. L. Huggins, appellee, against the Missouri, Kansas & Texas Railway Company of Texas, appellant, for damages on three counts: First, for \$217.15 damages alleged to have been sustained by plaintiff by shrinkage in 100 head of cattle shipped by plaintiff over defendant's line of railway on July 11, 1896, from Hazle, Texas, to East St. Louis, Illinois, by reaching destination too late for market of July 13, 1896; second, for damages to 40 acres grass burned; and, third, for steer killed near Hazle, Texas, on public-road crossing, of alleged value of \$31.50. Defendant answered, pleading not guilty, and setting up two contracts under which cattle were shipped, denying delay in shipment of cattle, and waiver of damages prior to signing contract, and that steer was killed on public-road crossing, and that defendant was not guilty of negligence in killing same. The case was tried before a jury, and verdict rendered for plaintiff on first and third counts for full amount prayed for, and for defendant on second count for grass burned. Defendant filed a motion for new trial, which was overruled by the court, and defendant perfected its appeal to the court of civil appeals."

We deem it necessary to notice but one question presented on this appeal. Counsel for appellee, in argument to the jury, used the following language: "The railway company had just such men as these men who prepared these contracts employed to rob citizens out of their property." The contracts referred to had been read in evidence, and were in the usual form of cattle-shipping contracts. The argument quoted was excepted to, and we fail to find in the record a semblance of proof or of argument of opposing counsel warranting it. Appellee's answer to the assignment raising the question is that "the expression of an attorney as to his opinion of the honesty and fair dealing of his adversary is not of itself reversible error." In the case of *Franklin v. Tiernan*, 62 Tex. 97, our supreme court say: "In a suitable case, where it becomes necessary to do it, improper and uncalled-for reflections on parties to the suit by counsel, when not warranted by the evidence, would be a good ground for a reversal of

the judgment. It is for this, as well as many other good reasons, always best for counsel to confine their remarks to the case made by the evidence,"—citing *Willis v. McNeill*, 57 Tex. 465. The judgment in the case of *Beville v. Jones*, 74 Tex. 148, 11 S. W. 1128, was reversed, among other things, because of argument somewhat similar to that of which complaint is here made, reflecting upon the honesty and good faith of adverse parties. The answer of appellee to the proposition, therefore, is not of universal application, nor, in our opinion, is it applicable to the circumstances of this case. It was more than the expression of a mere opinion, unattended. Features calculated to render it harmful here exist. It is fair to presume that counsel by the use of the language quoted intended to thereby influence the jury. If it did, it was an improper one, and nothing in the record excludes the idea that the jury were thereby in fact unaffected. The evidence of unnecessary delay in shipment was sharply conflicting, and the verdict of the jury was for an amount of damages on account of delay in shipment greater by \$30 than the most favorable testimony for appellee on this issue justified, and greater in that amount than the court in fact adjudged to appellee. The evidence also of appellant's liability for the value of the steer killed on the crossing was, to say the least of it, by no means conclusive. The steer was killed on a public-road crossing, the railroad being duly fenced on either side up to the crossing. None of appellee's witnesses saw it killed, while the engineer and fireman of the passing train testified that after the steer was seen upon the track they applied the air brakes, rang the bell, blew the whistle, and did all they could to avoid the collision. The fireman testified that the steer stepped upon the track when the engine was within about 50 feet of the crossing. No evidence of contrary tendency appears, except perhaps that the engineer and fireman differed in the statement as to the side of the track from which the steer approached, and the circumstance that the locus in quo was in an open country. *Railway Co. v. Adams* (Tex. Civ. App.) 58 S. W. 1085. No justifying reason for the argument has been suggested or occurs to us, and, in this state of the evidence and verdict, we are of opinion that it was probably prejudicial. It was certainly in direct violation of rule 39, requiring counsel, in argument on the facts addressed to the jury, to confine themselves "strictly to the evidence and to the argument of opposing counsel," and was likewise contrary to frequent authoritative admonitions of this and other appellate tribunals. See *Railway Co. v. Burton* (decided by this court January 12, 1901) 60 S. W. 816; *Railway Co. v. Langston*, 19 Tex. Civ. App. 588, 47 S. W. 1027, 48 S. W. 610; *Id.*, 92 Tex. 709, 50 S. W. 574, 51 S. W. 881. *Rotan v. Maedgen* (Tex. Civ. App.)

61 S.W.—62

59 S. W. 585; and authorities cited in the several cases named. The judgment will therefore be reversed, and the cause remanded for a new trial.

LARGENT v. STOREY.

(Court of Civil Appeals of Texas. March 9, 1901.)

BROKERS—COMMISSION—EVIDENCE—ISSUES—INSTRUCTIONS.

A broker sued to recover commissions for selling defendant's real estate, and testified that during defendant's absence he exhibited the premises to one who, after defendant's return, purchased for \$2,700. Defendant testified that it was agreed that the broker was to receive no commission unless he sold for \$3,000 during defendant's absence. *Held*, that it was error, under the evidence, to charge that if plaintiff was the procuring cause of the sale he was entitled to recover.

Appeal from Taylor county court; D. G. Hill, Judge.

Suit by T. B. Storey against O. M. Largent. From a judgment in favor of plaintiff, defendant appeals. Reversed.

J. M. Wagstaff and Theodore Mack, for appellant. B. A. Cox, for appellee.

CONNER, C. J. This suit originated in the justice court precinct No. 5 of Taylor county, Tex., was appealed to the county court, and on trial there judgment was rendered in favor of appellee for \$185, from which judgment this appeal is prosecuted.

Appellee, T. B. Storey, claims commissions on the amount for which appellant, C. M. Largent, sold his business house and lot in Merkel, Tex. Storey testified: "The contract was if he (Storey) sold said property for \$3,000 or less, down to \$2,500, he was to have 5% commission; that, if the property brought \$2,500 or less, he was only to get 2½% commission; that if he got an offer for less than \$2,500 he was to submit the same to Largent; that there was no specified time in which to make the sale." Appellant, Largent, testified that he "finally agreed with Storey if he sold for \$3,000 he would pay him \$75 commission; that he never at any time agreed or authorized Storey to sell the property for less than \$3,000, and he then made that agreement only for the time he was at Boulder, Colo., and, if Storey did not sell at that price before he returned, that he could handle it no longer." Appellant was absent some six weeks at Boulder, Colo., and there was evidence to the effect that during such absence appellee endeavored to sell the property in question, and, among others, exhibited it to one J. C. Calcutt, who testified he was acting for his son C. Calcutt, the latter of whom, without subsequent intervention of appellee, purchased the property from appellant for the sum of \$2,700, after appellant's return from Boulder. Among other things, at appellee's request the court instructed the jury:

"If you find and believe from the evidence in this case that the plaintiff, T. B. Storey, was the procuring cause of the sale of the property in controversy, as given you in the main charge, you will find for the plaintiff, though you further believe and find that the defendant knew nothing of that fact until after the sale was closed, if you find it was closed." We think in so instructing the jury the court committed error as assigned. The charge plainly excludes issues made by the evidence. If in fact the contract was that appellee in no event was to receive commissions unless he sold for \$3,000 before appellant's return from Boulder, as appellant testified, then the mere fact that during appellant's absence appellee exhibited the property to the person, or the representative of the person, who afterwards purchased the property for \$2,700, does not entitle him to commissions. The record fails to show that C. Calcutt, either in person or by representative, made any contract with appellee to take the property at any price, or expressed a willingness to purchase the property and pay therefor any sum named as the selling price. The limitations of the contract for commission, as indicated by appellant in his testimony, should not have been excluded from the jury. For the error in the charge indicated, the judgment is reversed, and the cause remanded for a new trial.

MISSOURI, K. & T. RY. CO. OF TEXAS v. MILLER.¹

(Court of Civil Appeals of Texas. March 9, 1901.)

MASTER AND SERVANT—NEGLIGENCE—EVIDENCE—MENTAL ANGUISH.

1. A freight conductor was injured by falling from the side of a freight car, caused by a round of the ladder giving way for want of a nut on the bolt which held it; the evidence tending to show that the nut had slipped by reason of the threads of the bolt being worn or battered off. Plaintiff did not know of the defect, and it was too dark to discover it at the time he was injured. The car had been inspected on the 13th, 14th, 16th, and 17th of the month, and the defect was not discovered. A proper inspection on the 18th, the day of the injury, would have disclosed the defect, and avoided the injury. *Held*, that the injury was caused by the negligence of the company's failing to have the car properly inspected and repaired.

2. In an action for injuries to an employe occurring from a failure to inspect the freight cars of the employer, evidence that the employer had formerly had two inspectors at the place of the injury, but had none at the time of the accident, was competent as tending to prove the want of ordinary care on the part of the employer to have its cars sufficiently inspected.

3. In an action for injuries reducing a healthy, vigorous man to a physical wreck, mental anguish being a proper subject for damages, it is proper for such person to testify as to his mental suffering in contemplating his crippled condition and brooding over his future prospects.

Appeal from district court, Denton county; D. E. Barrett, Judge.

¹ Writ of error denied by supreme court.

Action by George F. Miller against the Missouri, Kansas & Texas Railway Company of Texas. From a judgment for plaintiff, defendant appeals. Affirmed.

T. S. Miller and Head & Dillord, for appellant. Greenlee & Bradley, for appellee.

HUNTER, J. This suit was filed January 30, 1900, to recover of appellant for personal injuries received by appellee at Whitesboro, Tex., on the 18th day of December, 1899, while in the employ of appellant as freight-train conductor, by reason of the defective condition of one of its cars, and the failure to properly inspect it, whereby the top round of the ladder on the side of said car gave way for want of a nut on the bolt which held it as appellee was climbing on top of said car at night in the performance of his duty, whereby he fell to the ground with his back across the rail of a side track, causing him serious and permanent injuries, as it is alleged, to the extent that he is unable to work, his health destroyed, partial paralysis of his lower limbs from the hips down, and constant suffering from mental anguish and physical pain. The appellant answered by general denial and special pleas of contributory negligence, and that the defect, if any, was patent and obvious, and by the use of ordinary care could have been discovered by appellee, and also that the defect, if any, was latent, and could not have been discovered by appellant by the use of ordinary care, and that appellee assumed the risk of injury from such cause. The jury found a verdict in favor of appellee for \$10,000, and from the judgment rendered thereon this appeal is taken.

The evidence tended to prove, and was sufficient to establish, the material allegations in appellee's petition. It was dark when the accident occurred, and, though the evidence tends to establish that the nut from the bolt which held the round of the ladder had slipped off by reason of the threads of the same being worn or battered off, the appellee did not know of the defect, and it was too dark to discover it at the time he was injured. The car had been inspected at Galveston on the 14th of the month, at Houston on the 13th and 16th, at Smithville on the 17th, and the defect was not discovered. The conductor, Graham, and brakemen, Bolin and McDonald, brought the car in their train from Smithville to Hillsboro on the 17th and 18th, and failed to discover the defect. A proper inspection of the ladder at Hillsboro on the 18th, or at Whitesboro, as we infer from the evidence, would have disclosed the defect, and avoided the injury. We therefore conclude that the injury was occasioned by the negligence of the appellant in failing to have the car properly inspected and repaired.

At the time of his injury the appellee was unacquainted with sickness and suffering, weighed 204 pounds, and was earning \$100 per month, but is now a physical wreck, and

a constant sufferer, both physically and mentally.

The first assignment of error complains of the admission of evidence that the appellant had formerly had two car inspectors at Whitesboro, but had none at the time of the accident, because the same was immaterial and irrelevant. We think the court did not err in admitting it, as it tended to prove the want of ordinary care on the part of appellant to have its cars and trains sufficiently and properly inspected; in fact, that it was derelict in taking away its inspectors at this place, when the condition of this car itself tended to prove the necessity for keeping them there.

The second assignment complains of the court in permitting the plaintiff to testify on the issue as to mental anguish as follows: "There are times when I am thinking of what I am now, and what I have been. The prospects are so heavy for me that I can hardly bear the weight. I have been a very active man in my days, and when I think of what I have been,—a powerful man,—and when I think that I have got to be laid up the balance of my life, the load is a little heavy for me." Appellee's evidence, and that of three or four doctors, describe his condition in detail, and fully justify our conclusion that he is now a physical wreck, and a constant sufferer, both physically and mentally. The objection to this evidence, as stated in appellant's brief, was as follows: "Defendant objected to the question, and to any evidence of mental suffering from contemplating his crippled condition, and requested the court to restrict the testimony to mental anguish growing out of the physical injury to plaintiff, and not contemplating his crippled condition, because such evidence would be immaterial, irrelevant, and too remote." The third assignment complained of the court's refusal to give a special charge in this language: "If you find in favor of plaintiff, you will not allow him any amount as compensation for any mental anguish or suffering you may believe he has suffered from brooding over or contemplating his maimed or injured condition, and regretting the difference, if any, between his present physical condition and what it was before he was injured." Only one proposition is submitted under these two assignments, and that is: "Mental suffering which an injured person experiences from brooding over and regretting his crippled condition is too remote, and not a proper subject, for damages in cases of this kind." We think the court did not err in admitting the evidence, nor in refusing to give the special charge asked. Since mental anguish or suffering is a proper subject for damages in cases where one in good health and strength, sound in mind and members, by reason of the wrongful act of another, is reduced to the state of a physical wreck, maimed and crippled for life, broken in body and spirit; and, since the jury may presume mental anguish

in the absence of affirmative evidence thereof in cases where such would be the natural consequence of such injury, we can see no good reason, since parties to the suit may testify, why they may not relate their mental anguish as well as their physical sufferings. And we understand that this mental suffering may be, in part at least, the result of comparing their present wretched, dependent condition and hopeless future with the bright, happy, and independent life of which they were deprived by the injury, as well as the contemplation of the fact that they must suffer from the effects of such injuries during the balance of their lives. The distinguished counsel for appellant have not favored us with a definition of the kind of mental anguish for which, in their opinion, damages may be given other than as expressed in their requested charge; but we are unable to see why the mental sufferings of this man in contemplating his changed condition from a bright, happy life to a living death should not form one of the natural results of such an injury, and a proper subject of evidence and of damages.

All the other assignments of error have been carefully considered by us, and are overruled, and we deem it unnecessary to discuss them, as no new question is raised thereby. Finding no error in the judgment, it is affirmed.

CATES et al. v. ALSTON'S HEIRS.¹

(Court of Civil Appeals of Texas. March 2, 1901.)

TRESPASS TO TRY TITLE—ACTION AGAINST UNKNOWN HEIRS—SUFFICIENCY OF COMPLAINT.

Rev. St. art. 1236, provides that, when any property has accrued to heirs who are unknown, a party having a claim to such property may bring an action against such persons by describing them as heirs of their ancestor, but does not prescribe the requisites of the petition. Article 5250 prescribes the form of petition for an action of trespass to try title but does not require that the title of plaintiff and the claim of defendant should be alleged. Title 80, c. 22, being an act for the determination of the rights of unknown persons to property in Texas, requires the pleadings in such case to allege the title of plaintiff and the claim of defendants, if known. *Held*, that a petition in an action of trespass to try title to land against unknown heirs must allege complainants' title and the claim of defendants, if known.

Appeal from district court, Hardeman county; G. A. Brown, Judge.

Trespass to try title by Rowena and C. D. Cates against the unknown heirs of W. L. Alston. From a judgment in favor of defendants, plaintiffs appeal. Affirmed.

R. E. Carswell, for appellants. Robert Cole, for appellees.

CONNER, C. J. This suit was instituted by appellants against the unknown heirs of W. L. Alston to try the title and recover possession of the land described in appellants' petition. The petition did not set out

¹ Writ of error denied by supreme court.

the title of appellants, nor the claim of appellees, but was in the usual form of petitions in trespass to try title, alleging that plaintiffs were the owners of the land described, and were in possession thereof, and were ousted therefrom by appellees, whose residence was alleged to be unknown, with prayer for citation, judgment of restitution, and general relief. The sufficiency of this petition was questioned by a general demurrer, and special exception presented by counsel appointed by the court to represent appellees, who were cited by publication. Said demurrers having been sustained, and appellants having declined to amend, judgment of dismissal was entered, and hence this appeal.

We have not been favored with brief in behalf of appellees, nor have we been able to find where the precise point in question has ever been decided in this state. We are of opinion, however, that the court properly held the petition insufficient. Without question, the general rule is, and has long been, that our statutes regulating the remedy of trespass to try title are sufficiently comprehensive to include all cases wherein the title or right of possession to real property is directly involved, and that ordinarily in this character of action a petition, as in the case before us, in substantial compliance with the form prescribed by the statute, is sufficient, and not subject to the special exception urged below, which was that it does "not set forth the title of plaintiff, and does not set forth the claim of defendants, nor state that the same is unknown to plaintiffs." See title 106, c. 1, Rev. St.; *Moody v. Holcomb*, 26 Tex. 719; *Sloan v. Thompson* (Tex. Civ. App.) 23 S. W. 616; *Titus v. Johnson*, 50 Tex. 238; and *Hardy v. Beaty*, 84 Tex. 564, 19 S. W. 778. But an act entitled "An act to provide for determining the rights of nonresidents, persons unknown, and transient persons, to property in Texas," was passed by the legislature of Texas, and approved April 27, 1893 (see Gen. Laws 1893, p. 77), which we think must be held to apply to this case. In the chapter regulating "Process and Returns" is to be found the law under which it is insisted this suit was prosecuted. This is article 1236, Rev. St., in force long prior to the act of 1893. It provides that: "Where any property of any kind in this state may have been granted or may have accrued to the heirs, as such, of any deceased person, any party having a claim against them relative to such property, if their names be unknown to him, may bring his action against them, their heirs or legal representatives, describing them as the heirs of such ancestor, naming him; and if the plaintiff, his agent or attorney, shall at the time of instituting the suit or any time during its progress, make oath that the names of such heirs are unknown to the affiant, the clerk shall issue a citation for such heirs addressed to the sher-

iff or any constable of the county in which the suit is pending. Such citation shall contain a brief statement of the cause of action, and shall command the sheriff or constable to summon the defendant by making publication of the citation in some newspaper of his county, if there be a newspaper published therein, but if not, then in the nearest county where a newspaper is published, once in each week for eight successive weeks previous to the return day of such citation." It will be observed that under this article of the statute the requisites of the petition are not given, and hence a petition in the form prescribed by the chapter relating to suits in trespass to try title might well be held sufficient. The act of 1893, however, undertakes to regulate a particular character of suit. The third section of that act provides that: "The pleadings in such case shall set forth the title of the complainant, as well as the claim of the defendant, if known." This act was embodied in the Revised Statutes of 1895 as chapter 22, tit. 30, among other general provisions, and carried forward with article 1236; and these several provisions must therefore be construed together. We must so construe them as that both shall stand if it can be done. Construing articles 1236, 5250, and chapter 22, tit. 30, Rev. St., together, we are of opinion that in suits of this character the petition should set forth the title of the plaintiff and the claim of defendant if known. Articles 1236 and 5250 declare general rules, while chapter 22 undertakes to regulate a particular subject within which this suit falls. There is no necessary conflict between the provisions named. Article 1236 confers the right of suit, but prescribes no form of pleading. Article 5250 prescribes a form of petition in trespass to try title, but does not inhibit the requisites prescribed by article 1504c of said chapter 22. Article 1504c merely gives a more particular designation of the requisites of the petition in cases such as this. We think compliance with article 1504c easy of observance, and that our construction of the articles named is conducive to the preservation of the rights of unknown heirs. We therefore affirm the judgment.

TEXAS & P. RY. CO. et al. v. STELL.
(Court of Civil Appeals of Texas. March 9, 1901.)

JURY—CHALLENGES—JURISDICTION.

1. Under Act 1899, p. 214, authorizing actions for damage to freight transported over two or more routes against all such routes, but requiring the damages recovered against more than one to be apportioned, in such an action in reality two separate causes are tried at the same time, each against a different defendant, and hence each defendant is entitled to three peremptory challenges in the selection of the jury, as provided by Rev. St. art. 3213.

2. Where a petition against two railroads al-

leges a partnership or joint liability, the plea of one of them, a nonresident, to the jurisdiction, is properly overruled, where it fails to charge fraud in the allegations as to partnership or joint liability.

Appeal from Taylor county court; D. G. Hill, Judge.

Action by Bush Stell against the Texas & Pacific Railway Company and the St. Louis, Iron Mountain & Southern Railway Company. From a judgment for plaintiff, defendants appeal. Reversed.

J. M. Wagstaff, for appellant Texas & P. Ry. Co. Henry & Henry, for appellant St. Louis, I. M. & S. Ry. Co. Cunningham & Wilson, for appellee.

STEPHENS, J. Appellee recovered a judgment against the Texas & Pacific Railway Company for \$100 and a judgment against the St. Louis, Iron Mountain & Southern Railway Company for \$75. The action was brought against both companies for damages to a car load of calves carried by them from Abilene, Tex., to East St. Louis, Ill. A separate verdict was brought in against each in response to the following charge, authorized by Act 1899, p. 214: "You are further instructed that our law provides, in substance, that when any freight or other property has been transported over two or more railroads operating any part of their roads in this state, and having an agent in this state, or operated by an assignee, trustee, or receiver of any such railways, suits for damages thereto, or other cause of action connected therewith, or arising out of such transportation, or contract in relation thereto, may be brought against any one or all of such railways in any county in which either of such railroads extends or is operated: provided, however, that if damages be recovered against more than one carrier not partners in the shipment or contract, they shall be apportioned between the defendants by the verdict of the jury." The next paragraph of the charge instructed the jury, in accordance with the stipulations in the contract of carriage, to limit the recovery against each company to the amount of damage done on its own line. It thus appears that in reality two separate causes of action were tried at the same time, each against a different defendant. It also appears that it was to the interest of each defendant to make it appear, as far as possible, that the damage was done on the line of the other. Each defendant claimed, and was, therefore, entitled to, three peremptory challenges in the selection of the jury. Rev. St. art. 3213. Two defendants cannot be said in such case to be one party within the meaning of the article just cited. Because this statutory right was denied each defendant in the trial below, the judgments will be reversed, and the cause remanded for a new trial.

The plea of the St. Louis, Iron Mountain & Southern Railway Company to the juris-

diction of the county court of Taylor county was properly overruled, if for no other reason, because it failed to charge fraud in the allegations of the petition as to partnership or joint liability. Jurisdiction in such cases is determined by the averments of the petition, unless they be falsely made to confer jurisdiction, and, merely because they may not be proven or may be disproven on the trial, will not, as in case of suit to foreclose lien on land and the like, deprive the court of jurisdiction. Railway Co. v. Short (Tex. Civ. App.) 51 S. W. 261; Hoffman v. Association, 2 Tex. Civ. App. 688, 22 S. W. 155; Id., 85 Tex. 409, 22 S. W. 154. We are not to be understood, however, as intimating that the act of 1899, given in charge to the jury, was not intended to apply to cases like this, where one of the connecting roads is entirely beyond the limits of the state, but has agents within the state. Upon that question we express no opinion. Reversed and remanded.

CLARKE et al. v. REEVES COUNTY.¹
(Court of Civil Appeals of Texas. March 16, 1901.)

COUNTIES—DISORGANIZATION—ATTACHING TO OTHER COUNTY—SPECIAL LAW.

Gen. Laws 1897, c. 143, p. 205, disorganizing a county on the ground of public necessity, and attaching it to another county, and providing that the latter county shall levy taxes on the former, and pay its debts from such taxes, and authorizing the presentation of claims against the former to the commissioners' court of the latter, is not a special or local law, within the prohibition of Const. art. 3, §§ 56, 57, since it deals with the public division of the state, and its taxes and revenues.

Appeal from district court, Reeves county; W. R. Smith, Judge.

Action by Clarke & Courts against Reeves county. From a judgment in favor of the defendant, plaintiffs appeal. Reversed.

Browning & Madden, for appellants. George Estes and Edwards & Edwards, for appellee.

HUNTER, J. Clarke & Courts filed this suit in the district court of Reeves county, on the 13th day of September, 1898, against said county, under the provisions of the act of the 25th legislature disorganizing Loving county, on county warrants issued by Loving county, aggregating \$3,369.55; also an account amounting to \$99.10 against said county. The defendant answered by general and special demurrers, raising the question of the constitutionality of the act named, as follows: "Comes now the defendant, Reeves county, and says there is no power in this court to hear and determine plaintiff's cause of action, because the defendant says this suit is instituted under authority attempted to be given in an act of the legislature of the state of Texas entitled 'An act to provide for the disorganization of the county

¹ Writ of error denied by supreme court.

of Loving, in the state of Texas, and to attach said county of Loving to the county of Reeves for judicial and other purposes, and to provide for the assessment and collection of taxes in said county, and for the payment of the outstanding indebtedness of said county' (Gen. Laws 1897, c. 143), under which act said suit is brought; that said act of the legislature, in so far as it attempts to authorize the presentation of said claim to the commissioners' court of Reeves county, or to grant said court the power to audit and establish claims against Loving county, and to assess and collect taxes for the payment of said claims, and to require the county treasurer, assessor, and collector of Reeves county to give new and additional bonds, and to suspend the statute of limitations in said Loving county, is unconstitutional and void. Defendant further shows to the court that this suit is prematurely brought, in this: That said original petition filed herein fails to show that said claims were presented to the commissioners' court of Loving county, and rejected by said court, and there is no valid law authorizing the presentation of said claims to the commissioners' court of Reeves county; wherefore defendant prays judgment." The demurrers were sustained, and the suit dismissed, and appellants bring the cause here for revision.

The most important question involved here is whether the act of 1897 (Gen. Laws, c. 143, p. 205), disorganizing Loving county and attaching it to Reeves county for judicial and other purposes named in the act, is a general or local law, within the meaning of our constitution. The preamble and first and second sections of the act are as follows:

"Whereas, the county of Loving as it now exists is in a disorganized condition, having no county officials resident within the limit of said county, and no taxes have been assessed and collected in said county for the years 1895 and 1896, and a portion of the taxes assessed for the years 1893 and 1894 remain uncollected: Therefore,

"Section 1. Be it enacted by the legislature of the state of Texas: That said county of Loving be and the same is hereby disorganized, and said county is hereby attached to the county of Reeves for judicial and other purposes, until such time as the said (county) shall resume an organized state.

"Sec. 2. The county commissioners' court of Reeves county shall hereafter levy a sufficient annual tax, general and special, upon all property subject to taxation, situated in the county of Loving, to liquidate the indebtedness now existing against said county, which taxes shall be assessed and collected in the manner now provided by law for the assessment and collection of taxes in the unorganized counties of this state: provided, also, that all taxes due the state of Texas and such as may be levied for

county purposes as herein provided, upon all property situated in said county, for the present year, and for all previous years during which such taxes have not been paid, shall be assessed and collected by the officers charged by law with such duty, to the same effect as though Loving county had at all times been an (un)organized county attached to the said county of Reeves."

The act then provides that the assessor and collector of taxes and treasurer of Reeves county shall execute additional bonds to the county judge of said county, in the sum of \$5,000 each, to secure the taxes collected and held by them in and for Loving county, and directs what they shall do with such taxes when so collected and received; provides that the books and public records, papers, accounts, and property of Loving county shall pass into the custody of the officers of Reeves county; and that "the county judge shall publish notice to all persons holding claims against Loving county to present them to the commissioners' court of Reeves county for approval or rejection."

Sections 9, 10, 11, and 12, of said act then provide:

"Sec. 9. That all parties now having any claims against or warrant or bond or indebtedness of Loving county shall on or before the first day of December, 1897, present the claim or indebtedness to the commissioners' court of Reeves county for rejection or approval, and the commissioners' court of Reeves county shall pass on all such claims, warrants, bonds, and indebtedness in the same manner and order as if they were the commissioners of Loving county, approving or rejecting the same in all respects as claims and debentures are now required to be presented for approval or rejection to commissioners' court."

"Sec. 10. That whenever any claim or indebtedness above named shall have been rejected by the commissioners of Reeves county, the owners thereof may have all legal remedies in Reeves county, as fully as if the claim or indebtedness were against Reeves county, the judgment, order or decree, to be against the assets of Loving county only, and to be paid by the proper funds realized upon the property of Loving county.

"Sec. 11. That all existing indebtedness or claims against Loving county which have not been barred for more than two years after this act shall take effect, may be presented to the commissioners' court of Reeves county, on or before the first day of December, 1897, for rejection or approval, and shall be passed upon by said commissioners' court in all respects as if presented at any time not earlier than two years prior to the time of presentation.

"Sec. 12. That the commissioners' court of Reeves county, after the aforesaid claims have been filed with and approved by them as above provided, shall classify them as provided by law, and they shall levy a suffi-

cient general and special tax as hereinbefore named, not to exceed the limit allowed by law, for each year, to pay all the indebtedness of each class so registered and approved by them, including the expenses authorized by this act; and where legal bonds have been issued to create a sinking fund, keeping each class and the funds belonging to it separate and distinct from every other fund, and out of each fund to pay the claims against such fund only. Where claims filed with and approved by the commissioners' court of Loving county are also filed with and approved by the commissioners' court of Reeves county, they shall be paid in the order registered by and approved in Loving county; provided, they are filed on or before December the 1st, 1897; otherwise, they shall be paid in the order registered by and approved by the Reeves county commissioners."

This act was passed under the emergency clause of the constitution, by more than a two-thirds vote in its favor in both house and senate, and became a law May 23, 1897. The emergency, as stated in the act, is as follows: "The fact that there can be no taxes assessed or collected and no court either criminal or civil held in Loving county under the existing condition of affairs, creates an emergency and an imperative public necessity" that the constitutional rule be suspended, etc.

The appellants' petition shows a compliance with this act in every particular, so that, if the act is not prohibited by the constitution, they are entitled to recover judgment establishing their claim against Loving county, and to a decree for its payment out of the taxes collected in said county, as provided in section 10 of said act. Our constitution provides: "The legislature shall not, except as otherwise provided in this constitution, pass any local or special law * * * creating offices or prescribing powers and duties of officers in counties, * * * regulating the practice or jurisdiction of, or changing the rules of evidence in any judicial proceeding or inquiry before courts, * * * and in all other cases where a general law can be made applicable, no local or special law shall be enacted." Article 3, § 56. "No local or special law shall be passed unless notice of the intention to apply therefor shall have been published in the locality where the matter or thing to be affected may be situated, which notice shall state the substance of the contemplated law, and shall be published at least thirty days prior to the introduction into the legislature of such bill and in the manner provided by law." Article 3, § 57. Other objections are also urged to the act, as being violative of the constitution, but, in view of the disposition we shall make of the case, it will not be necessary to discuss them, as we think they are clearly not well taken.

We have concluded that the act in question, while it seems to refer to and affect only two counties in the state, yet it deals with the political division of the state, and with the taxes and revenues of the state, and affects more or less the judicial organization of the state and the state school fund, and incidentally the public school lands of the state, and many other subjects which might be enumerated, affecting more or less the interests of the people of the state generally; and where the act operates upon subjects in which the people at large are interested it is, within the meaning of our constitution, a general, and not a local or special, law. *Reed v. Rogan* (Tex. Sup.) 59 S. W. 255; *Clark v. Finley*, 98 Tex. 178, 54 S. W. 348; *Healey v. Dudley*, 5 Lans. 115. If the act is a general law, then all the other objections urged against it by appellee must fail. The judgment is reversed, and the cause is remanded.

McCORMICK v. MISSOURI, K. & T. RY. CO. OF TEXAS.¹

(Court of Civil Appeals of Texas. Feb. 23, 1901.)

MASTER AND SERVANT—PERSONAL INJURIES—DAMAGES.

In an action against a railroad for injuries received by a fireman by the explosion of an engine, there was evidence that plaintiff was walking about the engine immediately after the explosion; that he assisted in extinguishing the fire therein; that he made no complaint of any injury at the time; that he was not scalded or visibly bruised; and that he was able to visit the office of his physicians for treatment after the first or second time of treatment. The testimony of the physicians first called on was not produced, and the physicians testifying seemed to differ in conclusion in their diagnosis as to plaintiff's condition. The value of the physicians' services were not shown. *Held*, that a verdict of \$500 was not so inadequate and against the weight of the evidence as to indicate that the jury were actuated by improper influences.

Appeal from district court, Tarrant county; Irby Dunklin, Judge.

Action by R. McCormick against the Missouri, Kansas & Texas Railway Company of Texas. From a judgment for plaintiff for less than the relief demanded, he appeals. Affirmed.

Wynn, McCart & Bowlin and Carden & Carden, for appellant. T. S. Miller and Stanley, Spoons & Thompson, for appellee.

CONNOR, C. J. Appellant brought this suit, in the district court of Tarrant county, against appellee, on the 14th day of November, 1899, for damages for personal injuries alleged to have been received by appellant, through negligence of appellee, by the explosion of certain parts of an engine or locomotive, upon which appellant was engaged as a fireman for appellee, on the 20th day of May, 1899. The case was tried in the court

¹ Writ of error denied by supreme court.

below before a jury on the 17th day of April, 1900, and resulted in a verdict and judgment for appellant for \$500, and appellant brings the case to this court by writ of error.

Substantially but one question is presented on this appeal, and that is whether the evidence sustains the verdict and judgment below. Appellant asserts that the undisputed evidence shows that he was seriously injured; that he had been incapacitated for labor for more than 10 months preceding the trial; that he was earning, at the time of his injury, \$75 per month; that he had suffered great pain; had incurred liabilities for doctors' bills; and that "there was not a scintilla of evidence" to the contrary. It is therefore insisted that the damages awarded appellant are grossly inadequate. The statute provides that "new trials may be granted as well when the damages are manifestly too small as when they are too large." Rev. St. art. 1452. And this has been held to apply as well to actions ex delicto as to actions ex contractu. *Allison v. Railway Co.* (Tex. Civ. App.) 29 S. W. 425. So that, as before stated, the question is simply whether the state of the evidence is such as to require us to set aside the verdict of the jury and the judgment of the trial court. We have very carefully considered the evidence, and find ourselves unable to say that the damages awarded appellant are "manifestly too small," or that there is no evidence tending to contradict the evidence offered in behalf of appellant as to the extent of his injuries. The evidence was sharply conflicting upon, if it did not preponderate in favor of, the defense that appellant's injuries resulted from a cause other than that alleged in his petition. There was evidence also to the effect that immediately after the explosion appellant was walking around and about the engine; assisted in extinguishing the fire therein; that he made no complaint of any injury at the time; that he was not scalded or visibly bruised; and that he was able to visit the office of his physicians for treatment after the first or second time of treatment. The testimony of the physicians first called upon to treat him was not produced. The physicians testifying seemed to differ in conclusion in their diagnosis and prognosis as to appellant's condition. While a great number of nonexpert witnesses testified to the effect that appellant was severely injured, it was developed that such conclusion was based largely, if not entirely, upon evidences of injury and pain easily simulated. The reasonable value of the physicians' services was not shown. So that, while other circumstances might be adverted to, we think it sufficient to say that in our opinion the evidence was not so conclusively against the verdict as to indicate that the jury were actuated by improper influences. The rule upon the subject approved by this court is thus stated in the case cited supra: "Where

there is not a legal measure of damages, and where they are unliquidated, and the amount thereof is referred to the discretion of the jury, the court will not ordinarily interfere with the verdict. It is the peculiar province of the jury to decide such cases under appropriate instructions from the court, and the law does not recognize in the latter the power to substitute its own judgment for that of the jury. Although the verdict may be considerably more or less than, in the judgment of the court, it ought to have been, still it will decline to interfere unless the amount is so great or small as to indicate that the jury must have found it while under the influence of passion, prejudice, or gross mistake; or, in other words, that it is the result of accident or perverted judgment, and not of cool and impartial deliberation. When the verdict is thus excessive or deficient, the trial court, in its discretion, will interpose and set it aside." The cause seems to have been fairly submitted, the verdict of the jury to have been duly approved by the trial court, and we find no sufficient ground upon which to disturb the result. The judgment below is accordingly affirmed.

In re GRAYSON et al.

(Court of Appeals of Indian Territory. April 5, 1901.)

BANKRUPTCY — EXEMPTIONS — INDIANS — INDIAN LAND — IMPROVEMENTS — TOWN LOTS — TITLE IN INDIAN NATION.

1. Bankr. Act 1898, § 6, provides that it shall not affect the allowance to bankrupts of the exemptions prescribed by state laws in force at the time of filing the petition in the state of their domicile. Act Cong. May 2, 1890 (Ind. T. Ann. St. 1899, c. 26), forbids the issue of attachment against improvements on real estate while the title to the land is vested in any Indian nation, except where such improvements are owned by an adopted citizen of a tribe, or any person residing in the Indian country and not a citizen thereof. *Held*, that Indian bankrupts were entitled to their improvements on Indian lands as exemptions.

2. Where the petitioners in bankruptcy were Indians by blood, doing business in an incorporated town in the Creek Nation, they were entitled to their improvements on lots in such town, since the title to the land therein was in the nation.

Appeal from the United States court for the Northern district of the Indian Territory; before Justice John R. Thomas, May 23, 1900.

Proceedings in bankruptcy by Grayson Bros. From an order refusing final discharge till petitioners should turn over certain property, they appeal. Reversed.

G. W. Grayson and Samuel Grayson are Creek Indians by blood, and were doing business at Eufaula, an incorporated town in the Creek Nation, under the firm name and style of Grayson Bros. On the 16th day of February, 1899, they filed their petition in the United States court at Muskogee, Ind. T., praying that they be adjudged bankrupts, etc. The petition was referred to the referees

in bankruptcy, and the petitioners were duly declared bankrupts. At the time of filing their petition, besides other property, the petitioners owned the following, which they claimed as exempt: Grayson Bros.' joint property, located at Eufaula, Creek Nation: Store building, appraised at \$1,200; gin building, appraised at \$350; barn-like building, appraised at \$200; printing office, appraised at \$150; school-house building, appraised at \$250. Individual property of G. W. Grayson: One farm in Creek Nation; one dwelling house in Eufaula, occupied by him and family as a home; one other dwelling house in Eufaula,—appraised at \$300. Individual property of Samuel Grayson: One farm in Creek Nation; one dwelling house in Eufaula, occupied by him and family as a home; one other dwelling house in Eufaula,—appraised at \$450. The United States court for the Northern district held that the petitioners were entitled to hold as exempt property their farms and the dwelling houses occupied as their homes, together with so much personal property as is exempt from execution under Mansfield's Digest and refused to finally discharge the bankrupts until they should turn over the balance of their property to the trustee. From this decision the bankrupts appeal to this court.

Maxey & Martin, for appellants. Eck H. Brook and J. S. Davenport, for appellees.

CLAYTON, C. J. (after stating the facts). From the foregoing statement of facts it will be observed that in this case there are four classes of property claimed as exempt under the bankrupt laws: First, improvements on Indian farming lands; second, improvements erected by the individual partners upon town lots in an incorporated town, and occupied by them as homes; third, other improvements on lots in the same town, not occupied or claimed as homesteads; and, fourth, personal property. As to the improvements of the individual partners upon the town lots occupied by them as their homes, and the exemptions of their personal property, there is no contention. All agree that, whatever view may be taken of this case, the bankrupts are entitled to these as exempt. The proposition presented for our determination is: Are improvements erected by Indians by blood on Indian lands and on city lots, not claimed as homesteads in this territory, exempt under the bankrupt laws? We see no reason, under the present conditions which exist here, why the bankrupt laws may not apply to Indians engaged in business transactions as well as to aliens; but it must be conceded that, if they may take the benefits of the law, they must conform to its provisions and perform its conditions. The bankrupt law itself does not specially name the property to be exempt to the bankrupt. Section 6 of the act provides: "That this act shall not affect the allowance to bankrupts of the exemptions

which are prescribed by the state laws in force at the time of the filing of the petition, in the state wherein they have had their domicile for six months, or the greater portion thereof, immediately preceding the filing of the petition." By this provision congress probably intended to adopt the exemption laws of the territory as well as the states. See Loveland, Bankr. p. 333, § 177. But, whether this be true or not, as the exemption laws of this territory are prescribed by act of congress, it cannot be presumed that they are not available under proceedings in bankruptcy. Section 31 of the act of congress approved May 2, 1890, entitled, "An act to provide a temporary government for the territory of Oklahoma, and for other purposes," among other things extends over this territory chapter 60 of Mansfield's Digest of the Laws of Arkansas (chapter 26, Ind. T. Ann. St. 1899), and this law is as much an act of congress as if enacted in *hæc verba*. But by the following paragraph of the same act it is provided: "That no attachment shall issue against improvements on real estate while the title to the land is vested in any Indian nation, except where such improvements have been made by persons, companies, or corporations operating coal or other mines, railroads or other industries, under lease or permission of law of an Indian national council, or charter, or law of the United States. That executions upon judgments obtained in any other than Indian courts shall not be valid for the sale or conveyance of title to improvements made upon lands owned by an Indian nation, except in the cases wherein attachments are provided for. Upon a return of nulla bona, upon an execution upon any judgment against an adopted citizen of any Indian tribe, or against any person residing in the Indian country and not a citizen thereof, if the judgment debtor shall be the owner of any improvements upon real estate within the Indian Territory in excess of one hundred and sixty acres occupied as a homestead, such improvements may be subjected to the payment of such judgment, by a decree of the court in which such judgment was rendered. Proceedings to subject such property to the payment of judgments may be by petition, of which the judgment debtor shall have notice as in the original suit. If, on the hearing, the court shall be satisfied from the evidence that the judgment debtor is the owner of improvements on real estate, subject to the payment of said judgment, the court may order the same sold, and the proceeds, or so much thereof as may be necessary to satisfy said judgment and costs, applied to the payment of said judgment; or if the improvement is of sufficient rental value to discharge the judgment within a reasonable time, the court may appoint a receiver, who shall take charge of such property and apply the rental receipts thereof to the payment of such judgment, under such regulations as the court may prescribe. If under such proceedings

any improvement is sold, only citizens of the tribe in which said property is situate may become the purchaser thereof." The clear intent of congress in the enactment of this statute was: First, to extend over this territory the execution and exemption laws of the state of Arkansas; and, secondly, to except from the provisions of the Arkansas law all lands the title to which is in the Indian tribes, and the improvements erected thereon. Of course, Indian lands are not subject to sale under execution; and the statute provides that all improvements erected upon them, when owned by an Indian by blood, shall be exempt. But, if the improvements be owned by a person operating coal or other mines, railroads or other industries, under lease or permission of law of an Indian national council, or charter, or law of the United States, or by a person not a citizen of the tribe, or only a citizen by adoption, then the improvements upon 160 acres of land only are exempt; and any surplus may be subjected to the payment of the owner's debts. In this case the bankrupts, being Creek Indians by blood, are clearly entitled to have exempted to them the improvements on their farming lands owned by them, and erected on lands the title to which is in the Creek nation. Whether the same rule is to prevail as to improvements owned by Indians by blood on town lots depends upon an answer to the question, "Is the title to the lands upon which these improvements are located in a town of the Creek nation still in that nation, or has it been divested from it?" If the title is in the nation, then by the very terms of the act of congress above quoted the improvements of these Creek Indians by blood upon their town lots are exempt, and that, too, independent of the fact as to whether they are used as a home, a storehouse, or for any other purposes. The test is, not the locality, or the uses to which the improvements are to be applied, but are they upon lands the title to which is in the Creek nation, and owned by persons in whose veins the blood of an Indian flows. The question, then, is, is the Creek nation vested with the title to the lands in the town of Eufaula, on which the improvements of these bankrupts are situated? Whatever may be the effect of the fifteenth section of the Curtis bill when carried into operation, it is certain that the Creek title to the lands on which towns are built remains in that nation until it may be divested by compliance with the provisions of that section; and, as far as the town of Eufaula is concerned, there has been no such consummation of the provisions of that section as to divest the nation of its title to the lands; and whatever inchoate rights or equities may have sprung up by virtue of the Curtis bill as to white owners of improvements on town lots, the Indian by blood owning an improvement on a lot in the town of Eufaula stands, as far as the question involved in this case is concerned, with his

Indian rights unimpaired. He is the Indian owner of improvements on lands the title to which is vested in his tribe, and therefore such property, whether held as a homestead or otherwise, is, in our opinion, exempt from the bankrupt law. The judgment of the court below is therefore reversed as to its findings that the said town property was liable to execution and sale for the payment of the debts of the said bankrupts, and in refusing to grant them their discharge. In all other things the judgment below is affirmed. Let the cause be remanded, with instructions to the court below to grant to the bankrupts their final discharge.

TOWNSEND and GILL, JJ., concur.

SMITH v. SIMPSON.

(Court of Appeals of Indian Territory. April 5, 1901.)

APPEAL—BILL OF EXCEPTIONS—MOTION FOR NEW TRIAL—ERRORS ASSIGNED.

Under Mansf. Dig. § 1810 (Ind. T. Ann. St. 1899, § 812), declaring that a judgment shall not be reversed for an error which can be corrected on motion in the inferior court, until such motion has been made there and overruled, where the errors assigned might have been corrected by motion for a new trial they will not be considered on appeal, where the bill of exceptions merely states that a motion for a new trial was made and overruled, but does not set forth any of the grounds on which it was asked.

Appeal from the United States court for the Southern district of the Indian Territory; before Justice Hosea Townsend, April 12, 1900.

Action by J. W. Simpson against J. B. Smith. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Johnson & Carter, for appellant. J. W. Hocker, for appellee.

GILL, J. Counsel for appellant in their brief assign two grounds of error, to wit: (1) The court erred in rendering judgment, for the reason that there is no evidence to sustain such judgment; (2) the court erred in instructing the jury that the payment to Smith, plaintiff in error, being proven, the burden was upon him to show that he did not have reasonable cause to believe that Goode, the bankrupt, was insolvent, and intended a preference of such payment. Both of these alleged errors could have been corrected on a proper motion before the court below. Section 1310, Mansf. Dig. (Ind. T. Ann. St. 1899, § 812), is as follows: "A judgment or final order shall not be reversed for an error which can be corrected on motion in the inferior courts until such motion has been made there and overruled." Was a motion presenting the errors complained of presented to the court below and ruled upon? We have carefully examined the bill of exceptions, and must say that the record fails to disclose any such motion or ruling. It is

true that the bill of exceptions contains a brief statement to the effect that a motion for a new trial was filed and overruled, but it does not set forth a single one of the grounds upon which a new trial was asked. We think that the contention of the counsel for appellee that the errors assigned for the consideration of this court must first be presented by a motion for a new trial to the court below, and then made a part of the record by a bill of exceptions, is correct, and that his position is fully sustained by the following authorities cited in his brief: *Rogers v. Richards* (N. M.) 47 Pac. 719; *Steck v. Mahar*, 26 Ark. 536; *Mills v. Jones*, 27 Ark. 506; *Lambert v. Killian*, Id. 549; *Union Co. v. Smith*, 24 Ark. 684; *Hanf v. Ford*, 37 Ark. 544; *Blanchard v. U. S. (Okl.)* 54 Pac. 300; *Bank v. Anderson* (Wyo.) 53 Pac. 280; *Siebel v. Bath* (Wyo.) 40 Pac. 756, reading page 759; *Berman v. Wolf*, 40 Ark. 251; and *Walker v. McGill*, Id. 39. A motion for a new trial is not a part of the record proper unless it is included in the bill of exceptions. In the absence of a statute making it a part of the record,—and we have no such statute,—it must be included in the bill of exceptions. The authorities are uniform on this proposition. There being no error apparent in the record before the court, this appeal is dismissed.

CLAYTON, C. J., and THOMAS, J., concur.

BUTLER et al. v. PENN et al.

(Court of Appeals of Indian Territory. April 5, 1901.)

COURTS—UNITED STATES DISTRICT COURTS—UNITED STATES COMMISSIONERS—APPELLATE JURISDICTION.

Under Act Cong. March 1, 1895 (Ind. T. Ann. St. 1899, c. 41), authorizing appeals to be taken to the United States court from final judgments of the United States commissioners acting as justices of the peace, provided that no appeal shall be allowed in civil cases where the amount of the judgment, exclusive of costs, does not exceed \$20, the United States district court did not acquire jurisdiction of an appeal from the United States commissioner's court of an action on a note determined in favor of the defendants, no judgment for more than \$20, exclusive of costs, being recovered.

Appeal from the United States court for the Central district of the Indian Territory; before Justice Yancey Lewis, November 25, 1896.

Action by S. B. Penn & Co. against Lem Butler and another. From a judgment in favor of the plaintiffs, the defendants appeal. Reversed, with direction to dismiss the action.

This action is on a promissory note alleged to have been executed by appellants to appellee, dated May 16, 1896, for the sum of \$150, with 10 per cent. interest. The action was begun in the United States commissioner's court, Central district, Durant division, where same was tried to a jury, which found a ver-

dict for defendants, the appellants. So far as the record discloses, no judgment was rendered in the commissioner's court on the verdict, but, assuming that proper judgment was entered, it would only have been for costs against the plaintiffs. Plaintiffs appealed the case to the United States court for the Central district of the Indian Territory, sitting at Atoka, in which court the case was again tried to a jury, and in which court, under exceptions of appellants, the jury were instructed to return a verdict in favor of plaintiffs, appellees here, and against defendants, appellants here, in the sum of \$150, which verdict was returned accordingly. Appellants filed motion for new trial, which was overruled by the court under exceptions of appellants. The court thereupon pronounced its judgment on the verdict in favor of appellees and against appellants in the sum of \$150 and for interest and costs. From this judgment appellants prayed and were allowed an appeal.

J. G. Ralls, for appellants. W. L. Richards, for appellees.

GILL, J. (after stating the facts). The only point urged in this case by appellants, and necessary to be considered by this court, is one of jurisdiction. Did the United States court have jurisdiction to try the cause, it being an appeal from the United States commissioner's court, and there being no judgment in the cause, unless a judgment for costs? In the Act of March 1, 1895, congress provided that "appeals may be taken to the United States court in the Indian Territory in said districts, respectively, from the final judgment of said commissioners, acting as justices of the peace, in all cases; and such appeals shall be taken in the manner that appeals may be taken from the final judgments of the justices of the peace under the provisions of said chapter 91, in civil cases, * * * of the Laws of Arkansas: provided, that no appeal shall be allowed in civil cases where the amount of the judgment in civil cases, exclusive of costs, does not exceed twenty dollars." Ind. T. Ann. St. 1899, c. 41. In the case at bar, if there was a judgment at all, certainly there was none which exceeded \$20 exclusive of costs, and the district court was without jurisdiction on appeal to try the case. The question of jurisdiction may be properly raised in this court for the first time, but it is not the most commendable practice for attorneys to discover and raise questions of jurisdiction in this court for the first time, when, if raised in the court below at the time of presentation of the case, the necessity of an appeal to this court would probably not exist. This question was passed upon in this court in *Morrow v. Barney* (Ind. T.) 51 S. W. 1078, and other cases referred to therein. We are clearly of the opinion that the court below was without jurisdiction to try this cause, and therefore its judgment is reversed, and the cause remanded, with di-

rections to dismiss the appeal from the commissioner's court.

CLAYTON, O. J., and THOMAS and TOWNSEND, JJ., concur.

CARDER et al. v. WALLACE.

(Court of Appeals of Indian Territory. April 5, 1901.)

APPEAL AND ERROR—MASTER IN CHANCERY—FINDINGS—CONCLUSIVENESS—CONFIRMATION—CONFLICTING EVIDENCE.

1. Findings of a master on conflicting evidence, confirmed by the trial court, cannot be disturbed on appeal.

2. Defendant pleaded usury in an action on a note, but was unable to state what amounts he had paid as interest or otherwise on the notes, or how he had repaid small sums of money loaned to him, for which the note was executed. *Held*, that the evidence was insufficient to sustain defendant's burden of proof.

Appeal from the United States court for the Northern district of the Indian Territory; before Justice William M. Springer, May 24, 1899.

Action by J. W. Wallace against A. E. Carder and others. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

The appellee (plaintiff below) brought suit against appellants (defendants below) in equity on a promissory note executed by the defendants on March 15, 1898, for the sum of \$2,500, due in six months, with interest at 10 per cent. per annum, payable to the order of plaintiff, and to foreclose a mortgage on certain premises in the town of Wagoner, given by said defendants to plaintiff to secure the payment of said note. Defendants in their answer admit the execution of the note and mortgage, but deny that the plaintiff is entitled to recover on said note, because the same is tainted with usury, and say that said usury arose as follows: That on the 1st day of November, 1895, defendants borrowed \$1,800 of plaintiff, but that plaintiff contracted with and demanded and exacted of and from said defendant Carder 18 per cent. interest per annum on said amount of money, for which defendants gave their note, due 90 days after date, to plaintiff, which note on its face bore only 10 per cent. interest; that thereafter, and on July 1, 1896, said last note having come due, defendants executed a second note to plaintiff for the sum of \$1,700, due October 1, 1896, bearing on its face interest at the rate of 10 per cent. per annum, and that thereafter, on the 15th day of March, 1898, said last-named note being unpaid, the defendants, at the request of plaintiff, executed and delivered to plaintiff the promissory note sued on in this case, for \$2,500, to cover the amount which plaintiff falsely and corruptly claimed to be due him on said last above mentioned note, and the further sum of \$185, which had been advanced by plaintiff to defendants after

the execution of the said \$1,700. This case was referred by the court to the master in chancery, who took testimony and reported his special findings of law and facts, finding in favor of plaintiff (the appellee) to which defendants (the appellants) filed exceptions. Said report and the exceptions thereto were fully considered by the court below, and the court overruled said exceptions and confirmed the report of the master in chancery, and entered up judgment therein in favor of appellee and against appellants in the sum of \$2,672.89, with interest from May 24, 1899, at the rate of 10 per cent. per annum, and for costs, and a further judgment for the foreclosure of said mortgage and the sale of said mortgaged premises to satisfy said judgment. To these rulings and this judgment appellants duly excepted, and prayed and were allowed an appeal to this court.

John D. Freeman, Thomas Marcum, De Roos Bailey, and Thomas Owen, for appellants. N. B. Maxey, W. B. Hunt, and Anthony Crafton, for appellee.

GILL, J. (after stating the facts). This case turns entirely upon matters of fact, or rather upon the conclusions of the master in chancery and the court below in its judgment on the testimony submitted. The master in chancery, to whom the case was referred, reported his conclusions upon the law and the facts. In this case exceptions were filed to the report of the master in chancery, and the court below, upon full presentation of the matter, sustained the master's conclusions as to the facts, and confirmed his report, and announced its judgment upon such report.

It seems to be well established as a principle that this court will not disturb the judgment of the trial court where the evidence is conflicting. *Martin Browne Co. v. Morris*, 1 Ind. T. 495, 42 S. W. 423; *Malting Co. v. Schroeder*, 67 Ill. App. 560; *Hayes v. Hammond*, 162 Ill. 133, 44 N. E. 422; *Dean v. Emerson*, 102 Mass. 480; 14 Am. & Eng. Enc. Law (1st Ed.) 940, and notes; *Missouri Pac. R. Co. v. Texas & P. Ry. Co. (C. C.)* 33 Fed. 803. An examination of the evidence in this case not only discloses conflict therein, but further that the defendant failed wholly to establish his claim of usury by a preponderance of the testimony. The plea of usury is affirmative in its nature,—one which the defendant undertakes to establish and must establish by a preponderance of the evidence. *McEwin v. Humphrey*, 1 Ind. T. 553, 45 S. W. 114; *Bayliss v. Cockcroft*, 51 N. Y. 303; *Webb, Usury*, §§ 416-418; 27 Am. & Eng. Enc. Law, 1046, and note 1, and cases cited; *Berdan v. Trustees*, 47 N. J. Eq. 8, 21 Atl. 40; *McAleese v. Goodwin*, 69 Fed. 759, 16 C. C. A. 887. In this case, where the burden is upon the defendant, he not only fails by a preponderance of the testimony to show that the note sued on is tainted with

usury, but was unable to state clearly the amounts of money going to make up the \$1,700 note or the \$2,500 note; nor does it appear clearly by his testimony that he knew just what amounts he had paid the plaintiff by way of interest, or otherwise, on the notes, or how he had repaid the plaintiff various small sums of money which appear in the testimony to have been loaned him from time to time by the plaintiff. Inasmuch as the master in chancery has reported fully in this case, and that report has been confirmed by the court below, and in view of the fact that this ordinarily is as conclusive upon the parties as the verdict of a jury in an action at law, and the evidence in the case is, to say the least, conflicting, we are of the opinion that the judgment of the court below was right and ought to stand, and the same is therefore affirmed.

CLAYTON, C. J., and THOMAS and TOWNSEND, JJ., concur.

RUTHERFORD et al. v. McDONALD et al.
(Court of Appeals of Indian Territory. April 5, 1901.)

ACTIONS—EJECTMENT—FORCIBLE ENTRY AND
DETAINER—PLEADING—AMENDMENT—
CAUSE OF ACTION—CONTENTS.

Plaintiff brought action in forcible entry and detainer, and defendant, after giving bond to retain possession, answered, denying plaintiff's title, and asserting title in himself. After the introduction of some testimony, plaintiff was allowed to amend by changing the name of the action to ejectment; the issues remaining the same, and the trial not being interrupted. *Held*, that it was not error to allow the amendment, as Mansf. Dig. § 5060 (Ind. T. Ann. St. 1899, § 3285), allows the court to amend pleadings when the amendment does not substantially change the claim or defense, and it was immaterial that defendant had been required to give bond, or that plaintiff had a right to institute a separate action in ejectment.

Appeal from the United States court for the Northern district of the Indian Territory; before Justice William M. Springer, May 19, 1899.

Action by C. C. McDonald and others against A. W. Rutherford and others. From a judgment in plaintiffs' favor, defendants Appeal. Affirmed.

It is shown in the transcript that on April 23, 1898, appellees (plaintiffs below) filed their complaint against appellants (defendants below), as a complaint in forcible entry and detainer, to recover possession of some 25 acres of land described therein, and situated in the Cherokee Nation, in the Northern district of the Indian Territory, claiming to be the owners of said land, and that the defendants (appellants here) on or about December 20, 1897, took forcible possession of said premises from appellees, and refused to deliver the same upon written demand from appellees; that the appellees filed

the necessary affidavit and filed bond for the immediate delivery of said premises; that thereupon writ of possession and summons issued in said case, and was served on Rutherford and Austin, appellants, who in turn gave the statutory bond to retain possession of said premises. Appellants (defendants below) filed their answer in said cause on November 16, 1898, in which they admit that Rutherford, one of the appellees, was in the possession of the premises at the commencement of suit, and deny that Austin, one of the appellees, was in such possession; deny the chain of title of appellees, and set up a claim under chain of title in themselves. The issues in said cause were tried to a jury. After some testimony had been introduced by the plaintiffs (the appellees), they were, on motion, allowed to amend their complaint, over the objection and exception of appellants, so as to make the cause an action of ejectment, instead of one in forcible entry and detainer. No formal amendment appears in the record, except that the name of the action was changed from forcible entry and detainer to ejectment. All the issues remained as before, and the trial proceeded. Appellees introduced their testimony. Appellants introduced their testimony. The jury was charged by the court as to the law, exceptions being duly noted as to certain portions of the charge, and retired and returned a verdict in favor of appellees (plaintiffs below). Appellants (defendants below) moved for a new trial, which was overruled by the court under their exceptions; and the court thereupon rendered judgment upon the verdict in favor of appellees and against the appellants for costs, awarding a writ of restitution for the premises involved. From this judgment appellants appealed. Appellants assign eight specifications of error, the first and principal of which is: "(1) In permitting appellees to substitute the action of ejectment for forcible entry and detainer in the trial of the action of forcible entry and detainer."

Charles G. Watts and Marcum, Bailey & Owen, for appellants. Bradley, Wells & Bonner and Hutchings & West, for appellees.

GILL, J. (after stating the facts). As to the specifications of error from 2 to 8, inclusive, the court has examined the instructions of the court below, and is of the opinion that they fully cover all the points necessary to be stated in the case, and accurately and comprehensively state the law governing, and that the court below committed no error in giving these instructions, and in refusing to give those asked by appellants. The only question, then, that remains to be examined, is the error complained of in specification No. 1. Did the court below err in substituting an action of ejectment for one begun as an action of forcible entry and detainer? An examination of the pleadings

in this case shows that the issues tried in the cause were those of an action in ejectment, instead of those in an action in forcible entry and detainer. The amendment asked for by the plaintiff in the cause below, and allowed by the court, was a change in the name of the action, and not such an amendment as changed the issues to be tried. The answer of the defendant in the action is just such an answer as he would have had to have filed in the case to have his title and possession of the premises tried in action of ejectment. He was not surprised by the amendment, but in fact had treated the action up to the time that the amendment was asked as though it were an action of ejectment, had produced his witnesses, and was ready to go on with the trial and present his side of the issues in the case. The statute (section 5060, Mansf. Dig.; section 3285, Ind. T. Ann. St. 1890) provides that "the court may at any time in furtherance of justice, and on such terms as may be proper, amend any pleadings or proceeding, by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect, or by inserting other allegations material to the case, or, when the amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the facts proved." Under this section the court is given a wide discretion, in the furtherance of justice, to allow any mistake made in a pleading to be corrected, where it does not substantially change the claim or defense. In this case the claim and defense remained exactly as they were before the amendment was made. There was not even necessity for delaying the trial of the action, as both parties were ready to try the action as though it were one in ejectment. Under section 5083, Mansf. Dig. (section 3288, Ind. T. Ann. St. 1890), "the court must, in every stage of an action, disregard any error or defect in the proceedings which does not affect the substantial rights of the adverse party, and no judgment shall be reversed or affected by reason of such error or defect." Here the court below saw that the substantial rights of both parties were presented by the pleadings in the action, and that they could proceed to a trial of the action without injury to either; and, in compliance with the directions of the statute, the court could not do otherwise than to proceed to try this action, instead of putting both parties to the expense and delays incident to the filing of a new cause. While in this case it is true that the appellants were necessitated to the giving of a bond to hold possession of the premises, it was at their own option whether they should or should not give the bond. Having given the bond, they retained possession of the premises, and consequently the mere fact that in forcible entry and detainer the plaintiffs could have acquired possession of the prem-

ises, and were endeavoring to do so, does not in the least change the power of the court, in the furtherance of justice, to treat this action and the pleadings therein as an action of ejectment, and to try the case as such. Nor does it make any difference that, because the plaintiffs had the right to institute a separate suit in ejectment under the statute, the court could not treat the action before it as one such. We think there is no error in the judgment of the court below, and the same is therefore affirmed.

CLAYTON, C. J., and THOMAS and TOWNSEND, JJ., concur.

GENTRY v. SINGLETON.

(Court of Appeals of Indian Territory. April 6, 1901.)

PARTNERSHIP—CONTRACT—AGENCY—EVIDENCE—QUESTION FOR JURY.

Plaintiff entered into a partnership with J. whereby plaintiff was to furnish the money and J. was to buy and sell cattle, dividing profits. J. made an agreement with H. to assist him, to which arrangement plaintiff did not dissent, further than to say that J. was the only partner whom he knew. H. and J. purchased certain cattle, but, before they were removed, H., without authority, sold them to defendant, and plaintiff brought trover. *Held*, that it was error to reject evidence that J. and H. were commonly reputed to be partners, and to direct a verdict for plaintiff, but the question of agency or partnership on the part of H. should have been submitted to the jury.

Appeal from the United States court for the Northern district of the Indian Territory; before Justice William M. Springer, October 4, 1898.

Action by Thomas G. Singleton against William E. Gentry. From a judgment in plaintiff's favor, defendant appeals. Reversed.

This is an action in the nature of the common-law action of trover to recover the value of 56 head of cattle which the plaintiff alleged the defendant wrongfully took and converted to his own use. The facts are as follows: The plaintiff, Thomas G. Singleton, appellee herein, and who resided at Fredonia, in the state of Kansas, and J. A. Skaggs, who resided at Shawnee, Oklahoma territory, in the spring of 1897 entered into a co-partnership whereby Singleton was to furnish the money, and Skaggs his skill and time, in the purchase and sale of cattle, and they were to divide the profits equally. Skaggs afterwards made an arrangement with J. N. Henry by which Henry was to assist him in the cattle business, and Skaggs was to divide his half of the profits equally with Henry. Singleton afterwards learned from Henry of this arrangement, and made no other objection than that Skaggs was the only partner he knew in the business, and Henry replied that all he claimed was one-fourth of the profits. About the latter part

of June, 1897, Skaggs and Henry went together in a buggy to a farmer and cattle man by the name of Charles Bruner, and bought the cattle in question; and Skaggs gave Bruner a check for \$500, and agreed to let the cattle remain in Bruner's pasture until he saw that the check was good, and that he would pay the balance later on. On July 7th Skaggs gave Bruner another check for \$1,062, being the balance on the purchase price of the cattle. The cattle were to remain in Bruner's pasture for a few days, until they got ready to move them, and they were to pay Bruner pasturage. Some days afterwards Henry came to Bruner's pasture with a man named Magill, who was the agent and buyer for W. E. Gentry, the appellant; and, after examining the cattle, Magill bought them for Gentry, and paid for them, and drove them across the country to Checotah, from which place they were shipped to market by Gentry. Henry paid Bruner for the pasturage of the cattle for the time they had remained after he and Skaggs went there. Henry then returned to Shawnee, where he deposited the check which he had received for the cattle in the bank. He and Skaggs then got into a controversy over a settlement, and Skaggs telegraphed for Singleton, who came down from Kansas and got out a warrant for Henry, but by direction of Singleton it was not served on Henry. After Skaggs, Singleton, and Henry failed to settle, Skaggs and Singleton came to Checotah to see Gentry, who told them that he had already shipped the cattle to market, and asked them why they did not go on to Henry about it, if he had no right to sell them. Singleton replied that he did, but Henry "talked real sassy" to him. Gentry refused to pay Singleton for the cattle, and he brings this suit. On the trial of the case Gentry offered to prove that Skaggs and Henry were dealing in cattle generally about the time the cattle in controversy were bought, and that they were generally regarded as partners, in the neighborhood, in such business; but the trial court ruled that, unless Skaggs and Henry had authority from Singleton to sell the particular cattle in controversy, he was not bound by the sale, and no title passed. The defendant saved exceptions to this ruling of the court, and the same is assigned as error. At the close of the testimony the trial court, on motion of counsel for plaintiff, directed the jury to find the issues for the plaintiff, and assess the damages at the reasonable market value of the cattle at the time they were sold by Henry to Gentry. Defendant duly excepted to this action of the court, and the same is assigned as error. The jury, under the direction of the court, returned a verdict for plaintiff, and assessed his damages at \$1,550. Defendant filed his motion for a new trial, which was overruled by the court; and the court entered judgment on the verdict, to which defendant excepted and prayed an appeal, and took time to file

a bill of exceptions, and in due time brought this case before this court for review.

N. B. Maxey and Benjamin Martin, Jr., (James M. Shackelford, of counsel), for appellant. W. T. Hutchings and P. C. West, for appellee.

THOMAS, J. (after stating the facts). Under the facts in this case, the appellee and J. A. Skaggs were partners. Singleton was to do nothing but furnish the money, and Skaggs was to buy and sell, and divide the profits equally with Singleton. This constituted them partners. Mr. Bates, in his work on Partnership (volume 1, p. 48, § 36), says: "Where A. contributes services in collecting and buying hogs and cattle, and B. furnishes the capital, profits to be divided, nothing being said about losses, there is a community of profits, and therefore a partnership, and A. cannot sue B. at law for his share. B. advanced \$20,000 to H., to invest in the purchase and sale of cotton goods; H. to attend to business, and, after repaying the money, divide the profits equally. Real estate was bought with part of the proceeds, and the title taken in H.'s name. There was held to be a partnership *inter se*, and a loss must fall upon both. So, where S. gave N. \$300 to buy sheep, S. to have half the profits, and if there were losses he was to have no interest, this is a partnership *inter se*, not merely in the profits, but in the \$300." In *Dob v. Halsey*, 8 Am. Dec. 293, it was held: "Where one furnishes the capital for an undertaking, and another puts in his services in consideration of a share of the profits, indefinitely, there is a partnership between them, as regards the parties themselves, as well as third persons." See, also, *Miller v. Hughes*, 10 Am. Dec. 719; *Bromley v. Elliot*, 75 Am. Dec. 182; *Leggett v. Hyde*, 58 N. Y. 272. The court, in the case of *Miller v. Hughes*, above cited, in passing upon the power of one partner to bind another by private agreement between themselves, uses the following language: "That was a matter that concerned themselves only, and could not affect a contract made with any other; for, as partners have equal authority over their partnership affairs, it would be preposterous to suppose that either of them could by such instructions limit the power of the other to bind him." In the same case a partnership is defined to be a voluntary contract between two or more persons for joining together their money, goods, or labor, upon an agreement that their gain or loss shall be divided proportionately; and whether each contributes money or labor, or both money and labor, or, as in the present case, one finds money and the other labor, still it is equally a partnership. The fact that there was no agreement between Singleton and Skaggs that Skaggs should be liable to sustain a proportion of the loss, if any should happen in the course of trade, constitutes them none the

less partners. As Skaggs was entitled to a share of the profits, it follows as a legal consequence that he must share the loss. The rule in this respect is that one who shares in the advantages must also share in the disadvantages of the partnership concern. *Miller v. Hughes*, supra. Skaggs entered into an arrangement with Henry whereby he was to divide his half of the profits with him. This arrangement was known to Singleton. Skaggs was the active member of the co-partnership. Few persons, if any, in the neighborhood, outside of the bank through which he and Singleton conducted their business, knew Singleton in the business at all. Singleton's home was in Fredonia, Kan., several miles away from where this business was being conducted. He furnished the capital with which to carry on the business, and the practical management of it was turned over to J. A. Skaggs. That the members of a partnership are bound by the action of one of its members in the employment of servants and employés for the purpose of carrying on the partnership business is well established. "Each partner in the prosecution of the business has implied power to employ labor or engage services such as are necessary to conduct the ordinary business of joint enterprise." 1 Bates, Partn. § 334, and cases cited. The testimony shows that the cattle were purchased originally from Charles Bruner; that at the time of the purchase Skaggs and Henry went to the house of Charles Bruner, and contracted with him for the purchase of the same; that the cattle were left in the pasture of Bruner for some time after they were purchased. And Bruner testified that he did not know Singleton in the transaction; that he told them he would not be responsible, as he was going to be away from home, and Skaggs said he or Henry would be around there to look after the cattle; that the cattle were taken away while he was absent from home; and that Henry afterwards paid him for the pasturage of the cattle. The testimony of a number of other witnesses was offered to show that Skaggs and Henry were buying and selling cattle in the neighborhood, and were generally regarded as partners. The trial court ruled that this testimony was not proper until defendant had first established that Henry was Singleton's agent. We think that the question of whether Henry's relations to the business were such as to constitute him a partner of Skaggs, or an agent of the partnership, should have been submitted to the jury, under proper instructions, and that it was error for the court to direct a verdict for the plaintiff. In *Bromley v. Elliot*, 75 Am. Dec. 183, it was held "that a person who receives a share of business profits by way of salary or compensation for services is liable as a partner to third persons, unless the true character of the agreement is known, or the apparent relations of the parties are such as should put parties dealing with them upon inquiry." If a wrong has been commit-

ted in this case, it was occasioned by the appellee, and, if it be claimed for him that he was innocent of the transaction in question, he stands upon no higher ground than the appellant; and, where one of two innocent parties must suffer, every principle of right and justice would suggest that it should be the one who made the commission of the wrong possible,—the one who placed the power in the hands of the man who actually committed the wrong. "Where one person clothes another with all the indicia of ownership of personal property, he is bound by the act of such person, even though it be contrary to his instructions." *Carmichael v. Buck*, 70 Am. Dec. 226; *Mowrey v. Walsh*, 8 Cow. 238; *Rosser v. Darden* (Ga.) 7 S. E. 919, 14 Am. St. Rep. 152; *Steamboat Co. v. Scudder*, 67 U. S. 372, 17 L. Ed. 232; *Saltus v. Everett*, 20 Wend. 267; 2 Herm. Estop. § 978. Mr. Herman, in his work on Estoppel and Res Judicata, in the section above quoted, says: "Where the owner holds out another or allows him to appear as the owner of, or as having full power of disposition over, the property, and innocent third parties are led into dealing with such apparent owner, they will be protected. Their rights in such cases do not depend upon the actual title or authority of the party with whom they deal directly, but are derived from the act of the real owner, which precludes him from disputing, as against them, the existence of the title or power which, through negligence or mistaken confidence, he caused or allowed to appear to be vested in the party making the sale or conveyance. Possession of personal property is prima facie evidence of title. It would furnish fraudulent parties with the means of defrauding honest purchasers to intrust them with the apparent ownership of property, while the real title is allowed to remain in a third party, who can reclaim it at pleasure." We are therefore of opinion that there is error in the record, and that the appellant was entitled to a new trial. The case is therefore reversed, with directions to the court below to set aside the judgment and grant a new trial. Reversed and remanded.

CLAYTON, C. J., and TOWNSEND and GILL, JJ., concur.

In re ENGLISH.

(Court of Appeals of Indian Territory. April 5, 1901.)

MUNICIPAL CORPORATIONS—POWERS—WOODEN BUILDINGS—HEIGHT—EXTENT—ORDINANCE—ULTRA VIRES—CONVICTION UNDER—HABEAS CORPUS.

Mansf. Dig. § 752 (Ind. T. Ann. St. 1899, § 522), provides that municipal governments shall have power to guard against accidents by fire, to regulate the building of houses, and to prohibit the erection of any building "more than ten feet high," unless of brick, etc. Mansf. Dig. § 764 (Ind. T. Ann. St. 1899, §

534), empowers municipal corporations to make such ordinances, not inconsistent with the laws of the state, as to them shall seem necessary for the public safety, general welfare, etc. *Held*, that a city ordinance prohibiting the erection of wooden buildings more than 10 feet square was ultra vires as to buildings less than 10 feet in height.

Appeal from the United States court for the Northern district of the Indian Territory; before Justice John R. Thomas, November 4, 1899.

Petition for a writ of habeas corpus by Albert Z. English. From an order denying the petition and remanding petitioner to custody, he appeals. Reversed.

Hutchings & West, for appellant. Charles Von Weise, for appellee.

CLAYTON, C. J. On the 1st day of November, 1899, the appellant, Albert Z. English, a resident of the incorporated town of Muskogee, was arrested and brought before the mayor of said town for a violation of ordinance No. 30, and was fined \$2.50 and costs. In default of payment of said fine, he was committed to the custody of the marshal. He immediately sued out the writ of habeas corpus involved herein, which was tried on Saturday, November 4, 1899. The petition sets forth sections of the ordinance which the appellant violated, he having built some wooden buildings within the fire district $9\frac{1}{2}$ feet high, but admittedly of greater width than those allowed under the ordinance. The ordinance only permitted out-houses not exceeding 10 feet square to be constructed of wood, or wood and corrugated iron. Plaintiff contended that, under the laws of Arkansas, he could erect necessary outbuildings of any width, provided they did not exceed 10 feet in height. The town appeared by its attorney, and demurred to the petition, and the demurrer was sustained by the court, and it is from that ruling this appeal is prosecuted.

The sections of the city ordinance referred to are as follows:

"Sec. 2. No building shall be erected within the aforesaid district [the fire limits] except as hereinafter provided, unless the same shall be constructed of brick, stone, or other fire-proof material.

"Sec. 3. Sheds not exceeding 12 feet in height at the highest part thereof, and necessary out-houses not exceeding ten feet square and 12 feet high at the highest part, may be constructed of wood, or wood and corrugated iron: provided, that the term shed shall be construed to mean a structure with one or more sides thereof entirely open."

It is contended that the provisions of this ordinance, which prohibits the erection of wooden out-houses more than 10 feet square, although they may be within the prescribed height, is in violation of section 752, Mansf. Dig. (section 522, Ind. T. Ann. St. 1899), which reads as follows: "They shall have power to

regulate the building of houses; to make regulations for the purpose of guarding against accidents by fire, and to prohibit the erection of any building or any addition to any building, more than ten feet high, unless the outer walls thereof be made of brick and mortar, or of iron, or stone and mortar; and to provide for the removal of any building or additions erected contrary to such prohibition." The first two clauses of the above section, that municipal governments shall have power "to regulate the building of houses," and to make "regulations for the purpose of guarding against accidents by fire," together with the general welfare clause ingrafted in section 764, Mansf. Dig. (section 534, Ind. T. Ann. St. 1899), that "municipal corporations shall have power to make and publish by-laws and ordinances not inconsistent with the laws of the state * * * as to them shall seem necessary to provide for the safety, preserve the health, promote the prosperity, and improve the morals, order, comfort and convenience of such corporations and the inhabitants thereof," are unquestionably sufficiently broad and comprehensive to include the power to prescribe the dimensions of wooden buildings, or to prohibit their erection altogether, within the fire limits of a city or town. "The decided weight of authority in this country is that municipal corporations have the power, under the general welfare clauses usually contained in their charters, without express legislative grant, to establish fire limits, forbidding the erection of wooden buildings within such limits, when such regulations are not inconsistent with the general laws of the state." See Am. & Eng. Enc. Law, 1170, and note 1, where the authorities are collated. But the clause of section 752, Mansf. Dig. (section 522, Ind. T. Ann. St. 1899), above set out, granting the power to cities and towns to prohibit the erection of wooden buildings, expressly limits that power to buildings more than 10 feet high. The language is: "And to prohibit the erection of any building, or any addition to any building, more than ten feet high, unless the outer walls," etc. The statute is silent as to any dimensions except as to height, and therefore the power to prohibit the erection of buildings at all springs into existence only when the height mentioned in the statute is exceeded. And as the city council is the creation of the statute, and derives all its powers from it, it can pass no ordinance except such as the legislature, by statute, has authorized it to do; and, inasmuch as the legislature has seen fit to grant the power to prohibit the erection of wooden buildings only when their height exceeds 10 feet, the city council cannot enlarge its power by prescribing their length and breadth when under that height. The judgment of the court below in sustaining the demurrer and remanding the prisoner is therefore reversed, and the cause re-

manded, with directions to discharge the prisoner.

TOWNSEND and GILL, JJ., concur.

CASE et al. v. INGLE.

(Court of Appeals of Indian Territory. April 5, 1901.)

MORTGAGES—FORECLOSURE—EQUITABLE DEFENSE—DEMURRER.

1. Allegations that defendant bought a printing office and papers of plaintiff for \$3,000, and paid \$200 in cash, and assigned to him the \$500 note in suit, and executed installment notes for the balance, and that plaintiff fraudulently represented that the income derived from the printing business amounted to \$100 a month over and above expenses, and that during the six months defendant operated the business the proceeds were not sufficient to pay the expenses, constituted an equitable defense to an action to foreclose a mortgage securing the assigned note, and hence it was error to sustain a demurrer to the answer.

2. Where plaintiff brought an action against C. and W. as makers of a note and M. as indorser, and for the foreclosure of a mortgage securing it, and M. filed an answer alleging facts constituting an equitable defense, which was adopted by C. and W., it was error to sustain a demurrer to the answer of C. and W.

Appeal from the United States court for the Southern district of the Indian Territory; before Justice C. B. Kilgore, March 29, 1897.

Action by Ed. P. Ingle against S. S. Case and another. From a judgment in favor of plaintiff, defendants appeal. Reversed.

This was a suit begun in the Southern district of the Indian Territory, at Purcell, at the instance of Ed. P. Ingle, as plaintiff, against S. S. Case, W. H. Walker, and R. Y. Mangum, as defendants, and was a suit in equity upon a promissory note bearing date of September 6, 1894, executed and delivered by S. S. Case and W. H. Walker to R. Y. Mangum, for the sum of \$500, due on September 1, 1896, with interest at 10 per cent. per annum, which note was afterwards, on the 22d day of September, 1894, transferred by said R. Y. Mangum by indorsement to the plaintiff. On the 6th day of September, 1894, the defendants S. S. Case and W. H. Walker made, executed, and delivered to said R. Y. Mangum their certain chattel mortgage in writing to secure the payment of said promissory note, on certain chattel property mentioned there, and suit was brought by plaintiff to recover judgment against the makers of said note, and against R. Y. Mangum as indorser thereon, and to foreclose the chattel mortgage above mentioned. On October 14, 1896, defendants S. S. Case and W. H. Walker filed their demurrer to plaintiff's petition, on the ground that the same did not state facts sufficient to constitute a cause of action, or to entitle the plaintiff to the relief sought, and because the plaintiff had a plain, adequate, speedy, and complete remedy at law, and on the same day Case and Walker filed their separate

answer to said petition. On the 23d day of October, 1896, R. Y. Mangum, defendant, filed his separate answer in said case, in which he admitted the assignment of the note, but claimed failure of consideration there, and pleaded fraudulent representations and statements made by the plaintiff in order to obtain said note, and further undertook to plead a counterclaim for damages, and asked for judgment upon his counterclaim. On the 20th of November, 1896, the plaintiff filed his amended complaint in equity, setting up, in substance, therein about the same matters as were in his original complaint, with the exception of changing certain dates, and attaching certain exhibits referred to in the original of said amended complaint. On November 26, 1896, defendant Mangum filed his motion in said cause to strike plaintiff's amended complaint from the files for the reason that on October 23, 1896, said defendant filed his answer in the above-entitled cause, in which he pleaded a counterclaim, and that plaintiff filed no reply thereto, and on said 26th day of November, 1896, plaintiff filed his demurrer to the separate answer of R. Y. Mangum on the ground that the answer did not state facts sufficient to constitute a defense to the action, and that the sixth count in his answer did not state facts sufficient to constitute a counterclaim or set-off in his favor, and on said November 26, 1896, the plaintiff filed his demurrer to the separate answer of S. S. Case and W. H. Walker on the ground that the answer did not state facts sufficient to constitute a defense, and that the facts stated in the second count and the facts stated in the third count and the facts stated in the fourth count of said defendants' answer were not sufficient to constitute a defense to the action, and on November 27, 1896, the plaintiff also filed his reply to the separate answer of R. Y. Mangum, which consists largely in denials of the allegations of said separate answer. On March 23, 1897, one of these demurrers appears to have been submitted to the court and sustained. Presumably, this demurrer related to the separate answer of S. S. Case and W. H. Walker, because on the following day, March 24, 1897, said Case and Walker filed an amended answer, and on said March 24, 1897, the plaintiff filed a motion to strike from the files the separate answer of Case and Walker because the answer was not verified, and on March 24, 1897, the plaintiff also filed his demurrer to the separate answer of Case and Walker because said answer did not state facts sufficient to constitute a defense in favor of defendants; and on March 29, 1897, the demurrer of the plaintiff to the separate answer of defendants Case and Walker, and also the plaintiff's demurrer to the separate answer of R. Y. Mangum, were submitted to the court, and the court sustained said several demurrers, and said defendants, and each of them, declining to amend or

plead any further, the court made and entered judgment that plaintiff should recover of and from defendants Case and Walker, as makers of said note, \$529, with interest to date, and also further decreed foreclosure of the chattel mortgage, and that the plaintiff was the owner of the same, and directed the issuance of a writ directing the marshal to seize and sell said property, and to apply the proceeds thereof in payment of the above-mentioned judgment, interest, and costs, and to pay any excess arising from said sale to said defendants Case and Walker. Exceptions were taken to the action of the court in sustaining the demurrers to the amended answer of Case and Walker, and also to the separate answer of R. Y. Mangum. On December 20, 1899, the Honorable Melville W. Fuller, chief justice of the supreme court of the United States of America, on the allowance of the Honorable William H. H. Clayton, United States associate justice of the court of appeals for the Indian Territory, directed that said cause be certified to the United States court of appeals for the Indian Territory, for review and correction of any error therein, and on June 12, 1900, in said court of appeals, said appeal was ordered dismissed, for the reason that the cause had not been finally disposed of as to all parties. Case v. Ingle, 51 S. W. 958. On November 22, 1899, the plaintiff filed his motion in the United States court for the Southern district of the Indian Territory for judgment *nunc pro tunc* in said cause, which motion was submitted to said court on November 22, 1900, and sustained by said court, and on said date, in said court and cause, judgment was entered *nunc pro tunc* against the defendant R. Y. Mangum for the sum of \$500, with interest from the 1st of September, 1896, at 10 per cent. per annum, and further decreed a judgment and decree foreclosing the chattel mortgage in plaintiff's complaint mentioned, and directing and ordering the marshal of the court to seize and sell the property therein described, as sales are made under execution, and to pay the above judgment, interest, and costs, and to pay to the defendants Case and Walker any excess. From this judgment the defendants, R. Y. Mangum, Case, and Walker appealed, and the case now stands in this court upon their appeal.

J. W. Hocker, for appellants. W. M. Newell and J. W. Cherryholmes, for appellee.

GILL, J. (after stating the facts). An examination of the record in this case shows some irregularities with reference to the hearing and disposing of motions and demurrers, and action upon papers filed after time fixed by the statute for filing such papers, without first obtaining leave of court therefor; but inasmuch as the parties interested did not, at the time of the filing of such papers, make specific objection thereto, nor thereafter at-

tack such filing by sufficient motion, it will be presumed that such papers were filed by leave of the court, particularly as the parties interested, the defendants, filed their answers thereto. The amended complaint of the plaintiff is attacked in no way except by motion to strike the same from the files, and then only for the reason that the same was filed after the defendant R. Y. Mangum had filed his answer in the case in which he says he pleaded a counterclaim, and because the plaintiff had filed no reply to said counterclaim, and not because the same was filed out of time without leave of court, and prayed for judgment on the pleadings. The separate answer of S. S. Case and W. H. Walker denies every allegation in said complaint not admitted in their answer. They admit the residence and citizenship of the parties, and the execution of the note and mortgage as set forth as exhibits in plaintiff's complaint; and, second, "defendants specially deny that plaintiff is the bona fide holder of said note for a valuable consideration, and that he became possessed of said note in the usual course of business, and allege, and so charge, that plaintiff obtained possession of said note through fraud and misrepresentation, and without any consideration whatsoever"; and, third, "specially deny that the same has been assigned or transferred to plaintiff, and deny that he has any interest in the same, but that the same is, in truth and in fact, the property of R. Y. Mangum, the original payee in said note, and that defendants, from time to time, in good faith believing that said R. Y. Mangum was the rightful owner and holder of said note and mortgage, have fully paid off and discharged said note, without notice or knowledge of plaintiff's interest, if any he has, in and to said note, to the said R. Y. Mangum, and that after full payment of said note said mortgage has been and is fully released and satisfied of record, and the original delivered up to these defendants." They plead, fourth, "that said R. Y. Mangum is insolvent, and that said plaintiff, as is shown by the answer of said R. Y. Mangum filed herein, which these defendants allege to be true and adopt the same, is indebted to R. Y. Mangum in a sum exceeding the amount of the note sued upon, and that Ed. P. Ingle is a nonresident, and has no property in the jurisdiction of the court." The separate answer of R. Y. Mangum, omitting caption, is in words and figures as follows, to wit: "Now comes the defendant R. Y. Mangum, and for answer to plaintiff's petition filed herein alleges: First. That on the 22d day of September, 1894, the plaintiff, Ed. P. Ingle, was possessed of a certain printing office, presses, furniture, and fixtures situated in the town of Norman, Oklahoma territory, and known as the 'Norman Transcript,' the business of said office being publishing the weekly newspaper known as the 'Norman Transcript,' and of a monthly journal known as the 'Oklahoma School Herald,' of job printing, and a general printing

business. Second. Said plaintiff being desirous of selling said property and business, and the good will of the same, falsely and fraudulently represented to defendant that the said printing office was doing a lucrative and paying business; that said printing office had done a cash business for the six months immediately preceding the month of September, A. D. 1894, amounting in the aggregate to the sum of \$1,349.20, and that the cash receipts of the office for said months exceeded the expenses of the office an amount exceeding one hundred dollars per month; that said office had always paid plaintiff as much or more than one hundred dollars per month above the actual and necessary expenses of said office; that if defendant would purchase said business, and retain the then manager, O. W. Meacham, that said office would net a profit to defendant, above all expenses, a sum to exceed one hundred dollars per month, under the management of said O. W. Meacham. Third. Defendant, confiding in the representations of the plaintiff, purchased said printing office, business, and good will thereof for the sum of \$3,000, then and there paying in cash the sum of \$200, and delivered to plaintiff the \$500 note signed by Case and Walker, payable to defendant, and which is the subject of plaintiff's cause of action as set forth in his petition herein, and executed and delivered to plaintiff his 23 promissory notes for \$100 each, payable thirty days apart, commencing November 10, 1894. Fourth. That the business of said printing office was not, before nor at the time of making said false and fraudulent statements and representations, a paying and lucrative business, and at no time did the income of said office amount to as much as \$150 per month, and the said business never paid a net profit during the six months aforesaid, or before, of as much as \$100 per month, as plaintiff at the time well knew; that said business had been running at a dead loss for several months prior to the time defendant purchased, which was well known to the plaintiff at the time. Fifth. That although defendant, relying upon the representations of plaintiff, retained the said O. W. Meacham in control and management of said business, running the same for four months after said purchase, during all of said time said business failed to pay the running expenses of said office, and resulted in a dead loss to defendant. Sixth. That, to secure the deferred payments aforesaid, defendant made and delivered to plaintiff a mortgage on said printing office and business, by the terms of which, if default were made in the payment of any of the installment notes of \$100, as aforesaid, plaintiff should be entitled to assume possession of said business and office, and, after refusal of defendant to pay the second and third installment notes, plaintiff took possession of said printing office and business, and now holds the same, together with supplies furnished said office, put in by defendant, amounting to the sum of \$55.

Seventh. That, by reason of the aforesaid false and fraudulent representations of plaintiff, defendant paid plaintiff the sum of \$200 in money, as aforesaid, and delivered plaintiff the \$500 Case and Walker note, aforesaid, and paid the first installment note, amounting to the sum of \$100, and furnished said office with necessary supplies, which were taken possession of by plaintiff, in the sum of \$55, and expended four months of his time and labor attempting and trying to make said office pay, as defendant reasonably expected it to do, reasonably worth the sum of \$75 per month, or a total of \$300, and in all defendant has been damaged in the full sum of \$655, besides the amount of the Case and Walker note aforesaid. Eighth. The plaintiff still holds possession of two of said installment notes for \$100 each, and refuses to deliver the same to defendant. Wherefore, as plaintiff obtained the possession of said \$500 note, the subject of this cause of action, through fraud and deceit, defendant prays the judgment of the court that the two notes, of \$100 each, be also delivered up to defendant, and canceled, and that defendant have further judgment of the court over and against the plaintiff in the sum of \$655, his damage as aforesaid, costs of suit, and such general and special relief as in equity and good conscience the court may deem fit and proper." To this separate answer of Mangum's, and also to the separate answer of Case and Walker, the plaintiff filed his demurrer that the same did not state facts sufficient to constitute a defense, and at the same time the plaintiff filed his reply to the separate answer of Mangum.

The answer of Mangum and the reply of the plaintiff raise an issue as to the fraudulent representations and deceit, and as to the failure in consideration in the transfer by Mangum of the Case and Walker note to Ingle. We think that the separate answer of Mangum stated an equitable defense against the claim of Ingle on said promissory note. If Ingle had obtained this note through fraud and deceit from Mangum, as well as other valuable considerations, and held other notes of Mangum's which Mangum was endeavoring to have canceled, we think that the matters of the transfer of the note, and the means through which the note was obtained by Ingle, were so closely connected as to be one and the same transaction, and that Mangum would have the right to plead, not by way of counterclaim or set-off, these facts, but as matters of defense; and, if the testimony should establish his claims, that he would be entitled in this suit in equity to have the sale to him by Ingle set aside, and his notes canceled, and the Case and Walker note returned to him, and the demurrer to his separate answer should have been overruled; and, inasmuch as Case and Walker make Mangum's answer a part of their separate answer, Mangum should be relegated to his original position in reference to said note. The demurrer to the answer of Case and Walker

should, in like manner, have been overruled, and the parties permitted to test the facts by trial. It is not necessary to pass upon the other questions involved in this case, as, for the reasons foregoing, the case is reversed and remanded, with directions to the lower court to overrule the demurrers to the separate answers of the parties, and proceed with the case according to law.

CLAYTON, C. J., and THOMAS and TOWNSEND, JJ., concur.

BECKER v. LOUISVILLE & N. R. CO.¹
(Court of Appeals of Kentucky. April 12, 1901.)

RAILROADS—DUTY TO TRESPASSER ON BRIDGE
—CONTRIBUTORY NEGLIGENCE—PER-
EMPTORY INSTRUCTION.

1. Plaintiff, a boy 12 or 14 years of age, was not guilty of contributory negligence in remaining on a railroad bridge, after he saw a train approaching, for the purpose of rescuing one of his companions, a girl about the same age, who had fallen between the ties.

2. If the engineer saw plaintiff in time to have so slackened the speed of the train as to enable plaintiff to reach the end of the bridge in safety, he was guilty of negligence in failing to do so, though plaintiff was only a trespasser; there being no other means of escape for plaintiff.

3. As the engineer, if he was on the lookout, must have seen plaintiff and his companions in time to so slacken the speed of the train as to enable plaintiff to escape, and it is not to be presumed that he would have gone upon the bridge without looking to see whether it could be crossed in safety to the crew, the question as to whether the engineer did see the children in time to slacken the speed of the train so as to save plaintiff was for the jury, especially as some one was seen to look out of the cab of the engine towards the bridge as the train approached.

Appeal from circuit court, Lincoln county.
"To be officially reported."

Action by Claude W. Becker, by next friend, against the Louisville & Nashville Railroad Company to recover damages for personal injuries. Judgment for defendant, and plaintiff appeals. Reversed.

Robert Harding, John W. Rawlings, and Emmet V. Puryear, for appellant. Chas. R. McDowell and J. W. Alcorn, for appellee.

GUFFY, J. It is substantially alleged in the petition that one Mary Vanarsdale, an infant between 12 and 14 years of age, was upon the railroad bridge of the defendant at said time and place, and in front of said approaching train, and in great danger and peril of being run over by said train, and was placed in said danger and peril aforesaid by the gross negligence of defendant in failing to slacken said speed of said train after it became aware of her presence on said track and bridge, and by the gross negligence of the defendant in failing to stop said train

after it became aware of her presence on said track and bridge, and by the gross negligence of the defendant in the operation of said train after it became aware of her presence thereon, and that defendant became aware of her presence on said bridge in ample time to slacken the speed of said train to avoid running over and upon her and relieve her of said danger and peril. It is further alleged that plaintiff, Becker, undertook to rescue the said Vanarsdale from her peril and danger, and to enable her to escape from being killed by said train by the gross negligence of defendant, and in his efforts to rescue said Vanarsdale, and while he was endeavoring to do so, the train ran over him, knocking him from said bridge, and permanently injuring him, to the damage of \$5,000, for which he prayed judgment. The answer denies that on the occasion mentioned it could have slackened the speed of its train any more than it did after it became aware of the presence of said Vanarsdale and plaintiff, or that after it became aware of their presence on the bridge it could have avoided running over them. Denies any negligence at all. The answer may also be treated as pleading contributory negligence upon the part of the plaintiff. It is also pleaded that neither plaintiff nor Vanarsdale had any right to be upon the bridge in question. The affirmative averments of the answer were properly denied by reply. After the pleadings were made up, and various motions disposed of, which we deem it unnecessary to notice, the trial was entered into; and at the conclusion of plaintiff's testimony the court, upon motion of defendant, instructed the jury peremptorily to find for the defendant, which was accordingly done. And, plaintiff's motion for a new trial having been overruled, he prosecutes this appeal.

The sole question presented for decision is whether the plaintiff was entitled to have the case submitted to the jury, or, in other words, was there sufficient evidence from which the jury might find a verdict for the plaintiff? It appears from the evidence in this case that five children, to wit, Ed Hunn, Katie Hood, Lillie Owens, Mary Vanarsdale, and plaintiff, the ages of whom are about as follows: Lillie Owens, between 8 and 9; Ed Hunn, in his fourteenth year; Katie Hood, about 15; Mary Vanarsdale, between 12 and 13; and the plaintiff, in his fourteenth year, —had gone to the creek for the purpose of fishing, and, not being satisfied with the first point they reached, decided to go to another place, and, to reach it, decided to cross the creek on the railroad bridge, and while crossing it they heard or by some means became aware of the approaching freight train, and at once made an effort to get out of the way of the train, by continuing to cross the bridge to the other side of the creek. Three of the party escaped, but Miss Vanarsdale, it seems, fell through between the ties or bars of the bridge; and the plaintiff, who seems to have

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

been her escort, sought to rescue her, and perhaps pulled her up once out of the opening in which she had fallen, but she again fell into another, and as the result of this delay she was killed, and the plaintiff suffered the injuries sued for in this action.

It is the contention of appellee that plaintiff had no right to be on the bridge, and that it owed him no duty until after it discovered his peril, which it claims it did not do in time to avoid the injury; also that he was guilty of such contributory negligence as to bar his right to recover. It is evident that it was the legal right as well as the moral duty of the plaintiff to remain with and seek to rescue his companion, and, so far as that question is concerned, the law seems to be well settled that he was not guilty of any contributory negligence for remaining on the said bridge for the purpose of saving the life of his companion.

It is the contention of appellant that the defendant or its agents discovered those parties upon the bridge in ample time to have slackened the speed of the train so as to enable the plaintiff to have avoided the danger. The evidence conduces to show that the engineer could see the whole bridge from a distance of 960 feet, and one standing on the track at the bluff can see the whole length of the bridge for 320 yards; that a man in the cab could see the train 120 feet further back. The proof also conduces to show that a man in the cab could see the bridge 120 feet further back than if on the ground. It is also evident from the proof that for a considerable distance from the bridge it is up grade in reaching the bridge in question. There is also some proof tending to show that some one on the engine was seen to put his head out, as if looking towards the bridge, at some distance from it. It seems to us, from the evidence, that the jury were authorized to believe and to have found that the defendant's agents and servants saw those children upon the bridge in ample time to have so slackened the speed of the train as to enable them to have escaped the danger. There is hardly room to doubt this, from the map and evidence filed in this action. It is not at all reasonable to suppose that the defendant, if it had a right to do so, was indifferent as to the condition of the bridge it had to cross. It can hardly be presumed that the defendant would not feel enough of interest in its own train and those aboard to risk running on the bridge without looking to see whether the bridge was in a condition to be crossed in safety to the crew, and if the defendant was on the lookout it must have seen those children in time to have slackened the speed of the train and thus have prevented the injury. The reasonable conclusion is that the children were seen, but the defendant supposed that they had ample time to complete the crossing of the bridge and thus escape injury, which the proof evidently shows they would have done

but for the misfortune of Miss Vanarsdale in falling between the ties or bars of the bridge. If it be conceded that the plaintiff was a trespasser, and that defendant owed him no duty except to protect him after discovering his peril, it is clear that when discovered upon the bridge the defendant should have given him ample time to have escaped. If he had simply been on the railroad track in the open country, it might be said that defendant had a right to presume that he would step off the track and get out of the way of the train; but if a party, having started to cross a bridge of as much length as the one under consideration, had no means of escape except to reach the termination of the bridge, common humanity demands that, even if a trespasser, he should not be wantonly run over, but should have a reasonable chance to cross the bridge in safety. A few minutes' delay of the train would have saved plaintiff the great personal injury which he suffered in the vain attempt to save the life of the little girl with him. It is said in section 483, 2 Shear. & R. Neg.: "The rule stated in section 99, that the plaintiff may recover, notwithstanding his contributory negligence, if the defendant, after becoming chargeable with notice of the plaintiff's danger, failed to use ordinary care to avoid injuring him, has been enforced in many railroad cases. * * * (Thus) a locomotive engineer or motorman, after becoming aware of the presence of any person on or dangerously near the track, however imprudently or wrongfully, is bound to use as much care to avoid injury to him as he ought to use in favor of one lawfully and properly upon the track; that is to say, ordinary care with respect to anticipating injury before it becomes imminent, and the utmost care and diligence of which he is personally capable after he knows that it is imminent. He must promptly use all the usual signals to warn the trespasser of danger, and he must also check the speed of his train, and even bring it to a full stop, if necessary, unless the circumstances are such as to justify him, acting prudently, in believing that the traveler sees or hears the train, and will step off the track in ample time to avoid all danger without any diminution of the speed of the train. These rules apply to all cases, even of the most outrageous negligence on the part of a person on the track,—as, for example, where a person attempts to cross in the very front of a train, or where children or drunkards have actually fallen asleep, lying across the rails. If the engineer becomes aware of anything lying upon or dangerously near the track, which may possibly be a human being or a valuable animal, he is bound to check the speed of his train so as to enable him to stop in time to avoid injury; and, if injury ensues from his neglect to do this, his sincere belief that the object was worthless is of no defense. In general, an engineer has the right to assume that a person walk-

ing upon the track is free to act, and is in possession of all ordinary faculties, and will therefore act with ordinary prudence; but, when the conduct of the traveler is such as to excite a doubt of this, the engineer is bound to use greater caution, and to check or even stop the train, as may be necessary. So, where he sees a little child upon the track, he has no right to assume that the child will use the same discretion for its own protection as an older person would; and he must bring the speed of the train under control as quickly as possible, so as to be able to stop it altogether if the child does not appreciate its danger." In section 484, Id., it is said: "The rule stated in the last section, however, does not cover the whole ground. The defendant is responsible not only for what he actually knows, but for that which he is bound to know. It is clear that the frequent statements that contributory negligence is an absolute bar to recovery, except where the defendant's conduct has been 'reckless,' 'willful,' or 'wanton,' or even grossly negligent, are not sound. No courts have in actual practice adhered to this imaginary rule. It has been explicitly overruled, and, indeed, it has been explained away or disavowed by courts which had previously stated it."

After a careful consideration of the evidence in this case, as well as the law applicable thereto, we are clearly of the opinion that the court erred in giving the peremptory instruction. The evidence made a prima facie case which would entitle plaintiff to recover. The judgment appealed from is therefore reversed, and the cause remanded, with directions to award plaintiff a new trial, and for proceedings consistent herewith.

SOHOBARG et al. v. MANSON.¹

(Court of Appeals of Kentucky. April 12, 1901.)

PROHIBITION—REFUSAL OF JUSTICE OF THE PEACE TO TRANSFER CASE.

The mere entry of a motion before a justice of the peace to transfer a case to some other justice of the county for trial does not divest him of jurisdiction; and therefore a writ of prohibition does not lie to restrain him from proceeding with the trial, though he may have committed an error in overruling the motion.

Appeal from circuit court, Kenton county. "To be officially reported."

Action by C. B. Schobarg and another against L. L. Manson for a writ of prohibition. Judgment for defendant, and plaintiffs appeal. Affirmed.

Tisdale and Gray, for appellants. B. F. Graziani, for appellee.

DU RELLE, J. One Louis Christian instituted an action against appellants, Scho-

barg and Ellis, in the court of appellee, a justice of the peace in Kenton county. Appellants filed an affidavit, and moved to transfer the case for trial to some other justice of the county. This motion being overruled, appellants instituted the present proceeding for a writ of prohibition, to prevent appellee from proceeding with the trial. A demurrer to the petition was sustained.

There seems but one question for decision, and that is whether the filing of the affidavit and entry of the motion to transfer divests a justice of the peace of jurisdiction to try the case. If it does not, a writ of prohibition is not a proper remedy. When sitting as a court to pass upon a motion, a justice of the peace is a judicial officer exercising a judicial function. If acting within the scope of his jurisdiction, a writ of prohibition does not lie to control the exercise of his judicial discretion. If he is wrong in his judgment, it is error, to correct which appeal will lie in proper cases, but not prohibition. This exact question seems decided in an opinion by Judge Paynter in Galbraith v. Williams (Ky.) 50 S. W. 666. The judgment is affirmed.

HATFIELD et al. v. STEELE.¹

(Court of Appeals of Kentucky. April 12, 1901.)

EXECUTORS AND ADMINISTRATORS—PAYMENT OF CLAIM NOT PROPERLY PROVED—REPAYMENT TO ESTATE.

Where a claim not properly proved was paid by an administrator, but the amount was afterwards repaid to, and accounted for by, him, the item should not have appeared in his settlement, either as a debit or credit, but, as it appeared on both sides of the account, the result was the same, and the court properly refused to again charge the administrator with the amount.

Appeal from circuit court, Whitley county. "Not to be officially reported."

Action by Elizabeth Hatfield and others against E. H. Steele to surcharge a settlement. Judgment for defendant, and plaintiffs appeal. Affirmed.

R. D. Hill, for appellants. Perkins & Boyd, for appellee.

WHITE, J. This is an action to surcharge a settlement of the accounts of appellee, Steele, as administrator of William Hatfield. The two items in question are one of \$238.25, paid to J. B. McLin, and one of \$322.50, to Jane Hatfield. The court below refused to charge appellee with these two sums, and hence this appeal.

It appears in proof that the McLin claim of \$238.25 was for merchandise sold to Ira E. Steele on the written order of decedent, Hatfield, and was paid by appellee administrator on presentation of the claim by McLin. This claim was not properly proven as the law directs, but it is conclusively shown

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

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that it was repaid to the estate by Ira E. Steele, and accounted for by the administrator, so that this item appears as a debit as well as a credit on the settlement, when, properly speaking, it should not appear at all on either side. As to this item there was no error in the action of the court.

The item of \$322.50 to Jane Hatfield was, we think, fully proven to be a charge against the estate, and, as it had been paid, should have been credited. Finding no error, the judgment is affirmed.

BRITTAIN et al. v. LANKFORD.¹

(Court of Appeals of Kentucky. April 12, 1901.)

JUDGMENT — RIGHT TO EXECUTION — WHEN BARRED BY LAPSE OF TIME — DEDUCTION OF TIME OF DEFENDANT'S ABSENCE FROM STATE.

In determining whether the right to an execution on a judgment is barred by the 15-years statute of limitations, the time of defendant's absence from the state since the last execution was issued is to be deducted, as is done in determining whether an action to enforce the judgment is barred.

Paynter, C. J., dissenting.

Appeal from circuit court, Harlan county. "To be officially reported."

Action by B. B. Lankford against Carr Brittain and another to recover possession of land. Judgment for plaintiff, and defendants appeal. Affirmed.

Holt, Alexander & Holt and W. F. Hall, for appellants. N. B. Hays, for appellee.

GUFFY, J. It appears from this record that appellant Brittain as principal, and appellee, B. B. Lankford, as his surety, became indebted to one W. T. Hall, administrator, in the sum of \$90, and at the January term, 1867, of the Harlan quarterly court, said Hall obtained judgment against Brittain and Lankford for said debt, and on the 1st February, 1867, Brittain paid on said judgment \$29, and in September, 1871, Lankford paid the residue of said judgment, and took an assignment from Hall thereon to himself. In September, 1871, or January, 1872, Brittain, then being a resident of Kentucky, left the state, and went to the state of Virginia, where he remained until about 1885 or 1886, and then returned to Kentucky. On September 17, 1889, an execution was issued on said judgment for the benefit of Lankford, and was returned, "No property found." A transcript of the proceedings of the quarterly court was filed in the circuit court clerk's office, and such proceedings were had that an execution was issued from the clerk's office of the circuit court, and levied upon certain land as the property of Brittain, which was sold, and purchased by appellee, who afterwards ob-

tained a sheriff's deed therefor, and thereafter instituted proceedings, as provided by law, to obtain possession of the land so purchased by him. After various motions and orders were made, a trial was had, and a judgment rendered in favor of Lankford for possession of the land in controversy, and from that judgment this appeal is prosecuted.

The chief defense relied on by appellant is the statute of limitations. It is evident that the other defenses set up were insufficient. But it is earnestly, and with some plausibility, urged that appellee's right to enforce the judgment was barred by the statute of limitations. It is evident from the evidence, as well as from the agreed state of facts, that no execution was issued upon the judgment until more than 15 years after its rendition and after its payment by Lankford. It is also evident that Brittain removed from the state of Kentucky after the payment by Lankford, and remained a non-resident of Kentucky until at least about 1884 or 1886, so that if his absence from the state is to be deducted from the 15-year statute, which as to residents of the state would bar appellee's right to have an execution, then, in that event, the right of Lankford to have execution issued and collect the debt must be unquestioned.

It is, however, insisted for appellant that the statute of limitations applies only to actions, or, in other words, suits, to obtain judgment and enforce the collection of debts or demands against the defendant, and the reason for the exemptions in the statute of limitations is because the removal of the debtor obstructs the prosecution of the action.

It is argued that the removal of the debtor in no wise obstructed or hindered the appellee in obtaining an execution upon the judgment and collecting the same, if any property could be found subject to levy, and that it therefore follows that the delay of 15 years in causing an execution to issue is and was an absolute bar to appellee's right to have the execution issued, and that, being illegally issued, the levy and sale thereunder were absolutely void, and passed no title to the purchaser. It is insisted for appellee that the removal of Brittain suspended the statute of limitations, and that the judgment remained in full force against him, or, in other words, that the period of his absence from the state should not be counted as any part of the 15 years which would bar the judgment. It is conceded that the precise question involved in this case has never been decided by this court. It therefore follows that this question must be decided with reference to the statutes and such decisions as may shed some light upon the question involved herein.

The case of Davidson v. Simmons, 11 Bush, 330, is cited by appellee. In that case it appears that Simmons recovered a judgment

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against Davidson in 1848 in Warren county, where Davidson then resided, upon which an execution was issued in the same year, and returned, "No property found." In 1849, Davidson removed from the state, and continued absent therefrom ever since. In 1873, Simmons brought suit in equity to enforce a satisfaction of the judgment, and sued out an attachment, and levied it upon the interest of Davidson in the estate of his father, who had recently died in Warren county. Davidson interposed a plea of the statute of limitations, and insisted that, as there had been no execution upon the judgment for more than 15 years from the date of the last execution before the institution of the suit, the judgment was barred by the statute, and that the suit could not be maintained. This court, however, held that the period of Davidson's absence from the state should be deducted from the 15 years; or, in other words, that the statute did not run in defendant's favor during his absence from the state, and therefore Simmons was entitled to maintain his action for the enforcement of his judgment. It will thus be seen that, if we sustain the contention of appellant in the case at bar, rather an anomalous state of case will be presented, namely, that a party may enforce the collection of a judgment by suit under a state of facts, but could not enforce its collection by a less expensive and more summary way by having an execution issued. In other words, the period of the absence of the debtor from the state shall suspend the statute of limitations so far as enforcing the collection of a judgment by suit, but does not suspend it as to the collection of the debt by execution. In *Selden v. Preston*, 11 Bush, 200, it was the contention of appellee that, inasmuch as he had property in Kentucky which Selden might have subjected to the payment of his debt by attachment, his absence from the state did not suspend the running of the statute of limitations in his favor; but this court decided against such contention, and held that the period of Preston's absence should be deducted from the period named in the statute of limitations. In *Craig's Ex'r v. Anderson*, 96 Ky. 425, 29 S. W. 311, it appears that Craig sought to subject certain real estate conveyed to Anderson's wife by one Little, upon which it was alleged that Anderson of his own means had caused to be erected valuable improvements, the debt being due from the husband. One of the defenses relied on by Mrs. Anderson was the statute of limitations, more than 15 years having elapsed from the creation of the debt before the institution of plaintiff's action. It, however, appeared that the Andersons removed from this state to Kansas in 1880, and had so remained ever since. It was, however, contended for Mrs. Anderson that plaintiff had no demand against her, that it was not her debt, and that, the real estate being in this

state, the plaintiff could at any time have instituted suit and levied upon the land. Therefore the statute continued to run, notwithstanding her absence from the state. The court below sustained her contention, but this court reversed the judgment, holding that the removal from the state, although the property remained here and might have been attached, had the effect of suspending the statute. Section 401 of the Civil Code of Practice reads as follows: "An execution may be issued upon a judgment at any time until the collection of it is barred by the statute of limitations, although no execution may have been previously issued within a year and a day." It does not appear in this case whether the appellant had any property in this state at any time from the rendition of the judgment up to the time of the levy of the execution, nor are we inclined to hold that that question would affect the rights of the parties in this litigation. It may be true that one of the reasons that the statute which provides that the period of absence of the debtor from the state shall suspend the running of the statute in his favor is because his absence to some extent obstructs the prosecution of the suit. It may, however, be plausibly argued that another reason is that a person not a citizen of the state ought not to be entitled to the benefit of a statute of repose, which evidently was enacted chiefly for the benefit of citizens of the state. After a careful consideration of the authorities and arguments, we have reached the conclusion that a judgment debtor who has removed from the state cannot avail himself of the statute of limitations during his absence from the state. In other words, the statute does not run against the judgment, or the right of the execution plaintiff to have execution issued upon the judgment. The court below having so adjudged, the judgment appealed from is affirmed.

PAYNTER, C. J., dissenting.

FULTON v. BORDERS.¹

(Court of Appeals of Kentucky. April 11, 1901.)

ADVERSE POSSESSION—TITLE ACQUIRED NOT DEFEATED BY SUBSEQUENT AGREEMENT.

Where defendant had been in adverse possession of land for more than 15 years at the time plaintiff bought the land and accepted a deed for it, the title thus acquired by defendant was not defeated by his subsequent agreement to the appointment of proceSSIONERS by the county court, and the fixing of the line by them so as to give the land to plaintiff.

Du Relle, J., dissenting.

Appeal from circuit court, Marshall county.
"Not to be officially reported."

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

Action by Alex. Fulton against A. H. Borders to quiet title to land. Judgment for defendant, and plaintiff appeals. Affirmed.

Reed, Greer & Oliver, for appellant. John G. Lovett, for appellee.

O'REAR, J. The land in controversy in this case was adjudged to appellee on the grounds that he and those under whom he claimed had been in the continuous, actual, adverse possession of it for more than 15 years, and was in such possession when appellant bought and accepted a deed for it. The majority of the court are of the opinion that, under the facts of this case, appellee's title thus acquired was not defeated by his subsequent agreement to the appointment of processioners by the county court, and their fixing the line so as to give the land in dispute to appellant. Judgment affirmed.

DU RELLE, J., dissents.

STONE et al. v. GREGORY, Judge, et al.¹
(Court of Appeals of Kentucky. April 12, 1901.)

ELECTIONS—FREE TURNPIKES—QUESTION SUBMITTED—MISTAKE OF CLERK.

Where, by mistake of the clerk in the printing of ballots, the question submitted to the voters of a county was, "Are you in favor of issuing bonds for the purchase and maintenance of the turnpike roads of this county free of toll to the traveling public?" instead of the question ordered to be voted upon, which was, "Are you in favor of free turnpike and gravel roads?" the mistake in the form of the question submitted did not invalidate the election, as it is not to be presumed that any person who was in favor of the county assuming the burden of free turnpikes by issuing bonds was opposed to free turnpikes, and therefore the mistake could not have increased the affirmative vote.

Appeal from circuit court, Jefferson county, chancery division.

"To be officially reported."

Action by H. L. Stone, for himself and other taxpayers, against J. P. Gregory, Judge, and others, for an injunction. Judgment for defendants, and plaintiffs appeal. Affirmed.

Lane & Harrison, for appellants. Morton V. Joyes, D. W. Sanders, Wm. B. Thomas, and W. W. Thum, for appellees.

DU RELLE, J. On August 4, 1900, a petition signed by some 9,000 voters of Jefferson county was presented to the county judge, petitioning him to direct an election to be held in that county at the next regular election to take the sense of the qualified voters upon the proposition to have free turnpike and gravel roads in that county. On September 1, 1900, at the next regular term of the court, an order was duly entered directing such election to be held. Within five days af-

ter the entry of the order a certified copy was delivered to the sheriff, who made publication as required by the act of March 17, 1896, under which the election was to be held. The second section of the act provides that in submitting the proposition to the voters the question, "Are you in favor of free turnpikes and gravel roads?" shall be printed on the ballot, so arranged that the voter can vote "Yes" or "No," by placing the stencil mark to the right of the question in a square appropriately marked. Ky. St. § 1459. The act also provides that return of the vote shall be made by the election commissioners, and a certificate thereof spread on the order book of the county court, and that, if it appear that a majority of all the votes cast for and against the proposition are in favor of the proposition, then the fiscal court may acquire by gift, lease, purchase, or contract any or all the turnpike roads within the county on the best terms consistent with the public interest. By section 5 of the act it is provided that the fiscal court may levy a tax from year to year, not exceeding 25 cents on the \$100, for the purpose of paying for and maintaining the roads acquired under the act. By section 9 it is provided that the fiscal court may issue and sell bonds, within the constitutional limitation, for the purpose of acquiring and maintaining such roads; but before issuing such bonds the fiscal court shall call an election and direct a poll to be opened at the next county or regular election not occurring within 60 days from the date of the order, at which election the question is to be printed on the ballot, "Are you in favor of issuing bonds for the purchase and maintenance of the turnpike roads of this county free of toll to the traveling public?" The act further provides that, if two-thirds of the legal voters voting on such proposition favor the proposition, then the fiscal court may proceed to issue bonds. There is an express provision that the question of issuing bonds may be submitted to the voters at the same time that the question of having free turnpike and gravel roads is submitted, or at some other time. The act provides for two elections,—one called by the county judge upon the petition of 15 per cent of the vote cast at the last preceding general election upon the question, "Are you in favor of free turnpike and gravel roads?" on which question a majority of the vote is sufficient; the other called by the fiscal court upon the question, "Are you in favor of issuing bonds for the purchase and maintenance of the turnpike roads of this county free of toll to the traveling public?" upon which a two-thirds vote is required to carry the proposition. All the proceedings with relation to the order calling the election and the advertisement by the sheriff are conceded to have been regular. But by some mistake of the clerk, the question printed upon the ballot was not in the form provided by the order, but in the form authorized to be submitted

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

by order of the fiscal court upon the proposition of issuing bonds, to wit, "Are you in favor of issuing bonds for the purchase and maintenance of the turnpike roads of this county free of toll to the traveling public?" Of the votes cast upon this proposition more than two-thirds were in the affirmative. Appellant brought this suit as a taxpayer of Jefferson county, for himself and all others similarly situated, against the fiscal court to enjoin it from purchasing certain turnpikes, and from proceeding to levy taxes to pay the purchase price of the roads or for their maintenance. The answer of the fiscal court bases upon two grounds its claim of power to levy the proposed tax: First, upon the proceedings and election had under authority of the act of March 17, 1896; and, second, under the general powers given to the fiscal court by the various acts contained in chapters 52, 110, Ky. St. Demurrers were submitted to the second and third paragraphs of the answer, carried back to the petition, sustained, and, appellant declining to plead further, his petition was dismissed.

The wrong question was presented to the voters. The question ordered to be voted upon was, "Are you in favor of free turnpike and gravel roads?" The question actually voted upon was, "Are you in favor of issuing bonds for the purchase and maintenance of the turnpike roads of this county free of toll to the traveling public?" The first question presented is, therefore, whether the question actually submitted and voted upon, fairly construed, is a definite expression of the will of the people upon the question which should have been submitted and voted upon. If it was, then undoubtedly the will of the people ought not to be defeated by the fault of the officer; if not, the election was a nullity. On behalf of appellant it is insisted that the act of March 17, 1896, is a delegation of power under limitations which must be strictly observed, and that it is only where it is made to appear in the manner provided by the statute that a majority of all the votes cast upon the proposition to have free turnpike and gravel roads is in favor thereof that the fiscal court has any power, in any manner, to acquire the turnpike or toll roads of the county, or to levy from year to year a tax of not exceeding 25 cents on the \$100 to pay off and maintain such roads. On the other hand, the fiscal court insists that the voters, in answering the question printed upon the ballot, stated not only their desire to have free turnpike and gravel roads, but also their willingness that bonds of the county should be issued to pay for and maintain them. It will be observed that after an election resulting in a vote in favor of the proposition to have free turnpikes, two courses might be pursued to pay the cost of the conversion of the toll roads into free highways,—it might be provided for by a tax levy not exceeding 25 cents on the \$100, or, in counties where the constitutional limitation of liability, or the

current necessities of the county, render this mode impracticable, authority might be obtained by a two-thirds vote at an election held for the purpose to issue and sell bonds in order to acquire and free the toll roads. In the recent case of *Whaley v. Com.* (Ky.) 61 S. W. 35, it was held that if, at an election held on the proposition to have free turnpikes and gravel roads, two-thirds of those voting were in favor of the proposition, such a vote by implication authorized the county to incur indebtedness in excess of the revenue provided for the year to purchase the turnpikes of the county, though not to issue bonds for that purpose. By section 1459, Ky. St., it is provided: "Whenever a constitutional amendment or other public measure is proposed to be voted upon by the people, the substance of such an amendment or other public measure shall be clearly indicated on the ballot. * * *" This requirement indicates that, in determining the sufficiency of such submission to the voters, substance, and not form, is to be looked to. To say nothing of the written application for the election, signed by more than 9,000 voters of the county who petitioned for an opportunity to vote upon the question of having free turnpike and gravel roads, the object of the election was shown by the newspaper publications by the sheriff and the printed notices posted in as many as four places in every voting precinct in the county. But when we turn to the question printed upon the ballot it seems fairly to indicate that those who voted "Yes" were in favor not only of having free turnpike roads, but were so to the extent of being in favor of the issuance of bonds to pay therefor. Those who voted upon the proposition may be supposed to have belonged to three classes,—those who were opposed to the county assuming the burden of free turnpikes, those who were in favor of its doing so by an annual tax, and those who were in favor of its doing so by the issuance of county bonds. Clearly, it is not fair to assume that any one in either of the last two classes was opposed to free turnpikes. It is argued that some of the voters may have been willing the county should acquire the turnpikes by the issuance of bonds, but unwilling that it should do so by the levy of an annual tax; but the knowledge which the court has, and must be presumed to have, of prevailing public opinion upon such subjects, does not lend support to this proposition; and, while we may suppose that the addition of a proposition to issue bonds may have deterred some of the voters from voting at all upon the proposition, or have led others to vote against it, we are not of opinion that it could be fairly presumed to have increased the vote in favor of free turnpikes. If the substance of the public measure was clearly indicated on the ballot, no mere mistake of the officer should be permitted to stand between the voters and the execution of their will. The question of having free

turnpike and gravel roads was requested by the requisite number of voters. It was ordered to be submitted to the voters of the county by the proper authority. Due public notice was given in the proper manner, and by the proper officer, before and at the election. The substance of the measure was clearly indicated upon the ballot, and a two-thirds majority of those voting expressed themselves as in its favor to the extent of having the county incur a bonded indebtedness for the purpose. There is no question here of the issuance of bonds or of levying an annual tax greater than that authorized for the purpose. The simple question is whether the fiscal court can exercise the authority the granting of which was with every formality directed to be submitted to the vote of the people, and was, in substance, voted for upon the ballots. In *Gayle v. Owen Co. Ct.*, 83 Ky. 64, the act required the voters to be asked whether they were in favor of the sale of spirituous, vinous, or malt liquors in Owen county as a beverage. The question asked was, "Are you in favor of the sale of spirituous, vinous, or malt liquors in this county?" Said Judge Pryor, delivering the opinion of the court: "There is no alleged fraud, or any fact showing that the voters were deceived, or in ignorance of the provisions of the act in regard to which they were voting; nor would such an irregularity have invalidated the election. The order for the election had been entered on the order book of the county by the county judge, and the same published for weeks before the election. An intelligent people must be presumed to have known what they were voting for; and, besides, the questions propounded were as much prejudicial to the one side as to the other, and that a majority voted for the measure is not controverted." In *Clark v. Leathers* (Ky.) 5 S. W. 578, the proposition to be voted on was "whether these commissioners should be empowered to subscribe to the capital stock of turnpike roads constructed in the county." The question really asked was, "Are you for the tax or against the tax?" without specifying its object. Said Judge Pryor, delivering the opinion of the court: "Where there has been a fair and free expression of the popular will, a mere irregularity in conducting an election will not invalidate it. * * * The order of the county judge is in compliance with the statute authorizing the vote to be taken on the question of empowering the commissioners to make the subscription. The report of the judges of the election, or those supervising the vote, shows a vote 'for the tax' and a vote 'against the tax,' and this was probably the manner in which the question was submitted on the poll book; that is, one column headed 'For the tax' and the other 'Against the tax.' The question in fact was whether the voters of Kenton county, excluding the city of Covington, were for or against a tax by which was to be raised the sum of \$750

for each mile of turnpike agreed to be constructed by private subscription. The voters understood the proposition; and, if submitted as is said it was by the appellants, it is a substantial compliance with the law." So, in *Taylor v. Com.* (Ky.) 59 S. W. 482, it was held that a vote in favor of the sale of liquor necessarily meant that the local option law then in force should become inoperative. Said Judge Hobson, delivering the opinion of the court: "The order of the county court directs the sheriff of the county to 'cause a poll to be opened at the voting places in said precinct on July 15, 1899, when the sense of the voters of said precinct shall be taken as to whether spirituous, vinous, or malt liquors shall be sold in said Tom's Creek precinct No. 3 of Bell county, Ky.' If the court had further directed the vote to be taken on the question whether or not the prohibition law then in force should become inoperative, it would have added nothing to the sense of the sentence above quoted. A vote in favor of the sale was of necessity a vote in favor of the law then in force prohibiting the sale becoming inoperative. The substance of the statute was clearly complied with." See also, *Cattell v. Lowry*, 45 Iowa, 478; *Hawes v. Miller*, 56 Iowa, 395, 9 N. W. 307; *State v. Elwood*, 12 Wis. 551; *Hubbard v. Com.*, 10 Ky. Law Rep. 688; *Bowers v. Smith*, 111 Mo. 45, 20 S. W. 101, 16 L. R. A. 754, 83 Am. St. Rep. 491; *State v. Cavers*, 22 Iowa, 343. The other questions presented in argument are not necessary to the decision of the case, and are not decided. The judgment is affirmed. Whole court sitting.

BRYANT v. BENNETT.¹

(Court of Appeals of Kentucky. April 11, 1901.)

HOMESTEAD—SALE BY WIDOW—ABANDONMENT.

Where a widow sells the deceased husband's homestead, and removes therefrom, the purchaser acquires only her dower interest, occupancy being a continuing condition precedent to the widow's right of homestead.

Appeal from circuit court, Caldwell county.

"Not to be officially reported."

Action by Harriet Bryant against W. H. Bennett to cancel a deed. Judgment granting the relief sought, subject to a right of homestead, and plaintiff appeals. Reversed.

S. Hodge, for appellant.

BURNAM, J. On the 1st day of July, 1885, the appellant, Harriet Bryant, in consideration of love and affection, conveyed to her son Harvey Bennett, by general warranty deed, the house and lot in controversy in this action, situated in the town of Princeton, and he remained the owner thereof until he died, intestate and childless, leaving surviving him, as his only heirs at law, his

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

mother, and wife, Ellen Bennett. On the 12th day of February, 1892, the appellant again sold and conveyed, by general warranty deed, her entire interest in the house and lot to her son W. H. Bennett. The consideration of the transfer, as expressed in the deed, was that he should maintain and provide for her during her life, furnishing her with food, raiment, and all the necessities of life, and to attend to her business generally. Subsequent to this transfer to W. H. Bennett by his mother, he purchased from the wife of his deceased brother, Harvey Bennett, her dower and life interest in the property as surviving widow, she having in the meantime married William Fletcher, and removed to Christian county. On the 16th day of July, 1896, appellant instituted this suit, in which she alleged that the appellee, W. H. Bennett, had failed and refused to furnish her with food and raiment, and generally to perform the conditions of the agreement which was the basis of the conveyance to him of the house and lot, and had removed from the state, and asked for a judgment against appellee for \$345, this being the amount of money which she alleged was due her, and for an enforcement of her lien against the house and lot to secure the payment thereof, and for all proper relief. Upon final submission of the case to the chancellor, it was adjudged that the deed from appellant to appellee be canceled and set aside, and the appellant restored to all her interest in the real estate; but it was also adjudged that Ellen Fletcher, the surviving widow of Harvey Bennett, was entitled to a homestead in the property during her life, and which passed under her deed to appellee, W. H. Bennett, and, as the entire property was of less value than \$1,000, that appellee was entitled to the use and possession of the property under his purchase until the death of Mrs. Fletcher; and to reverse that judgment this appeal is prosecuted.

Section 1707 of the Kentucky Statutes provides that the homestead shall be for the use of the widow as long as she occupies same. And it was held in *Freeman v. Mills* (Ky.) 39 S. W. 827: "That occupancy was a continuing condition precedent to the widow's right of homestead, and that a sale of her interest was a complete and irrevocable abandonment thereof, and that the purchaser acquired no title under his purchase." We are therefore of the opinion that, under the law as expounded in that case, Mrs. Fletcher did not pass any title to the homestead by her conveyance to appellee, and he only acquired by virtue of his purchase her dower interest as surviving widow, and in fact the conveyance from Mrs. Fletcher to him only purports to convey her dower interest therein. For reasons indicated, the judgment appealed from is reversed, and the cause remanded for proceedings consistent with this opinion.

JOHNSON v. COMMONWEALTH.¹

(Court of Appeals of Kentucky. April 11, 1901.)

WITNESSES—IMPEACHMENT BY SHOWING INDICTMENT FOR PERJURY—AFFIDAVIT FOR CONTINUANCE AS DEPOSITION OF ABSENT WITNESSES—HOMICIDE—RES GESTÆ.

1. It was prejudicial error to permit the commonwealth to prove that the principal witness for accused had been indicted for perjury on account of his testimony on a former trial of the case.

2. Where the court, to avoid a continuance, permitted the statements of defendant's affidavit as to the testimony of absent witnesses to be read as their deposition, it was improper for the attorney for the commonwealth to refer to those statements as the statements of defendant as to the testimony of the absent witnesses, as they were entitled to the same weight as if given by the witnesses in a deposition.

3. Where defendant had testified that on the day before the killing he had, when not far from his house, heard his wife scream, and upon going to her found her crying, when she told him that deceased had made a criminal assault upon her, and defendant had further testified that at the time of the killing deceased had assaulted him upon his refusal to promise to say nothing about what had occurred, the testimony of another witness that he had, on the day before the killing, seen deceased going to defendant's house, and had soon thereafter heard the screams of defendant's wife, and that upon going to her she had told him deceased had attempted to rape her, was admissible as a part of the *res gestæ*.

Appeal from circuit court, Estill county.

"Not to be officially reported."

Andrew J. Johnson was convicted of the offense of manslaughter, under an indictment for murder, and he appeals. Reversed.

Grant E. Lilly and Henry Watson, for appellant. R. J. Breckinridge, for the Commonwealth.

HORSON, J. Appellant was indicted for the murder of Acey Abner. On the first trial the jury failed to agree. On the second, the jury found him guilty of manslaughter, and fixed his punishment at 18 years in the penitentiary. The proof for the commonwealth was largely circumstantial as to the facts of the homicide. The deceased and the defendant were on a hill back of defendant's house, and some shots were fired. The defendant came immediately to the house, and told the father of the deceased to go to his son. The father went to where they were, and found his son shot. The defendant testified that on the day before the homicide the deceased had made a criminal assault on defendant's wife, and he made for the deceased with his pistol, intending to kill him, but the deceased threw up his hands and he desisted, but ordered the deceased off his place, and told him not to come there again. The next day the deceased came back with his father to get some property he had left, and went out on the hill to look for some hogs. The defendant went with

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him, and when they got out there the defendant's version of what occurred is as follows: "He sat down on his huncers and said he wanted to talk to me, and I sat down. He took out his knife and opened it, and began scraping his nail. He said: 'Andrew, I don't want you to make any fuss about what occurred here yesterday. I don't want my family to hear of it.' I said to him that when the grand jury met I expected to see to it that my wife went before it, and I would put the stripes on him. He said, 'God damn you! I will cut your guts out,' and struck at me with the knife, and sprung up and continued to cut at me with his knife, while I was backing from him all the time, and did cut my clothes. When I got out my pistol I fired as rapidly as I could three times, but missed him the first two times. The last shot struck him, and he turned and walked about eight or ten steps back towards where we were sitting, and then fell. I immediately started to the house after his father." The open knife of the deceased was found on the ground not far from him, and the clothes of the defendant were cut in several places. Green Johnson testified to being an eye witness of the difficulty. He was introduced by the defendant, and was the only witness introduced in person at the trial who professed to have seen the difficulty. He stated that he saw the deceased and the defendant in a conflict. Defendant was backing, and deceased cutting at him, or the motions of his arm indicated he was cutting. The defendant backed from the deceased six, eight, or ten steps. The deceased was still pursuing him and cutting at him, when defendant fired three shots, and deceased went back several steps and fell. On cross-examination he was asked this question, "Are you not indicted for perjury in this case?" The defendant objected to the question. The court overruled the objection, and required the witness to answer that he had been indicted for perjury in the case. To this the defendant excepted. This was the most important witness for the defendant in the case,—in fact, substantially his only witness present at the trial as to what occurred on the hill. It was peculiarly prejudicial for the commonwealth to attempt to destroy the credit of this witness by showing that he had been indicted by the grand jury for his testimony given on the former trial of the case. In *Baker v. Com.* (Ky.) 50 S. W. 54; *Parker v. Com.* (Ky.) 51 S. W. 573; *Pennington v. Com.* (Ky.) 51 S. W. 818; and *Ashcraft v. Com.* (Ky.) 60 S. W. 931,—it was held that such evidence was inadmissible. These rulings are in accord with the current of authority, and seem to us to rest on sound reasoning; for, if such a course of cross-examination were allowed, the credit of the witness might be ruined by a charge which he had had no opportunity to meet, made against him by those who had an interest in destroying his testimony.

There were a number of important witnesses for the defendant who were unable to get to court on account of a rise in the Kentucky river. He asked for a continuance on this ground, which was refused; his affidavit being allowed to be read as the deposition of the witnesses. It is unnecessary for us to determine whether this was error, for the reason that the judgment must be reversed for errors in the admission and rejection of testimony. It seems from the record that in his argument to the jury the attorney for the commonwealth, in speaking of the affidavit for continuance, which was read to the jury as the evidence of the absent witnesses, called it the "defendant's affidavit," and classed the testimony in it as the statements of the defendant himself. This was very improper. The defendant had been refused a continuance on the condition that the statements of the affidavit as to the testimony of the absent witnesses should be read as their deposition, and, on a trial had on this condition, these statements were entitled to the same respect as if given by the witnesses in person in a deposition; and there should have been no allusion to them as the defendant's statement of the testimony, or imputation that they were not precisely the correct and genuine statements of the witnesses, especially as one of these witnesses purported to have seen the difficulty, and stated the facts substantially as the defendant and Green Johnson.

To sustain his statement that the deceased had made a criminal assault on his wife the day before, and to show why the deceased assaulted him on the hill when he refused to say nothing about what had occurred, defendant introduced Sidney Johnson, who testified that he was cutting wood for defendant the day before the killing, about 50 yards from the residence, and heard some one crying at the house, and went to it immediately as soon as he could go, and found defendant's wife crying. No one was there but her. Before he heard the crying the deceased came to where he was, and after a few minutes went towards the house, and shortly after this he heard the woman crying. As he went to the house he saw defendant coming towards the house. He was then asked to state what defendant's wife told him when he got there, and the court refused to allow him to answer. The defendant avowed he would state, if permitted to answer, that defendant's wife told him deceased had attempted to rape her. The exclusion of this evidence is also complained of. The defendant had been permitted to state that when about 100 yards from his house he heard some one scream, and went up to the house and found his wife crying. She finally told him what the trouble was. The testimony of Johnson was important, as corroborating that of the defendant. He was the first person to get to the house, and went to it as quick as he could after he heard the screams. The statement that the

woman then made to him was competent in proof of the assault on her by the deceased, as part of the res gestæ. Thus, in Steph. Dig. Ev. p. 6, it is said: "The question is whether A. committed manslaughter on B. by carelessly driving over him. A statement made by B. as to the cause of the accident as soon as he was picked up is a relevant fact, though it may not be admissible as a dying declaration." So, in *Thompson v. Trevanion*, Skin. 402, what the wife said "immediately upon the hurt received, and before she had time to contrive or devise anything for her own advantage," was allowed to be given in evidence. In *Com. v. McPike*, 3 Cush. 181, similar statements of the wife were allowed in evidence against the husband on indictment for murdering her. These principles have been followed by this court in several cases. *Railroad Co. v. Earl's Adm'r*, 94 Ky. 366, 22 S. W. 607; *McLeod v. Gintner's Adm'r*, 80 Ky. 899; *Railroad Co. v. Foley*, 94 Ky. 220, 21 S. W. 866.

We see no error in the instructions, and do not think that, taken as a whole, they could have misled the jury. The defendant was found guilty under instruction No. 2, which is unobjectionable; and it is hard to see how he could have been prejudiced by No. 1, even on his counsel's construction of it. But on another trial, to cover all questions, it will be better to substitute for the words "from immediate danger of death or great bodily harm then about to be inflicted on him by said Abner," in instruction No. 1, the following: "from immediate danger of death or great bodily harm at the hands of said Abner." Judgment reversed and cause remanded, with directions to grant appellant a new trial, and for further proceedings consistent with this opinion.

BRINKMEYER et al. v. RANKIN.¹

(Court of Appeals of Kentucky. April 11, 1901.)

MINING LEASE—IMPROVEMENTS ERECTED BY LESSEE—FAILURE OF LESSOR TO EXERCISE OPTION TO PURCHASE—PARTITION.

By a mining lease the lessees agreed to leave the mines in good working order at the expiration of their lease, with the exception of the improvements, which it was recited belonged to the lessees. It was further stipulated that if the lessors should wish, at the expiration of the lease, to hold the improvements, they should pay the lessees "a fair valuation for the said improvements, and they have no right to remove them." *Held*, that the houses erected on the land by the lessees belonged to them, with an option to the lessors to purchase, and, the lessors having failed to exercise that option, the lessees, who subsequently acquired an interest in the land, are entitled in a partition to have that part of the land on which the houses are situated allotted to them, as it can be done equitably.

Appeal from circuit court, Henderson county.

"Not to be officially reported."

Action by Maria Brinkmeyer and others against G. Rankin to recover possession of real estate. Judgment for defendant, and plaintiffs appeal. Affirmed.

John F. Lockett and Givens & Givens, for appellants. Montgomery Merritt, for appellee.

BURNAM, J. Appellants instituted this suit against appellee to recover possession of three small houses and lots, and the rents for a number of years. The facts as to the ownership of the property, as shown by the record, may be summarized as follows: Previous to the 5th day of July, 1873, J. B. Thomas and J. H. Morris, who resided in Evansville, Ind., and did business as coal merchants under the name of Thomas & Co., owned a tract of coal land in Henderson county, Ky., which they had leased to a firm doing business under the name of Shiver & Bro., for the purpose of mining coal. This lease having terminated on July 5th, a new lease was made of the property to the same parties for a period of 10 years. While the first lease was in force, Shiver & Bro. had erected on the leased premises a number of houses for the accommodation of their employes; and the new lease, which was dated July 4, 1874, contains this stipulation: "Shiver & Bro. agree to leave the said mines in good working order at the expiration of the lease, with the exceptions of the improvements inside and outside of the mines, such as machinery, cars, drums, iron, houses, etc., which belong to Shiver & Bro. If Thomas & Co. wish to hold the said improvements at the expiration of the lease, then they are to pay Shiver & Bro. a fair valuation for the said improvements, and they have no right to remove them." The lease clearly recognizes that the houses belong to Shiver & Bro. In 1877, Thomas sold his half interest in the coal property to one Brinkmeyer, and he thereafter received the rents due on Thomas' half of the property. In July, 1881, Shiver & Bro. claimed to have bought the one-half undivided interest in a small tract of land, containing from four to six acres, near the mouth of the shaft, and which constituted a part of the coal property on which the buildings in controversy were situated, from Morris. From this time on Shiver & Bro. accounted to Brinkmeyer for one-half of the rent on the property. In 1881, Brinkmeyer executed another lease to Shiver & Bro. on his one-half undivided interest in the mines and lands for a period of 10 years. During the continuance of this lease, in 1895, Shiver & Bro. mortgaged their interest in the property to G. Rankin, and the mortgage specially recited the houses and lands in contest. After the maturity of the debt of Rankin, he instituted a suit to enforce his lien, and bought the property at the decretal sale rendered in that proceeding, and was awarded possession thereof. It appears from the testimony that

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

the houses in contest at that time were in a very dilapidated condition. One of them was torn down, and a new house built, and substantial repairs made upon the other two. On the 19th day of August, 1898, appellants instituted this suit, claiming to be the owners of all of the houses and lots, as widow and heirs at law of F. W. Brinkmeyer, and asked to have their title thereto quieted, and that appellee, Rankin, account to them for rents. Upon final hearing, the chancellor adjudged appellants to be the owners of one half of the lot of six acres of land on which the houses were built, and appellee the owner of the other half, and that the houses were the exclusive property of Shiver & Bro. under their contract of lease, and that they passed under their mortgage to Rankin, and that the six-acre tract of land should be divided so as to give to Rankin the three houses in contest, and that their value should not be estimated in the division of the lot. Appellants excepted to so much of the judgment as failed to charge appellee with the value of the houses, and prosecutes this appeal.

Appellants had, by virtue of the deed from Thomas to Brinkmeyer, the title to one undivided half of the real estate. But we think it is evident, from not only the testimony of T. Shiver, but also from the reservation contained in the lease of 1874 from Thomas & Morris to Shiver & Bro., that the houses belonged to the tenants, and, under the agreement with them, were to remain their property, with an option, however, to Thomas & Morris to acquire them by purchase at the expiration of the lease, if they desired. Never having done so, the houses remained the property of Shiver & Bro., and they were entitled in a partition to have that portion of the land upon which the houses are situated allotted to them, if it could be done equitably. Judgment affirmed.

WINCHESTER & STONER TURNPIKE ROAD CO. v. EVANS, Judge.¹

(Court of Appeals of Kentucky. April 11, 1901.)

BILLS OF EXCEPTIONS—PROCEEDINGS IN COUNTY COURT.

As an appeal from the county court to the circuit court in a proceeding by the fiscal court of the county to condemn a turnpike road must be tried de novo in the circuit court, no bill of exceptions is necessary, and therefore the county judge properly refused to sign such a bill; a party having no right to a bill of exceptions except for the purpose of an appeal.

Appeal from circuit court, Clark county.
"To be officially reported."

Action by the Winchester & Stoner Turnpike Road Company against James H. Evans, judge, for a mandamus. Judgment for defendant, and plaintiff appeals. Affirmed.

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

B. F. Buckner, for appellant. Hathaway & Hodgkin, for appellee.

HOBSON, J. Under the act approved March 17, 1896, entitled "An act to provide free turnpike and gravel roads" (Acts 1896, c. 27), the Clark county fiscal court, being unable to enter into a contract with the owners of the Winchester & Stoner Turnpike Road Company, began on January 2, 1899, proceedings in the Clark county court for the assessment of the damages the owners of the turnpike were entitled to receive for it. The commissioners appointed by the county court reported that the pike was of no value. To this report exceptions were filed, and the case was then tried before a jury, who returned the following verdict: "We, the jury, find the value of the $1\frac{22}{248}$ of the Winchester & Stoner Turnpike Road to be \$450." Judgment was entered upon this verdict, and the motion of the turnpike company for a new trial was overruled. No appeal was taken from the judgment, but the turnpike company tendered a bill of exceptions, and moved the county judge to sign it and order it filed as a part of the record. This he refused to do. The turnpike company then filed this suit against the county judge in the Clark circuit court to obtain a mandamus compelling him to sign and file its bill of exceptions. The record of the former case is set out in the petition. It is also alleged that the judge of the county court stated when he refused to sign the bill that it was correct; that he was asked either to allow and sign the bill if correct, or to conform it to the truth if incorrect, but refused to do either, for the reason that the counsel for the fiscal court had advised him not to do so; that the turnpike company owed debts which were unpaid, and the entire value of its property should have been assessed; that it did not desire to appeal from the judgment, for reasons which on the advice of its attorney seemed good to it, but it did desire that the record should show that only the interest above stated in the road was condemned; and that it was necessary to have its bill of exceptions made part of the record, in order that the true effect and operation of the verdict might appear of record. There were 248 shares of stock in the turnpike. Of these, the county owned 116. The purpose of the bill of exceptions seems mainly to have been to incorporate into the record the instructions of the court to the jury to the effect that they should find the actual value of $1\frac{22}{248}$ of the turnpike sought to be taken. The court below sustained a demurrer to the petition, and refused to award the mandamus.

By section 15 of the act referred to, the trial, upon exceptions to the report by either party, and the appeal therefrom, shall be the same as provided by sections 839, 840, Ky. St. By section 839 the appeal in such cases must be tried de novo in the circuit court.

No bill of exceptions as to what was done in the county court was therefore necessary for an appeal, and we know of no provision of law requiring inferior courts to sign and file of record a bill of exceptions of their proceedings in such cases. Such a bill could not be considered for any purpose in case of an appeal. The purpose of the law in requiring appeals from the inferior courts to the circuit courts to be tried *de novo* is to avoid the necessity for bills of exceptions. If a bill of exceptions may be required in this case, it may be, also, in every case tried before a magistrate. Such a rule would embarrass, rather than aid, the administration of justice. As we understand the record, all the facts as to what was determined in the case referred to appear substantially from the verdict of the jury, the judgment of the county court, and the record of the case. But, if this is not true, the truth may be shown by evidence as to what was determined, if this is ever drawn in question; and appellant may have the evidence perpetuated, if necessary to its protection. In 3 Enc. Pl. & Prac. p. 280, the rule is thus stated: "A bill of exceptions does not lie in special statutory actions unknown to the common law, unless expressly made applicable thereto. Nor will it lie to decisions of courts of inferior jurisdiction, as the court of a justice of the peace." In *McAllister v. Insurance Co.*, 78 Ky. 583, this court said: "The only office of a motion for a new trial and a bill of exceptions is to bring into the record for review matters which would not otherwise appear in it." As no bill of exceptions was necessary to review the proceedings of the county court, which were wholly statutory, the county judge properly refused to sign the bill, and the court below did not err in refusing the mandamus sought by appellant. *Moline, Milburn & Stoddard Co. v. Curtis*, 38 Neb. 520, 57 N. W. 161; *Baer v. Otto*, 34 Ohio St. 11. Judgment affirmed.

RICHS ADM'R v. HURST et al.¹

(Court of Appeals of Kentucky. April 12, 1901.)

APPEAL AND ERROR—HARMLESS ERROR IN OVERRULING DEMURRER.

Where the jury found for defendants upon their plea of payment, and that finding was sustained by the evidence, the error, if any, in overruling plaintiff's demurrer to another plea of defendants was harmless.

Appeal from circuit court, Harlan county.
"Not to be officially reported."

Action by the administrator of B. A. Rice against John B. Hurst and others to enforce a mortgage lien. Judgment for defendants, and plaintiff appeals. Affirmed.

N. B. Hays, for appellant. B. M. Lee and W. H. Holt, for appellees.

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

WHITE, J. This action was brought to enforce collection of certain notes executed by appellees to B. A. Rice, and to foreclose a mortgage on certain property given to secure payment. Appellees admit the execution of the notes, and plead a payment to the administrator by a contract for the erection of a monument at the grave of decedent at the agreed price of the full sum of the two notes. In a separate paragraph it is pleaded that the estate of B. A. Rice was solvent, and that there was a large amount of personalty to be distributed among the various heirs entitled thereto, and that appellees had entered into a written contract with certain named heirs and distributees of decedent by which each and all released, relinquished, and assigned to appellee all right, title, interest, or distributable share in the two notes sued on belonging to them, or either of them, or that may be due either or all of them, on condition that a monument of a certain kind and dimensions be erected at the grave of decedent. He further alleges that the monument had been erected. The prayer is that the notes be adjudged paid by reason of the contract alleged with the administrator, and, in the alternative, if this could not be done, the notes be abated eight-thirteenths by reason of the written release of the heirs and distributees pleaded; it being alleged that their share therein is eight-thirteenths. There was a demurrer to the second paragraph of the answer on account of jurisdiction of the court as to that plea, which was overruled, and of that action complaint is made. The issue as to the contract with the administrator was tried out before a jury, and resulted in a verdict and judgment for appellees, which sustains his plea of payment. The question of abatement of eight-thirteenths by reason of the assignment of the heirs and distributees, if treated as a counterclaim, never came up for adjudication, and as to that plea appellant could not have been prejudiced by any action of the court thereon. On the plea of payment it is clear that appellees were entitled to a trial in Harlan county, and, having been successful on that issue, the other was never tried, and therefore becomes immaterial. We find no error of the court in the admission or rejection of testimony, and the instructions fairly present the law to the jury. The verdict is supported by the testimony, the question being contract or no contract. We find no error in the judgment, and the same is affirmed.

COMMONWEALTH v. PATE.¹

(Court of Appeals of Kentucky. April 11, 1901.)

OFFICERS—PRESUMPTION THAT OFFICER HAS TAKEN OATH.

Under Ky. St. § 4332, providing for the punishment of any road supervisor who shall

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

become interested in any road or bridge order or certificate, or any claim growing out of such work, a road supervisor cannot escape punishment on the ground that he had not taken the oath of office, as it will be conclusively presumed, as he was discharging the duties of the office and receiving its emoluments, that he had taken the oath, such a presumption being necessary for the protection of the public.

Appeal from circuit court, Breckinridge county.

"To be officially reported."

An indictment against S. A. Pate for becoming interested in a road claim while holding the office of road supervisor was dismissed, and the commonwealth appeals. Reversed.

Robt. J. Breckinridge and Weed S. Chelf, for the Commonwealth. David R. Murray, H. C. Murray, and D. H. Severa, for appellee.

O'REAR, J. Appellee, S. A. Pate, was indicted under section 4882, Ky. St., which provides: "It shall be unlawful for the county judge, any justice of the peace, sheriff or tax collector, county attorney, or supervisor or assistant supervisor, or any overseer to become directly or indirectly interested in any contract for working roads or building or repairing bridges; and it shall be unlawful for either of said officers or employes to buy or become interested in any road or bridge order or certificate, or any claim growing out of such work. Either of said officers or employes who shall violate this section shall be guilty of a misdemeanor, and, upon indictment by a grand jury, and conviction thereof before any court of competent jurisdiction, shall be fined for each offense not less than fifty nor more than three hundred dollars. This section shall be given in charge to the grand jury by the judge of the circuit court." Appellee had previously been appointed supervisor of roads for Breckinridge county by the county court, and had qualified by accepting the appointment, executing the bond, and entering upon the discharge of the duties of the office. It appears that Breckinridge county had adopted the "taxation system" of keeping its roads in repair. The indictment charges, in substance, the appointment, qualification, and acting of appellee as road supervisor of Breckinridge county; that within a year before the finding of the indictment he had unlawfully and willfully, while holding the office of supervisor of public roads in Breckinridge county, become interested in and the beneficiary of a certain road order and claim growing out of road work in magisterial district No. 1 of Breckinridge county, which order was as follows: "No. 66. Breckinridge County, Ky., Nov. 2, 1899. To the Treasurer of Breckinridge County: Pay to the order of S. A. Pate, six hundred and forty-two and $\frac{70}{100}$ dollars for teams on road, and charge same to road fund of First magisterial district. [Signed] S. A. Pate,

Supervisor Maj. Dist." The indictment further charged that the above order was for teams furnished by said Pate in his own interest for work on road in said district of Breckinridge county; that the order was drawn by Pate payable to himself for work on said road, and he thereby becoming interested in said order and claim; that said claim was approved by the county judge of Breckinridge county, and collected by said Pate out of the road funds of said magisterial district of said county. A demurrer was interposed to the indictment, which we think was properly overruled by the trial court. The evidence in behalf of the commonwealth sustained the charge set out in the indictment, but, failing to show that appellee had taken the oath of office as such supervisor, the court gave the jury a peremptory instruction to find the defendant not guilty, which was done. The court seems to have proceeded upon the theory that the taking of the oath required by law was a prerequisite to the investiture of appellee with the title and legal responsibility for the duties of the office. Section 4314, requiring the oath, is in these words: "The supervisor shall, at the next regular term of the county court after his appointment, execute bond to the commonwealth, for the benefit of the county with sureties to be approved by the court in double the amount of the bridge and road fund, and shall take an oath for the faithful discharge of his duties. The taking of the oath and the execution of said bond shall be noted on the order book of the court. The bond shall be recorded in the order book," etc. It is assumed in argument by counsel for appellee that the taking of the oath was not only a necessary incident to appellee's induction into office, but that the fact of it must be proven by the record, and affirmatively shown as part of the commonwealth's case; that, unless it was so shown, appellee was a mere usurper of his office, his only offense being that of usurpation; that the penalties denounced by the statute under consideration applied only to de jure, not to de facto, officers. The statute was enacted to protect the public by removing from its agent and representative every possible interest in the character of the public works under his supervision that could conflict with his public duty. The legislature recognized the old truth that, where the interest of the servant and the served came into conflict, the servant cannot properly discriminate between his interest and his duty; hence the temptation is sought to be removed. The protection is to the public against those who assume, under right of office, to serve it. A number of cases have been examined holding that the oath to be taken by the officer is merely an incident to the holding of the office, as an additional protection to the public as the most solemn assurance the official can give of his purpose to honestly administer the affairs of his position. In

its practical effect it can give no additional weight to the official's obligation to the public. Its violation involves no additional penalty. Of course, if the statute expressly provides that the right to the office should not attach till after the oath was taken, a more serious difficulty would be presented. In this case the record shows the appointment of appellee as supervisor of public roads. He accepted the appointment by executing the bond required by law, and actually took possession of the office, and undertook by virtue of that appointment and qualification to serve the public in that capacity. In *Johnston v. Wilson*, 2 N. H. 202, cases are cited supporting the doctrine that, "when a person has distinctly admitted or recognized the official capacity of another, he cannot afterwards offer evidence against the validity of his appointment; and, where a person has acted in an official capacity, he himself cannot afterwards offer evidence against the validity of his own appointment." And this seems to us to be sound doctrine; for one should not be suffered to enjoy the emoluments and benefits of a public office without being subject to the pains and penalties for a breach of its duties. If the oath was a prerequisite to appellee's investiture of the office, his accepting the appointment, entering upon and engaging in a discharge of its public duties, and enjoying its benefits, in a controversy between third persons, as well as in a controversy between him and third persons, or him and the public, raises the conclusive presumption that he took the prescribed oath where the indulgence of such presumption will tend to protect the rights of such third persons or the public. Judgment reversed, and cause remanded for proceedings consistent herewith.

CITY OF LOUISVILLE v. HARBIN.¹
(Court of Appeals of Kentucky. April 10, 1901.)

MUNICIPAL CORPORATIONS—INJURY TO PROPERTY IN MAKING STREET IMPROVEMENT—MEASURE OF DAMAGES—DEDICATION.

1. In an action against a city to recover damages for injury to property in making a street improvement, the criterion of recovery is the diminution in value of plaintiff's property by reason of the acts complained of.

2. The dedication of land for a street does not give the city the right to so construct the street as to materially damage the property of the dedicator or his vendees.

Appeal from circuit court, Jefferson county, law and equity division.

"Not to be officially reported."

Action by D. M. Harbin against the city of Louisville to recover damages for injury to property. Judgment for plaintiff, and defendant appeals. Affirmed.

H. L. Stone, for appellant. T. L. Burnett, Lane & Burnett, and W. W. Thum, for appellee.

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

GUFFY, J. The plaintiff in this action sought to recover \$1,000 in damages against the defendant, alleged to have been sustained by him by reason of certain improvements or work on Grayson street. The answer is a traverse of plaintiff's right to recover. A trial resulted in a verdict and judgment in favor of plaintiff for \$400, and, defendant's motion for a new trial having been overruled, it prosecutes this appeal.

We do not think that the court erred to the prejudice of the substantial rights of the defendant in the admission or rejection of testimony. The evidence is abundantly sufficient to sustain the verdict.

Complaint is made as to the giving and refusing of instructions. It would have been well for the court to have expressly instructed the jury as to the criterion of recovery, which was the diminution in value of plaintiff's property by reason of the acts complained of. We think that the instructions given fairly presented the true criterion for recovery, and this is especially so in view of the fact that the court so often announced during the trial the true criterion of recovery.

It is insisted for appellant that the plaintiff did not deny that his vendor had dedicated the street to defendant. But the most that this could imply, under the pleadings in this case, would be that the dedicator merely allowed the city to establish a street at the place indicated without the formality of condemnation proceedings. But in no event could such dedication carry with it the right of the city to so construct a street as to materially damage the property of the dedicator or his vendees. Perceiving no error to the prejudice of the substantial rights of the defendant, the judgment appealed from is affirmed.

DUNN et al. v. DUNCAN et al.¹

(Court of Appeals of Kentucky. April 11, 1901.)

WITNESSES — TRANSACTION WITH PERSON SINCE DECEASED—PAYEE HOLDING NOTE IN TRUST FOR OTHERS—RIGHT TO SELL BEFORE MATURITY—ESTOPPEL.

1. Where the husband unites with the wife in an action brought in her right, he is not a competent witness for plaintiffs as to a transaction with a person since deceased, as he will, if defeated, be liable, at least, for costs.

2. Where a note for the price of land sold by devisees was executed to one of their number, as curator of the estate, under a mistake of law as to his duties as curator, the payee held the note in trust for the other devisees, to the extent of their interest; and as he could not, without express authority to do so, discount it before maturity for cash, one to whom he attempted to thus discount it, having notice of all the facts, acquired no title to the interest of the other devisees.

3. The failure of the other devisees to appear in the county court and file exceptions to the report of the curator in which he charged himself with the proceeds of the note does not

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

estop them from repudiating the sale of the note; the settlement being only prima facie evidence, and the purchaser, who was the curator's surety, knowing all the facts as well as they did.

Appeal from circuit court, Henderson county.

"Not to be officially reported."

Action by A. I. Dunn and others against Thomas Duncan and others upon a promissory note. Judgment for defendants, and plaintiffs appeal. Reversed.

John F. Lockett, for appellants. Montgomery Merritt, for appellees.

HOBSON, J. Amelia Vickers died some years since, a resident of Henderson county, leaving a will which was subsequently probated. Thomas L. Watson was appointed as curator of her estate. By her will she devised a tract of nine acres of land, known as the "Cotton Place," to Watson and appellants, A. I. Dunn, Annie Stone, Fannie Swann, Jennie Johnson, and Laura Watson, who are his half-sisters. Larkin White, who was the stepfather of Watson, was the surety on his bond as curator. About two years after the death of the testator all the devisees united in a deed conveying the Cotton place to Thomas Duncan in consideration of \$500, payable January 1, 1894, with interest at 8 per cent. from date. The deed is dated June 3, 1893, and recites that the note is of the same date; but the note was burned some years since in a fire at Henderson, and is not produced. The proof shows it was made payable to Watson as curator, as the other devisees supposed he had authority as such, and the right to take it in this way. Duncan also executed to Watson a mortgage on another tract of land to secure the note. This mortgage is dated May 17, 1893, which, it will be observed, was some two weeks before the date of the deed; but from all the evidence we conclude that it is the same debt as that referred to in the deed, and that the date was filled in the deed when it was acknowledged, thus bringing about the discrepancy. The deed was not acknowledged by all the parties until August 26, 1893, and was lodged for record on August 19th; but before this, on July 10th, Watson sold and assigned the \$500 note to White, who paid him \$500 for it. After this, on January 5, 1895, Watson settled his accounts as curator with the county judge, and was charged in the settlement with the \$500. He fell short \$631. White, as the surety of Watson, paid \$131 in the year 1897 of the balance found due by the curator, but refused to pay the \$500, being advised that he was not liable as Watson's surety for it. Duncan was notified not to pay the note to White, and thus things stood until appellants filed this suit on August 24, 1898, against Duncan, Watson as curator, and White's administrator, in which appellants allege that they owned five-sixths of the land;

that the note was made payable to Watson as curator by mistake, and was unpaid; and that they were entitled to five-sixths of the proceeds of it. They also allege that White claimed some interest in the note under an alleged assignment of it by Watson to him; that Watson had no authority from them to assign the note, and this White knew. They prayed judgment for their five-sixths of the note. White's administrator answered, and set up his rights to the note by reason of the assignment from Watson, and pleaded an estoppel of appellants to allege Watson's want of authority, by reason of their acquiescence in the charge of the money to the curator in the county-court settlement. The proceedings in the county court, as shown by the record, were entirely ex parte. It does not appear that any of the appellants appeared in that court or took any proceeding there. White knew all about the title to the land, and the rights of the parties in it. Watson fell behind financially, and White seems to have been under the impression that he was responsible for the entire default of Watson until advised otherwise. It is urged for appellants that White did not in fact pay Watson for this note, but paid him for other paper, and took this note to secure him in his liability as surety of Watson. While the record is not very clear on this point, we think it, on the whole, sustains appellees' version of the transaction. J. E. Swann, the husband of appellant Fannie Swann, and a co-appellant with her in this case, was introduced as a witness for appellants as to certain admissions made to him by the deceased White. Appellants complain that this evidence was excluded by the court below. He was a party to the record, and was testifying for himself against one who was dead; for, if defeated in the action, he will be liable at least for costs. The court therefore properly held the evidence inadmissible. The vital questions to be determined in this case are: (1) Was Watson authorized to sell and assign the note to White, so as to vest in White title to appellants' five-sixths of it? (2) Are appellants estopped to rely on his want of authority or assert their rights under the circumstances?

1. Five-sixths of the land belonged to appellants, and one-sixth to Watson. The note was taken to Watson as curator for the price of the land simply because of a mistake of law on the part of the parties as to the duties of Watson as curator. He held the note as trustee for appellants to the extent of their five-sixths interest in it. It was not due, and, whatever authority to collect it at maturity might be inferred from the circumstances, he had no power, without express authority for this purpose, to sell the note before maturity. It bore 8 per cent. interest, and he had no right to discount it before maturity for cash, unless expressly authorized to do so by those interested. No such authority is shown. The note on its face

apprised White of Watson's want of authority to sell it unless specially authorized to do so by the parties, and White knew all the facts. It is also significant that White paid Watson for this note before the deed was acknowledged or lodged for record. We conclude, therefore, that Watson had no power to sell or assign the note as against the appellants, and that White took no title by virtue of the assignment to the interest of appellants therein, as matters then stood. *Bank v. Bennett* (Ky.) 47 S. W. 623; *Rodgers v. Bass*, 46 Tex. 505; *Hays v. Lynn*, 7 Watts, 524.

2. It remains to inquire whether appellants have lost their rights by what occurred afterwards. The proceedings in the county court, being wholly *ex parte*, do not estop appellants. They notified Duncan not to pay the note. And from the fact that the note remained unpaid, and no effort was made to collect it, so far as appears, until the bringing of this suit, it would seem that both the parties were standing on their rights. Appellants do not appear to have misled White in any respect, and we are unable to see that they have omitted anything that was essential to the maintenance of their rights. They were not required to enter their appearance in the county court and file exceptions to Watson's report as curator, because he charged himself with the money that was not properly chargeable to him. The settlement was only *prima facie* evidence. White knew the facts as well as they did. Estoppels are not favored, and will not be indulged to take away an admitted right, except upon clear evidence.

On the whole case, appellants have the older and better right to five-sixths of the proceeds of the note. White knew all the facts, and, if a loss must fall on either, it should fall on him. Judgment reversed and cause remanded, with directions to the court below to adjudge to appellants five-sixths of the proceeds of the note in contest.

SHUTTLEWORTH et al. v. KENTUCKY COAL, IRON & DEVELOPMENT CO. et al.¹

(Court of Appeals of Kentucky. March 28, 1901.)

CONTRACTS — CONSIDERATION — FAILURE TO PERFORM STIPULATED SERVICES — RIGHTS OF ASSIGNEE — FRAUD.

1. Persons to whom an equitable interest in land was assigned by a writing reciting that the transfer was in consideration of services to be performed by them could not demand the property without a performance of the stipulated services, and a purchaser from them stands in their shoes, the paper being sufficient to put him on inquiry as to the services to be rendered and as to whether they had been performed.

2. Where H., pretending to have authority to act for M., procured a contract from P. and A. in consideration of services to be rendered by M., who knew nothing of the contract, and never

assented to it, the contract not being binding on M. was not binding on P. and A.

"Not to be officially reported."

Petition for rehearing. Denied.

For former report, see 60 S. W. 534.

Simrall & Doolan and J. H. Hazelrigg, for appellants. A. K. Cook, for appellees.

HOBSON, J. We have read with care the able petition for rehearing filed by appellant. There would be great force in the argument of the learned counsel if the paper given by Patterson and Allen to Harman purported to be an assignment of one-half their equitable title to the land for a consideration paid or received by them, and thus vested in Harman on its face an absolute right to this interest. But the paper reads: "Whereas, said Patterson and Allen desire the assistance of S. P. Myer and Archer Harman in effecting the sale of said land and property to others, or in otherwise realizing or making profit therefrom: Now, in consideration of one dollar paid to us, and of the services and assistance of said Myer and Harman to be by them rendered in effecting the above purpose, which services and assistance they hereby agree to render, we, said Patterson and Allen, hereby transfer and assign to said Myer and Harman," etc. This apprised any one to whom the paper was presented that S. P. Myer and Archer Harman agreed to render certain services and assistance, and that the transfer was in consideration of such services to be thereafter rendered by them. Any one who took the paper was put on inquiry to learn what these services were, and took it subject to the performance by them of their part of the contract. They could not demand the property without a performance of the stipulated service, and a purchaser from them stands only in their shoes. The evidence shows that Harman acted without authority from Myer in making this contract; that Myer, who was in reality to render the services, knew nothing of the contract, and never assented to it. The contract was not binding on Myer, and, having been obtained from Patterson and Allen by fraud of Harman, who pretended to have authority to act for Myer, was not binding on them; and they had a right to repudiate the contract thus obtained from them. The authorities relied on for appellant do not apply where the contract under which the purchaser bought was sufficient on its face to put him upon inquiry as to what the consideration was, or where it plainly showed that the consideration had not been paid or performed. The principle that "one who has conferred upon another by a written transfer all the indicia of ownership of property is estopped to assert title to it as against a third person, who has in good faith purchased it for value from the apparent owner," has no application, for the reason that the paper in this case did not confer upon Myer and Harman all the indicia of owner-

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

ship of property, but plainly showed that the transfer was in consideration of certain services to be rendered by them, and that they would not be entitled to a deed until these services were rendered. Petition overruled.

CITY OF LOUISVILLE v. BOHLSSEN.¹

(Court of Appeals of Kentucky. April 10, 1901.)

MUNICIPAL CORPORATIONS—INJURY TO PROPERTY IN MAKING STREET IMPROVEMENT—MEASURE OF DAMAGES.

1. In an action against a city to recover damages for injury to property in changing the grade of a street, the criterion of recovery is the diminution in value of plaintiff's property by reason of the acts complained of.

2. The failure of the court to expressly tell the jury, as it should have done, that the measure of damages was the diminution in value of plaintiff's property by reason of the acts complained of, is not reversible error, as the instructions fairly conveyed that idea, and the rulings of the court on the trial clearly indicated to the jury the true criterion of recovery.

Appeal from circuit court, Jefferson county, law and equity division.

"Not to be officially reported."

Action by A. Bohlssen against the city of Louisville to recover damages for injury to property. Judgment for plaintiff, and defendant appeals. Affirmed.

H. L. Stone, for appellant. Newton G. Rogers, for appellee.

GUFFY, J. The substance of plaintiff's claim is that the defendant, by reason of excavations, etc., on Chestnut to Twenty-Eighth street, and, in order to reduce the grade of same, damaged his property to the extent of \$3,000, for which he prayed judgment. The defendant denied the damage, and in fact the answer may be considered as a denial of all the averments of the petition showing a right to recover. After the issues were fully made up, and proof heard, a jury trial resulted in a verdict and judgment in favor of plaintiff for \$500, and, appellant's motion for a new trial having been overruled, it prosecutes this appeal.

After a careful consideration of this record, we fail to perceive any error to the prejudice of appellant's substantial rights. The evidence is sufficient to sustain the verdict, and it seems to us that the instructions fairly present the law applicable to the case on trial. We do not think that the evidence at all sustains any such dedication of the street in question by plaintiff's vendors to the city as would deprive plaintiff of the right to recover in this case. The true criterion of recovery is the diminution in value of plaintiff's property by reason of the acts complained of, and, while it is true that the instructions do not in words so state to the jury, yet the reasonable and fair meaning of the instructions given conveys that idea, and

the rulings of the court on trial seem to us to clearly indicate to the jury the criterion of recovery. We do not think the court erred in the admission or rejection of testimony. If the so-called improvements made or caused to be made by the defendant lessened the value of plaintiff's property, it is perfectly clear that he was entitled to recover therefor. Judgment affirmed.

BAKER v. SMITH et al.¹

(Court of Appeals of Kentucky. April 11, 1901.)

VENDOR AND PURCHASER — ASSIGNMENT OF COUPONS IN INVESTMENT COMPANY AS COLLATERAL—DEFAULT IN PAYMENT PRECIPITATING MATURITY OF OBLIGATION.

1. A purchaser assigned to the vendors, as collateral for the price of land, certain certificates issued to him by an investment company, and authorized them to collect all matured coupons until the purchase price should be fully paid, agreeing to pay to the investment company, according to its rules, two dollars per month on each certificate or renewal thereof, and to renew the certificates and coupons thereon as fast as they matured; and further agreeing that if, at any time, he should be three months in default on any of such payments, all of the unpaid purchase money should become due. Held, that it was not necessary, in order to precipitate the maturity of the purchaser's obligation to the vendors, that he should make default for three "consecutive" months in the payments to the investment company, it being sufficient that he was in default for three months on any of such payments, especially as the charter of the company provided that upon default for two consecutive months on any coupon the coupon and all money theretofore paid upon it should be forfeited to the company.

2. As no personal duty was imposed upon the vendors except to make a deed when all of the purchase price had been paid, the contract was assignable.

3. The failure of the vendors to promptly take advantage of the first default did not preclude them from subsequently relying upon such omission.

Appeal from circuit court, Fayette county.

"Not to be officially reported."

Action by F. P. Smith and others against J. H. Baker to enforce a lien. Judgment for plaintiffs, and defendant appeals. Affirmed.

Z. Gibbons and G. E. Billingsley, for appellant. Forman & Forman, for appellees.

BURNAM, J. In January, 1896, F. P. Smith and William Sleath, by executory contract, sold to appellant, Baker, several parcels of real estate in Lexington, Ky., at the price of \$3,300, and agreed that when the purchase price was paid they would convey the title thereto by general warranty deed. Appellant, to secure the payment of the contract price, assigned and delivered to the vendors, as collateral, 16½ certificates, or 33 coupons, issued to him by the Southern Mutual Investment Company, of Lexington, Ky., and authorized them to collect and receipt for all matured coupons until the pur-

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

chase price, with interest, was fully paid by him; and agreed that, beginning on the 15th day of February, 1896, he would pay to the investment company, according to its rules, \$2 per month on each certificate or renewal thereof, and that he would renew the certificates and coupons thereon as fast as they matured. It was further stipulated that if, at any time, appellant should be three months in default on any of the payments due to the investment company, all the unpaid purchase price should become due and payable; and that the vendors should have the right to carry the certificates in the investment company as their own property, free from any claim on the part of appellant. Appellant was also to pay the taxes and insurance on the property. Subsequently to the execution of this contract, Smith assigned his interest therein to W. P. Cockrell for the use of the Lexington Lumber & Manufacturing Company, and on the 10th day of December, 1898, this suit was instituted by Cockrell, the lumber company, and Sleath, in which they allege that appellant had not performed his agreement to pay the investment company two dollars per month on each of the certificates and renewals thereof held by them as collateral, but that he was in default in a large number of these payments for more than three months, and that he had also permitted a number of the coupons to lapse for nonpayment of the monthly premiums due thereon, and claimed that by reason of such default, under the terms of the contract, their entire debt matured, and asked for a judgment decreeing a sale of the real estate and coupons. The appellant filed a general and special demurrer to appellees' petition, which was overruled, and then filed his answer, in which he denied that he had at any time before the institution of the suit been in default for three consecutive months in his payments to the investment company, and alleged that the contract made with Smith and Sleath was personal and not assignable. He also pleaded that appellees, by their failure to promptly assert their claims at the time of the original default in payment to the investment company, had waived their right to prosecute this suit. We will consider these defenses in the order in which they have been stated.

The first condition in the certificate of membership of the investment company provides: "That the holder thereof should on the first day of each and every month pay to the company \$1.00 on each unredeemed coupon thereto attached for the full term of 153 months." And the by-laws of the company provide that: "If there shall be default in the payment of the monthly installments for 2 consecutive months on any coupon, that the coupon and all money theretofore paid upon it should be forfeited to the company." It is clear, therefore, that

the contention of appellant that the defaults must be for three consecutive months is untenable, as such default would have rendered the coupons themselves, under the terms of the contract, uncollectible. Besides, there is nothing in the words of the contract which supports such a contention. On the contrary, it clearly says that, if appellant should be in default for three months on any of the payments which he had assumed to make to the investment company, that the debt of appellees should become due. There is no suggestion that the default must be for three consecutive months. It is not controverted that appellant defaulted in the payment of 843 of the monthly premiums, which were due upon the 83 coupons assigned to appellees as collateral between the date of the contract in 1896 and the institution of this suit in 1898, and that by reason of such default the redemption value of these coupons had become greatly reduced. This violation of appellant's undertaking with appellees precipitated the maturity of their obligation in accordance with the terms of the contract. Appellees do not claim any forfeiture. The sole purpose of the petition is to subject the property sold to appellant and the collateral assigned by him to the appellees to the payment of the balance due upon the debt, and the numerous authorities cited upon the question of forfeiture have no application.

The next ground relied on is that the contract was not assignable. There is no personal duty imposed by the contract upon Smith, except to make a deed to the property when all of the purchase price had been paid. Appellant's duty was to pay one dollar per month on each coupon to the investment company, and, when these coupons matured, it was appellees' duty to collect the maturities from the investment company and apply the proceeds to the payment of their debt for purchase money. This was the agreed scheme, and we think, under section 474 of the Kentucky Statutes, Smith had a right to transfer and assign the benefit of his interest in the contract to appellee Cockrell.

The mere failure of appellees to take advantage of the first default by appellant was not prejudicial to them, and did not affect their right to rely upon such omission at the time this suit was brought, especially as the testimony in the case shows that the number of these defaults increased as the years went by; and that he failed to pay 109 demands in the year 1898, in which the suit was instituted. As appellant first neglected to perform the duties imposed upon him by the contract, appellees were entitled to avail themselves of the contract provisions arising upon such default, and ask a sale of the coupons held by them as collateral and for an enforcement of their vendor's lien against the real estate. Judgment affirmed.

HIGGINS v. HOWARD.¹

(Court of Appeals of Kentucky. April 10, 1901.)

EJECTMENT—DEED TO PLAINTIFF PENDING ACTION—CHAMPERTY.

1. A deed conveying to the plaintiff in ejectment the land in controversy, which was executed after the institution of the action, and while defendant was in adverse possession of the land, was void.

2. As plaintiff, at most, had title to only an undivided interest in the land sued for, his remedy was a suit for a division of the land, and not an action of ejectment.

Appeal from circuit court, Magoffin county.

"Not to be officially reported."

Action by John Higgins against Lark Howard, Jr., to recover possession of land. Judgment for defendant, and plaintiff appeals. Affirmed.

D. D. Sublett, Howard & Howard, C. P. Chenault, and W. S. Pryor, for appellant. W. W. McGuire, for appellee.

GUFFY, J. The appellant instituted this action in the Magoffin circuit court, claiming to be the owner and entitled to the possession of about 200 acres of land, and charging that the appellee was in the wrongful possession of the same, and prayed judgment for possession of the land, and \$200 in damages. The answer of the defendant is a denial of plaintiff's ownership of the land, and also claims that the defendant is the owner of said land. After various amendments were made by plaintiff, a trial was entered into; and plaintiff offered in evidence a deed from Benjamin Howard, Sr., for one-sixth of a large boundary of land. He also offered in evidence a deed from one Risner and others to the residue of said boundary of land; also testified in regard thereto, and introduced other testimony. And at the conclusion of all his testimony the court, on motion of defendant, instructed the jury peremptorily to find for the defendant, which was accordingly done; and, plaintiff's motion for a new trial having been overruled, he prosecutes this appeal.

It seems to us that the paper title offered fails to show sufficient title in plaintiff to authorize a recovery. It will be seen that the deed from Risner, etc., to plaintiff was executed after the institution of this suit, and while it appeared that the defendant was in adverse possession of the land in controversy; hence no valid title passed to the plaintiff. If it be contended that plaintiff's vendor had been in the possession of the said land long enough to give him a perfect title, the pleadings do not rely upon such possession, and the proof is not sufficient to show a possessory title sufficient to authorize a recovery in this case. Under the pleadings and proof, it would seem that Benjamin Howard was only occupying the land

as a joint owner with other parties. If appellant had any title to the land in question, it would seem, under the pleadings and proof in this case, that his remedy would be by a suit in equity for a division of the land, so far as the right, if any, was acquired by virtue of the deed from Benjamin Howard to him. Moreover, it does not satisfactorily appear in this case that the title of the original patentee of the land has vested in the appellant. Taking the record as presented in this case, we are of the opinion that the circuit court did not err in giving the peremptory instructions complained of. Judgment affirmed.

AUDITOR OF PUBLIC ACCOUNTS v. CAIN.¹

(Court of Appeals of Kentucky. April 11, 1901.)

CLERKS—FEES FOR ORDERS EXCUSING JURORS—CONTEMPORANEOUS CONSTRUCTION OF STATUTE.

1. Under Gen. St. c. 41, art. 2. fixing the fees of clerks for orders excusing jurors at 25 cents for each juror excused, the clerk was entitled, for an order discharging the panel at the close of the term, to 25 cents for each member of the panel; that being the construction placed upon the statute by the circuit judges of the state and the auditors of public accounts for many years.

2. The construction placed upon such a statute by the legislative and executive branches of the government for many years will be adopted by the courts.

Appeal from circuit court, Franklin county.

"Not to be officially reported."

Action by John S. Cain against the auditor of public accounts for a mandamus. Judgment for plaintiff, and defendant appeals. Affirmed.

R. J. Breckinridge, for appellant. Carroll & Carroll, for appellee.

O'REAR, J. John S. Cain, as clerk of the circuit court of Jefferson county, rendered a fee bill against the commonwealth, payable out of the treasury, for services performed by him as such clerk from January 6, 1896, to July 3, 1897, amounting to \$481.76, which was indorsed "Approved" by the commonwealth's attorney, and allowed by the judge of the circuit court (criminal division), Jefferson county, and certified to the auditor of public accounts for payment. This claim was presented to the auditor, who refused to draw his warrant on the treasurer for its amount; hence this suit in the Franklin circuit court, seeking a mandamus to compel its payment. Of the foregoing sum total, it appears that \$75 was based upon orders entered by the clerk recording the list or venire returned to court by the sheriff, and then an order excusing such of them as were not accepted and impaneled

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

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as jurors, grand or petit, charging 25 cents for each name so excused. \$104 of the sum total represents orders "excusing jurors" based upon orders excusing the panel from service for a time specified,—for example, from January 10, 1896, to January 17, 1896,—charging 25 cents for each name. \$154.53 of the disputed sum was for orders finally discharging the panel; for example: "Ordered that the present panel of petit jurors be now excused from further service, and that the trustee of the jury fund now pay to each the amount opposite his name for services this week, etc., charging twenty-five cents for each name." \$10.53 of the total sum was for allowance and certifying of jurors' fees when the jurors were not finally discharged, but were actually certified to the trustee of the jury fund and paid for the time already served. \$2 was for furnishing names of persons exempt from jury service. These fees were all charged for services rendered under the following statute (chapter 41, art. 2, Gen. St.):

Fees of clerks payable out of state treasury:

Order excusing juror, for each juror excused	.....	.25
Noting on order book the allowance to petit juror	.....	.02
Noting on order book the allowance to grand juror	.....	.02
Certifying allowance to trustee of jury fund to petit jurors, each	.....	.02
(Same to grand jurors)	.....	.02

(The above statute was amended in 1892, but did not apply to the then incumbents.)

We do not deem it necessary to give an original construction to the statute as affecting the facts set out above concerning the "excusing" of jurors, because from the proof in this case, and from an inspection of the statute laws of this state, it appears that this schedule of fees for the service in question has obtained in this state since 1865 to 1892; that appellee was clerk of the Jefferson circuit court for about 30 years during this time; that he and his predecessor in office, the then circuit judges of Jefferson county and their predecessors in office, and all the auditors of the state had given the statute the same construction from the time of its enactment till the refusal to pay this fee bill. It furthermore appears from the deposition of Gen. Hewitt that while he was auditor of state he, on as many as two occasions, called the attention of the legislature to the statute in question, and recommended its amendment so at least to prevent the clerk from charging for excusing the panel finally or at the termination of the term. The legislature failed to take action in the matter until in 1892-93 they passed the present statute, which provides: "Order excusing juror, for each juror excused, except the regular panel, twenty-five cents." Section 355, Ky. St. Thus we have the legislative and executive departments of the state government and the circuit judges of the

state, whose duty it was constantly to pass upon the matter for a period of a quarter of a century or more, concurring in the construction of the statute now claimed by appellee. In *Harrison v. Com.*, 83 Ky. 162, involving a similar line of construction of a very similar statute (regulating fees of county assessors), this court held: "The very fact that persons, and even courts, are differing as to its meaning, tends strongly to show that it is, at least, of doubtful import. It is alleged in the answer, and admitted by the demurrer to it, that the state, through its county courts, and its executive department, has for many years allowed and paid for each list, whether it embraced property or not. The executive branch of a government must necessarily give a construction to the laws which it must execute; and if its construction has been followed for years, and in view of, and without interference by, the lawmaking power, then such contemporaneous and long-continued construction should not be departed from without the most cogent reasons. A long-continued practice under a statute, under such circumstances, ripens into an authoritative construction of it." In that case it was further held: "Not only those claiming rights under the law now in question, but the county courts of the state, and those who have charge of its execution, have, for over half a century, interpreted it otherwise; and, while this was being done, the various legislatures, and the people behind and over them, have known of it, and recognized it by failing to interfere." We gave the same effect to long-continued contemporaneous interpretation or construction of a statute by the co-ordinate branches of government in *Pennington v. Woolfolk*, 79 Ky. 13, and such, indeed, is the great preponderance of authority of the other states and of text writers on this subject. Other questions of an interesting nature are presented, but, in view of our conclusions set out above, we do not deem it expedient to further consider them at this time. The judgment of the circuit court, having been in conformity herewith, is affirmed.

MORGAN v. WICKLIFFE.¹

(Court of Appeals of Kentucky. April 11, 1901.)

CONTRACTS—USURY AS CONSIDERATION FOR AGREEMENT TO EXTEND TIME OF PAYMENT.

Where plaintiff agreed to extend the time of payment of the debt sued on, in consideration of defendant's promise to pay usurious interest, defendant, having repudiated the agreement to pay usury, cannot insist upon the agreed extension of time.

"Not to be officially reported."

Petition for rehearing. Denied.

For former report, see 61 S. W. 18.

¹ Reported by Edward W. Hines, Esq., of the Frankfort bar, and formerly state reporter.

HOBSON, J. It is insisted for appellant that, the interest having been paid by him to January 27, 1898, the action brought on December 29, 1897, was premature, and cannot be maintained. The alleged agreement of appellee to extend the time for the payment of the debt until November 1, 1901, was in consideration of appellant's agreement to pay him interest at 8 per cent. per annum on the amount, payable semiannually in advance. Appellant cannot repudiate the contract to pay 8 per cent., and rely upon usury, and at the same time hold appellant to a performance of his part of the agreement. Appellant's agreement to pay interest at 8 per cent. semiannually in advance was void, under the statute, and not binding on him. Notwithstanding his promise, he was not required to pay interest exceeding 6 per cent. But he cannot require appellant to wait until November, 1901, on the debt, in consideration of interest at 6 per cent.; for this was not the agreement between them. Appellee's promise to wait on the debt until November, 1901, was in consideration of appellant's promise to pay usurious interest, and, as appellant was not bound by his promise, neither was appellee. The court will never enforce specific performance of a contract of this character. It was deemed unnecessary to extend the opinion on this point, as we supposed the distinguished counsel for the appellant would concur with us in the judgment on this branch of the case, and we concluded from the evidence that in fact no final agreement has been made. Petition overruled.

LOUISVILLE & N. R. CO. v. WEBSTER et al.

(Supreme Court of Tennessee. March 12, 1901.)
COVENANTS RUNNING WITH LAND—DESCRIPTION—SUFFICIENCY—CONTRACTS
—EASEMENTS.

1. An agreement by a railroad company to furnish material to fence land owned by H., of G. county, Ohio, and "fronting 4,574 feet on the line of the railroad on mile 295 of the Henderson Division," the material to be furnished at G., Tenn., in consideration of a release by the owner of damages arising from stock being killed by the railroad, did not contain a sufficient description of the land to convey any interest therein, so as to support the agreement if it be construed as creating a covenant running with the land.

2. Where a contract recited that a party owning certain land fronting a railroad track desired to build "a fence along his line," and that in consideration of the railroad furnishing the material the owner agreed for himself, heirs, and vendees to release the company from damages arising from killing stock, it not appearing that any part of the fence was to be on the railroad's land, the contract did not create an easement, and was not binding on the owner's grantees as a covenant running with the land, but was merely a personal contract.

Appeal from circuit court, Robertson county; A. H. Munford, Judge.

Action by Charles Webster and another

against the Louisville & Nashville Railroad Company. From a judgment in plaintiffs' favor, defendant appeals. Affirmed.

Ohas. N. Burch, J. W. Judd, and Louis T. Cobbs, for appellant. H. T. True and A. M. Garner, for appellees.

McALISTER, J. This suit was commenced before a justice of the peace to recover damages for the wrongful killing of plaintiffs' mule by the railroad company. The trial in the circuit court before Hon. Lytton Taylor, special judge, and a jury, resulted in a verdict and judgment in favor of the plaintiffs for the sum of \$100. The company appealed, and has assigned errors.

On the trial below there was evidence tending to show that the defendant company had not kept its track fenced in the manner prescribed by law, and the animal, having escaped from its owners' premises, strayed upon the track, and was killed by a passing train. Under the statute the failure of the company to keep its track fenced and in repair makes its liability absolute for the killing of stock. In this view it is not seriously denied that the proof makes out a case. The real controversy, however, arises upon the action of the trial judge in excluding two written instruments offered in evidence. The object of this evidence was to show that plaintiffs' grantor had entered into a covenant running with the land with the defendant company by which the company was to be exempt from liability for killing stock in consideration of furnishing material to keep up the fences. The first instrument was a deed dated October 8, 1894, from Dr. J. M. Harris to Charles and Ben F. Webster, the present plaintiffs, conveying in fee two tracts of land lying in the Twelfth civil district of Robertson county. The second instrument was a contract entered into on the 9th January, 1892, between Dr. J. M. Harris and the defendant railroad company, which contract was duly acknowledged and recorded in the register's office of Robertson county, viz.: "This contract entered into this 9th day of January, 1892, between Dr. J. M. Harris, of the county of Greene, state of Ohio, of the first part, and the Louisville & Nashville Railroad Company, of the second part, witnesseth: That whereas, the said Dr. J. M. Harris, the first party, is the owner of certain lands fronting 4,574 lineal feet, more or less, on said second party's line of railroad, on mile 295 of Henderson Division, and desires to build a fence along his line next to said railroad fifty feet from the center of track. Therefore, in consideration of the second party furnishing at the depot at Greenbrier, Tennessee, station, the wire and the staples sufficient to construct a fence of seven strands, the said first party hereby agrees for himself, heirs, and vendees that he and they will furnish the balance of the material, erect, and perpetually maintain such fence at his and their

cost and expense, and hereby release the said second party from all claims or damages by reason of his or their stock or cattle, or any stock or cattle in their charge, straying upon said railroad, and there being killed or injured. It is further agreed that repairs to said fence shall be made on same basis, the railroad company furnishing the wire and staples, and the party of the first part furnishing the balance of the material and doing the work. Said immunity from claims or liability for damages for killing or injuring such stock or cattle shall be a perpetual charge upon said land, not only as against its present owners, but also as against all persons who may hereafter own said land. In testimony whereof we have hereunto set our hands and seals the day and year herein written. J. M. Harris. Louisville & Nashville R. R. Co., by J. G. Metcalf, Gen'l Mgr. Witness: George Cooper. Charles S. Johnson." In connection with the deed and contract the defendant company offered to prove that the Dr. J. M. Harris who executed the deed to the plaintiffs was the same person who executed the contract; and the land described and conveyed in the deed is the same land mentioned in the contract. The court, over objection from plaintiffs' counsel, excluded this evidence. It is insisted on behalf of plaintiffs that the action of the court in excluding the contract between Dr. J. M. Harris and defendant company was correct upon two grounds: First, that it contains no description of the land; second, that it is merely a personal covenant between Dr. Harris and defendant company, and does not run with the land, so as to bind the successors in title of Harris. It is insisted on behalf of plaintiffs that the description and location of the land is not sufficient to give actual or constructive notice of what particular land was referred to in the contract; that it does not recite in what state, county, or civil district the land is situated; and that an inspection of the record would not have put a purchaser upon inquiry. The only description given in the contract is that "the party of the first part is the owner of certain lands fronting 4,574 lineal feet on said second party's line of railroad on mile 295 of Henderson Division." It is insisted, however, that parol proof is admissible to show what particular land was intended, and in that view defendant company offered to prove that the land described and conveyed in the deed from Dr. J. M. Harris to the plaintiff is the same land mentioned in the contract. The court, however, excluded this offer of evidence. In *Dobson v. Litton*, 5 Cold. 616, the court stated the rule on this subject as follows: "Where an instrument is so drawn that upon its face it refers necessarily to some existing tract of land, and its terms can be applied to that one tract only, parol evidence may be employed to show where the tract so mentioned is located. But where the description employed is one that must necessarily apply

with equal exactness to any one of an independent number of tracts, parol evidence is not admissible to show that the parties intended to designate a particular tract by the description." The rule in that case was announced with reference to the following writing, viz.: "I have this day sold to W. K. Dobson a certain tract of land containing nine acres and sixty-six poles, near the junction of Broad St., Nashville, and the Hillsboro turnpike, Davidson county, Tennessee, for the sum of four thousand dollars." In *Johnson v. Kellogg*, 7 Helsk. 265, it is said, if the contract be for the sale of a tract of land well known by some name given to it in the contract, in such case no doubt that would be a sufficient description, and, if necessary, parol proof might be heard to show where the property is. "In such case," continues the court, "it will be observed that the parol proof thus resorted to is not to introduce any additional evidence as to the terms or stipulations of the contract, but simply to ascertain if there be lands or property known by the name or description given in the writing, and where that property is." *White v. Motley*, 4 Baxt. 548. These rules were applied by this court in *Dougherty v. Chesnutt*, 86 Tenn. 1, 5 S. W. 444. The description of the land given in the lease was, viz.: "All the right to quarry marble on the farm of Henderson Fudge, known as 'Rose Hill'." The court held that this farm was sufficiently well known by the name of "Rose Hill" to furnish an identification and description of the land in the writing to meet the requirements of the statute, and that evidence might be heard to show the location of the property. The court, however, was careful to remark that the instrument showed on its face that Henderson Fudge, the lessor, and W. F. Wright, the lessee, both lived in Hawkins county, Tenn., from which it may be reasonably inferred that the lands lay in that county. The contract in the case at bar cannot be assimilated to the case last cited. The residence of the vendor, Dr. J. M. Harris, is stated in the face of the contract to be in Greene county, state of Ohio, while the situs of the railroad company is not stated at all. The contract does state that the material for building the fence to be furnished by the railroad company shall be delivered at Greenbrier, Tenn., but there is no recitation or intimation in the contract that this farm is at or near Greenbrier, Tenn. The whole description is that the said Dr. J. M. Harris is the owner of land on mile 295 of Henderson Division. We find here no general description of a particular tract of land by which it is known and can be identified. But this description would equally apply to the land on both sides of the railroad. There is nothing on the face of this contract that would give notice, actual or constructive, of this incumbrance to a purchaser who was in good faith investigating the title. The latest case on this subject is

Wood v. Zeigler, 99 Tenn. 515, 42 S. W. 447. In that case it was held that a memorandum of a sale of land which describes the land sold as the "Baldwin Place," without giving the name of the state or county where located, or the name of the owner, is void. So that, in our opinion, if this contract between Dr. Harris and defendant company be viewed as conveying an interest in land, it is void for insufficient description. But the important inquiry remains whether this instrument does in point of fact convey, or attempt to convey, any interest in land. Touching the latter proposition, Mr. Jones, in his work on Conveyancing (volume 1, § 788), says: "Though a covenant be made by one for himself and his assigns, yet, if it does not concern the land, his assignee is not bound by it. The covenant in such case is merely collateral." At section 703 the author says: "To create a covenant running with the land, it is essential that with the making of the covenant there be a transfer of title from one party to the other, unless there is the equivalent of a grant of an easement or servitude, which may attach to the possession of the land, and run with it, regardless of any change of ownership. Where one party covenants with another in respect of land, and at the same time, with and as a part of the making of the covenant, neither parts with nor receives any title or interest in the land, nor creates an easement, nor a right in the nature of an easement, for the benefit of the land, such a covenant is at best but a mere personal contract." See Jones, Easem. § 670. It is conceded by counsel for the company that, in order to create a covenant running with the land so as to bind successors in title, two things must concur, namely: First, the covenant to be done or performed must touch and concern the land, and not a thing collateral to the land conveyed; second, there must be between the original covenantor and covenantee, the conveyance of an estate to which the covenant is pertinent, or the creation of an easement which is equivalent to an estate. It is not insisted by counsel that there was any transfer of title in this case from one party to the other, but the insistence is that there was the creation of an easement which was equivalent to an estate. This contention presents the crucial question in the case. It is contended that this contract between Dr. J. M. Harris and the defendant company creates both an easement in his land in favor of the defendant company, and a servitude which attaches to the possession of it. The argument is that, since the fence must rest equally on the land of both Harris and defendant company, this fact gives the company an easement in the land of Harris. It was held in Sanders v. Martin, 2 Lea, 215, that "if two adjoining owners build a wall partly on each lot, and by agreement or continuous user for twenty years treat it as a party wall, each has an easement of support for his half." The

position of counsel is that we have here an agreement between Dr. Harris and the railroad company, two adjacent landowners, to build and perpetually maintain a fence on their adjoining lands. Now, in answer to this contention it is only necessary to refer to the contract, and we find it recited that Dr. Harris desires to build a fence along his (Harris') line next to said railroad 50 feet from the center of the track. It does not appear that any part of this fence was to lie on defendant's land, but it was to be built on Harris' line. Hence defendant company thereby acquired no interest or easement in plaintiffs' land. In order to create a covenant running with the land, some interest in the land must pass from the grantor, or be created by the covenant. "If the covenant is not of a nature that the law permits to be attached to the estate as a covenant running with the land, it cannot be made such by agreement of the parties. Where the agreement is nothing more than a simple contract, which in law has no greater force than a license, there is no privity of contract or estate which will authorize a recovery upon it in an action at law. The contract is in such case personal, or not assignable at law; and the right to enforce it and the liability upon it rests with the parties alone. Jones, Easem. §§ 670-674. If one taking such covenant neither parts with nor receives any interest in the land as a part of the covenant, this is at best merely personal, and does not bind the grantee." Jones, Easem. § 676. Whether Dr. Harris, the original owner, might not have been bound by this contract by way of an estoppel, we need express no opinion. The question presented upon this record is whether a purchaser of the land is bound by said contract, and we hold he is not so bound, for the reason that the exemption from liability was merely a personal contract between the original parties, and not a covenant running with the land. The result is that the judgment of the circuit court is affirmed.

McMILLAN v. HANNAH.

(Supreme Court of Tennessee. April 6, 1901.)
COUNTIES — TERRITORIAL EXTENT — CHANGE OF BOUNDARIES — ACQUIESCENCE IN NEW CONSTITUTIONAL ACT — ESTOPPEL.

1. Const. art. 10, § 4, providing that no county shall be reduced to less than 500 square miles, prohibits any reduction of counties containing less than 500 square miles; and hence Acts 1881, c. 143, taking certain lands out of Cheatham county, which contained but 310.8 square miles, and putting them in Dickson county, was unconstitutional and void.

2. The fact that Cheatham county acquiesced for 14 years in the action of the legislature (Acts 1881, c. 143) in transferring certain land from that county to Dickson county, did not estop Cheatham county from then asserting a claim to the land, since, under Const. art. 10, § 4, providing that no county shall be reduced to less than 500 square miles, Cheatham county

had no power to contract its limits by acquiescence or otherwise.

Appeal from chancery court, Cheatham county; J. S. Gribble, Chancellor.

Interpleader by W. G. McMillan against G. W. Hannah and others to determine the ownership of certain taxes. From a judgment of the court of chancery appeals reversing a judgment in favor of Dickson county, that county appeals. Affirmed.

R. S. Turner, for appellees Hannah et al.
A. E. Garner, for appellee W. G. McMillan.

CALDWELL, J. This record presents a bill of interpleader, whereby W. G. McMillan, a landowner and taxpayer, brought the counties of Cheatham and Dickson before the court for the purpose of ascertaining and settling by decree which of them had jurisdiction of his land and was entitled to receive his taxes. The chancellor decided the question in favor of the latter county, but the court of chancery appeals reversed his action, and pronounced a decree for the former one.

Cheatham was not one of the original counties of the state. It was created by and formed under chapter 122 of the Acts of 1855-56, a portion of its territory being taken from the county of Dickson. The court of chancery appeals has conclusively found as a fact that the land now owned by the complainant, and now here in question, is a part of that so transferred from the one county to the other, and that such was its location when the constitution of 1870 was adopted. That instrument expressly recognized Cheatham and other comparatively small and new counties as then formed by the following provision, namely: "The counties of Lewis, Cheatham, and Lequatchie, as now established by legislative enactments, are hereby declared to be constitutional counties." Const. art. 10, § 4. It follows, therefore, that this land is still within the proper territorial limits of Cheatham county, unless it has been legally transferred to some other county since the adoption of the constitution. Dickson county makes the contention that such a transfer has been made, and that she is the beneficiary thereof. Undoubtedly, chapter 143 of the Acts of 1881 was enacted for the purpose of changing the line between the two counties so as to take this and other lands out of Cheatham, and put them in Dickson county, and the terms employed are clearly sufficient for the accomplishment of that end if the legislation should be considered otherwise valid.

It is said in opposition to the validity of this act that it undertakes to reduce the area of Cheatham county below the constitutional limit, and that for that reason it must be regarded as entirely nugatory. The objection is a serious one. When originally established, and at the time of the passage of this act, the area of Cheatham county was only 310.8 square miles, and the effect of the act, if constitutional, was to diminish that area to the

extent of the territory intended to be passed into Dickson county. Section 4 of article 10 of the constitution authorizes the legislature to form new counties from parts of old ones, each new county to have an area of at least 275 square miles, and no "old county" to be "reduced to less than five hundred square miles." This restriction against the reduction of the area of an old county below the minimum named applies to the change of county lines as well as to the formation of new counties, and legislation in conflict therewith, whether for the one purpose or the other, is inevitably null and void. *Marion Co. v. Grundy Co.*, 5 Sneed, 490. Every county having a legal existence when the present constitution went into effect falls within the designation "old county"; consequently, Cheatham, though not an original county, is an "old county," and as such entitled to the full benefit of the restriction mentioned. It avails nothing to the advantage of Dickson county, or in favor of the constitutionality of the enactment, to say that Cheatham was not by the latter reduced below 500 square miles, but has always been so. The inhibition has the same force in such a case as in any other. No reduction of an "old county" is allowable in any instance where it leaves a less area than 500 square miles. Only those having more can be diminished in any way. A larger county may be reduced to that limit, but a smaller one cannot be reduced at all. In the late case of *Roane Co. v. Anderson Co.*, 89 Tenn. 259, 14 S. W. 1079, this court held that the legislature was without power to make any diminution of the area of a county that was already below that standard. A like ruling was made by the court of chancery appeals, and approved orally by this court in a still later litigation between the two counties now before the court. *Cheatham Co. v. Dickson Co.* (Tenn. Ch. App.) 39 S. W. 734. The conclusion follows irresistibly that the act under consideration is unconstitutional, and that, being so, it is of no legal effect whatever.

Dickson county contends, however, in the next place, that Cheatham county is at least estopped by long acquiescence from now asserting any claim in conflict with the provisions of that act. The facts pertinent to this contention are that "Cheatham county made no attempt to assert jurisdiction over the land of the complainant McMillan" for 14 years after the passage of the act, and that he during that period paid taxes, sat on juries, voted, served as election officer, and performed the functions of county superintendent of public instruction in Dickson county. These facts, though ample to preclude Cheatham county from a recovery of the taxes so paid from either the complainant or Dickson county, are clearly not sufficient to work a transfer of the complainant's land from one county to another. The former matter was one of revenue merely, which Cheatham county had the power, if not the legal right, to waive and

abandon, while the latter was one of territorial ownership, which she had neither the power nor the right to waive or abandon. She could well lose her rightful claim to complainant's taxes for a given period by knowingly permitting him to pay them to another claimant, but she could not by that or any other means contract the limits of her territory below the constitutional standard. The inhibition of the constitution would be of but little force if it could be so easily nullified or evaded. A reduction of the area which the legislature is inhibited from making by direct enactment the county cannot accomplish by mere nonclaim for itself and simple acquiescence in the asserted claim of another. This is especially so where, as in this instance, the quiescent course is pursued for only 14 years, and is then terminated by an affirmative assertion, in court, of the original status. The facts of this case do not call for the application of the doctrine announced in the cases of *Rhode Island v. Massachusetts*, 4 How. 591, 11 L. Ed. 1116; *Indiana v. Kentucky*, 136 U. S. 479, 10 Sup. Ct. 1051, 34 L. Ed. 329; and *Virginia v. Tennessee*, 148 U. S. 523, 13 Sup. Ct. 728, 37 L. Ed. 537. Let the decree of the court of chancery appeals be affirmed.

SAWYER v. SAWYER et al.

(Supreme Court of Tennessee. March 16, 1901.)

REFORMATION OF DEED—EVIDENCE—SUFFICIENCY—GRANTOR'S ADMISSION.

1. The evidence must be clear and satisfactory in order to justify the reformation of a deed for mistake.

2. Where a bill is filed against a grantor to reform and correct his deed for mistake long after he has divested himself of all his interest in the property, his answer, admitting the allegations of the bill, and assenting to the granting of the relief sought, is not of sufficient probative force to justify a decree granting such relief as against his minor co-defendants, to whom the deed conveys an interest.

Appeal from chancery court, Davidson county; Andrew Allison, Chancellor.

Bill by J. C. Sawyer against J. G. Sawyer and others. Decree for complainant. From a decree of the court of chancery appeals dismissing the bill, complainant appeals. Modified, and remanded for further proof.

Wm. G. Brien, Morris & Turney, and Wm. T. Turley, for appellant. James P. Atkinson, for appellees J. G. Sawyer and another. Robt. O. Allen, for guardian ad litem.

WILKES, J. This is a bill to reform and correct a deed made by J. G. Sawyer to his son the complainant, J. C. Sawyer, and to his wife and minor children. The bill is filed by the son against his wife, his father, and minor children. The wife and father filed answers, in which they admitted the allegations of the bill and assented to the relief sought. The minors filed a formal answer by their guardian ad litem, and submitted

their rights and interests to the care of the court. The chancellor, upon hearing, granted the relief sought, and reformed the deed, but not strictly in accord with the prayer of the bill. The decree granting the relief and reforming the deed was entered on August 13, 1894. The minor defendants have now brought the decree and proceedings before this court upon a writ of error, and the cause has been heard by the court of chancery appeals, which court reversed the action and decree of the chancellor, and dismissed the bill, denying all relief, and the complainant has appealed to this court, and assigned errors.

The case, as presented by the bill, is that J. G. Sawyer, the father, made a deed to J. C. Sawyer and his wife and children, on the 25th of December, 1890; that it was his intention to vest the entire interest and a fee-simple title in the son, but by mistake of the draftsman of the deed, and unknown to the grantor, J. G. Sawyer, the title was vested in the son and his wife and children as tenants in common, for the life of the son and his wife, or the survivors of them, to be used by them as a home, and the rents and profits to be used by them as a family, with remainder to their children or the issue of their children. The complainant charges that this was done by mistake, and upon the ground of mistake the deed is sought to be reformed and corrected. Some objections to the proceedings were made in the court of chancery appeals, which were disposed of by that court, and need not be further considered by this court, and there are virtually but two assignments that are to be considered by this court.

The first assignment we will consider is thus stated: "The court of chancery appeals erred in not finding that the answer of J. G. Sawyer was admissible as evidence and conclusive upon the minor defendants." The real finding of the court of chancery appeals is that the statements of J. G. Sawyer in his answer are not admissible against the minor defendants as evidence to affect their title; but that court also finds that there is nothing in the record to show that it was specially offered as evidence, but simply that the cause was heard upon the bill, answers, proof, etc. In the same connection, that court reports that the answer could only be regarded as an admission made by one defendant, made years after the transaction, and when he had no interest in the land, and no special interest in the controversy. "That court further reports that, if this statement had been made in the shape of a deposition with opportunity for cross-examination, it would have been strong evidence for the complainant, and, if there was nothing to contradict it, would have been sufficient to establish the fact, but that the admissions of the grantor, J. G. Sawyer, made years after he had parted with the possession of the land, could have no probative effect against the minors, to whom his

conveyance had given a remainder interest, and that there is no other evidence sufficient to reform the deed.

The contention before us is that the court did not give the proper weight and probative force to this answer, and that, if it had been given its proper effect, the case would have been made out for a reformation and correction of the deed. The general rule in chancery is that the answer of one defendant cannot be read against another. There are, however, exceptions to this rule. They are laid down in *Turner v. Collier*, 4 Heisk. 95, and may be summarized under these heads: (1) Where the co-defendant claims through the person whose answer it is proposed to read; (2) when the co-defendants are jointly interested as partners or otherwise; (3) when the respondent refers in his own answer to that of his co-defendant for further information.

This general rule and exceptions are taken from 3 Greenl. Ev. p. 283. We need only notice the first exception, as manifestly the other two do not apply in the present case.

We think there is and must necessarily be a difference in the weight and probative force of an admission in the answer of a co-defendant and the deposition of such co-defendant. In the former case the statement is *ex parte*, and in the latter there is full opportunity for cross-examination, and the application of such tests as are practicable to detect the falsity of such statement. In the case of minors who are to be adversely affected, the rule should be still more strongly drawn, since an agreement between the plaintiff and defendant, solemnly entered into, would not be allowed *ipso facto* to prejudice their rights. The strength of such admission must also depend largely upon the circumstances of each case. It may be that there is no antagonism between the parties, but their interests and wishes in the matter may be the same. In such case the statement of the defendant can scarcely be called an admission, which implies some concession against the interest of the party making the statement, but it is rather an affirmation or verification of the statement made by the plaintiff. Now, in the present case, the statement made by the father, J. G. Sawyer, was in no sense a concession or admission against his interest, or affecting him in any way adversely, as he had long since parted with the possession and title to the property, and had no interest whatever in it. It was not an admission made while he was the owner of that property, but after he had divested himself of all interest in it, and his evident desire appears to be to aid the complainant in his contention. Still it was a matter of vital interest and importance to his minor co-defendants, inasmuch as their rights are sought to be swept away by this statement. It can be seen at a glance how important it was to these minors that their co-defendant should be rigidly cross-examined and questioned as to why it was the deed was drawn vesting

the children with an interest in the land with so much particularity of detail and nicety of provision, and he could have been asked who wrote the deed, and what instructions were given about writing it, and other details absolutely necessary for the protection of the interests of these minors. In *Beach, Mod. Eq. Prac.* § 799, it is said: "There can be no valid decree binding the interest of any infant defendant without proof, although his co-defendant and the complainant agree as to the facts." See, to the same effect, 10 Enc. Pl. & Prac. p. 689; 1 Enc. Pl. & Prac. p. 955.

We need not specially pass upon the assignment of errors that the evidence, outside of the answer, is not sufficient to warrant the correction. This is a question of the quantum of evidence upon a matter of fact, and comes within the exclusive province of the court of chancery appeals upon the application of proper rules. These rules are properly formulated by the court of chancery appeals in their statement that the law requires the evidence to be clear and satisfactory in order to justify a reformation or cancellation of a deed for mistake. In the present case, excluding the answer of J. G. Sawyer, the grantor, there is no evidence upon which the chancellor could have rested his decree, except the statements of the two witnesses, J. C. Sawyer and his wife. But one other witness, Jackson, was examined, and he merely testifies that J. C. Sawyer claimed the land, improved it, and was in possession of it for a number of years. Indeed, the chancellor appears to have based his decree upon the agreement between these parties, as the latter part of the decree recites that "It is framed as it is, the said J. G., J. C., and Emma A. Sawyer consenting thereto, as the real intention of the parties it is so ordered and decreed."

Recurring again to the force and effect to be given to the answer of J. G. Sawyer, it is proper to say that it is merely formal, and very meager, consisting of only five lines, and stating simply that the allegations of the bill are true, and that he is ready and willing that the title to the property shall be made according to the prayer of the bill. This answer was filed in August, 1894, or about four years after he had parted with the title to the land in 1890, and when he had no interest whatever in it, and no possession or right to its possession. Mr. Greenleaf, after laying down the general exception that an answer of a defendant may be used as evidence against his co-defendant when the co-defendant claims under the party answering (1 Greenl. Ev. § 178), says: "The admissions which are thus receivable in evidence must, as we have seen, be those of a person having at the time some interest in the matter afterwards in controversy in the suit to which he is a party (Id. § 179). This most just and equitable doctrine will be found to apply, not only to admissions made by

bankrupts and insolvents, but to the case of vendor and vendee, payee and indorsee, grantor and grantee, and, generally, to be the pervading doctrine in all cases of rights acquired in good faith previous to the time of making the admissions in question. Id. § 180. The principle is thus announced in 1 Phil. Ev. note 104, pp. 255, 259-262: "All the cases agree that declarations made by the person under whom the party claims, after the declarant has parted with his right, are utterly inadmissible to affect any one claiming under him, and this rule applies even though they are sworn admissions in answer to a bill in chancery." *Doyle v. Sleeper*, 1 Dana, 531. The propriety of the admissions depends upon two matters—First, that they were made while the declarant had an interest; and, secondly, that the party to be affected claims under him. *Reed v. Dickey*, 1 Watts, 152-154; 2 Phil. Ev. p. 61; *Moseley v. Armstrong*, 3 T. B. Mon. 287. We are of opinion, therefore, that there is no error in the holding of the court of chancery appeals, upon the record as now presented, that a case for reforming the original deed was not made out, and that there was error in the decree of the chancellor in holding that it was. It appears, however, that court and counsel were misled into treating the answer of J. G. Sawyer as evidence against the minors, and the decree of the court below was based on this theory; and the decree of the court of chancery appeals will be reversed and so far modified as to direct a remand of the cause to the court below, to the end that further proof, if any, may be adduced to show the mistake made in the original deed, and the right of the complainant, J. C. Sawyer, to have the same changed so as to rest the title as prayed for in the original bill. The costs of the writ of error and proceedings in this court will be divided equally.

MARTIN v. PALATINE INS. CO.

(Supreme Court of Tennessee. Feb. 2, 1901.)

INSURANCE BROKER—CANCELLATION OF POLICY—IMPLIED AUTHORITY.

B.'s manager applied to W. for insurance, and W. obtained a policy for him in the defendant company, and divided the commission with defendant's agent. Subsequently, after the death of B., defendant's agent informed W. that it desired to cancel the policy, and W. issued one in another company, and handed it to B.'s manager, who refused to accept such cancellation. The new policy was forwarded to B.'s administrator without knowledge that it was in exchange for the one issued by defendant. Defendant's policy remained in the administrator's possession, and a loss occurred before its expiration. *Held*, that the defendant company was liable for the loss, since W. had no implied authority to accept the cancellation.

Appeal from chancery court, Davidson county; H. H. Cook, Chancellor.

Action by N. Martin, as administrator of the estate of P. Bernstein, against the Pala-

tine Insurance Company and the Hartford Insurance Company. From a judgment in favor of plaintiff and exonerating the Hartford Company from liability, the Palatine Company appeals. Affirmed.

Granbery & Marks, for appellant. Edward H. East, for appellee Martin, administrator, etc. R. W. Barger and John J. Ver-trees, for appellee Hartford Fire Ins. Co.

McALISTER, J. This record presents a controversy between two fire insurance companies as to which shall be operated with a loss. The complainant has sued both companies. The Palatine Company issued the first policy, but it contended that policy was canceled upon notice, and a new policy substituted in the Hartford Company. The chancellor and the court of chancery appeals concurred in adjudging liability against the Palatine Company and in exonerating the Hartford Company. The Palatine Company appealed, and has assigned errors.

The facts found by the court of chancery appeals are substantially these: In December, 1897, P. Bernstein, of Nashville, was the owner of a stock of merchandise in the city of Jackson, Tenn. His son, C. Bernstein, was placed in charge of this store as manager. It appears that P. Bernstein insured this stock of goods at Jackson, and carried the policies with him to Nashville, where he resided. Desiring additional insurance, he directed his son, at Jackson, to take out another policy for \$2,000. The son accordingly applied to Fisher & Wilkerson, agents, stating that he preferred a policy either in the Hartford or Aetna Insurance Companies. The agents informed him these companies had as much insurance in that block as they desired, but they would procure a policy for him in the Palatine Insurance Company. This insurance was placed through another agent, and the policy was to run for 12 months. Wilkerson & Fisher delivered this policy to C. Bernstein, and collected the premium for one year, with the understanding that they would divide commissions with the agent of the Palatine Insurance Company in accordance with the usual custom in such cases. This policy was forwarded by C. Bernstein to his father, at Nashville. P. Bernstein, the father, died on December 26, 1897, and on December 31, N. Martin, of Nashville, qualified as administrator of his estate. It appears that on December 30th the agent of the Palatine Insurance Company notified Wilkerson & Fisher that the manager of the Palatine Company desired to take up the policy that it had issued on this stock. They replied: "All right. Consider it canceled, and we will substitute for it our policy in the Hartford." At that time nothing was said about returning the premium. On the 1st of January, 1898, Wilkerson & Fisher, without the request of any one representing the assured,

wrote a policy in the Hartford Insurance Company for \$2,000, payable to the estate of P. Bernstein, deceased, for one year from January 1, 1898. This policy was handed to Clarence Bernstein, and by the latter given to N. Martin, administrator of Phillip Bernstein, deceased. The administrator received the policy on the 7th January, and up to that time he had no knowledge of any change in the policies made by the agents. When the Hartford policy was delivered to C. Bernstein, he was informed that the Palatine policy had been canceled. C. Bernstein afterwards promised to have the Palatine policy sent back to the agent. He stated, however, that he did not agree to the cancellation of the Palatine policy. On the night of January 4, 1898, a fire occurred, which destroyed a portion of the stock covered by the insurance. The Palatine policy had never been surrendered by the administrator, but was still in his possession. The administrator inquired of Wilkerson & Fisher and of the agent of the Palatine which of the two policies was in force, and offered to surrender the one that had been annulled, but they declined to pass upon the question, or to accept a surrender of either policy. The administrator made proofs of loss to both companies. The amount of the loss sustained by the fire was \$649.42. This amount is not disputed, but which of the two companies is liable for the loss presents the real controversy. In the contract of insurance is this clause, to wit: "This policy shall be canceled at any time at the request of the insured, or by the company by giving five days' notice of such cancellation. If this policy shall be canceled as as heretofore provided, or become void or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy or last renewal; this company returning the customary short rate. Except when this policy is canceled by this company by giving notice, it shall return only the pro rata premium." The court of chancery appeals find as a fact that the only notice of the cancellation of the Palatine policy was given to Wilkerson & Fisher, that they were not agents of the insured, and that notice to them was insufficient under the terms of the policy. It is very obvious upon the facts found that Wilkerson & Fisher were merely insurance brokers. Their only connection with the case was in negotiating insurance through the agent of the Palatine Insurance Company. When this policy was written and accepted by the insured, Wilkerson & Fisher had no further connection with the case. It appears that when the Hartford policy was issued Bernstein was dead, and the insurance was made payable to his estate. It is shown that Martin, administrator, neither agreed to the cancellation of the Palatine policy nor applied for the Hartford policy. So it is plain that the alleged cancellation

of the old policy and the substitution of the new one was an arrangement entered into between persons who had no authority to act in the premises. In *Hermann v. Insurance Co.*, 100 N. Y. 411, 8 N. E. 341, it was said, viz.: But the authority of a broker employed to procure insurance for his principal, such broker not being a general agent to place and manage insurance on his principal's property, terminates with the procurement of the policy. It cannot, in reason, be held to continue after the insurance has been procured and the policy has been delivered to the principal. An agent to procure a contract has no power to discharge it implied from the original authority merely. If he possesses that power, it arises from some actual or apparent authority superadded to the mere power to enter into the contract. *Grace v. Insurance Co.*, 109 U. S. 278, 3 Sup. Ct. 207, 27 L. Ed. 982; *Adams v. Insurance Co.* (C.C.) 17 Fed. 630; *Kehler v. Insurance Co.* (C. C.) 23 Fed. 709; *Wight v. Insurance Co.* (C. C.) 53 Fed. 340; *Ostr. Ins.* § 16; 1 *Joyce, Ins.* §§ 636, 637; 2 *Joyce, Ins.* §§ 1655-1666; *White v. Insurance Co.*, 120 Mass. 330; *Mechem, Ag.* § 931. It results that there was, as matter of law, no cancellation of the policy issued by the Palatine Insurance Company, nor substitution of the Hartford policy, and, without discussing other questions, which are perhaps equally as conclusive, we affirm the decree.

RIDLEY et al. v. HALLIDAY et al.

(Supreme Court of Tennessee. March 22, 1901.)

TRUSTS—LIFE TENANT—REMAINDERS—SALE OF LANDS—REMAINDER-MEN NOT IN ESSE—DECREE PRESERVING RIGHTS IN PROCEEDS—DECREE BINDING PARTIES NOT IN ESSE—BILL BROUGHT BY OR AGAINST LIFE TENANT.

1. Since a petition for the sale of lands deeded in trust to one for life, with remainder to his children, filed by the trustee and life tenant before the latter's children were in being, is not within Shannon's Code, tit. 2, c. 3, authorizing courts of chancery to decree a sale of the property of persons under coverture and infancy, on bill filed by husband or regular guardian, section 5086 of that chapter, authorizing the sale of property so limited that persons not in being may have an interest therein if all those interested then in being, having a common interest with those not in esse, are before the court, has no application to such petition.

2. Where a trust deed conveyed property to the use of one for life, and after his death to his children, or, should he leave no children, to the children of the grantor, and the one child of the cestui in esse was made a party to a bill for a decree of sale of such property, the decree rendered on such bill would bind all other such children coming into being subsequently; it being assumed that the living representative would look after the interests of the entire class.

3. Where a trust deed conveyed property to the use of one for life, and after his death to his children and the issue of any deceased child, or, should he leave no children nor their

issue, to the children of the grantor, and a bill seeking a decree of sale of such property was filed by the trustee and life tenant, no children of the latter being in esse, a decree granting the prayer of such bill, and preserving the interest of such possible children in the proceeds of the sale, would bind such children, in absence of fraud, since the life tenant would virtually represent the contingent remainder-men not in esse.

4. Where decree of sale of property deeded in trust to the use of one for life and then to his children was rendered before any such children were in esse, it was immaterial, as to its binding force on such children, whether the bill was brought by or against the life tenant.

Error to court of chancery appeals.

Bill by Webb Ridley and others against W. P. Halliday, Jr., and others, seeking a decree of sale of property deeded in trust to the use of parties some of whom are not in esse. From a decree of sale, affirmed by the chancery court of appeals, defendants bring error. Affirmed.

J. C. Bradford, E. H. Hatcher, and Figures & Padgett, for plaintiffs in error. W. C. Salmon, for defendants in error.

BEARD, J. In 1895 J. W. S. Ridley by deed of gift conveyed to his son Webb Ridley a valuable farm of 580 acres of land in the county of Maury, upon the following trusts: That the said Webb Ridley, trustee, should permit and suffer his son William Ridley, for and during his natural life, to have and receive the rents, income, and profits of said lands, and to exercise such control over the use, occupation, renting, and cultivation thereof as he, the said William, might deem proper, but in such way, nevertheless, that such lands, and the rents, incomes, and profits thereof, should not in any way be liable for the debts or contracts of the said William; that upon his, the said William's, death, said lands should go to his children and to the living issue of any deceased child, the issue taking the parent's share; that, in case William left a widow surviving, she should have the right to occupy the land during her widowhood, sharing equally with the children, or their issue, the rents, incomes, and profits derived therefrom; that should said William at death leave a widow, but no children, or issue of children, the trustee should suffer and permit her to receive and enjoy the income of the lands during her life or widowhood, but so that they should not be liable for her debts or contracts, and that at the death or marriage of the widow the lands should go to the grantor's other children, and to the issue of such of them as might be dead; that, should William die leaving no widow or children, or issue of deceased child or children, the said lands should go to the grantor's other living children, or the issue of such of them as might be dead. In 1898 the defendants, the two Strudwicks and one Carpenter, made a written proposition to the trustee and the life tenant in which they agreed to purchase this property at the price

of \$75 an acre, upon the condition that the latter parties would institute proper proceedings in the chancery court of Maury county and procure an acceptance of the same. Upon receiving the proposition the trustee, Webb, and the life tenant, William P., Ridley, at once filed a bill in that court, to which all persons in interest, in esse, were made parties defendant, as follows: Annie Halliday and W. P. Halliday, her husband, and their minor child, W. P. Halliday, Mary P. Ridley, and the infant children of Webb Ridley. Of these defendants, Annie R. Halliday and Mary P. Ridley were the children of the donor, J. W. S. Ridley, and the sisters of the trustee, Webb, and the life tenant, W. P., Ridley. In this bill, after setting out the deed of gift, the interests created by it, both vested and contingent, and the proposition for its purchase already set out, many reasons were then averred why it was greatly to the interest of all concerned that the same should be accepted. The prayer was that the matter might be referred to the clerk and master to take proof whether such sale would be advantageous, and, in the event he should report it was, then that it be made. It was also averred that William P. Ridley, the life tenant, was unmarried, and that he had never had children born to him. Answers were filed by the adult defendants and by guardians ad litem duly appointed for the minors. The answer of the adults conceded that it would be wise to accept the proposition of purchase, while those of the guardians ad litem simply craved the protection of the court for the interest of the minors. The cause then proceeded to a reference to the clerk and master, who, after taking much proof, reported that the offer of purchase from the Strudwicks and Carpenter was a very advantageous one, and recommended its acceptance by the court. This report was unexcepted to, and the chancellor entered a decree of confirmation, and at the same time made provision for the investment of the money received for the purchase of the property so that the interests of all parties, born and unborn, might be preserved in the fund as they existed under the deed in the land itself. From this decree a writ of error has been duly prosecuted.

No question was made in the courts below, by demurrer or otherwise, as to the jurisdiction of the chancery court to grant the relief sought by the bill. While, if that court had been absolutely lacking in jurisdiction of the subject-matter of the cause, then jurisdiction would not have been conferred by this failure to make an objection by pleading at the proper time (*Richards v. Railway Co.*, 124 Ill. 518, 16 N. E. 909), yet, as a chancery court has unquestionably the power, in a proper case, where it has the proper parties before it, to convert realty into personalty (*Ruggles v. Tyson*, 104 Wis. 500, 81 N. W. 367, 48 L. R. A. 809; *Gavin v. Cur-*

tin. 171 Ill. 641, 49 N. E. 523, 40 L. R. A. 776), a failure to make objection by some preliminary pleading was a waiver of objection that the court was without jurisdiction to act in the cause. But not only no jurisdictional objection was taken in the court below; none is made here. To the contrary, the power of the court to decree the conversion of the realty into money, under the conditions averred in the bill and established by the evidence, was conceded there, and is equally conceded in this court. The only question made upon this appeal and by assignment of error is that as the record shows that the life tenant, William P. Ridley, was unmarried and without children, the decrees pronounced would not bind such children should they hereafter be born to him upon his possible future marriage; the contention of the appellants being that they are without virtual representation in the case. This insistence rests in part upon section 5086 of Shannon's Code, and in part upon the rule of jurisprudence so generally recognized,—that no one is bound by a judgment or decree save parties to the record, regularly served, and their privies. What may be the proper construction of this Code section we think it unnecessary to determine in this cause. It is one of the sections of chapter 3 of title 2 of part 3 of the Code. This chapter is entitled, "Of the Sale of Property of Persons under Disability," and the body of the chapter is in keeping with the title. Section 5072 (this being the first section of the chapter) provides that "the court of chancery may, for and on behalf of persons laboring under the disability of coverture and infancy, consent to and decree a sale of the property * * * of such persons under the provisions of this chapter," while section 5073 provides that this "application may be made by bill or petition filed by the husband or regular guardian, to which the person under disability is a defendant to be represented by next friend or guardian ad litem," etc. The present bill is not filed within these statutory provisions. It is not filed either by a husband of a married woman, asking a sale of her property, or that of a guardian of minors, seeking the same relief as to them. It is that of a trustee and life tenant, who, bringing all the contingent remainder-men in esse into court, and averring the necessity of such relief, ask that real estate in which these parties have a contingent interest be sold by order of court, and that its proceeds be held subject to the trusts imposed upon the realty. The bill, being outside these provisions, must rest upon the inherent power of a chancery court to grant such relief, and by its decree for conversion bind parties who may hereafter come into existence. There is no doubt that if there had been in being, and made a party by proper process to this cause, one of the first class of contingent remainder-men provided for in the trust deed, the decree would have bound all

other members of the class who subsequently came into being. That result follows from the doctrine of representation; it being assumed that the living representative would look after the interests of the entire class, by bringing to the attention of the court the merits of the controversy so far as they affected the class. But, in the absence of a member of such class, can the decree herein pronounced carry the whole title to the purchasers? This was the purpose in filing the bill, and if it fails in this respect the failure is absolute. It has been held by a large majority of the courts, both English and American, that in certain cases the life tenant will represent contingent remainder-men, where no one of the latter is in esse at the time the court is called upon to intervene with regard to the estate in controversy. In *Finch v. Finch*, 2 Ves. Sr. 492, in passing upon the rule of virtual representation as applied to the sale of lands limited in remainder, under a bill to execute trusts, Lord Hardwicke said: "It is admitted to be necessary to bring in the first person entitled to the remainder and inheritance of the estate, if such is in being. It is true, if there is no such person in whom the remainder of the inheritance is vested in being, then it is impossible to say the creditors are to remain unpaid, and the trust be not executed, until a son is born. If there is no first son in being, the court must take the facts as they stand. It would be a very good decree, and no son born afterwards could dispute it unless he could show fraud, collusion, or misbehavior in the performance of the trust." In *Leonard v. Sussex*, 2 Vern. 527, there was a tenant for life, with remainder to his sons. The tenant for life, before he had a son born, brought a bill against the trustees in whom the title was vested for an account, which was decreed, and it was held that the account should stand and be binding upon the sons. In *Gaskell v. Gaskell*, 6 Sim. 643, there was a tenant for life, with remainder to his first and other sons in tail of an undivided moiety of certain estates. The tenant for life, before a son was born to him, filed his bill against his co-tenants for partition. Objection was made that the complainant then had no issue in being. But the vice chancellor (Shadwell), in overruling this objection, said the court had frequently decreed partition under such circumstances, and that a decree for partition in that case would be binding upon the tenant in tail when he came into being. In *Giffard v. Hort*, 1 Schoales & L. 408, Lord Redesdale announced the rule thus: "Courts of equity have determined, on grounds of high expediency, that it is sufficient to bring before the court the first tenant in tail in being, and, if there be no tenant in tail in being, the first person entitled to the inheritance, and, if no such person, then the tenant for life. * * * Where all the parties are brought into court,

and the court acts on the property according to the rights that appear, without fraud, its decision must of necessity be final and conclusive. It has been repeatedly determined that if there be a tenant for life, remainder to his first son in tail, remainder over, and he is brought before the court before he has issue, the contingent remainder-men are bound. This is now considered a settled rule of courts of equity, and of necessity." Perhaps no one in the history of equity jurisprudence can more properly be said to be a master of the rules and practice of the English chancery courts. Before his elevation, as John Mitford he had published a work on Equity Pleading and Practice, which is regarded as a valuable text-book by the profession to this day. In that work he embodied the rule of virtual representation which he subsequently announced in the case last cited.

Turning to the cases determined by American courts, with the exception of the supreme court of North Carolina, we find them holding the same rule. In *Cheesman v. Thorne*, 1 Edw. Ch. 629, the vice chancellor held that the partition proceedings in that case would bind after-born remainder-men, under the authority of *Wills v. Slade*, 6 Ves. 498, even without the aid of statute. In *Kent v. Church of St. Michael*, 136 N. Y. 10, 82 N. E. 704, 18 L. R. A. 331, in the course of its opinion the court said: "Where an estate is vested in persons living, subject only to the contingency that persons may be born who will have an interest therein, the living owners of the estate, for all purposes of any litigation in reference thereto, and affecting the jurisdiction of the courts to deal with the same, represent the whole estate, and stand not only for themselves, but also for the persons unborn. This is a rule of convenience, and almost necessity. The rights of persons unborn are sufficiently cared for, if, when the estate shall be sold under a regular and valid judgment, its proceeds take its place, and are secured in some way for such persons." The case of *Gavin v. Curtin*, 171 Ill. 640, 49 N. E. 523, 40 L. R. A. 776, is directly in point. The complainant in that case under the will of her father was tenant for life, with remainder in fee to her children, or to the issue of any of these children dying during the existence of the life estate; and in the event of her death without children, or the issue of such, then remainder over to the testator's sons. Before the birth of any child the life tenant filed a bill for the conversion of this real estate, stating strong equitable grounds therefor, and made as the only defendants thereto her brothers, who were contingent remainder-men of the second class. It was held that the bill was maintainable, and that the decree for sale, of necessity, would bind her after-born children. In addition we refer to *Ruggles v. Tyson*, supra; *Sweet v. Parker*, 22 N. J. Eq. 454; *Baylor's Lessee v. Dejar-*

nette, 13 Grat. 152; *Faulkner v. Davis*, 18 Grat. 651; *McArthur v. Scott*, 113 U. S. 391, 5 Sup. Ct. 652, 28 L. Ed. 1015.

The authors of works on equity pleading and practice, so far as we have examined, with singular unanimity adopt the same view. Reference is here made to *Mittf. Eq. Pl.*, supra; *Calv. Parties*, 49-53; *Tyler, Parties*, 24; *Story, Eq. Pl.* § 145. In the section referred to, Judge Story says: "Doubts were formerly entertained whether in suit in equity for a partition, brought only by or against a tenant for life of the estate, where the remainder is to persons not in esse, a decree could be made which would be binding upon the persons in remainder. That doubt, however, is now removed, and the decree is held binding upon them, upon the ground of a virtual representation of them by the tenant for life in such cases." It is true that this statement of the rule by the author is by its terms limited to cases in partition, but, as we have already seen, it was applied in *Leonard v. Sussex*, supra, in the matter of an account, and to the enforcement of a trust in favor of creditors by a decree for the sale of lands in *Finch v. Finch*, supra. No sound reason has been, or, so far as we can discover, can be, suggested why it should not apply in any other proceeding where a court of equity is exercising its jurisdictional power in disposing of real estate, the title to which is embarrassed by contingent remainders awaiting unborn remainder-men. If in the one class of cases necessity requires an application of the doctrine of virtual representation, why should it not be as operative in the latter? We have held that, without the aid of the statute already referred to, a court of equity, in proper cases, has the inherent power to convert, for the benefit of minors, realty into personalty. *Hurt v. Long*, 90 Tenn. 445, 16 S. W. 968; *Thompson v. Mebane*, 4 Heisk. 370. In such a case could there be found any solid ground for distinguishing it, so far as this matter of representation is concerned, from a case of mere partition? We think not. If in the case of partition and of the conversion of the property of infants, falling within the inherent jurisdiction of courts of equity, then why not in every case where the nature of the trusts and the situation of the property make it eminently judicious, if not absolutely essential, in the interest of all persons in esse, as well as in posse, that a conversion should take place? In each case it is essential that the interest of the contingent remainder-men in the proceeds of the converted property be preserved by the decree directing the conversion. *Monarque v. Monarque*, 80 N. Y. 320. This being done, we see no good reason why the rule of virtual representation should not apply. Even if the limitation or qualification suggested in *Calv. Parties*, p. 52 (that is "that, except under very particular circumstances, no tenant for life should be

capable of maintaining the suit, unless he were one to whose issue there was a remainder in tail"), is to prevail the present case would fall within its spirit; for here the contingent remainder-men whom the tenant for life represents are not remainder-men in tail, yet they are children who may be born to him, and the children of such as may die during his life.

We have examined the cases from North Carolina referred to in the able and exhaustive brief of the counsel for appellants, and, while they are entitled to great consideration, we think they are overborne by the weight of authority. There is nothing in our own cases to exclude us from the rule we have already indicated, and we think that its adoption is consistent with sound policy, and, when applied under proper restrictions, will work to the advantage of all interests involved.

Before concluding, it is proper to say that, upon the authorities, it is immaterial whether in such a case the bill is brought by or against the tenant for life. *Gaskell v. Gaskell*, supra. *Hale v. Hale*, 146 Ill. 257, 33 N. E. 858, 20 L. R. A. 247; *Leonard v. Sussex*, supra; *Story*, Eq. Pl. § 145. The decree of the court of chancery appeals is affirmed.

BAKER v. LOUISVILLE & N. TERMINAL CO. et al.

(Supreme Court of Tennessee. Jan. 19, 1901.)
RAILROADS—DEFECTIVE PREMISES—ICE CARS
—NEGLIGENCE—LICENSEES—ASSUMPTION OF
RISK—PLEADING—DEFECTIVE COUNT.

1. The fact that a car was placed on an inclined track, which caused it to careen, instead of being placed at a derrick, for the purpose of being iced, did not show that the track was out of repair, improperly constructed, or otherwise defective, so as to render the railroad company liable to an employé of the ice company, who was injured by slipping while attempting to pull ice onto the car.

2. The presence of ice and snow on a car at the time it was being iced by a servant of an ice company was a danger which was obvious, and which the servant assumed, and hence he was not entitled to recover from the railroad company for injuries sustained by slipping, caused by such ice and snow.

3. Snow and ice on the roof of a car was not such a defect in the premises of a railroad company as would render it liable for injuries sustained by a servant of an ice company while icing the car, under the rule that the owner of premises inviting others thereon is bound to keep them in a reasonably safe condition.

4. Unless the second or other count in a declaration expressly refers to the first, no defect therein will be aided by the preceding count.

5. A declaration alleging that it was the duty of defendant railroad company to have all of its cars needing ice placed at a certain derrick, without alleging the facts from which such duty arose, states a mere conclusion of law, and is therefore insufficient.

Appeal from circuit court, Davidson county; J. W. Bonner, Judge.

Action by H. B. Baker against the Louisville & Nashville Terminal Company and

others. From a judgment for defendants, plaintiff appeals. Affirmed.

Washington, Allen & Rains, for appellant. Smith & Maddin, for appellee Louisville & N. Terminal Co. East & Fogg, Claude Waller, and J. D. De Bow, for appellee North Carolina & St. L. Ry. Co.

McALISTER, J. Plaintiff brought this suit to recover damages for personal injuries. Demurrers were filed by each of the defendants, and were sustained by the court, and leave granted to amend declaration. A voluntary nonsuit was taken as to Louisville & Nashville Railroad Company. Two amended counts were then filed. Demurrers to these amended counts were also sustained, and plaintiff's suit was dismissed. Plaintiff appealed, and assigns as error the action of the court on the demurrers.

The last amended declaration embraces all the features contained in the original and first amended declarations, with additional allegations. It is therefore only necessary to consider that count, and the demurrers interposed thereto, to reach the real merits of the controversy and a correct judgment thereon. The amended declaration was, viz.: "Defendants were common carriers, and shipped large amounts of fresh meats, requiring ice in their cars, which was placed therein by opening the top of the cars and letting down blocks of about 100 pounds. The defendants had a contract with the ice company to do the work, and plaintiff had for a long time been employed by the ice company, and did this work for it, in the yards of the railroad company. That in doing the work it was necessary for plaintiff to go on defendants' premises, and upon their tracks and cars, and it had been his custom to go on their premises and ice the cars at a derrick provided for that purpose, and with the derrick the work could be done in safety. At the time of the injuries defendants expressly invited plaintiff on their premises to ice a car on the 25th February, 1900, and defendants negligently failed and refused to place the car which they had invited plaintiff to ice at the derrick, but placed it on a curved track on an incline, which caused the car to careen. It was night, and the car had just gotten into the yards from the North. Plaintiff asked the defendants to place the car at the derrick, but defendants refused, and invited plaintiff to ice it at said remote point, saying it should be iced there, and nowhere else. In icing it away from the derrick, the ice had to be drawn up by hand, by rope and hooks, and plaintiff had to go on top of the car, and the work was accompanied by dangers which the use of the derrick would have obviated. It was accompanied by hidden dangers, which were known to defendants and not known by plaintiff. By reason of the darkness, plaintiff did not know the car was on a curve or incline, and did not know,

or have any means of knowing, that the car brought with it upon the roof from distant points ice and snow, which made it extra-hazardous to ice it by hand. The invitation of defendants to ice this car away from the derrick led the plaintiff to believe, and he did believe, the work could be done with safety, and that the place was safe; the defendants and their servants knowing that by reason of the darkness plaintiff could not, by the exercise of ordinary care, observe the dangers of the situation, and the dangers of icing said car by hand at that time and place. That on said date and place the defendants negligently failed to warn him of the fact that the car was on an incline, and was covered with ice and snow, and, these facts not being open to observation, and while plaintiff was upon the car, and in the exercise of ordinary care, and by reason of the ice and snow on top of the car, and by reason of the car being careened on the curve, he slipped, and fell upon and from the roof of the car to the ground," etc. This declaration does not set out any duty or contract on part of defendants to put the car to be iced at any particular place or at any derrick.

The demurrer of both defendants in substance is as follows: (1) The declaration shows that plaintiff was in the employ of the ice company, and was undertaking to fill a car with ice by virtue of his contract of employment with the ice company, when he was injured. The declaration fails to show that defendants or their officers or agents had any authority to direct plaintiff to go into any dangerous position; or that the plaintiff was under any contract of employment with defendants by which there was any duty imposed on him to obey such orders, if any had been given him by it or its agents. The declaration simply alleges that this defendant requested plaintiff to ice a certain car when it arrived in Nashville, and when it arrived plaintiff requested defendant's servants to place the car at a derrick, which defendant refused to do, but placed it at a less convenient point; and that while he was undertaking to fill the cars with ice at the inconvenient place he was injured. The declaration fails to show the violation of any legal duty which defendants owed plaintiff, and a violation of which caused the injury to him. (2) The declaration shows that plaintiff was not an employé of these defendants, but was an employé of the ice company, and that in attempting to fill a certain car with ice he was acting as an employé of that company. The only allegation of negligence is that the defendants failed to put the cars at a convenient place for icing them. There was no duty imposed upon these defendants by the common or statutory law to place the cars at any particular place. Any duty which was imposed upon them in this respect arose out of their legal contract with the ice company; and such duty, if it existed, was for

the benefit of that company, for a breach of which that company would have had its action for damages for breach of contract. (3) The declaration shows that plaintiff voluntarily undertook to ice the car in the position in which it had been placed without any orders from the defendant or its agents or officers having control or authority over him, and it therefore seems that in undertaking to do this work he assumed all the risks and dangers incident to its performance. (4) The declaration shows that the only danger incident to the performance of this work was that the snow and ice were upon the car, which was careened and steeper upon one side than upon the other, on account of which the plaintiff slipped and fell. The declaration fails to show that there were any hidden or unseen dangers, or what they were, if any, or that they caused or contributed to the injury; and does show that the dangers were as obvious to the plaintiff as to any one else, and that it required no expert knowledge to detect them. The plaintiff, in law, assumed all of the risks obvious to him when he undertook to put ice in this car while it was covered with snow and sleet, and careened so as to make one side of the roof higher than the other.

A condensed statement of the case made in the declaration is that the Nashville Ice Company was under a contract with the defendants to ice their refrigerator cars. The plaintiff, Baker, who sustained the injuries, was an employé of the ice company, and not of the defendants. It had been customary to ice the cars at a derrick by means of which the ice could be elevated to the top of the car, and deposited therein. The car in question was not placed at the derrick, but was left on an inclined and curved track. The company's servants declined to station the car at the derrick. The plaintiff undertook to ice the car by stationing himself on top of the car and pulling the ice up by hand with the aid of ropes and hooks. It appears that the roof of the car was covered with ice and snow, and, as the plaintiff attempted to pull the ice up, he slipped and fell from the car, sustaining very serious personal injuries. The theory of plaintiff's counsel is that plaintiff was upon the defendants' premises for the purpose of transacting business upon an implied invitation, and that the injury was occasioned by reason of defects on defendants' premises. The rule invoked by counsel is thus stated by Mr. Wood in his work on Master and Servant (section 337), viz.: "Although a contractee is not, in general, liable to the employés of the contractor for injuries resulting to them while engaged in his work under the contract of such contractors, yet, if the work is done on his premises, he is bound by the same legal obligation that exists as between him and his immediate servants to keep them in a suitable and safe condition, and is liable to any of the servants of such contractor for injuries result-

ing to them from defects therein not under a contract obligation, but arising from the duty he owes to each of the employes arising out of his obligation to provide such appliances, and this duty extends to keeping the premises upon which the servants of the contractor are at work in a reasonably safe condition whether the contract provides therefor or not." *Mechem, Ag. § 166; Id. p. 492, note.* Counsel for plaintiff especially rely upon the case of *Coughtry v. Woolen Co.*, 56 N. Y. 124, 15 Am. Rep. 387. In that case it appeared that plaintiff's intestate was in the employ of some carpenters who contracted with defendants to put a cornice on their mill, and the defendants were to provide all scaffolds required for the purpose. The deceased, while engaged in the work, was killed by the fall of a scaffold built by the defendants for the use of the workmen. In an action to recover damages the plaintiff was nonsuited in the lower court upon the ground that the defendants owed no duty to the deceased, but this was reversed by the court of appeals upon the ground that, the scaffold being erected by the defendants upon their own premises for the express purpose of accommodating the workmen, a duty was thereby imposed upon the defendants to use proper diligence in constructing and maintaining the structure, and that this duty existed independently of the contract; and this is the rule applicable to every person who can be said to have come upon the master's premises by his invitation, and not in the character of a mere licensee, whether such person be a stranger or not to the owner. Mr. Wood, in commenting on this case, says that the rule must be understood as applying only in cases where the contractee owes a duty to the contractor's servants, and is limited to cases of defects in his premises. Applying the rule thus laid down to the facts of this case, it must be conceded that the plaintiff was upon the defendants' premises by an implied invitation, and not in the character of a mere licensee. But there was no breach of any duty which defendants owed the plaintiff as the servant of the ice company, an independent contractor. The company had not agreed to furnish any particular appliances or machinery for the accommodation of the workmen of the contractor in hoisting the ice into the top of the car, nor was the injury caused by any neglect in constructing and maintaining the appliances, like the insufficient scaffolding in *Coughtry v. Woolen Co.* If, for instance, it had appeared in this case that defendants had agreed to furnish a derrick for the use of the contractor's servants in loading the ice into the car, and the injury to plaintiff had been caused by the falling of the derrick, owing to its insufficient construction, plaintiff's right of action would be sustained by the case cited of *Coughtry v. Woolen Co.* But it does not appear from the face of the declaration that defendants had agreed to do

anything for the benefit of the contractor's servants. Hence the sole inquiry is whether the premises of defendants, where the plaintiff was impliedly invited to work, were in a reasonably safe condition. In order to warrant a recovery under this rule, it must be alleged that the injury was caused by defects in the premises, and the facts constituting the particular defect complained of must be set out. It is alleged that the refrigerator car required to be iced in this case was stopped on a curved or inclined track, but it is not alleged that this track was out of repair, or improperly constructed, or otherwise defective, except that it was curved and inclined. The angle of inclination is not even stated so that the court can see that the track was dangerous. Plaintiff could not be heard to complain of the original construction of the track, since the company would have the right to build it in a manner best suited to its business. The other allegation is that plaintiff did not know of the snow and ice being on said car, which defendants had negligently allowed to be there, and failed to warn plaintiff against the danger. This was a danger that was open and obvious to plaintiff the moment he climbed upon the car, and, having assumed the risk of icing the car under such conditions, he cannot be heard now to complain. In addition to this, we are of opinion that snow and ice on the roof of a car is not such a defect in the premises as the law contemplates in fixing the rule of liability to one there by implied invitation.

Another ground of recovery alleged is that it was the duty of defendants to have all cars needing ice placed at the derrick to be iced, and that defendants were guilty of a breach of this duty. This allegation is made in the first amended declaration filed. The last amended declaration does not contain this allegation. In *State v. Lea*, 1 Cold. 178, the rule was stated to be that, unless the second or other count expressly refers to the first, no defect therein will be aided by the preceding count, for, though both counts are in the same declaration, yet they are as distinct as if they were in separate declarations, and consequently they must independently contain all necessary allegations, or the latter count must expressly refer to the former. 1 Chit. Pl. p. 356; 6 Bac. Abr. 188. In *Railroad Co. v. House*, 104 Tenn. 110, 56 S. W. 886, it was said: "The rule is the original complaint (or declaration) is superseded, and its effect as a pleading destroyed, by filing an amended declaration complete in itself, and which does not refer to or adopt the original as a part of it." The last amended declaration was complete in itself, and makes no reference to the allegation in the first amended declaration that it was the duty of the defendants to place the car at the derrick to be iced. But, independently of this, the allegation was insufficient, for the reason that it merely stated a conclusion of

law. It did not allege how it became the duty of defendants to place the cars at the derrick. No such contract with plaintiff is alleged, nor is it stated that such a contract was made with the ice company, by whom plaintiff was employed. At most, it simply appears that it had been customary to place the cars at the derrick, but no duty or obligation, contractual or otherwise, is shown; so that this allegation is not material. Moreover, it is not shown that the failure of defendants to place the car at the derrick was the proximate cause of the accident. Affirmed.

ARNOLD v. ST. PAUL FIRE & MARINE INS. CO.

(Supreme Court of Tennessee. Feb. 2, 1901.)
INSURANCE—RECOVERY PRECLUDED—LACHES OF INSURED—RATIFICATION.

1. Plaintiff requested a friend to effect insurance on some household goods, which was done; a policy being obtained from defendant on October 11th. Plaintiff, without knowledge that the property had been insured, and without consulting his friend, had the property insured in another company on November 1st, and the property was destroyed on November 27th, when plaintiff learned for the first time that the defendant had insured the property. *Held*, in an action on the policy, that plaintiff was precluded from a recovery by his failure to ascertain whether any insurance had been effected by his agent, under the provisions that the policy should be void if the insured should thereafter make any other contract of insurance on the property covered in whole or in part by the policy.

2. Where plaintiff requested a friend to secure insurance on certain property, which was done without plaintiff's knowledge, the act of the agent in securing the policy was ratified by plaintiff's bringing a suit thereon, and hence plaintiff was bound by all the provisions of the policy.

Appeal from chancery court, Davidson county; H. H. Cook, Chancellor.

Action by William Arnold against the St. Paul Fire & Marine Insurance Company. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

W. D. Covington, for appellant. C. C. Slaughter, for appellee.

McALISTER, J. This is a suit upon a policy of fire insurance. The chancellor and the court of chancery appeals concurred in adjudging the policy noncollectible upon the ground of double insurance. The complainant has again appealed.

The policy contained this clause, to wit: "This entire policy, unless otherwise provided by agreement indorsed hereon, shall be void if the insured now has, or shall hereafter make or procure, any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy." The case was decided on demurrer. The bill alleged that complainant was the owner of certain household goods and furniture, that he spoke to a friend about having them in-

sured, and that on the 11th of October this friend took out a policy for him in defendant company. Complainant, however, alleges that his friend had failed to inform him that he had procured this insurance, and that, in ignorance of this fact, complainant on November 1, 1899,—19 days thereafter,—also procured a policy on the same goods in the Williamsburg Fire Insurance Company. It is further shown that on the night of November 27, 1899, this property was destroyed by fire; that on the morning after the fire agents representing both companies called to adjust the loss, and then it was, for the first time, that complainant learned that his friend had taken out a policy for him. Complainant undertook to explain to the agents how this double insurance happened, but both disclaimed any liability and repudiated the policies. Complainant alleges in his bill that the double insurance was unintentional and an innocent mistake; that complainant did not see his friend from the time he agreed to procure a policy for him until after the fire, nor did he know the first policy had been issued; that, not hearing from his friend, and in ignorance of the issuance of the first policy, and believing that his property had not been insured, complainant took out a policy on November 1, 1899. The present suit is upon the policy taken out by the agent.

It will be observed from the allegations of the bill, which, of course, are admitted to be true on demurrer, that complainant neglected from October 11, 1899, to November 27, 1899, to take any steps to ascertain from the agent whether he had procured a policy for him as he had directed, but that in the meantime he undertook to insure the property himself. The position assumed by complainant is that, inasmuch as he did not have actual knowledge of the existence of the prior policy when he took out the second, he therefore did so innocently, and did not thereby forfeit the first policy. But we think the complainant failed to exercise any diligence in ascertaining whether his agent had procured the policy. He had directed his agent to insure the property, and, without hearing from him or taking any steps to learn, he undertook to insure the property himself. It is shown from the bill that complainant neglected from October 11th to November 27th, when the fire occurred, to see his agent or communicate with him. It is not charged that the additional insurance was effected with the knowledge or consent of the defendant company. The law is well settled that additional insurance in violation of the terms of the contract will avoid the policy. *Somerfield v. Insurance Co.*, 8 Lea, 547; *Sugg v. Insurance Co.*, 98 N. C. 143, 8 S. E. 732; *Insurance Co. v. Copeland*, 86 Ala. 551, 6 South. 143; 13 Am. & Eng. Enc. Law (2d Ed.) 300; 3 *Joyce, Ins.* §§ 2457, 2458; *Couch v. Insurance Co.*, 33 Conn. 185; *Sanders v. Cooper*, 115 N. Y. 279, 22 N. E. 212, 12 Am. St. Rep. 101; *May, Ins.* § 364; *Ostr. Ins.* § 244. Complainant has

ratified the act of his agent by bringing suit on the policy procured by him, and is, of course, bound by all the terms of the policy, as though he had taken it out himself. Joyce, Ins. § 4567. Affirmed.

NEELY v. NEELY et al.

(Court of Chancery Appeals of Tennessee.
Jan. 24, 1901.)

EQUITY—APPEAL—CROSS BILL—DEMURRER.

Under Shannon's Code, § 4889, providing that the chancellor may allow an appeal from his decree in equity cases determining the principles involved, or settling a party's right, or on overruling a demurrer, in his discretion, no appeal lies from a decree sustaining a demurrer to a cross bill, since the rights of the parties under the original bill are left unadjudicated, and hence it is not a final decree.

Appeal from chancery court, Maury county; Andrew J. Abernathy, Chancellor.

Suit by S. E. Neely, by next friend, against W. M. Neely and others. From a decree sustaining a demurrer to the cross bill, respondents appeal. Dismissed.

H. P. Figures and L. P. Padgett, for appellants. W. C. Salmon, W. B. Turner, and G. T. Hughes, for appellee.

MURRY, J. This suit was brought by bill filed August 15, 1889, in the chancery court of Maury county, to foreclose a mortgage on a certain tract of land in Maury county, Tenn., which is described in the bill and Exhibit A thereto; being a mortgage executed, properly acknowledged, with proper privy examination of the wife, by W. M. Neely and wife, S. A. Neely, to S. E. Neely, on the 1st day of November, 1893, to the sole and separate use of S. E. Neely, to secure a loan of \$900, with further loans not to exceed in all \$2,000, which loans were made and to be made out of the sole and separate estate of said S. E. Neely, for the payment of balance of said note for \$900 and interest, after crediting same with \$300 paid thereon on October 22, 1898, and \$870 paid thereon February 27, 1899, and also to pay balance of a note for \$100 dated November 8, 1894, and interest, after crediting said note with \$130 paid thereon February 27, 1899, and also to pay balance of a note and interest for \$936.56, after crediting said note with \$900 paid thereon October 22, 1898, and also to pay attorney's fees, the costs and expenses of said mortgage, and costs of this suit, as provided for in said mortgage. The bill avers that since the execution and registration of said mortgage, on the 7th day of November, 1893, the defendants W. M. Neely and wife, S. A. Neely, have sold and conveyed said land to defendants Courtwright and wife, Christine, who in turn have sold and conveyed said lands to W. J. Neely, the husband of complainant, and that said lands are now in the possession of W. J. Neely; that each of said conveyances warrants the

title in general terms, and also specially against the mortgage of complainant; that said mortgage provided for payment of reasonable attorney's fees; and that said mortgage is made to the sole and separate use of complainant. The bill prays for decree for balance of said notes and interest, and reasonable attorney's fees and costs of suit; that said mortgage be foreclosed, and said lands be sold to pay said amounts; that it be sold for cost, free from and in bar of the equity of redemption, that right being expressly waived by said mortgage; and for general relief. The defendants Courtwright and wife and W. J. Neely interpose no defense whatever to complainant's bill. William Neely and wife, S. A. Neely, filed their answer as a cross bill on the 23d of February, 1900, in which it is stated and averred that they executed the mortgage, and they refer to it for its contents, provisions, etc. They admit the execution of some notes to complainant, but do not remember dates, etc., and cannot say whether notes are correctly copied into bill or not; that they are entitled to other and further credits but specify none; that they have fully paid said notes, and do not owe complainant anything on them. They admit the sale and conveyance of the land by them to Courtwright and wife and W. J. Neely. All allegations in the bill not heretofore explained, admitted, or denied are here denied. By way of further answer and cross complaint, it is averred that concurrently with the execution of said mortgage and notes, and as part of the same agreement and understanding, respondents made and entered into a contract with the complainant and her husband, W. J. Neely, which is herewith filed as Exhibit A, as a part of this cross bill, by which respondents rented to W. J. and S. E. Neely the farm of S. A. Neely, situated in Maury county, Tenn. This contract is as follows (Exhibit A): "Filed February 23, 1900, A. N. Akin, C. & M. This indenture of contract entered into by and between Mrs. S. A. Neely and W. M. Neely, her husband, parties of the first part, and Mrs. S. E. Neely and her husband, W. J. Neely, parties of the second part, witnesseth: The parties of the first part hath this day leased their farm, lying and being in the 8th civil district of Maury county, and state of Tennessee, to the parties of the second part, for the following consideration: The parties of the second part are to pay one-third of all the products of said farm annually, except a small orchard southeast of the spring, which is reserved by the parties of the first part for the fruit; but the parties of the second part is to have the use of said orchard ground for pasturage. The parties of the first part further agrees to furnish the necessary materials for building, repairing fences, and building to be repaired. The parties of the second part agrees to do such work free of charge on fences and buildings, and to cultivate the

farm in a good and proper manner. Witness our hands and seal. S. A. Neely. Wm. M. Neely. S. E. Neely. W. J. Neely." A pencil mark at the head of the contract reads as follows: "Fall of 1893, about time Neely moved up there." Respondents aver: That said W. J. and S. E. Neely breached said contract, in this: They failed to pay one-third of all the products of said farm annually, but paid less. They failed to make the repairs provided for. They did not properly care for and cultivate said land in a proper and husbandlike manner, but suffered it to go to waste and ruin, to cross complainant's damage, \$500. That W. J. and S. E. Neely are indebted, bound, and liable to complainant as shown by Exhibit B to cross bill, and that said amount is due, owing, and unpaid. The items set out in Exhibit A are for horse hire, wagon hire, use of mower, use of cultivator, rent of garden, destruction of hay rake, damage to orchard, five years' waste and sale of apples from orchard reserved, 50 wheat sacks lost, damage by improper cultivation, \$500 horse feeds, two sows, one-third cider made, 200 bushels rent wheat, etc., all aggregating \$1,279.71. The prayer is for decree against W. J. and S. E. Neely for said amount and for general relief. To this cross bill defendants thereto, to wit, W. J. Neely and wife, S. E. Neely, interposed a demurrer setting forth the following grounds: "(1) The complainants in said cross bill seek a joint recovery against defendants W. J. Neely and S. E. Neely, whereas it appears from said bill and the contract exhibited that defendant S. E. Neely is and was at the date of said contract a married woman, and the bill does not allege that she had any separate estate, or that she did in fact or that she ought to bind such separate estate by such contract, wherefore defendants say that the contract alleged and set up in the cross bill is void; and defendants demur to so much and such part of said bill as seeks to recover of these defendants jointly under said contract. (2) The complainants seek in said cross bill to recover jointly of defendants W. J. Neely and S. E. Neely for an account for certain articles alleged to have been sold and delivered to them, when it appears from the cross bill that defendant S. E. Neely is now, and was at the date of said contract, a married woman, and it is not alleged that she had any separate estate, or that she had contracted to bind or to charge the same, wherefore cross defendants say that complainants cannot have and recover of them on account of said matters; and they demur to so much of said bill as seeks to recover jointly of them on account of said account and items therein set out. (3) The cross defendants demur to said cross bill because they say that, if cross complainants have any remedy at all, it is against defendant W. J. Neely alone, and not against complainant in the original bill, S. E. Neely, and that

there is no mutuality in the demands sought to be set up and established in the cross bill and those sued on in the original bill. Wherefore defendants pray the judgment of the court if they should make any further defense to the complainants' bill." The chancellor sustained this demurrer and dismissed cross complainants' answer as a cross bill, and an appeal was prayed and granted; and this case is now before us on the appeal granted by the chancellor from this interlocutory decree sustaining said demurrer to said cross bill and dismissing said bill.

We are of the opinion, and so hold, that no appeal lies from this decree, either as a matter of right, or in the discretionary power of the chancellor under Shannon's Code, § 4889. The decree is in no sense final. It leaves unsettled all questions, rights, and principles under the original bill and the answer thereto. The cross bill incorporates itself into and becomes part of the original bill, and an interlocutory decree sustaining the demurrer thereto and dismissing said cross bill cannot be appealed from. The appeal is therefore premature, and is dismissed at costs of appellants and their securities for appeal. This being the case, we cannot go into and determine the questions as to whether the action of the chancellor in sustaining the demurrer and dismissing said cross bill was correct or erroneous, but, if this case was before us on proper appeal, we would hold that the chancellor's decree was correct, and that there was no error therein. All concur.

Affirmed orally by supreme court, March 12, 1901.

BENSON et al. v. EDWARDS et al.

(Court of Chancery Appeals of Tennessee. Jan. 9, 1901.)

DEEDS—CONSTRUCTION—TRUSTS—REMAINDER—CONTINGENCY—LIMITATION OVER.

A deed conveyed land to the grantor's "wife and her children forever, * * * to hold together with all its rents, issues, and profits, but during her natural life to her sole use," reserving to the grantor the use during his life, with remainder after the death of the grantor and his wife to the wife's children in fee simple forever, but, in default of such children or descendants of such children then "living or in esse," then the property to descend to designated persons. Held, that the wife took a life estate, with contingent remainder to her children, with limitation over to the persons designated, and the wife's children in esse did not acquire a vested remainder.

Appeal from chancery court, Davidson county; H. H. Cook, Chancellor.

Bill by Mrs. Addie C. Benson and Edmond L. Benson against Mrs. Elizabeth J. Edwards and others. From a judgment in defendants' favor, complainants' appeal. Affirmed.

Champion, Brown & Akers, for appellants. Thos. H. Malone, Jr., for appellees.

MURRY, J. The bill in this case was brought by Mrs. Addie C. Benson and her son, Edmond L. Benson, for the purpose of having the court declare and decree that under and by virtue of a deed made by L. F. Benson, husband of complainant Addie C. Benson, and for the complainant Edmond L. Benson, on October 29, 1881, and probated for registration on November 3, 1881, and registered in the register's office of Davidson county, Tenn., in Book No. 70, p. 497, on November 5, 1881, Addie C. Benson took a life estate in the property described in said deed, and that her son, Edmond L. Benson, took a vested remainder in fee simple in said lands at the date of the execution and delivery of said deed. The bill in this case was filed July 13, 1900, and states and avers: That Annie Russell Cole and John W. Gaines, Jr., and Edith L. Cole are minors under the age of 21 years, and that Edith L. Cole is a nonresident of the state, a resident of Kansas City, Mo. That said minor defendants, except said J. W. Gaines, Jr., have no regular guardian. That J. W. Gaines, Sr., is the regular guardian of J. W. Gaines, Jr. That on October 29, 1881, L. F. Benson, the late husband of complainant Addie C. Benson, sold, transferred, and conveyed to his said wife a certain tract of land located in the city of Nashville, Davidson county, Tenn., and described as follows: "Being a part of lot 137 in the original plan of Nashville, beginning on the west side of North Vine street at the intersection of the alley; thence north with the line of Vine street to the line of Dr. Paul F. Eve; thence at right angles westwardly with Eve's lot 190 feet, more or less, to Polk avenue; thence at right angles northwardly with the line of said avenue to the southern line of said alley; thence with the said line 190 feet, more or less, to the beginning,—it being the same lot conveyed to L. F. Benson by John M. Bass by deed of March 26, 1877, and registered in R. O. D. C. in Book 56, pp. 638-9, reference to which is here made." Said original deed is filed as Exhibit A to the bill, and asked to be made part of the same. That said L. F. Benson, the late husband of Addie C. Benson, departed this life August 24, 1889, and that said complainant Mrs. Addie C. Benson is now, and ever since has been, a widow, and that the said Edmond L. Benson is the only child of said Addie C. Benson. That they are advised, believe, and charge that by the terms of said deed complainant Edmond L. Benson has a remainder interest in said property in fee simple, but the wording of said deed is of such doubtful import as to cast a cloud upon his title. That said conveying part of said deed, which is necessary to be introduced and passed upon, is as follows: "I, L. F. Benson, have this day and do hereby bargain, sell, and convey unto my said wife, Addie Cole Benson, and her children, forever, lot and improvements," etc., describing

it as described above in the bill, "limiting it in the manner and in pursuance of the deed of her father, said Edmond W. Cole, to her, of December 4, 1875, registered in Book 54, p. 537, and in pursuance of his further expressed wish it being intended to invest her with a larger estate; * * * to have and to hold the above-described property and its appurtenances, together with all its rents, issues, and profits, forever, but during her life to her sole, separate, and exclusive use, free from the control, debts, and contracts of myself or any future husband, and she to have the exclusive control of the income thereof during her lifetime, and reserving to myself the use of said property during my lifetime if I should survive her. But I am to have no right or power to sell, pledge, or mortgage, or in any way incumber the same, but I am to simply have the use of it for a home, or the income thereof for my support during my life, if I survive her; and the same is not to be liable during my life if I survive her, and the same is not to be liable during my life or otherwise, for any debts or liabilities I may contract, with remainder after the death of the survivor of each of us, as aforesaid, to her children in fee simple forever; but, in default of such child or children, or descendants of such child or children, then living or in esse, then the property is to descend to the heirs at law of the said Edmond W. Cole; but she shall have and is hereby invested with full power to sell or exchange said property, I joining in the conveyance if living, provided the proceeds of such sale or exchange are reinvested in other real estate subject to the same powers and limitations provided in this deed, and persons so contracting with her are hereby operated with the duty of seeing that such investments are made as herein provided. Should she survive me, and desire to exchange said property, then she may do so subject to all the foregoing limitations and restrictions." Complainants further aver that they are informed, and therefore insist and charge, that it was the intention of the vendor of said property to deed the same to his wife for life, with remainder to her children in esse in fee simple forever. They therefore insist that said estate upon the execution and delivery of said deed became vested in complainants, complainant Mrs. Benson taking a life estate and complainant Edmond L. Benson a vested remainder; and that the limitations over to the heirs of the late Edmond W. Cole, are void in law, and constitute a cloud upon said title; that defendants are the only heirs at law of the late E. W. Cole. The prayer of the bill is for copy and process as to the resident defendants; that publication be made for the non-resident defendants, and that guardians ad litem be appointed to represent the interest of the minor defendants; that all of the defendants be required to answer all the

allegations of this bill under oath, and upon final decree that the court decree that complainant Mrs. Addie C. Benson acquired by the terms of said deed the life estate, and that complainant Edmond L. Benson acquired a vested remainder in fee simple, and that said limitations over are void in law, and complainants pray that the court decree that the defendants have no right, title, or interest in and to said property and for general relief. The deed from L. F. Benson to his wife, Mrs. Addie C. Benson, and her son, Edmond L. Benson, in remainder, the limitation over to the heirs of E. W. Cole, is made Exhibit A to the bill, and a part thereof. So, also, is the deed of E. W. Cole to Mrs. Addie C. Benson of December 4, 1875, and registered December 8, 1875, filed in the record in this cause, and made a part of the transcript. But it is unnecessary to say more in reference to this latter deed from E. W. Cole to Mrs. Addie C. Benson, for the reason that the limitations, terms, and provisions of the same are, in substance, the same as those set out in the deed from L. F. Benson to Mrs. Addie C. Benson and her children.

The defendants having been duly and properly brought before the court by process regularly served upon the resident defendants and by publication duly made as to the nonresident defendant, all of whom are minors without general guardian except J. W. Gaines, Jr., for whom J. W. Gaines, Sr., is guardian, after said minors were duly brought before the court as aforesaid, Thomas H. Malone, Jr., was appointed guardian ad litem for all of said minors except J. W. Gaines, Jr., and said guardian ad litem for said minors demurred to the bill. J. W. Gaines, Jr., answered the bill by his regular guardian, J. W. Gaines, Sr., he filing a mere formal answer. There was a judgment pro confesso taken and entered against Mrs. Elizabeth J. Edwards and J. W. Gaines, Sr. The demurrer filed by the defendant Whiteford R. Cole was filed on October 5, 1900, and sets forth the following causes: "(1) That the bill shows upon its face that the interest acquired by the complainant Edmond L. Benson under the deed of L. F. Benson, made a part of the original bill and attached thereto as Exhibit A, is not a vested remainder, but a contingent remainder, dependent upon his surviving his mother, the complainant Mrs. Addie C. Benson, or upon his leaving issue surviving at her death. (2) Said bill shows on its face that the estate created by said deed of said L. F. Benson in favor of this demurrant and the other heirs of E. W. Cole is a valid, contingent remainder interest, limited to take effect upon the death of complainant Edmond L. Benson before his mother, Mrs. Addie C. Benson, and without issue living at her death; and that said limitation is neither void nor a cloud upon complainants' title. (3) If this demurrant should be in error as to the grounds of demurrer hereinbefore assigned, and if the inter-

est of the said Edmond L. Benson under said deed is a vested, and not a contingent, remainder, still the bill shows upon its face that the limitations in said deed are by way of use or trust, and that the limitation over to the heirs of the said Edmond W. Cole is by way of a shifting use, which might and would operate in favor of the heirs of said E. W. Cole upon the happening of said contingencies in said deed specified, whether the estate of said Edmond L. Benson be vested or not, and which is a lawful and valid limitation." On October 28, 1900, the defendants Annie R. Cole and Edith L. Cole, by their guardian ad litem, Thomas H. Malone, Jr., filed their demurrer to complainants' bill, in which are assigned the following causes: The first, second, and fourth causes set forth in this demurrer are identical with the first, second, and third and only causes set forth in the demurrer of Whiteford R. Cole, hereinbefore set out in this opinion. The third cause in the demurrer of Annie R. Cole and Edith L. Cole is as follows: "Said bill shows upon its face that the limitation over to said heirs of said E. W. Cole in said deeds specified is a valid, contingent limitation by deed made to depend upon the death of said Edmond L. Benson before his said mother and without leaving children or descendants of children living at her death." On November 15, 1900, this cause was heard before the chancellor upon complainants' bill and the demurrers of defendants filed thereto which have hereinbefore been set out, when the following decree was pronounced and entered: "This cause came on to be heard this 15th day of November, 1900, before the Honorable Henry H. Cook, on the respective demurrers of defendants Whiteford R. Cole and of the minor defendants Annie R. Cole and Edith L. Cole, by their guardian ad litem, Thos. H. Malone, Jr., upon consideration whereof the court was of opinion: (1) That under the deed of L. F. Benson presented to the court for construction the complainant Mrs. Addie C. Benson took the property therein described in trust for herself and the other beneficiaries therein named. (2) That she was given by said deed a life estate in said property. (3) That on the death of said Mrs. Addie C. Benson, if she leaves children or the descendants of children living, then such children or descendants so surviving shall take said lands. (4) That, if no children or descendants of children of the said Mrs. Addie C. Benson are living at her death, the heirs of E. W. Cole shall take said lands. The court was thereupon pleased to order, adjudge, and decree that the respective demurrers of Whiteford R. Cole, Annie R. Cole, and Edith L. Cole be sustained, and that complainants' bill be dismissed, with costs, for which execution may issue."

To this decree of the chancellor Addie C. Benson and Edmond L. Benson excepted, and have perfected their appeal to the supreme court, and have assigned errors. The errors assigned are here set out as follows: "First

the court erred in not holding that Mrs. Benson took a life estate in said property, with a vested remainder in fee to her children; second, the court erred in holding that Mrs. Addie C. Benson took the lands described in the deed in trust for herself and the other beneficiaries therein named; third, the court erred in holding that on the death of Mrs. Addie C. Benson, if she leave children or descendants of children living, then such children surviving shall take said land; fourth, the chancellor should have held that the children of Mrs. Addie C. Benson, or their heirs at law, would take said property in fee simple at the death of Mrs. Addie C. Benson; fifth, the court erred in holding that, if no children or descendants of children of the said Mrs. Addie C. Benson are living at her death, the heirs of E. W. Cole take said lands."

Taking the deed or the clauses therein necessary to be looked to and passed upon, and viewing the whole deed in the light of the manifest intention of the conveyor, L. F. Benson, and in the light of the well-established rules laid down by our supreme court, and also by the text writers for the construction of such instruments, we are irresistibly forced to the conclusion that complainant Mrs. Addie C. Benson took only a life estate in said property, with a contingent remainder therein to her children, with a limitation over in certain contingencies to the heirs at law of E. W. Cole. Under a proper construction of said deed, complainant Edmond L. Benson did not take, as insisted by complainants, a vested remainder in the property described upon the execution and delivery of said deed, but he took only a contingent remainder, which would become vested upon the death of his mother prior to the death of himself. The vesting of the remainder interest in said property was made to depend upon his surviving his mother, Addie C. Benson; and, in the event he survived her, he would take upon her death a vested remainder in fee in said property, and the limitation over to the heirs of E. W. Cole would thereby be cut off and destroyed. Mrs. Addie C. Benson took a life estate in the property, with a contingent remainder to such child or children or the descendants of such children as might survive her; and in the event she left at her death a child or children, or the descendants of such child or children, the contingent remainder in said property to such would immediately vest in fee simple forever in such child or children or the descendants of such child or children as might survive her, and this remainder would at once upon her death become vested in such child or children or descendants of such as survived her; but, in the event there was no child or children or the descendants of such at the death of Mrs. Benson, then, in that event, the heirs at law of E. W. Cole would take said property by virtue of the limitations over to them, and the remainder interest in said property would at once vest in them in fee simple forever. This, in the opin-

ion of this court, is the fair and proper construction of said deed, taking all of its parts together, and looking at it in the light of the intention of the conveyor, L. F. Benson, and viewing it in the light of the well-established rules of construction laid down by our courts for the determination of such questions as are presented by the deed in this case; and we accordingly so hold.

The result reached by the chancellor was, in our opinion, correct, however much we may differ from him in some of his findings and premises upon which he based the ultimate result and conclusion. Yet, if the ultimate result and conclusion reached by the chancellor is correct, we need not further inquire into the methods by which or the premises upon which he reached such conclusion, being of opinion, and so holding, that the general and ultimate result reached by the chancellor is correct. His decree is affirmed, the demurrers to the complainants' bill sustained, and complainants' bill is dismissed. The complainants and their surety on the prosecution bond in this cause will pay all the costs accrued in the court below, and the complainants and their surety on the appeal bond will pay all the costs accrued on the appeal. All concur.

Affirmed orally by supreme court, February 8, 1901.

LILLARD v. COFFEE et al.

(Court of Chancery Appeals of Tennessee. Jan. 5, 1901.)

IMPROVEMENTS—BAD FAITH OF GRANTEE.

The grantee in a deed, which is set aside for the grantor's mental incapacity, is not entitled to compensation for his improvements, when made in bad faith, and their value is fully covered by his use of the land.

Appeal from chancery court, Davidson county; H. H. Cook, Chancellor.

Bill by Lottie Childers Lillard against Si Coffee and others. From a decree for complainant, defendants appeal. Affirmed.

Noah W. Cooper, for appellee.

NEIL, J. This bill was filed by Lottie Childers Lillard, who is the only heir at law of Tom Childers, deceased, to set aside a deed to a lot described, purporting to have been executed by Tom Childers, her father, to the defendant Si Coffee, on the 4th day of October, 1898. The allegations of the bill are, in substance, that complainant is the only heir at law of Tom Childers; that the deed was of the date mentioned; that it purports to have been for a consideration of \$350, paid to Tom Childers; that at the time this deed purports to have been made Tom Childers was a person of unsound mind, and incapable of contracting with any one; that no money was paid to him, or to any one for him, in consideration of the alleged conveyance, and that his signature thereto was forged. It is further alleged that the defendant Si Coffee is in possession of the property, claiming it as his own, and that

he has been in such possession since about the latter part of October, 1898; also that he has removed a considerable amount of merchantable rock from the land in the rear of the house. This bill was answered by Si Coffee and the defendant G. F. Anderson, denying its allegations. Si Coffee also filed a cross bill, in which he claimed that he had put improvements upon the place which had enhanced its value to the extent of \$200, and insisted that, if the deed should be set aside because of the mental incompetency of Tom Childers, then that he should have a lien declared to the extent of the sum to which the property was enhanced in value by his improvements. The answer to the cross bill insisted that his improvements would be fully covered by the rents and by the rock he had taken from the land. The chancellor sustained the original bill, and dismissed the cross bill, granting the complainant full relief.

We have carefully read the entire record and the briefs of counsel, and, after weighing all of the testimony and arguments submitted on both sides, we find, as the result of our investigations, that the allegations of the original bill, as above recited, are true. We also find that while Si Coffee did put some improvements upon the land in the way of completing the house, though of far less value than charged in the cross bill, yet that he did so in bad faith, after having forged the deed, or after having had it done, and that he knew at the time that Tom Childers was incompetent to contract. We further find that the enhanced value of the land produced by the improvements is fully covered by the amount of the rents and the value of the rock taken from the land. It results that the decree of the chancellor must be affirmed, with the costs of this court and of the court below. All concur.

Affirmed orally by supreme court, January 24, 1901.

WHITESIDES et al. v. EARLES.

(Court of Chancery Appeals of Tennessee. Feb. 15, 1901.)

HIGHWAYS — CONSTITUTION BY ORDER OF COURT — VIEWERS — FAILURE TO REPORT — APPOINTMENT OF OVERSEERS — PRESCRIPTION — PRIVATE GATES — USE BY PERMISSION — ARBITRATION FIXING PRIVATE RIGHTS.

1. Where viewers were appointed by a county court to open a certain road, but never completed it, nor reported their proceedings, such road was not constituted a public highway by order of court, notwithstanding that overseers were twice thereafter appointed by such court to work on the road, since a report of such jury and an order establishing the road were necessary to its coming into existence as a public way.

2. Where a jury of view were appointed by a county court in 1879 to open a certain road, but never completed it nor reported their proceedings, and overseers were subsequently appointed by such court to work on such road, but private gates hung across the road in 1879 were never disturbed, and the landowners generally allowed people to go through such gates

only by permission, the facts were insufficient to show that such road was a public highway by prescription.

3. Where a controversy between two landowners as to the right of each to pass over the other's land on a certain road running through the lands of both was settled by arbitration establishing mutual rights of way, such arbitration did not tend to show that such road was a public highway.

Appeal from chancery court, Sumner county; J. S. Gribble, Chancellor.

Bill by J. W. Whitesides & Son against Frank Earles. From a decree dismissing the bill, complainants appeal. Affirmed.

J. J. Turner, for appellants. Allen, Wilson & Boskerville, for appellee.

NEIL, J. This is a contest over a road alleged to be a public road. The defense is that it is not a public road. The bill alleges that the complainants are merchants at Bledsoe, on the C. & N. Railroad, and also on the Gallatin & Scottville turnpike; that they own sawmills and deal largely in timber, cross-ties, cord wood, and other wood products; that they have a side track of their own at said town, and ship largely from that station to Gallatin, Nashville, and other points, and have been so engaged for a number of years; that near them, and on the east side of the turnpike and railroad referred to, there is a road that branches off and goes to the Macon county line; that it runs through a very fine country, and that on or near it there is much valuable timber; that the station at which the complainants live is the nearest point to get an outlet to a turnpike, railroad, or market; that the timber is of little value without an outlet to the market; that complainant J. W. Whitesides for a number of years ran a sawmill near the station and purchased logs, lumber, and wood for many miles up and down the road without hindrance until lately. It is further alleged that the road running from the place were complainants live and from their store for some miles to the Macon county line was laid off by the county court a number of years prior to the filing of the bill,—at least 25 years; that there was no dispute as to the road until the defendant closed it up by gates; that he has forbidden to the complainants the right to go through the gates to get out their lumber or cord wood. Continuing, the bill says: "To show your honor the recognition of it, a copy of an order made at the January term, 1879, page 584, is given: 'It is ordered by the court that Jas. Jackson be appointed overseer of the road from Bledsoe, beginning near W. M. Wray's shop, running through the premises of Jas. M. Mason, Jas. L. Earles, J. L. Davis, Fuqua, and John Wickland to the La Fayette line; that the overseer cite the hands.' A similar order was made at the July term, 1888, page 139, and J. L. Gillem was appointed the overseer. It was laid off by the county court, and was worked by order of the county court many

years, and was never discontinued by order of the county court. * * * The said defendant Earles has put up gates on said county road, and without permission from the county court; but he permits the neighbors generally to haul through his premises, and through said gates, but he declined and refused to let your orators haul out at all through said farm, or said gates, or through said road from his premises. They have now a large amount of cord wood northeast of said Earles' premises, and he declines to let them haul it out, or come out through said premises, though he lets all other parties do so without let or hindrance. This is done to spite or injure them, and for no other purpose at all. They have no other road by which they can haul said timber or cord wood, and are greatly injured by his conduct." The prayer of the bill is that the defendant be enjoined from interfering with the complainants' use of the road, and that the road be declared a public one, and that the complainants' right to use it be decreed to them. The answer admits that the complainants are merchants at Bledsoe Station, and engaged in the lumber business; that there is a road running from the pike up Phillips Hollow, and known as the "Phillips Hollow Road," and about one mile from where the Phillips Hollow road leaves the pike there is a road running from the said Phillips Hollow land between the lands of J. A. Jackson and the Mason heirs, then about on the line between Samantha Rutledge and the Mason heirs, and then partly on the line between Samantha Rutledge and James Earles, but mostly on Earles' side of the line, to the lands of James Earles, and through said lands to the lands of F. M. Earles, and through said F. M. Earles' land to a distance of about one-fourth of a mile to the lands of E. G. Adams, and through said lands to a tenant house on the lands of J. W. Durham. It is averred that the road entirely terminates at this last point. It is denied that it is a public road. It is admitted that gates have been built across it, but avers that these gates have been on the road at various points a great many years, and that the road has been used only by permission of the owners of the land over which it passes. It is averred that the defendant has contracted with E. G. Adams, by which Adams is permitted to pass over respondent's land on this road, and that J. W. Durham and respondent settled the question of Durham passing over this road by arbitration in 1895, and that in pursuance of this arbitration Durham was allowed to pass over this road; that parties passing over this road both above and below have done so by permission of respondent. It is averred that the complainants at one time asked permission of respondent to use the road through the respondent's farm, and the permission was granted on certain conditions, and that complainants, in response to this permission, did haul through respondent's

farm until revoked; that this permission was revoked because the complainants refused to allow the respondent to unload his wood or lumber on the complainants' land in order to load it again on a switch at Bledsoe Station. It is denied that the road was ever laid off by the county court as a public road. It is averred that in 1878 the county court declined to entertain a petition to open it as a public road. It is admitted that a jury of view was appointed in 1879, but averred that that jury never made any report to the county court. It is admitted that the county court, at the January term, 1879, did appoint James Jackson overseer, but that this appointment was made prior to the appointment of the jury of view just referred to. It is admitted that at the July term, 1883, J. L. Gillem was appointed overseer on the road by the county court, but averred that respondent's father, who was then the owner of the land over which the road now passes, forbade the overseer and hands from working on his land, and they did no work on that part of the road, and since this time no overseer has worked this road, and the county has exercised no jurisdiction over it. It is admitted that respondent put up gates and changed gates on the road, but avers there were gates on this farm in 1876 and 1877 when he first came to the land. The answer continues: "Respondent would show that he would be greatly damaged, and put to great inconvenience to have a public road through his farm, and he denies that complainant, who does not own any land on this road, has the right for his own convenience and the profit he may make to his lumber trade to haul lumber through respondent's farm. He denies that this is a public road either by public use or prescription, or by being laid off by the county court as a public road."

The testimony in the cause is very meager, and so uncertain in outline that it is practically impossible to locate the road. It is admitted in the answer that there is now a road running from the Phillips Hollow road, between the lands of J. A. Jackson and the Mason heirs, then about on the line between Samantha Rutledge and the Masons, then partly on the line between Samantha Rutledge and James Earles, but mostly on the Earles side of the line, to the lands of James Earles, and through said lands to the lands of F. M. Earles, and through said F. M. Earles' land, a distance of about one-fourth of a mile, to the lands of E. G. Adams, and through said lands to a tenant house on the lands of J. W. Durham. It is also proven that the road stops at this last point. It seems to be proven that for a great many years the road ran, as it now does, at least through the land of Earles. The road so ran as far back as 1843. Beyond that point it ran along a different line from which it now runs. The old line has long since been covered with trees felled across it, or that

have fallen across it, and has also been fenced up, and has been cultivated. In short, it is impossible from this proof to indicate the line of the old road in 1843 from its beginning to its termination. In early times, wherever the line of the old road led, it seems to have been used by the public, whether under a claim of right or by permission does not clearly appear. However, it seems that about 1877 one James Earles, the father of Frank Earles, became the owner of the land now owned by Frank Earles. Gates were put across the road, and about the same time or earlier there were many other gates put across the road by other owners of the lands over which the road ran. These gates were across the road in 1878 when a petition was sent to the county court to open the road, which petition was refused by the court. These gates were still across the road when the county court appointed a jury of view to view out the road. This order of the county court was made at the January term, 1879, but not entered until the April term, of the same year, and then *nunc pro tunc*. This order reads: "Ordered by the court that the following named persons be appointed a jury of view: B. M. Flemming, Joseph Dodson, Hillary Weatherford, Wm. Meadow, Jas. Jackson, Taylor Key, to open the road between East Bledsoe creek and the road known as the 'Mason Hollow Road.' Said order made at the January term, and ordered to be entered *nunc pro tunc*." At the same term this order was made James Jackson was appointed "overseer of the road from Bledsoe creek, beginning near W. M. Wray's shop, running through the premises of James M. Mason, J. L. Earles, J. L. Davis, Fuqua, Landis Wicks, to the La Fayette road, and that the overseer list the hands." It does not appear that the jury of view ever reported. They undertook to lay out the road, but lacked one-fourth of a mile of reaching the terminus indicated in the order. This resulted from the objection of the landowners through whose land the road ran. These facts do not appear from any report made to the county court, but from the testimony of witnesses, as no report whatever was made to the county court. It appears that in 1879 one Jackson was appointed overseer of the road, and worked part of it, but, meeting with opposition from the owners, the work was abandoned; so the county never paid any more attention to the road until 1882 or 1883, when Gillem was appointed; but he soon quit the road, because of scarcity of hands. The gates were across the road at the time an effort was made to lay it out in 1879, and have remained there. They were also across the road when James Jackson, as overseer, undertook to work the road; also when Gillem worked it, and these gates were not disturbed by either overseer. Since the gates were put upon the land, the landowners, as

a general thing, have allowed people to go through their gates only by permission. It thus appears that only a part of the old road is definitely indicated in the proof, and it is not shown whether this was used by the public under a claim of right or not. We do not think the facts stated are sufficient to show that the road in controversy was ever a public road, either by prescription or by order of the court. It could not be treated as a road laid out by the county court, because the jury of view did not make any report. It is necessary, or was at the time indicated, that the jury should report, and that an order should be made establishing the road. See the practice referred to in *Justices of Greene Co. v. Graham*, 6 Baxt. 77, 80; *Hawkins v. Justices of Trousdale Co.*, 12 Lea, 351. It is not at all decisive that overseers were appointed. The other entries appearing upon the county court record already referred to destroy all significance that might otherwise be attached to the order appointing Jackson as overseer, and also that appointing Gillem.

Before closing this opinion, we should refer to a point made in argument to the effect that an arbitration was had between the defendant Earles and one Durham which practically settled the question in favor of the complainants' contention. The papers concerning that arbitration are before us. They have no such effect. The substance of the matter was that Durham and Earles had gotten into a controversy about the right of each to pass over the other's land on the road in question. The arbitrators decided as follows: "It is to the mutual interest and benefit of both parties to keep up a roadway through the said Earles land, and we decree that the said Durham shall make and hang a good gate [showing how and where the gate should be hung], and the said Earles shall make a good road out of gravel and stone through the soft mud at the new gate put up on end near Rutledge line. Each party to keep up his gate in good order, to prevent stock from trespassing. * * * Said Earles is to have a roadway through said Durham's land on the north on same conditions. * * * We recommend and decree the said gates to be made and the road through said new gates to be graveled ready for use at once, and when said Durham does his part herein decreed he is to have free use of the road, unobstructed with locks and keys." It is apparent this arbitration concerned a mere private controversy between Durham and Earles, and that it can have no sort of effect upon the question whether the road which is the subject of the present suit is or is not a public road. If it has any bearing at all, it tends to show that the road was not a public road. It results that the decree of the chancellor dismissing the bill must be affirmed, with the costs of this court and of the court below. All concur.

Affirmed orally by supreme court, March 16, 1901.

SPICER et al. v. JOHNSON.

(Court of Chancery Appeals of Tennessee. Feb. 27, 1901.)

MORTGAGES—INSTRUMENT CONVEYING ABSOLUTE TITLE—COSTS.

1. A decree confirming a partition sale, and vesting title in one who has advanced purchase money for a bidder who could not comply with his bid, will be held to be a mortgage, where there is clear, cogent, and convincing proof that the title was to be held by him as security only for the payment of the amount advanced.

2. A party who refuses to recognize a valid agreement that an instrument conveying an absolute title should be treated as a mortgage is not entitled to be relieved of the payment of costs of a suit to enforce the agreement.

Appeal from chancery court, Dickson county; A. J. Abernathy, Chancellor.

Bill by Burrell and Clarissa Spicer against J. W. Johnson. From a decree for complainants, defendant appeals. Affirmed.

W. T. Crotzer, for appellant. Morris & Cook, for appellees.

MURRY, J. This suit was brought by bill filed in the chancery court of Dickson county, Tenn., on April 18, 1898, for the purpose of having a report of sale, decree of confirmation, and divesting and vesting title in defendant, J. W. Johnson, to a certain tract of land of about 103 acres, lying and being in the Fifth civil district of Dickson county, Tenn., and which is fully described in Exhibit A to complainants' bill in this cause, called a pledge, pawn, mortgage, or security for the payment by complainants, Burrell and Clarissa Spicer, to defendant, J. W. Johnson, of the sum of \$88, with accrued interest, alleged to have been loaned by defendant, Johnson, to complainants to pay the cash payment on the tract of land aforesaid, which had been sold by the clerk of the county court of Dickson county, Tenn., under a decree of said county court decreeing a sale of said lands for distribution of proceeds among the heirs at law of Joseph Spicer, who died in 1896, seised and possessed of said land, after having made and published his last will and testament, by which he devised a one-half interest in his estate to complainants, and directing a sale for division, and also for the purpose of securing and saving harmless the said J. W. Johnson on two notes executed to the clerk of said county court for \$121.50 each, bearing interest from date, and due, respectively, in 12 and 18 months, on which the said J. W. Johnson became surety for Burrell Spicer; it being also alleged that complainants had tendered the defendant, J. W. Johnson, \$88, with accrued interest, and offered to release him on said notes from further liability by paying said notes, or by executing notes with other parties as security, and seeking to have the title to said land divested out of said Johnson, and vested in complainants. The bill avers and states that Joseph Spicer, father of complainants, died in 1896, and that he left a will, giving a half

interest in his estate to complainants; that he appointed no executor, and made no provisions in the will authorizing any person to sell the land owned by him, but directed a sale for division; that he died owner of about 103 acres of land in the Fifth civil district of Dickson county, Tenn., which is described in a paper filed as Exhibit A to this bill; that on January 5, 1897, complainants and others joined in a petition in the county court of Dickson county to effect the sale of this land in accordance with the will; that at the April term, 1897, of the court, an order of sale was made, and on April 28th thereafter the clerk exposed the land at public sale at Charlotte, and complainants became the purchasers at the price of \$300, and succeeded in executing their notes, due in 12 and 18 months, for \$110 each, but failed to raise the cash payment; before this sale was confirmed, a petition was filed by J. C. Cox to have the bid raised from \$300 to \$330, and the court so ordered, and reopened the bid-dings, and directed that they stand open until June 30, 1897, at which time the land was to be sold to the highest bidder; the citizens in the neighborhood wherein complainants reside and other members of complainants' family desired complainants to become the purchasers of this land, and refused to bid against them at the sale; the land is worth \$500 cash, and from \$700 to \$750 on a credit, and reliable persons would have bid \$600 or \$700 at the sale aforesaid, but for the reasons stated; on the date of the last sale, June 30, 1897, Burrell Spicer, a brother of his co-complainant, who acted through the whole proceeding for his sister, was the only bidder, and the land was sold to him for \$331; that a memorandum on the back of the sale notice, first written in pencil by the clerk and commissioner, reads as follows: "Sold to B. Spicer and Clarissa Spicer at \$331, but money not paid by Spicer yet;" that complainants were unable to raise the cash payment required by the decree, which was \$88, and W. L. Cook stated to them that, while he did not desire to pay the cash payment and help make the notes and advance the amount to them, yet he would do so rather than they should lose the place; that about 12 o'clock the day after the sale defendant, J. W. Johnson, a neighbor, came to complainants' home, and proposed that he would let complainants have the money at 6 per cent. for 12 months, if they would let him hold their bid; this proposition was agreed to, and in the afternoon complainant B. Spicer and J. W. Johnson went to Charlotte to perfect the arrangement, and the memorandum on the back of the sale notice was changed, and reads, "Sold to B. Spicer and J. W. Johnson," Johnson's name being inserted in ink, and Johnson signed the notes for the deferred payments with B. Spicer, and at the time, no report of sale having been made, defendant, Johnson, desiring to have the title vested in himself as security, requested, and it was agreed, that

the sale be reported as made to J. W. Johnson; this was agreed to in the presence of witnesses, and the only condition was that if complainants would repay him the cash advanced, with interest, in 12 months, and save him harmless from further liability on the notes, he would convey this land to them; this report of sale was confirmed, and, in accordance with the agreement, title was vested in J. W. Johnson; it was agreed at the time that complainants should remain in possession of the premises, and they did so, and still occupy them; that before 12 months had expired complainants tendered to defendant the amount of cash he had advanced for them, and arranged to meet the first deferred note, and relieve the defendant from all further liability, and requested him to transfer the legal title to the premises to them; he refused, and still refuses, to do so, and recently he has pulled down gaps in the fence between his premises and the tract in question, and permits his stock to run at large over the place; he also moved his fence so as to include about a fourth of an acre of the premises in question, but has taken no other steps to assert his ownership of the premises; he officiously attempted to pay the deferred payment before maturity, and has paid the first note and interest to date, before it matured. Complainants allege that defendant, with a fraudulent intent and purpose of obtaining the ownership of the property in question, made the false promise aforesaid, and they allege that he is a trustee for their benefit, holding the legal title to the premises for the security of the cash payment advanced, and to save himself harmless against the payment of the notes secured by him. They have tendered him the cash payment, and agreed to relieve him of responsibility for the other notes, and they here and now again agree to do so. They are willing to pay the money into court when and as the court directs. They allege that the conditions precedent to the vestiture of the title in him was that he should convey to complainants upon payment of the purchase money, and, upon their agreement to do so, he, with a fraudulent purpose of depriving complainants of the difference in value of the land and the price for which it was sold, refused to convey. The prayer of the bill is that complainants have a specific performance of their contract, or that Johnson be decreed a trustee for their benefit, or that he be held to be a mortgagee holding the premises as security for the purchase money, upon the payment of which the title to said lands be vested in complainants, and that Johnson's title be decreed a cloud upon complainants' title, and removed as such. They pray for injunction to enjoin Johnson from throwing down fences, allowing his stock to run on the premises, and from asserting any control over said land, and for general relief.

On June 15, 1898, defendant, Johnson, filed his answer to complainants' bill, stating

and averring as follows: The death of Joseph Spicer is admitted as stated. It is also admitted that he left a will, giving half of his estate to complainants; that the land was sold under a proper decree of the county court for partition, on April 28, 1897, and bid off by complainants, who failed to raise the cash payment; that J. C. Cox filed a petition, under which the biddings were opened, and were to stand open until June 30th; that Cox raised the bid of complainants to \$330, and that complainants, on June 30th, bid \$331, and that the clerk indorsed on the sale notice, "Sold to B. and Clarissa Spicer at \$331, but money not paid in by Spicer yet." But it is positively and emphatically denied that the citizens of the neighborhood all refused to bid against complainants on the land. It is admitted that complainants were unable to raise the cash payment of \$88; that they could not do so, and thus comply with the sale of April 28th, and had not done so when Cox raised the bid, and, although they had two whole months to raise the money, they had not done so on June 30th, when the biddings were to be closed and the sale made final. It may be true that Cox made the statements to complainants as they have stated in their bill. Complainant B. Spicer was out of humor, and unwilling that Cox should have the land, but said he could not help it, and defendant asked him if he would let him (defendant) have his bid. At this complainant Burrell Spicer brightened up, and said: "Yes; I would as soon that you would get the land as anybody in the world, and I don't want Cox to have it." Defendant had not thought of buying the land, had as much as he needed, and did not care particularly about buying it, except about 12 acres lying between defendant's farm at one end and the public road; but he proposed to take it at complainant's bid, and agreed, remarking that if he could get up the money he wanted to pay it back, and asked defendant what the interest on it would be for 12 months, and defendant told him plainly that he did not propose to lend him the money and take it back with interest, and complainant fully understood that defendant was not loaning him the money. There was not a word said about defendant lending him the money at 6 per cent. for 12 months if they would let him hold their bid, no such proposition was made or agreed to, and nobody ever witnessed such an agreement. Defendant never heard until the bill was filed that Spicer had anything to do with the sale. Complainant B. Spicer could not comply with the sale, told defendant so, and that he would not let defendant have his bid. He did this to prevent the sale of the land to Cox. He had the choice of letting defendant have his bid of \$331 or letting J. C. Cox get the land at \$330. He did not want Cox to have it, and would lose one dollar if it went to Cox. Complainant B. Spicer repeated that if he could get the money he

wanted to pay it back; but he fully understood that he was giving his bid to defendant, and that the defendant was not loaning money to be paid back, with interest, and agreed to let defendant have it rather than Cox, and they went to Charlotte, and had the sale reported to defendant. Defendant does not know what was indorsed on the sale notice, or what change was made by the clerk, but when they arrived complainant asked if Cox had been there. Being answered that he had not, he remarked that "we are all right." Defendant inquired if the bid of Spicer could be changed to him, and, being informed that it could, he informed the clerk that that was their business. He paid the cash required (\$88), and executed his notes for the balance. He went on no note for Spicer, and Spicer was not asked to go on defendant's note, and defendant did not see him sign the notes, and does not think he did. The sale was reported to defendant, the report was confirmed, and decree entered vesting title in defendant. It was not agreed at the time that complainants should remain in possession. Nothing was said about their remaining in possession. The year was far advanced, and defendant expected for complainants to remain until the crop was gathered, but nothing was said until along in the fall, when defendant met W. L. Cook, the administrator of Joseph Spicer, and solicitor of complainants in the county court proceeding at Dickson, and asked him about the possession of the premises, and Mr. Cook told him if the complainants would not give him possession the court would, and that was all that was said about possession at any time. Defendant wanted to sow wheat on some of the land, and did so, and made rails, and improved and changed fences on the land, and sowed oats and grass later on, without any trouble from complainants. The houses on the premises were almost worthless. Defendant had no use for them, and was not unwilling that complainants should occupy them, and have land to cultivate, as they had no other place, and permitted them to remain, and went on in the use and occupation of the land in several other ways than stated in the bill, until he was restrained by the injunction in this cause. The allegation that defendant, with fraudulent intent and purpose of obtaining ownership of the property, made the false promise aforesaid, or any false promise, is utterly denied. Defendant executed his notes due in April for the first deferred payment, and a few weeks previous to its maturity he had the opportunity of getting the money, and did so, and paid it off for fear he would not be able to get it when it fell due. There was never a word about defendant conveying the land to complainants, and that allegation is denied, and as to their tendering him the cash payment. J. B. Burgie, just before the filing of the bill in this cause with complainant B. Spicer, came to defendant, and offered, they

said, \$100 or more, and defendant refused to take it. He had paid \$88 in cash, and the first deferred payment of over \$100, and complainants did not tender all that defendant had paid, and defendant would not have accepted it if they had. Defendant has been very much surprised at the bringing of this suit by complainants, and is advised that if left to themselves they would not have done so, and the whole scheme is the conception of others, with the object of defrauding defendant. It is insisted that complainants' statement of the case constitutes nothing more than a parol agreement for the sale of the land, and a contract not to be performed within a year. The \$88 could not be demanded within a year, and the last deferred payment was not due until October of 1898, 14 months from the date of the transaction, and complainants could not hold defendant harmless in payment of this note, which would be more than one year, and the defendant pleads the same in bar of this suit. He pleads that the agreement set out in the bill was a contract, which was not to be and could not be performed within a year, and was not reduced to writing, and signed by himself or any one authorized by him to do so. He further pleads that the agreement set out in the complainants' bill is a parol agreement for the sale of the land, and that neither he, nor any other person by him thereunto lawfully authorized, ever signed any contract or agreement, or any memorandum or note thereof, for the sale to the complainants of the tract of land described in the bill, or any part thereof, or any interest therein, and he pleads this matter in bar of complainants' suit.

We find the facts to be as follows: (1) That Joseph Spicer died, in 1896, in Dickson county, Tenn., seised and possessed of the lands described in Exhibit A to complainants' bill, after having made and published his last will and testament, whereby he devised to complainants one-half of his estate, which included one-half interest in said tract of land of about 103 acres, lying in the Fifth civil district of Dickson county, Tenn., and which is fully described in Exhibit A to complainants' bill. (2) That after the death of Joseph Spicer a regular partition proceeding was had in the county court of Dickson county, by petition filed in said court by the tenants in common of said land, for the purpose of having said land sold for distribution of proceeds arising from a sale thereof among those entitled to share therein; that at the April term, 1897, a regular decree was duly entered in said case in said county court, ordering and decreeing that said land be sold by the clerk of said court for the purpose of division of the proceeds among the parties to said cause; that on April 28, 1897, the clerk of said court, after having advertised the time and place of sale as required by law in such cases, sold said land as provided by law, and as directed

by said decree for sale, when Burrell Spicer and Clarissa Spicer became the purchasers of said land at the sale at the price of \$300; that they executed their notes for \$110 each, due, respectively, in 12 and 18 months from date, bearing interest from date, but failed to raise the cash payment required by said decree, and that, before this sale was confirmed or reported, on petition of J. C. Cox for that purpose there was a decree entered in said cause, opening the biddings on said land, and directing that they stand open until June 30, 1897, at which time the land was to be sold to the highest bidder, beginning with the bid of said Cox at the open biddings of \$330; that Burrell Spicer, acting for himself and sister, Clarissa Spicer, at said sale, under the open bidding, again purchased said property at the price of \$331; that the complainants were unable to raise the cash payment required by said decree, which was \$88, and that defendant, Johnson, their neighbor, on the day after the sale to complainants at the price of \$331, went to the home of complainants, and proposed that he would let them have the money at 6 per cent. interest for 12 months to pay the cash payment required by said decree, and to make the notes for them for the deferred payments on said land, if complainants would let defendant, Johnson, hold their bid to secure to him the payment of the \$88, with interest at 6 per cent., and to save him harmless on said notes executed for the deferred payments on said land; that this proposition was accepted by complainants, and it was agreed between complainants and defendant, Johnson, that upon his loaning them the money or furnishing the money for them to pay the cash payment of \$88, and making good the payment of the notes executed for the deferred payments, the sale should be reported to Johnson and confirmed to him, and title divested, and vested in him, to secure to him (Johnson) the payment of said \$88 and interest, and to save him harmless on said purchase-money notes executed to said county court clerk for the purchase of said lands; that it was distinctly understood, contracted, and agreed by and between complainants and defendant, Johnson, that he was to hold the title to this land under said report of sale, decree confirming same, and decree divesting and vesting title in him, for the sole and only purpose of securing to him (Johnson) the payment of said \$88 and interest thereon, and of saving him harmless on the purchase-money notes executed to said county court clerk for the deferred payments on said land, and that the title was vested in the said Johnson in pursuance of this understanding, contract, and agreement, and that he so accepted the title to said land; that he was not to have a title absolute to said land, whereby the land would become his, but that the title was to be held by him only as a security for the payment of said money

and the satisfaction of said notes and to save him harmless thereon. We find that the proof in this cause overwhelmingly establishes the fact that this was the agreement, contract, and understanding between complainants and defendant, Johnson, that Johnson so understood it at the time, and so accepted the title only as a security, and for no other purpose as aforesaid. (3) That before this suit was brought complainants, through Burrell Spicer, made a tender to defendant, Johnson, of the money, with interest that had accrued thereon to the day of tender, which he had paid for complainants to the clerk of the county court in payment of the cash payment required by said decree, to wit, \$88, and that complainants, when they so tendered said money to said Johnson, also proposed and offered to release him from all further liability on the notes secured by him to the clerk of the county court for the deferred payments on said land, and thereupon requested the said Johnson to convey said land to them (complainants), which the said Johnson declined and refused to do. In defendant's answer he says that complainants did not tender all that defendant had paid, and defendant would not have accepted it if they had. Complainants tender with their bill and offer to pay into court the money, with its interest, which had been paid out by the defendant, and also offer to relieve him from all further liability on the note for the last deferred payment on the said land, and to relieve him from further liability on account of any of said notes. We find that the title was vested in Johnson only as a security for the amount of money paid by him, with interest, and to save him harmless on said purchase-money notes.

Upon the foregoing state of pleadings and facts, the chancellor decreed as follows: That defendant, J. W. Johnson, holds the land in controversy sold by decree of the county court as the property of Joseph Spicer in the cause of W. L. Cook, administrator, against Bettie Spicer, as a security to him for the money he had paid and is liable for on said land; that complainants have a right to have the right or title of J. W. Johnson thereto declared a mortgage for that purpose, and they have a right to have said land decreed to them upon completely reimbursing Johnson in what he has already paid of the purchase money on said land, and to be relieved from all liability on any balance of purchase money due the county court clerk. The chancellor then set out the amounts paid by Johnson, and the balance of the purchase money due on the land; directed that the complainants pay into the master's office an amount sufficient to cover the cash expended by Johnson, and his liability, and interest thereon, so as to completely relieve defendant from all liability; and the decree recites that this has been done, and that the requirements of the de-

cree had been complied with, and the defendant, Johnson, reimbursed and relieved of all liability; and he then decreed that the injunction granted in the cause be made perpetual, that the claim of J. W. Johnson to the land described in the pleadings was a cloud upon the complainants' title, and should be canceled and removed as such, and all the right, title, and claim of Johnson divested out of him, and vested in Burrell and Clarissa Spicer. The cost was adjudged against Johnson. From this decree the defendant, J. W. Johnson, has appealed, and assigned error as follows: The chancellor erred in finding that defendant's (J. W. Johnson's) title was a mortgage or a cloud upon complainant's title.

The proof is clear, cogent, and convincing that the title to said land was, under an understanding, agreement, and contract by and between complainants and defendant, J. W. Johnson, vested in J. W. Johnson as a security only to secure to him the payment of the \$88 and interest, cash loaned to complainants or paid for them to the clerk of the county court in payment for the required amount of cash to be paid down by said decree, and to save him harmless on the purchase-money notes executed for the deferred payments of purchase money on said land. The proof in this case brings this case fully and strictly within the rule laid down in the line of our authorities with reference to converting instruments conveying an absolute title upon their face into a mortgage, pledge, pawn, or security for the satisfaction of an obligation or obligations, where it is held that, in order to convert an instrument conveying upon its face an absolute title into a mortgage, pledge, pawn, or security, the proof must be clear, satisfactory, cogent, and convincing. There can be no room for doubt, even, that this was the contract, agreement, and understanding by and between the parties, and that this title was so accepted and held by said J. W. Johnson. It is recited in the chancellor's decree that the full amount of purchase money, with interest, including that paid by Johnson, to wit, \$88 cash, and the note for the first deferred payment on said land, and also the note for the last deferred payment, has been paid into court, and that thereby the said Johnson has been repaid all of the money paid out by him, with interest to the date of said decree, which amount so paid into court was directed to be paid to said Johnson. We find as a fact, and are also of opinion, and so hold as a proposition of law, that a sufficient tender was made by complainants to Johnson before the bill in this cause was filed, and also that Johnson declined to accept said tender, or to receive the amount of money paid out by him, with interest. In other words, he refused absolutely to recognize the right of complainants to pay him the money and interest paid out by him, and to save him

harmless on the outstanding note, and their right thereupon to demand from him a conveyance of the legal title to said land. This tender was kept up and is offered by complainants in their bill, so that there is nothing in the insistence of the defendant that there was no tender of a sufficient amount. We further find, and are further of the opinion, and so hold, that it was the duty of J. W. Johnson to have accepted his money and interest, and to have allowed complainants to relieve him, by payment or otherwise, from all further liability on the outstanding purchase-money note in the hands of the clerk of said county court, and thereupon to have conveyed to the complainants the legal title to said land, by doing which he could easily have avoided the litigation, and the unnecessary cost brought about by the litigation in this cause; and that by his failure to carry out his contract and agreement with complainants, and allow them to pay in the amount paid out by him, with interest, and secure him against loss upon the second note by paying it or otherwise securing it satisfactory to the clerk, and thereupon conveying said land as per contract and agreement to complainants, he brought about the necessity of filing this bill, and incurred thereby a liability for all the cost. So then, in our opinion, there is nothing in the insistence of defendant's counsel that he should be relieved of the payment of the cost in that cause accrued, nor is there anything in their insistence that the chancellor's decree was erroneous or inequitable in this record. This result was brought about by the unwillingness and failure of defendant to comply with the plain, valid, and binding contract, and he cannot now complain at the cost decreed against him, having himself made this litigation necessary, and having caused the accrual of this cost. We are of opinion, and so hold, that the assignment of error is not well taken, and that the decree of the chancellor is in all things correct, and that there is no error therein. We affirm the decree of the chancellor, and the defendant will pay the cost in the court below, and he and his security on the appeal bond will pay the cost of appeal in this case. All concur.

Affirmed orally by supreme court, March 16, 1901.

KERNELL et al. v. CRUTCHER.

(Court of Chancery Appeals of Tennessee.
Feb. 21, 1901.)

EXECUTORS AND ADMINISTRATORS—DISTRIBUTES' CLAIM AGAINST DECEASED ADMINISTRATOR—PROOF—SUFFICIENCY.

1. Distributees filed a bill against the estate of a deceased administrator to collect their interest in a sum of money which it was alleged he had not accounted for in his inventory and final settlement, to which no objections had been made. The bill was filed seven years aft-

er his final settlement, and nearly two years after his death, though he was solvent and complainants needed money. Complainants' delay was not explained, and the character of the witnesses who testified in support of the claim was doubtful. *Held*, that the claim was not sufficiently proven, in view of complainants' laches.

2. Distributees who are guilty of great delay and laches in asserting their claim against a solvent administrator in his lifetime must produce clear and undoubted proof of their claim when it is presented against his estate.

Appeal from chancery court, Stewart county; J. S. Gubble, Chancellor.

Bill by T. J. Kernell and others against Robert Crutcher, administrator of D. M. Jones, deceased. From a decree for defendant, complainants appeal. Affirmed.

J. W. Rice, for appellants. J. W. Stout, for appellee.

BARTON, J. This was a bill filed by two of the daughters, heirs at law, and distributees of Naomi Jones, deceased, who were joined by their husbands, against Robert Crutcher, the administrator of D. M. Jones, deceased, who (D. M. Jones) had been the administrator of their mother, Naomi Jones, deceased, to recover their shares, alleged to be one-fifth each, of the sum of \$1,050, which it was claimed the said D. M. Jones had borrowed from their mother in 1886, and which it is claimed that he had not paid, and had not accounted for in his inventory or settlement made by him as administrator of his mother. The bill was also filed against the other heirs and distributees of Naomi Jones, deceased. The bill claims that Naomi Jones died in 1887 or 1888; that D. M. Jones, Catherine Whitford, and the children and heirs of Emaline Rhoden, and the complainants Mrs. Martha Kernell and Sallie Anderson were left as her only heirs at law and distributees; that D. M. Jones was appointed her administrator on September 3, 1888, and filed his inventory soon thereafter, and on September 7, 1891, made a settlement with the clerk of the county court of Stewart county, and charged himself with only \$180.15, and was allowed credits amounting to \$139.55, leaving a balance for the distributees of only \$40.60. It was further charged that in 1896 or 1887 D. M. Jones had borrowed from his mother, Naomi Jones, \$1,050, but that he never charged himself with or accounted for this \$1,050, and never mentioned it, notwithstanding he had the amount in his own hands; and it is insisted that he should have been charged with the amount and interest, and he was bound, as administrator, to have collected this sum and accounted for it, and, not having done so, that his estate is liable for the same; that he, the said D. M. Jones, died in 1896, and the defendant Robert Crutcher qualified as his administrator; and that the complainants were entitled to recover one-fifth each of the sum of \$1,050, and one-fifth each of the sum of

\$40.60, shown by Jones' settlement to have been in his hands. This bill was filed on February 28, 1898. The administrator answered this bill. Admitted the death of Naomi Jones, the appointment of D. M. Jones as administrator, his death, and the appointment of the defendant Crutcher, and then denied that D. M. Jones ever borrowed \$1,050, or any other sum, from his mother, and denied that he owed her one cent for anything. Denied that he owed complainants anything at his death. Admitted that a settlement filed by Jones in the county court showed that there was due complainants about \$16 from the estate, but averred that the facts were that complainants were indebted to D. M. Jones in a large amount, and that he credited complainants with said amount, leaving them still in his debt, but that he never made any attempt to collect from them, because they were insolvent. He further averred that D. M. Jones had always been solvent, and that complainants had made no demand upon him in his lifetime, made no objection to his settlement, and made no claim or effort to collect anything, and charged that complainants had been guilty of gross laches and neglect, if anything was due them, in failing to object to Jones' settlement, and in failing to collect the amounts now sued for until the lapse of time and death had obscured the facts, and pleaded that they were estopped from claiming anything from the estate of D. M. Jones by reason of these matters, even if there had been anything due them, which was denied. The original bill was amended so as to make the other heirs and distributees of Mrs. Jones parties. Guardians ad litem were appointed, and answers were filed for them, and an administrator de bonis non was appointed and answered, and in his answer he denies that D. M. Jones owed Naomi Jones \$1,050, or any other sum of money, or anything else. He denied that there was anything due the complainants. Other of the defendants, heirs and distributees of Mrs. Jones, answered, disclaiming any claim on their part, and denying the allegations of the bill. Proof was taken, and the cause heard, and the chancellor dismissed the bill.

Most of the testimony adduced went to the point as to whether or not D. M. Jones, deceased, had obtained or borrowed from his mother \$1,000 in 1886 to pay for a tract of land, or interest in a tract of land, at that time bought by him from one Crisp: the payment really having been made to one Scarboro, the original vendor, from whom Crisp and Jones had bought; Jones buying Crisp's interest subsequently and paying for it. Two witnesses (Crisp and one Jeff Melton) testified that Jones did obtain \$1,000 from his mother to make this payment. These witnesses are both attacked, and testimony is adduced to show that they were not entitled to full faith and credit

on oath. Their character is sustained by other witnesses. As to one (Crisp) it appears that some years ago he was arrested before a magistrate and bound over to court for stealing two hogs; and, according to his own admissions, although he denies stealing the hogs, he bribed or hired the state's witnesses to leave the country, so as not to testify against him. The proof, however, shows that this was some 10 years ago, and witnesses say that his present character and standing are fair. Some of the witnesses also describe the witness Melton as having the reputation of being the biggest liar in the county. Others, however, say they would give him full faith and credit. Another witness, who is not impeached (one W. H. Shaw), states that he had a conversation about the purchase of the land known as the "Rigin Land," and that Jones said he and Mr. Crisp bought the land in partnership and gave \$1,500 for it. But he said he got tired of being in partnership with Crisp, and that he gave Crisp \$1,000 for his interest in the place; that he understood from him that he got it from his mother; and that it is his recollection that he paid \$1,000 to Scarborough for Crisp. Said that he was ready to settle with the heirs, but that there was nothing due them. The evidence of these witnesses, if they are to be believed, points strongly to the fact that D. M. Jones obtained at least \$1,000 from his mother. But we are confronted, when we come to consider this issue of fact, with the following undisputed facts: The husband of Mrs. Jones had died prior to 1880. She and her son lived together. In 1880 she was allotted dower and homestead. Her son had bought the interest of several of the heirs in the place, and, as stated, they lived together. The proof shows that he was a hard-working, close, saving, industrious, and successful man. On September 9, 1886, when he and his mother were living together, he bought the Crisp farm or interest for \$1,000. Mrs. Naomi Jones died in 1888, and her son D. M. Jones was appointed her administrator. If he borrowed the money at all, he obtained it on September 9, 1886. Two years afterwards, in September, 1888, he was appointed administrator of his mother, and then filed an inventory of her estate, in which he charged himself with \$180.15; and there was included in this a debt against the complainant Anderson for \$30, and against the complainant Kernell for \$7.40. On September 7, 1891, D. M. Jones, as administrator of his mother, made a final settlement with the clerk of the county court, which was approved, in which he was charged with the full amount of his inventory; no credits being allowed for insolvent claims. Matters remained in this shape, and, so far as this record shows, no complaint was made and no exception was taken to the inventory as filed by the administrator in 1888, nor to the settlement made by him in 1891,

until this bill was filed in 1898. D. M. Jones died in 1896, and the defendant Crutcher was appointed his administrator, and about two years thereafter (that is to say, on January 7, 1898) this bill was filed. Therefore we find the complainants seeking to collect an interest in a sum of money claimed to have been loaned by their mother twelve years before the filing of the bill. Their bill is filed ten years after their mother's death,—ten years after D. M. Jones, administrator, had filed his inventory, in which he did not charge himself with this sum, though he did charge himself with debts claimed to be due from these parties who are now complainants. So far as shown, they made no objection to this inventory and statement; do not appear to have denied that they then owed the estate, nor to have claimed that he was then indebted. Their bill is filed seven years after his final settlement, or about that long, and nearly two years after the death of D. M. Jones. The proof shows that during all this time they were insolvent and in need of money, while Jones was prosperous and amply solvent, and that any debt he owed could have been collected from him. In 1897 it appears that the administrator of D. M. Jones filed his inventory, showing his personal estate to be \$2,740.83. In 1897 he was assessed with real estate amounting to something over \$3,200. In other words, it is made entirely clear that D. M. Jones was amply solvent, and complainants could have collected this claim. No explanation is given why they did not do so. But now, some two years after his death, they bring this suit. It is true that the ten-years statute of limitations, which protects administrators, etc., has not expired. But it is evident that complainants have been guilty of great delay, laches, and neglect in asserting their claims.

If this suit had been brought within a reasonable time after Jones made the settlement, and during his lifetime, and if the evidence we find in this record had been adduced, and was not met, explained, and contradicted by him, we would be disposed to give much more weight to complainants' witnesses than we now are. But, in the first place, it is indeed remarkable that complainants, needing money as they did, and their brother, the administrator of their mother's estate, being able to pay, as he was, they should not, at the time his inventory was filed, have made some complaint. It is still more remarkable that when he made his final settlement, showing them charged with uncollected debts, and failing to charge himself with this large sum, they should for five years of his lifetime have let the matter sleep, and then waited two years more before asserting their claim; and we do find that they have been guilty of the greatest laches and neglect about the matter, and must suffer the consequences. We do not say that, whatever the facts might be, on account of this long delay, it being short of the time prescribed by

statute, the complainants would be repelled. If we could see from the entire record that there was no question as to the facts of the indebtedness, and that Jones had evidently failed to charge himself with the sum of \$1,050, and had failed to account for that amount,—as if, for instance, he had himself left evidence of this fact, or if his admissions to that effect were clearly and indubitably proven,—then the mere delay would not repel the complainants. But such a case is not presented. It is true that if the suit had been brought during the lifetime of Jones, or immediately after his settlement in the county court, upon the record as it now stands, without explanation by him, we might have serious doubts as to whether he should not be charged with this sum claimed. But we have no such case as stated in either supposition. We have this long neglect and delay, when the situation of the parties is entirely changed. If the suit had been promptly brought during the lifetime of Jones, then he could have been heard to explain and contradict, and to bring forth his evidence to contradict, the claims now set up by these parties; but they have waited until, as stated, he is deprived of this means of showing the truth,—waited until his lips are dumb, and we cannot any longer have his explanation or his aid in ascertaining the truth. We have, as proven by the complainants' own witnesses, a statement made by him that there was nothing coming to these parties. We have his sworn settlement in the county court. Beyond this he has not been and cannot be heard. As against the case so made in his behalf we have the statements of two witnesses as to whose character a doubt has at least been raised. The testimony of the two does not accurately correspond. The facts testified to by them are to some extent contradicted by the testimony of Scarborough as to the character of the money paid to him, and by the widow of D. M. Jones as to where he got the money at the time the payment was made. But, besides this, if we believe that he had originally obtained the money from his mother, there is nothing to show as to whether he had not paid it back to her before the time of her death. As a matter of fact, however, so far as we can gather from the proof in this record, without going into a discussion of its details, we do not believe that she ever had this sum. Counsel for the complainants makes a calculation in which it is shown that she had or should have received something like \$500 in cash; that is to say, that she received or should have received some \$218 as distributee of her husband's estate, and then had certain exempt property, as mules, oxen, cows, hogs, sheep, etc. It is not, however, shown that she received cash for these, and accounts kept by her in certain stores show that she made considerable expenditures for herself and relatives. But, without further going into details, we are of opinion that, if she had loaned her son \$1,000, she probably would have had a large part

of this on hand at her death, if he had repaid it; and the weight of the evidence would therefore seem to be that, if he had borrowed this sum from her, he had not fully repaid it. But it is equally true that the weight of the evidence is that in 1886, at the time he is said to have borrowed this money from her, she never had any such sum on hand. Taking this fact in connection with the statements she is proven to have made, with the not at all satisfactory character of the witnesses Melton and Crisp, and not being impressed with the character of their testimony when carefully analyzed, and in view of the fact that the administrator, D. M. Jones, filed his inventory, which, under the law, was sworn to, and filed his settlement, which stood unchallenged by these parties for seven years, we are impelled to believe that the claim presented is not a just one; and we do not believe, in the light of all these facts, and the conduct of the parties, that D. M. Jones had borrowed or owed his mother at the time of her death the sum of \$1,000, or any other sums, which he failed to account for. We therefore find as a fact that he did not. In finding this fact, however, in order that the parties may have the benefit of the question on an appeal, we state that the neglect, negligence, and delay of these parties in presenting this claim has, to a large extent, influenced this result; and we hold that, as a matter of law, there has been such delay, laches, and neglect that, to sustain a claim of this character, the parties must produce clear and undoubted evidence and proof of their claim.

In his final decree the chancellor allowed the complainants judgment against the administrator for two-fifths of \$40.60, shown to have been in the hands of the administrator at the time of his settlement, together with interest thereon, making \$24 in all. The whole case is probably opened up by the broad appeal of the complainants, but inasmuch as the defendant has assigned no errors, and makes no complaint of this much of the decree, we simply content ourselves with affirming the decree of the chancellor, though we very much doubt whether the complainants are entitled to recover anything or not. The decree of the chancellor will be affirmed. The costs of the court below will be paid as decreed by the chancellor; the cost of the appeal, by the appellants. All concur.

Affirmed orally by supreme court, February 13, 1901.

PETWAY et al. v. MATTHEWS et al.
(Court of Chancery Appeals of Tennessee.
Feb. 26, 1901.)

MORTGAGES—SATISFACTION—EFFECT—PAROL EVIDENCE TO CONTRADICT.

A mortgagee's entry of satisfaction on the record, reciting that the mortgage debt has been paid, is only prima facie evidence of payment, and may be consistently explained away

by evidence showing that it was not paid in full, and that he only intended to release the property from the lien of the mortgage.

Appeal from chancery court of Williamson county; H. H. Cook, Chancellor.

Bill by W. J. Petway and others against E. D. Matthews and others. From a decree for complainants, defendants appeal. Affirmed.

Henderson & Berry, for appellants Matthews et al. S. S. House, for appellant Parks. Eggleston & Eggleston and W. W. Fair, for appellees.

MURRY, J. This suit was brought by W. J. Petway and E. K. Smithson, executors of William Jones, deceased, against E. D. Matthews, B. E. Matthews, W. H. Matthews, and J. H. Parks, administrator of W. D. Parks, by bill filed in the chancery court of Williamson county on April 22, 1899, for the purpose of recovering balance claimed to be due on a note for \$800, executed to complainants' testator, February 21, 1894, and due January 1, 1896, with interest from date, and signed by E. D. Matthews, W. D. Parks, B. E. Matthews, and W. H. Matthews. The bill states and avers that complainants found in the bank box among the valuable papers of said William Jones, deceased, said note, which is indorsed on the back: "Received on within note interest to January, 1895. Wm. Jones." "Received on within note interest to Jan. 1, 1896. This March 30, 1896. Wm. Jones." "Received on the within note \$79.66. This July 25, 1896. Wm. Jones." That said note, with interest from January 1, 1896, is due and wholly unpaid, with the exception of a credit of \$79.66 made July 25, 1896. That W. D. Parks, one of the makers of said note, is dead, and J. H. Parks is his regularly qualified administrator. That defendant Matthews claims that said note has been paid in full in some real-estate transaction with William Jones during his lifetime, and, as complainants are informed, defendant Matthews and William Jones had a number of transactions, some of which appeared to be somewhat complicated. That complainants are constrained to seek the aid of the court in enforcing the collection of said note. That on February 21, 1894, defendants executed to William Jones their two notes, for the sum of \$800 each, due, respectively, January 1, 1895 and 1896, with interest from date. That said notes were secured by a mortgage on a house and lot in the city of Nashville, executed by defendants E. D. Matthews and wife, in which they covenanted that said house and lot was unincumbered. That Jones afterwards discovered that there was a prior mortgage on said house and lot held by the People's Building & Loan Association. That said house and lot was sold July 25, 1896, to Mrs. B. A. Carter for the sum of \$1,650. That out of said sale the mortgage of the building and loan association, amounting at that date

to \$619.56, and a commission of \$65 to the agent who negotiated the sale, and back taxes of about \$50, were paid, leaving of the purchase money about the sum of \$900, which came to the hands of William Jones under his mortgage above mentioned, which sum was applied to the payment in full of the first note above mentioned, with interest thereon, and the balance of \$79.66 was applied as a credit on the note sued on in this case. That complainants admit that William Jones released all liens he had by reason of his mortgage against the house and lot above mentioned, on the margin of the trust deed book, as he was required to do this by the purchaser of said property, but they deny that he thereby intended to show a satisfaction of the note sued on in this cause. The prayer of the bill is for decree in favor of complainants, and against the defendants, and each of them, for the amount of the note herein sued on, together with the interest thereon, less the credit of \$79.66 above mentioned, and for all costs of suit, and for general relief.

E. D. Matthews, on July 1, 1899, filed his answer to complainants' bill, in which he admits the debt of William Jones at the time stated in the bill, to wit, September, 1898, and the qualification of complainants as his executors. He admits the finding of the note as stated in the bill, but the production of the original note is demanded. Denies that said note is unpaid, but would show that the same had been paid and fully settled with William Jones in his lifetime, as far as respondents and the other makers of the note are concerned, and pleads that the same has been fully paid and discharged. It is denied that E. D. Matthews had a number of transactions with Jones. He had only the one referred to in the bill, out of which grew several negotiations in regard thereto. For several years he has been engaged in the business of real-estate agent in Nashville. One James Putman and wife were the owners of a certain lot in Nashville, which they had engaged respondent to sell for them, which lot was incumbered by mortgage to the People's Building & Savings Association at Nashville, dated April, 1897, upon which there was due the sum of \$744.16. William Jones was a depositor in the Commercial National Bank of Nashville at the time of its failure, in 1893, in the sum of \$3,693.55. Said bank was placed in the hands of a receiver by the federal authorities, and certificate of deposit was issued to Jones by J. W. Blake-more, receiver, for said amount. Jones had collected on this certificate, from time to time, in all 50 per cent. thereon, leaving unpaid a balance of \$1,846.77½. Respondent, acting for Putman, proposed to sell to Jones the lot above referred to for said certificate of deposit. Jones declined to purchase. After some negotiations between all three of the parties, it was finally agreed that Jones would turn the certificate over to respondent,

who would deliver same to Putman, and Putman would make a deed to said lot to respondent, who would execute his two notes of \$800 each to Jones, and make to Jones a mortgage on said lot to secure their payment. This was all done on February 21, 1894, and all papers bear that date. In the deed of Putman and wife to respondent, the consideration expressed is said certificate of deposit, Putman assuming the payment of the mortgage on the property to the People's Building & Savings Association. The certificate of deposit was turned over to the Nashville Trust Company to collect the dividends paid, and pay same in discharge of the prior mortgage to the building and savings association. From time to time the Nashville Trust Company collected the dividends on this certificate of deposit, in all 25 per cent., or \$923.40, 10 per cent. of same having been paid at the time when the above transactions were made. Afterwards, on July 25, 1896, said property was sold to Mrs. B. A. Carter for \$1,650. This was applied to the payment of expenses of sale, and the full discharge of the balance going to the People's Building & Savings Association, and the remainder was paid to William Jones. This left unpaid, on said two notes of \$800 each of respondent and others to Jones, \$625. On that date, to wit, July 25, 1896, Jones agreed to release respondent from further liability on said two notes, and agreed to look to Putman for the payment. In consummation of this agreement, Putman on that date executed to E. D. Matthews, as trustee for Jones, a mortgage upon certain other property in Nashville to secure the payment of said \$625, due two years after date, bearing interest from date, payable semiannually, Putman executing his note to respondent, trustee, accordingly. Jones understood and was a party to all these transactions, and, of course, assented thereto, and upon the margin of the above-mentioned mortgage of Matthews to Jones in the register's office of Davidson county (Book 184, p. 375) Jones executed the following release: "The entire debt secured by within instrument has been paid to me, the lawful owner and holder thereof, and I hereby release all lien or claim on the within-described property held to secure said debt. July 25, 1896. [Signed] Wm. Jones. Attest: F. B. Blair, Dep. Reg." By these transactions Jones intended to and did release the makers of said note from further liability on said two notes, and such was their agreement and understanding. Accordingly respondent has since collected from Putman, from time to time, the interest on his note to Jones for \$625, and paid same over to Jones, being four semiannual payments of interest, of \$18.75 each, including the interest up to July 25, 1896. These payments were made in checks to order of Jones as interest on Putman note, and are indorsed by Jones. E. D. Matthews does not owe to

Jones anything upon the note sued on in this case, or on any other account, and if there is anything due Jones it is from Putman, and not respondent. The mortgage to secure the same from Putman is still in full force, and the money can be collected out of same by complainants. Denied that Jones was not cognizant of all that was done and assented thereto. The lot mortgaged by Putman to Matthews, trustee, has since been sold by Putman to one Matthews, but said mortgage thereon remains in full force. Said mortgage and notes of Putman for \$625 are held by respondent, and he is ready and here offers to deliver them up to complainants. All the allegations not admitted or denied hereinbefore, or not heretofore answered, are hereby fully denied.

On August 5, 1899, J. H. Parks, administrator of W. D. Parks, filed his answer to complainants' bill, in which he admits the truth of the allegations contained in paragraph 1 of the bill as to the allegations under section 2. He says that he does not know where the complainants (executors) found the note sued on in this cause, but he denies that the same, with interest from January 1, 1896, is due and wholly unpaid, with the exception of the credit of \$79.66 paid July 25, 1896. On the other hand, he charges that said note has been paid and satisfied in full, as shown and set out in the answer of E. D. Matthews, to which he refers. It is true that respondent's intestate signed said two \$800 notes as security, but not as principal, although it appeared on the face of the note that he was one of the principals; that his intestate was only security, and never received a cent of the \$1,600; and complainants' testator, William Jones, accepted said notes knowing that respondent's intestate was only a security and not otherwise interested. On February 21, 1894, Matthews and wife executed to Jones a mortgage on the house and lot, as alleged in the bill, covenanting that the same was unincumbered, and it is denied that afterwards William Jones discovered that there was a prior mortgage held by the People's Building & Savings Association. William Jones knew of this mortgage at the time that said certificate of Blakemore, receiver, by and with Jones' consent, was placed with said Nashville Trust Company for the purpose of collecting the dividends, and applying the same to the payment of said mortgage, but the dividends, amounting to over \$900, arising from said certificate, were not applied to said mortgage, and said Jones knew that they were not so applied. Respondent's intestate knew nothing whatever of these agreements. Had said dividends been applied to said mortgage, then, in that event, the proceeds of the sale of the house and lot would have paid off both of said \$800 notes, and it is charged that it was the negligence of William Jones in not seeing that the dividends from said certificate were ap-

plied on the mortgage to the building and loan association, and hence respondent's intestate cannot now be held liable; that his intestate signed said notes with the understanding that said house and lot should first be held liable. On July 25, 1896, when said house and lot was privately sold, respondent's intestate was dead. Respondent qualified as administrator in December, 1896. He sets up the same release on the register's book of the mortgage set up by Matthews in his answer, and says that Jones then and there released respondent as security on said notes, and, in addition to releasing said lien and mortgage, the said William Jones on that day agreed with E. D. Matthews that the balance due on said two notes, of \$800 each, was \$625, and that the said Jones would look to Matthews for payment thereof, and agreed that Matthews should take the mortgage from Putman and wife, which was done, all of which went to release and relieve respondent's intestate. Respondent asks, "if necessary, that this answer be taken and treated as a cross bill.

We find the facts to be as follows: That on February 21, 1894, William Jones held a certificate of deposit in the Commercial National Bank for a balance of \$1,846.77½, originally issued by J. W. Blakemore, receiver of the Commercial National Bank after its failure, for \$3,693.55, upon which had been paid 50 per cent., leaving said balance of \$1,846.77½ due Jones on said certificate on February 21, 1894. That on that day James Putman and wife, Ella Putman, were the owners of a certain house and lot in Nashville, Tenn., which they conveyed by general warranty deed to E. D. Matthews for the consideration of said balance of said certificate of William Jones, issued by Blakemore, receiver, etc. That on the same day, in consideration of the balance of said certificate, E. D. Matthews executed to William Jones two notes, for \$800 each, bearing interest from date, one due January 1, 1895, and the other due January 1, 1896, with B. E. Matthews, W. D. Parks, and W. H. Matthews as securities on each of said notes, and that on the same day, to wit, February 21, 1894, E. D. Matthews and wife, Irene Matthews, executed and delivered to William Jones, to further secure said \$800 notes, a mortgage on said house and lot, which had on that day been conveyed by general warranty deed by Putman and wife to E. D. Matthews, in consideration of the balance of said bank certificate, which mortgage was duly acknowledged and properly registered in the register's office of Davidson county, Tenn., on the day of its execution. That on the said February 21, 1894, there was a prior mortgage on said house and lot to secure a balance then due to the People's Building & Savings Association of Nashville, Tenn., for \$744.16, which mortgage was assumed and agreed to be paid by said Putman, and was so expressed, set forth, and stipulated on

the face of the deed from Putman and wife to E. D. Matthews. That the certificate on which was due a balance of \$1,846.77½ was, by an agreement between Jones, Matthews, and Putman, deposited with the Nashville Trust Company, who was to hold said certificate, receive the dividends paid thereon by the receiver of the Commercial National Bank, and apply the same in satisfaction of the debt secured by the prior mortgage to the People's Building & Loan Association, and that under this agreement said certificate was so deposited with said trust company, and the dividends were so applied. That on July 25, 1896, said house and lot conveyed by Putman and wife to Matthews, and by Matthews mortgaged to Jones, was sold to Mrs. B. A. Carter for \$1,650 in cash, and that out of the proceeds of said house and lot there was paid certain taxes, real-estate agent's commissions, and the prior mortgage debt to the building and loan association, amounting then, after applying the amounts paid thereon by the Nashville Trust Company, and including interest to that date, to the sum of \$625. That prior to July 25, 1896, all accrued interest on both of said \$800 notes was paid up to January 1, 1896, and that on July 25, 1896, when said lot was sold to Mrs. Carter, and said debt to the building and savings association was paid off, one of said notes for \$800, with accrued interest from January 1, 1896, to July 25, 1896, amounting to the sum of \$327.20, was paid off in full to Jones out of the proceeds of the sale of said lot to Mrs. Carter, and was delivered by Jones to Matthews, and at the same time that said note was paid off in full, and taken up by Matthews from Jones, Jones credited on the back of the other \$800 note \$79.66, and retained said note, with said credit indorsed thereon, and did not deliver up this note as he did the other, which was paid in full, to E. D. Matthews, but retained the same, and after his death it was found in his bank box among his valuable papers by his executors, the complainants in this cause. On the same day, to wit, on July 25, 1896, William Jones indorsed upon the margin of the register's book, in the register's office of Davidson county, Tenn., where the mortgage from Matthews and wife to William Jones was recorded, this: "The entire debt secured by within instrument has been paid to me, the lawful owner and holder thereof, and I hereby release all lien or claim on the within-described property held to secure said debt. July 25, 1896. Wm. Jones. Attest: F. B. Blair, Dep. Reg." On the same day, to wit, July 25, 1896, James Putman and wife executed to E. D. Matthews, trustee, a mortgage upon other property in the city of Nashville to secure to William Jones the \$625 paid out of the proceeds of said lot due the building and savings association, and at the same time the said Putman executed his note to E. D. Matthews, trustee, for \$625, for the benefit

of William Jones, which was secured by said mortgage from Putman and wife to Matthews, trustee, in consideration of the fact that said building and savings association debt and mortgage had been paid out of the proceeds of the house and lot sold to Mrs. Carter. This note and mortgage from Putman is in the hands of Matthews, is the property of William Jones, and Matthews proposes to turn the same over to Jones' executors for collection, the same not having been collected, except four payments of interest semiannually due on said note. It is insisted by defendants that the entry on the margin of the register's book made by William Jones shows that said two \$800 notes and interest were paid in full, and that they do not owe any part of the note sued on, and that they were fully discharged from liability in consequence of the same. It is insisted, however, for complainants that this is only prima facie evidence of payment, and may be explained consistent with the theory that defendants do owe a balance on said note. We find that Mrs. Carter would not take the property unless it was freed of all incumbrances, and that in consequence of this Jones agreed to release his mortgage on said property, and we are of opinion, and so find, that it was not Jones' intention to show that the debt was fully paid, but only to release the property from further liability for said debt, and this conclusion is arrived at from a careful review of all of the testimony, taken together, as it appears in this record; and we find that this debt was not paid in full on July 25, 1896, but at that date, after crediting the note, as credited by Jones on the back thereof, with \$79.66, and crediting it also with the \$625 note executed by Putman, and secured by mortgage by Putman and wife on other real estate in the city of Nashville, which is shown to be amply worth the debt secured by said mortgage, there remained, due, as balance upon said \$800 note sued on, the sum of \$123, which, with interest to the date of the chancellor's decree, amounted to the sum of \$151.33, the amount found and fixed by the chancellor's decree. We find that Jones had present on July 25, 1896, both of said \$800 notes; that the one which was first due amounted at that time to \$827.20, including interest; that this note was paid in full out of the proceeds of the property sold to Mrs. Carter; and that this note was delivered up by Jones to Matthews. We find at the same time that Jones credited upon the back of the other note the \$79.66, and retained possession of the same, and that it was not delivered up by him to Matthews, as was the other note, which had been fully paid off.

Now, the entry made upon the register's book by Jones, in view of all that appears in this record, may be consistently explained away; but the fact that he at the same time delivered up one of the \$800 notes, which had been paid in full, and credited the other

with \$79.66, and retained possession of the same, and kept it in his bank box from that time till his death, and refused to, or at least did not, deliver up said note as he did the one paid before in full, cannot be explained in any reasonable way. If, as defendants insist, this note had been paid in full, why was it not taken up, as was the other? Moreover, when we come to add together the amount of the building and savings association debt, taxes, commissions, etc., and the amount paid to Jones on the two \$800 notes, we find that Jones only lacked a few cents of receiving enough to pay off one of the \$800 notes and interest in full, and to pay \$79.66 on the other. The chancellor decreed in favor of complainants, and against defendants, for \$151.33, balance due on said \$800 note, including interest, after deducting the \$625 note of Putman, and the \$79.66 paid to Jones, and the costs of the cause. From this decree, defendants E. D. Matthews and Parks, administrator, appealed, and have assigned errors. The error assigned by defendant Matthews is that the chancellor erred in rendering judgment against him for \$151.33 and costs. The errors assigned by defendant Parks are: First, that the house and lot was liable before his intestate, and that the whole proceeds of the house and lot should have been applied to the debt on which his intestate was liable; second, the release of Jones on the register's book operated to release his intestate.

The result, from what has hereinbefore been stated, is that the assignments of error are not well taken, and are overruled and disallowed, and the decree of the chancellor is affirmed. Defendants will pay the costs of the court below, and defendants and their sureties on the appeal bond will pay the costs of the appeal. All concur.

Affirmed orally by supreme court, March 14, 1901.

DIXON et al. v. SIMS et al.

(Court of Chancery Appeals of Tennessee.
March 7, 1901.)

SURETIES ON NOTE—LIABILITIES.

Where the evidence shows that a note signed by certain sureties was given for a half interest in a store, and does not show an agreement that it should not be collected, but was given only to strengthen the credit of the firm, as contended by the sureties, but shows that it was agreed by the payee that one-half of the proceeds of the sale of the goods should be applied on the note, which is shown to have been done, the assignee of the note can collect the balance due from the sureties.

Appeal from chancery court, Wayne county; A. J. Abernathy, Chancellor.

Injunction by Jesse B. Dixon and others against Shields Sims and others to restrain the collection of a note. From a decree in favor of the defendants, the plaintiffs appeal. Affirmed.

R. A. Haggard, for appellants. D. W. Broyles and John T. Morrison, for appellees.

BARTON, J. In stating the contentions in this case, we cannot do better than to adopt the very brief and sensible statement contained in the assignment of errors filed by Messrs. Pitts & Smith, which statement is as follows: "This is a bill to enjoin collection of what is claimed to be a balance of a note for \$560, made in 1892, by the complainants to the defendant J. E. Johnson. The chancellor dismissed the bill, giving a decree against complainants for \$340.99 and costs, and complainants appealed. The facts not in controversy are: One John Turman, a merchant living in Waynesboro, early in 1892, placed a small stock of goods in charge of defendant J. E. Johnson, at Moon, in Wayne county, to be sold and managed by him upon a small salary, Turman supplying more goods from his stock at Waynesboro from time to time as needed, and Johnson accounting to him for proceeds of sales as collected. J. E. Johnson admitted his brother, the complainant Robert F. Johnson, into the arrangement, dividing his salary with him, and the two conducting the business, together with some small farming operations, jointly as partners, though Turman dealt only with J. E. Johnson. After a few months J. E. Johnson purchased the stock of goods from Turman, giving his note to Turman for \$1,120, and shortly thereafter complainant Robert F. Johnson made his note to J. E. for one-half this amount, \$560, on which latter note the other complainants became sureties. It is upon the terms of the agreement at the time these sureties became such, and the subsequent dealing of the parties with reference to the settlement of this latter note before its transfer or alleged transfer to defendant S. Sims, in 1898, that the controversy arises. That controversy, as gathered from the pleadings, briefly but substantially stated, is this: The complainant says: (1) That J. E. Johnson, as an inducement to the sureties to sign the note for his brother, promised them that he would not transfer the note, but would hold it, as well as control the goods, until his brother's share of the profits should discharge it, and assured them that his only reason for wanting them to sign it was that it would show his business in better condition, and add to his credit. (2) That about October, 1893, defendant J. E. Johnson having controlled the business and handled the funds in the meantime, some of the creditors of the firm conducted as Johnson Bros. obtained judgment against them, whereupon the complainant sureties, becoming uneasy, insisted upon being protected against loss on account of their suretyship on said notes, and thereupon said J. E. and Robert F. Johnson sold and transferred to them for that purpose the entire stock of goods then on hand, and the accounts, valued by J. E. Johnson at

something over \$700; that complainants J. E. and T. M. Dixon then took out merchants' license, in order that the goods might be sold out, and the note to J. E. Johnson, on which they were sureties, paid; that, by agreement of all parties, J. E. Johnson was continued in charge for the purpose of disposing of the goods and collecting the accounts and satisfying the note, that being the only purpose of the transfer; that J. E. Johnson did sell the goods and collect the accounts, and complainants, supposing and believing the note settled, rested easy, and gave themselves no further concern about it, until sued on the note by J. E. Johnson's father-in-law, in 1898, about five years afterwards; and they charge that J. E. Johnson violated the agreement, and applied the proceeds of the goods and accounts turned over to him to his own use, the same having been entirely sufficient to have satisfied the note, and then transferred, or pretended to transfer, the note, which was many years past due, to his father-in-law, the defendant Sims, who, though he took it subject to all defenses, proceeded at once to bring suit on it, which suit the bill sought to enjoin. The defendant J. E. Johnson, on the other hand, says that he did not make the promises and assurances to the complainant sureties as they claim, and that the sale to them of the stock, etc., in the fall of 1893, was not for their protection as such sureties, as they allege, but was an outright sale for \$500, for which sum they gave their note, and that the trade was rescinded or recanted the same day, and said defendant and his brother placed back in charge as before, and that he thereafter credited upon the note his brother's share in the net proceeds of the goods and accounts. This is the substance of his contention. There is much in the pleadings and proof on collateral matters, such as the circumstances of the transfer of the note to defendant Sims, details of the collection and disposition of certain accounts, etc., but the above are the vital issues of the case; for, obviously, the note being transferred some five years after it was due, Sims took it subject to all equities affecting it in the hands of J. E. Johnson, without reference to the circumstances of the transfer, and it is undeniable that the goods, etc., transferred to complainant sureties were sufficient to have discharged the note on which they were bound, had the proceeds been applied to the agreement, as they contend it was. So that, as we understand the case, if the proof establishes the complainants' theory in reference to the transfer of the goods and the arrangement made in the fall of 1893, the decree of the chancellor is erroneous, and should be reversed, and complainants granted a perpetual injunction."

Such is the statement by complainants' counsel. But from the weight of the proof we find that complainants' contention and

theory is not sustained. We find that the note sued on, for \$500, was executed on the day it bears date, August 31, 1892, by R. F. Johnson, T. M. Dixon, J. B. Dixon, and C. F. Hollis, the last three being sureties, and was made payable to J. E. Johnson, and was given for a half interest in the stock of goods mentioned, which J. E. Johnson sold to his brother R. F. Johnson. We find that it is not true, as contended by the complainants, that it was agreed and understood that the note was not to be paid, and there was no agreement on the part of J. E. Johnson that the note should not be collected, and there was no agreement that it should be paid alone out of the stock of goods. We further find as a fact that the agreement as contended for by complainants at the time of the transfer of the goods and the arrangement made in the fall of 1893 was not made. We find that the agreement was that J. E. Johnson was to apply to the note the one-half of the proceeds of the goods that would belong to his brother, and that this was done. We find as a fact that it was not agreed that he should apply the entire proceeds of the goods. We find as a fact that he has properly accounted for the interest belonging to his brother that came into his hands. The result is that he is entitled to a decree for the balance that was due on the note. We find that the amount fixed by the chancellor in his decree for \$340.99 was the correct amount that was due on the note at the time of the rendition of the chancellor's decree. It therefore results that the defendant Sims is entitled to recover of the complainants R. F. Johnson, J. B. Dixon, T. M. Dixon, and C. F. Hollis, sureties upon said note, and of C. H. McCrory and J. V. Gallaher, sureties on the injunction bond, said sum of \$340.99, with interest from the date of the chancellor's decree. The cost below will be paid as adjudged by the chancellor, one-half by the complainants, and one-half by the defendants, including the cost before the justice of the peace. The cost of the appeal will be paid by the complainants and the sureties on their appeal bond. A decree will accordingly be entered. All concur.

Affirmed orally by supreme court, March 8, 1901.

GORE et al. v. BENEDIOT et al.

(Court of Chancery Appeals of Tennessee. Jan. 15, 1901.)

CONTRACTS — INSTRUCTION — PARTNERSHIP — JOINT OWNERSHIP — EVIDENCE — ESTOPPEL.

1. Plaintiff made a contract with T. whereby he was to cut logs belonging to plaintiff and raft them to market, in consideration of one-half the proceeds. T. transferred his interest in the contract to C., in an agreement reciting that T. had made a contract with plaintiff whereby he was to have one-half the amount the logs brought after being delivered. C. rafted the logs to market, and while he and plaintiff were

together defendant made an offer for the logs which was refused. The following day, C. without authority, sold the logs to defendant. Held that the agreement did not constitute C. a partner or joint owner, and plaintiff was entitled to recover possession of the logs.

2. The mere fact that plaintiff consulted with C. when the offer to buy was made was not holding C. out as a partner, and plaintiff was not thereby estopped from questioning the sale.

Appeal from chancery court, Davidson county; H. H. Cook, Chancellor.

Bill by M. L. and S. G. Gore, as Gore Bros., against Benedict Bros. and others. From a judgment in plaintiffs' favor, defendants appeal. Affirmed.

John McMillan and Crutchfield & Byrnes, for appellants. John Caruthers, for appellees.

BARTON, J. This bill was filed by M. L. and S. G. Gore, doing business under the firm name of Gore Bros., against Andrew and Chauncy H. Benedict, doing business under the firm name of Benedict Bros., and against George W. Clemens and G. O. Turner. The bill in this case is strictly a replevin bill, and was filed to replevy and recover a number of poplar logs lying in the Cumberland river, in or near Nashville. The charges are those strictly of a replevin case, viz. that the complainants were the owners of the property in question, were entitled to the exclusive right and possession of the property, and that it was unlawfully detained by the defendants. The answer was, in the main, simply a traverse of these allegations. The defendants denied that the complainants were the owners of the logs; that they were entitled to the exclusive possession of the logs; that the property was unlawfully detained by the defendants, or any of them, from the complainants; that the respondents are or were unlawfully claiming the logs, or that they were unlawfully exercising ownership or possession of the property. And then the answer concludes with these two sentences: "The facts are that the respondents Clemens and Turner sold said logs to respondents Benedict, which they had a right to do. They deny that the intention was unlawful." Such are the issues made by the pleadings. An exact finding of facts is important in this case, although the discrepancy in the testimony of the witnesses does not appear to be very great. The chancellor rendered a decree in favor of complainants. The defendants have appealed.

The complainants' claim, in substance, is that they were the owners of the logs, and had hired one G. B. Turner to cut and haul the logs to the river and raft them to the city of Nashville, with the understanding that for the services thus rendered he was to be paid a certain amount of the gross proceeds; he to bear all the expenses of cutting, hauling, and getting the logs to the market, and to receive one-half the proceeds of the logs when sold. The theory of the defend-

ants is that the defendants Benedict Bros. purchased these logs from one G. W. Clemens; that Clemens was authorized to sell them, either because he was a partner or a joint owner in possession, and authorized to make sale, having by contract purchased the right, privilege, and authority of G. B. Turner. It is also insisted by defendants that whatever the rights between Clemens and Turner and the Gore Bros., as between themselves, were, the conduct of the Gore Bros. was such as to justify the defendants in purchasing logs from Clemens, and that therefore they are protected in their purchase. This the complainants deny. While we do not believe that there was any purpose on the part of any of the witnesses to misrepresent the facts, there is a distinct difference in their version of what occurred in the original arrangement between the Gore Bros. and Turner; but it is evident, we think, that the differences between the parties and witnesses arose more from their construction of what occurred than from any attempt to differ as to actual facts. After a careful study and analysis of the evidence, we have arrived at the conclusion that a proper finding of facts, and a finding as exact as it is possible to make it, is as follows:

The Gore Bros. were the owners of a tract of land on which there was a lot of timber. M. L. Gore, acting for the Gore Bros., made a contract and arrangement with G. B. Turner that he should cut, haul, and deliver the logs at Nashville, the same to be rafted down the Cumberland river, for which services they were to pay Turner one-half of the proceeds of the sale of the logs; that is to say, Turner was to get the logs out and deliver them at Nashville, and was to bear all expenses incident to that, and the Gore Bros. were to pay Turner for his services one-half of what the logs brought on the Nashville market. It will be noted now that the Gore Bros. were the owners of the logs, or of the timber as it stood in the trees. Turner agreed to cut the logs, haul (or, as some of the witnesses state, "snake") them to the creek, which ran into the river, raft them, and deliver them at Nashville; and out of the proceeds of sale Turner was to receive one-half of whatever the logs might bring. Some question is made as to whether there was a specific agreement as to who should sell the logs. It was a matter of some doubt as to whether this was settled or agreed upon. It is clear that there was some discussion as to the matter, and the weight of the evidence is that Gore was to look after the sale. In the absence of any agreement about the matter, we take it that the Gore Bros. would have had the right, as the property was theirs, to sell the logs. The agreement simply appears to have been that for the services contracted to be rendered by Turner in cutting, hauling, rafting, and delivering the logs at Nashville, he was to receive one-half the proceeds of the logs sold.

There certainly never was any distinct agreement that Turner should be the owner of one-half of the logs. From the nature of the contract, this was impossible. It was not known how much it would cost to get, raft, and deliver the logs. Whatever it might be, this was to be borne by Turner. He could have no certain, definite interest in the logs,—at least, in the sense that any expense could be imposed on the one-half going to Gore Bros.,—because he was to bear all the expenses, whatever they were, of getting the logs to Nashville; and this might have exceeded one-half of what the logs should bring. Whatever it was, he was to bear it, and was to receive as his compensation for his outlay and his labor one-half of what the logs sold for; and, as we find as a fact, there was no agreement that Turner should sell the logs, but simply that he should have one-half the proceeds. After this contract had been made, Turner, finding himself embarrassed, and probably unable to do all the work and haul the logs, interested G. W. Clemens in the matter, and got him to do a part of the work, and finally made a written contract with him by which he transferred his interest in the matter to Clemens. The agreement between Turner and Clemens was in writing, and was as follows: "We, G. B. Turner and G. W. Clemens, have made the following contract as to getting out the Gore logs on Pine Lick creek: The logs are to be from 24 inches up. Turner is to cut the logs, or have it done, and snake them out, and squared up, so can load them, and in a place Clemens can get to them with wagon; and, all logs Clemens hauls to the lower yard at Whitiker's, Clemens is to have 30 cts. per hundred; and Turner is to have 20 cts. per hundred feet for cutting, snaking, and fixing roads to said logs. And what logs are left at the yard, close to Joe Bartley's, Clemens is to have 25 cts. per hundred feet for hauling them, and G. W. Turner is to have the same as above for cutting and snaking, and as above. And Clemens and Turner are, after logs are put on the yards above spoken of, to go equal expenses in rafting and carrying logs to Nashville, and, after sold, the 30 cts. and 25 cts. per hundred is to be paid as above stated. The balance of one-half of what said logs bring is to be divided equal between Turner and Clemens. Clemens has let Turner have thirty dollars' worth of corn, which is to have that amount (if not settled before) out of Turner's interest in said logs, and any amount Clemens pays for G. B. Turner by request of Turner is to have out of Turner's interest in said logs. G. B. Turner has heretofore made a contract with Gore as to the timber mentioned, and Turner was to have one-half of the amount the logs brought after delivered in Nashville, Tenn. A portion of said logs in this contract are all ready on the log yards. This Nov. 4, 1898. G. W. Clemens. G. B. Turner." It will be noted that this contract itself recites that G. B. Turner has

theretofore made a contract with Gore as to the timber mentioned, and that Turner was to have one-half the amount the logs brought after delivery in Nashville. It will be noted, also, that this contract, which is relied upon as a sale of Turner's interest in the logs, does not purport to be a complete sale or transfer of any definite interest in the logs, but is an agreement that Turner shall do certain work in getting out the logs, and that Clemens is to do certain hauling, and that the parties are to bear equal expenses in carrying the logs to Nashville, and to receive certain proportions of the proceeds for their work out of the one-half of the amount the logs should bring after delivery in Nashville, Tenn. It further appears from the evidence that the complainants had information that there was some kind of a contract between Clemens and Turner, but it does not appear that they were informed of the full details; and at one time, certainly, they declined to recognize Clemens in the arrangement. The logs were, however, cut and shipped to Nashville, when it appears that they were attached to another raft taken down by one McClure, which was sold to the Benedict Bros. Gore and Clemens appear to have been around together. And while they were together on the raft one of the Benedict Bros. made a proposition of purchase, which was declined. All that appears in reference to this transaction as to the acts of M. L. Gore in inducing the Benedict Bros. to believe that Clemens had any right to make a sale, or that he was a joint owner or partner, is that, when Mr. Benedict made his proposition, Clemens and Gore talked or conferred between themselves about the matter. It is obvious that the compensation of Clemens and Turner, who was interested with him, depended upon the price the logs would bring, and that Mr. Gore's or the Gore Bros.' interest also depended upon the same thing, and to this extent they were jointly or commonly interested in the property. It does not appear that Gore made any statement or in any way indicated that Clemens was interested in the logs, or had the right to sell the same, further than we have above stated. It does not appear that in Mr. Gore's presence Clemens claimed that he had the right to make the sale. It appears that Clemens, though not in the presence of Gore, stated to the Benedict Bros. that he had logs to sell for himself and the Gore Bros., and that he stated that the logs belonged to him and Mr. Gore. It appears that when Mr. Benedict made his first offer for the logs, at \$1.41 per 100 feet, Clemens and Gore declined to take it. It further appears that on the next day Clemens alone came to Mr. Benedict and asked him for his best price, and that Benedict then offered him \$1.50, and Clemens then agreed to sell the logs, received for himself \$10 on the purchase money, and directed the Benedict Bros. to retain certain amounts, and pay the same over to M. L. Gore for advances that Gore

had made to Clemens or Turner, or Clemens and Turner, and also to pay Gore one-half the proceeds of the logs, and to retain \$10 that the Benedict Bros. had theretofore advanced him. This was all that Clemens received; receiving at the time only \$10 in cash, and directing Benedict Bros. to pay Gore Bros. \$24.50 for amount paid hands by Gore, and also two additional items of 40 and 50 cents for the same purpose. These sums, together with the proceeds of one-half the logs, Benedict Bros. offered to pay M. L. Gore, but he declined to receive the same. The day after the transaction with Clemens, M. L. Gore took a party to look at the logs, and found one of the Benedict Bros. marking the logs in their brand, and thereupon notified him not to mark the logs, when Mr. Benedict claimed that he had bought them through Clemens, which purchase Mr. Gore repudiated, and afterwards sold the logs to Ransom Bros., and brought this replevin suit to recover the logs. The logs were branded with a T, which we suppose was Turner's brand, though it does not appear that the Gores ever authorized Turner to so brand them; and it does not appear that Turner accompanied the logs or was asserting any right of ownership over them, though Clemens' right was asserted and claimed through Turner.

The statement or bill of sale made out by the Benedict Bros. shows that their purchase of logs was as follows:

Nashville, Tenn., Jan. 25, 1899.	
George Clemens sold to Benedict Brothers, Manufacturers and Dealers in Hard Lumber, East Bank Cumberland River, Opposite Old Water-works.	
19,850 feet logs @ 1.50.....	\$297 75
Less hands paid by Gore by Clemens' order	\$24 05
Less hands paid by Gore.....	40
Less hands paid by Gore.....	50
Less money borrowed from Kittrell....	10 00
	34 95
	\$262 50
Cash to George Clemens.....	10 00

From this it would appear that the trade was made with Clemens as owner.

From these findings it is apparent that there was no partnership between the parties, but, at most, there was a common and a joint ownership, even if that can be said to be true, which we think it cannot. To constitute a partnership, there must be a relation which subsists between persons who have agreed to combine their property, labor, or skill in some business, and to share the profits or losses between them on some certain, fixed basis or community of interest. It is clear from the foregoing findings of facts, as we think, that in the first place the property in question was, without doubt, the property of the Gore Bros., and that the arrangement made was simply that Turner should do certain work in getting out the logs, in getting them to Nashville, for which he was to receive as full payment

for services and expenses one-half the proceeds of the logs. Such an arrangement does not constitute a partnership. *Bell v. Hare*, 12 Heisk. 617; *Whitworth v. Patterson*, 6 Lea, 124; *England v. England*, 1 Baxt. 108; *Polk v. Buchanan*, 5 Sneed, 727; 17 Am. & Eng. Enc. Law, p. 890 et seq., and notes. But we do not think there was even a joint ownership in the logs. Under the arrangements made, there never was a time prior to their delivery at Nashville, or even prior to their sale, when it could be said that Turner or Turner and Clemens had a half interest in a certain number of logs. The agreement was that they were to do all the work and bear all the expenses of cutting, hauling, rafting, and delivering these logs in Nashville, and for this were to have one-half the proceeds of the logs when sold. Various witnesses at times state that Turner was to be a "halver," as they put it,—to get out the logs on shares, etc. But it is evident from all the evidence that he was simply to be paid for the services and expenses of one-half the proceeds of the logs when sold, acting under the arrangement and agreement as made. It will be seen that the Gore Bros. had advanced certain sums of money to pay hands employed, and when Clemens made his pretended sale he left this amount so advanced to be paid Gore. So we think it clear that there never was a time when it could be said that Turner or Clemens had a certain, fixed interest in the logs. There never was a time when the creditors could have levied upon these logs and gotten any certain or fixed interest. There certainly was no partnership, and there was no joint ownership, except that, under the agreement, out of the proceeds Turner was to receive one-half of the gross proceeds, to pay him for his labor and expenses, when he did the work contracted to be done. This being so, the result is that there was neither a partnership, nor was there a joint or common ownership of the property, such as would give Turner, or Clemens, claiming through him, the right to sell or dispose of the property, nor was there any agreement that Turner or Clemens should have a right, as agent, to sell the logs; and we are not able to find that there was anything in the conduct of the Gore Bros., or either of them, that would justify the Benedict Bros. in believing that Clemens had the right to make the sale. It was their duty, and incumbent upon them, to make inquiry as to his rights. It appears that before the pretended sale Mr. Gore spoke to Mr. Benedict about detaching the logs from the raft which Mr. Benedict had bought, and that thereupon Mr. Benedict said to leave them as they were, and whoever bought them could detach them. We think this was enough to put the Benedict Bros. upon notice. But, at least, it may be said that there is not shown any act on the part of M. L. Gore or the Gore Bros. which

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would estop them to deny Clemens' authority to make the sale. It is not necessary for us to decide whether or not Clemens or Turner may or may not have had a lien upon the logs and their proceeds for their compensation according to the contract, as that question is not involved in this case. What we do decide is that, in our opinion, upon the facts as we find them, the title was in the Gore Bros., and they were entitled to the possession of them, and Clemens did not have the right to sell or dispose of this property. It therefore follows that the decree of the chancellor in favor of the complainants, holding that they were entitled to recover, was correct, and the same is in all things affirmed, with costs. All concur.

Affirmed orally by supreme court, January 23, 1901.

CALLENDER v. TURPIN et al.

(Court of Chancery Appeals of Tennessee.

Feb. 9, 1901.)

ATTORNEY AND CLIENT—EVIDENCE—EXCEPTION—SUFFICIENCY—RECORD—AMENDED BILL—COPYING IN TRANSCRIPT—REVIEW—ATTORNEY—EMPLOYMENT—SERVICES—VALUE—EVIDENCE—ADMISSIBILITY—ISSUES—ADMINISTRATOR—PERSONAL ASSETS—REALTY—SALE.

1. An exception to all the proof in complainant's deposition in regard to any conversations or transactions with plaintiff's intestate is too vague and indefinite to be considered on appeal.

2. Where the record did not show that the chancellor acted on an exception to evidence, the exception will not be reviewed on appeal.

3. Where complainant's offer to file an amended bill was refused, and there was no bill of exceptions or decree making the amended bill a part of the record, the copying of the amended bill in the transcript did not make it part of the record, so as to present the ruling of the trial court for review.

4. Where defendant's intestate had been convicted of murder, and complainant, at the instance of the intestate's attorneys, went to different parts of the county and secured affidavits and testimony on which a new trial was granted, and in the presence of the intestate assisted in the examination of the witnesses on the hearing of the motion, a finding that complainant was employed as counsel for the intestate was proper.

5. Where complainant went to different parts of the county and secured affidavits and testimony showing that the jurors by whom defendant's intestate had been convicted of murder had previously expressed an opinion on which testimony a new trial was granted, and assisted in the examination of witnesses on the hearing of the motion, a decree awarding complainant \$250 for his services will not be reversed as excessive.

6. The contention that the decree was erroneous because it awarded complainant \$250 as an attorney for services rendered as a detective was without merit.

7. Where complainant filed a bill for services rendered in securing defendant's intestate a new trial, evidence as to services rendered on a second trial of the intestate was properly excluded as not within the issues.

On Rehearing.

Where there were unappropriated personal assets in the hands of the administrator sufficient to satisfy complainant's judgment against the estate, complainant was not entitled to an order for the sale of the intestate's realty.

Appeal from chancery court, Sumner county; J. S. Gribble, Chancellor.

Bill by W. S. Callender against F. B. Turpin, as administrator of the estate of E. B. Turpin, deceased, and others. From a decree in favor of complainant, defendant administrator appeals. Modified.

Dismukes, Seay & Seay, for appellant. Rutherford & Rodes, for appellee.

MURRY, J. This suit was brought by bill filed in the chancery court of Sumner county, Tenn., by W. S. Callender, to recover compensation for services rendered E. B. Turpin, now deceased, in the case of the state of Tennessee against E. B. Turpin for the murder of William Carter, tried in the circuit court of Sumner county, Tenn., and afterwards, on change of venue, in Wilson county, Tenn., from F. B. Turpin, administrator of the estate of E. B. Turpin, deceased. The bill states and avers as follows: "Your complainant, W. S. Callender, would respectfully show to your honor that some time in the year ——— Edward B. Turpin became involved in a difficulty, and shot and killed William Carter upon the public square of the city of Gallatin. He would show your honor that said Carter was a popular young man and had many friends, while Turpin was exceedingly unpopular and possessed many powerful enemies. He would further show to your honor that, so strong was the feeling against Turpin, he had to be removed from the jail at Gallatin to the jail at Nashville to prevent his being lynched by a mob. Your complainant would further show that at a succeeding term of the circuit court at Gallatin said E. B. Turpin was tried and convicted, and condemned to death by his honor Judge Arthur Munford. Your complainant would show that, to such an extent was the public feeling and prejudice aroused, that it extended to the attorneys of said E. B. Turpin, who lost many friends by performing the necessary legal duties in his behalf, and that they lost social caste and standing in championing his cause. Your complainant would show that after the first trial in which Turpin was condemned, and while his motion for a new trial was pending, that complainant, W. S. Callender, was employed for the purpose of seeing what evidence could be gotten together and what affidavits obtained to sustain said motion. He would show your honor that upon evidence discovered by him, and upon affidavits taken and filed in the case, said Turpin was granted a new trial, and thereby his life was saved. He would show your honor that he has never received any remuneration for this work; that it is a just and subsisting debt against E. B. Turpin, who is now dead. He would show your honor that Frank B. Turpin, who is a nephew of said Edward B. Turpin, and whose home was in another state, came to

this state and qualified as the administrator of E. B. Turpin. He would further show that this estate was worth many thousands of dollars, and the said E. B. Turpin gave bond in the sum of \$——, with two nonresidents securities. He would further show to your honor that complainant is informed and believes, and on said information and belief charges and avers, that said F. B. Turpin has now left the state for good, and will not return thereto, or, if he returns at all, it will be at some future, distant time. He would show your honor that there is now no one within the state of Tennessee upon whom process can be served or against whom a judgment can be taken. He would show your honor that said E. B. Turpin died seised and possessed of a tract of land lying in district 9 of Sumner county, containing 5½ acres, and is bounded on the north by Bentley, south by Haynie, east by Blythe, and west by Trousdale. He also died seised and possessed of a tract of land lying in North Gallatin, containing 22½ acres, and bounded north by the estate of Arch Miller and J. C. Rodemer, south by Martha Haynie, Oliver Miller, and Cole Bodie, east by the L. & N. R. R., and west by Blythe street. He also owned at the time of his death a house and lot on Smith street in the town of Gallatin. Said house is not numbered, but it is the same in which Turpin was living at the time of his death. He would show your honor that F. B. Turpin purchased with part of the money belonging to the estate the hotel in the city of Gallatin situated upon Main street, and known as the 'Trousdale House.' Complainant would further show that F. B. Turpin, so complainant is informed, and upon this information charges and avers that it is his belief, has removed from the jurisdiction of this court all the personal estate of E. B. Turpin, deceased. Complainant would now ask the court to grant writs of attachment against the estate of E. B. Turpin, deceased, and that this court appoint another administrator for the estate of said E. B. Turpin, if the same shall be necessary. If this cannot be done, he prays the court to grant him writs of attachment and injunction against this property, upon the ground that said F. B. Turpin is a nonresident of the state of Tennessee, and that ordinary process of law cannot be served upon him. Complainant would further ask the court for a judgment for his attorney's fees for legal services performed for E. B. Turpin, deceased, in the case of the state against E. B. Turpin, in the sum of \$600, and for general relief." Attachment writ was issued and levied on the real property described in the return indorsed on said attachment writ, belonging to the estate of E. B. Turpin, deceased.

Defendant F. B. Turpin, administrator, on April 30, 1898, filed a demurrer to complainant's bill. The grounds of demurrer are that real estate belonging to the heirs of E. B.

Turpin is sought to be subjected to the payment of complainant's claim, and that the heirs of E. B. Turpin are not made parties defendant to said bill. When the demurrer was presented for argument, complainant asked leave to make the other heirs of E. B. Turpin parties to the cause, which amendment was allowed and made, and thereupon the demurrer was overruled and disallowed. On the 9th day of September, 1898, defendant F. B. Turpin answered complainant's bill, in which he states and avers as follows: "That it is true, as alleged by the complainant, that Edward B. Turpin, deceased, who was the uncle of this respondent, became involved in a difficulty in the town of Gallatin in February, 1892, with one William Carter, and which difficulty resulted in the death of said William Carter; and that he was a popular young man, with many friends, is also true, and that E. B. Turpin was quite unpopular and had many enemies; and it is true that E. B. Turpin was removed from the jail here to the one in Nashville. But respondent claims that there was no necessity for said removal, as he believes and has been informed that there was no danger of mob violence. But as to how this was, respondent supposes, is wholly and totally immaterial to this issue, as the said facts, be as they may, shed no light whatever upon the question involved. And it is true that upon the first trial the said E. B. Turpin was convicted of murder in the first degree, and this verdict was set aside and a new trial awarded or granted the defendant. It may be true, as alleged by the complainant, that the prejudice against E. B. Turpin was so strong that it extended to the attorneys of said Turpin, and it may be true that the attorneys who were employed by him and who represented him lost some friends; but, while admitting that it may be true that such prejudice did really extend to the attorneys of E. B. Turpin, yet respondent denies most positively that any such prejudice extended or existed towards this complainant, or that complainant lost any social standing whatever; and respondent most positively denies that complainant's character or social standing was in any way affected by his said or alleged connection with said case, as will be fully shown by the proof. Respondent denies that complainant was employed to get any affidavits upon motion for a new trial, and he denies that complainant discovered said evidence, or was employed by E. B. Turpin, or any one authorized to represent him. It may be true, and possibly is true, that complainant did go some ten or twelve miles from Gallatin, at the instance and request of one of Turpin's attorneys, and procured some two or three affidavits; but respondent denies most positively that he rendered this service at the instance of or by the employment of E. B. Turpin, as will be fully shown and developed by the proof in the cause. It is also

true that respondent qualified as administrator of his uncle E. B. Turpin, and said qualification was had in the county court of Sumner county, the 30th of December, 1896, and that after said qualification as such administrator he remained in Gallatin, winding up his uncle's estate, for a year, and this claim of complainant was never presented to him, and he knew nothing of the existence of the same, and as said administrator soon after his qualification, in December, 1896, he published a notice in the Gallatin Examiner, a newspaper published in Gallatin, directing and requesting all parties and persons having claims of whatever character against the estate of E. B. Turpin to present them or file them with him, as administrator, but this claim was never presented either by complainant or any one for him; and respondent during the whole year 1897 was in Gallatin, living here and making it his home, and only left here in December, 1897, and his residence and stay in Gallatin was well known to the complainant; but it does look a little strange that the complainant should have a meritorious claim against a solvent estate, and that he never presented it to the administrator for payment, and during this time the complainant was hard-run, and being pressed on debts that he owed, and that he was living at Hendersonville, in Sumner county, only some ten miles from Gallatin, and the respondent was in Gallatin, with an estate worth many thousands of dollars, with published notice in a newspaper directing and requesting him and all others who had claims to present them for payment; yet this complainant sits quietly by with a \$600 claim or debt against the estate, and never presented it,—never demanded its payment. To say the least of it, reading between the lines, the whole matter looks as an afterthought. As to the allegation that respondent purchased the Trousdale Hotel, in Gallatin, and paid for it wholly or in part out of the funds belonging to the estate of E. B. Turpin, said allegation is without foundation and is false; and said statement or allegation is a reckless one, uttered and stated by complainant without regard or respect for the facts of the case. Not one dollar of money belonging to the estate was ever used for said purpose, and every statement and intimation to that effect is totally without foundation and false; and if the complainant had taken the time, or wanted the facts and truth of the transaction, he could easily have ascertained that not a dollar belonging to the estate went into said purchase, and the proof will fully show the truth or falsity of said statement. The complainant alleges that both the sureties on complainant's bond are nonresidents of the state. This is true. But is it not strange that this complainant did not ascertain this fact until after respondent had left the state, and more than a year after his qualification as administrator? Respondent again denies that thi

complainant has any legal, equitable, or just claim against the estate of his intestate. He was never employed by his said intestate nor by any one authorized to represent him; and said complainant was never employed in said case, was never recognized or treated as an attorney in said case, and is not entitled to a judgment or decree in this or any other amount, as he was never employed in said case, and was never recognized or treated as an attorney in the case, by either E. B. Turpin or any of his counsel, as the proof will fully show. Respondent would here state and show to the court that E. B. Turpin was acquitted at Lebanon in June, 189-, and after that time he lived most of the time in Nashville, Tennessee, and remained there until July, 1896, when he came to Gallatin, and was taken sick, and never recovered, dying in December, 1896. And during this time complainant was living in Nashville, or claimed to have been living there, and this claim was never presented to E. B. Turpin during his life, or to his administrator, and said alleged claim was never heard of for more than three years after the alleged services were said to have been rendered. E. B. Turpin was a man of large estate, and long before his death all of his attorney's fees were paid or agreed upon, except probably a small balance to one of them, which has long since been paid. Respondent denies that complainant was ever employed in said case as an attorney, and he denies that said complainant has any right or claim against said estate. He denies that the social or legal standing of the complainant was in any way affected by his said alleged connection with the case. And, if his social or legal standing was in any way affected, this respondent, personally or as administrator, is in no way responsible for the same. For, if complainant rendered any services, he did not do so at the request or solicitation of E. B. Turpin or any one authorized to bind or represent him. But, if said service alleged to have been rendered was performed, the amount stated and fixed in complainant's bill is exorbitant and outrageously high and out of all reason. If complainant is entitled to any compensation at all, or rendered any services, then he must look to the party or person who procured him to render the same, and not to your respondent. All allegations not hereinbefore specifically denied are now generally denied."

We find the facts to be as follows: That complainant, W. S. Callender, was a practicing lawyer of Gallatin bar prior to February, 1892, when E. B. Turpin killed William Carter, and that he continued in the practice of law at Gallatin for some time thereafter, when he moved from there to Nashville. That he had no connection whatever with the case of the state against E. B. Turpin for the murder of William Carter until the trial at Gallatin that resulted in a verdict of

murder in the first degree, without mitigating circumstances, and that, while the motion for a new trial was pending, complainant learned that a juror who tried the case, by name of Williams, had repeatedly expressed himself to the effect that Turpin was neither more nor less than a murderer, and ought to be hung. That he remarked this in the presence of J. J. Vertrees and S. F. Wilson, two of the attorneys for Turpin, and that complainant was asked by them if he thought he could procure an affidavit to that effect, and replied to them that he did not know; that he could try. Thereupon Turpin, Vertrees, and Wilson conferred together a few moments in the circuit court room, and Vertrees and Wilson came back to complainant and said they would like to employ him to go and see after this matter. Vertrees procured a buggy, and complainant procured W. W. Pardue, a notary public of Sumner county, to go with him (complainant). That they went first to Mr. Rose, who lives several miles in the country, and Rose denied knowing anything about what they wanted stated in the affidavit; and complainant came back and reported this to Mr. Vertrees, and informed Vertrees that he (complainant) was of opinion that the necessary affidavits could be procured in the Center Point neighborhood, where Juror Williams lived, and Mr. Vertrees told complainant to attend to the matter at once. Thereupon complainant made the first trip to Hendersonville the same evening, and found, by talking to the relatives of Williams, that he had made the statement to his two sisters-in-law. It was then about dark, and complainant returned to Hendersonville, some four or five miles distant, and hired a conveyance, and got Mr. P. B. Willis to go with him to where the ladies lived, to have their affidavits taken before said Willis. The affidavits were taken that night to complainant, and marked "Filed" by J. A. Trout, and delivered by complainant to J. J. Turner, one of Turpin's attorneys. Complainant learned from the two ladies that Juror Williams had made the same statement to his two brothers-in-law, whose affidavits complainant could not then get, but informed Turpin and his attorneys of these facts. Complainant was asked if he could go back and procure the affidavits of these two brothers-in-law. Complainant went back and procured the two brothers-in-law to come to Gallatin, and complainant wrote the affidavits of said two brothers-in-law, to which they were sworn by J. A. Trout. The next day complainant went to Jerry Turner's neighborhood, about 20 miles from Gallatin, and found out what Jerry Turner, another of the jurors, had said upon the same subject, if anything. That complainant found out that Juror Jerry Turner was in Gallatin the day of the killing, and that he had expressed himself freely in regard to it; and the parties were subpoenaed to Gallatin, and their af-

affidavits taken. That upon the hearing of the motion for a new trial complainant was requested to be present and suggest to the attorneys upon the examination of Juror Williams, and also on the cross-examination of the parties who had made the four affidavits, which complainant did. That Turpin was present and saw all that was going on, and knew that complainant had taken these affidavits upon which Turpin obtained a new trial. That, after the new trial was granted, J. J. Vertrees, in the court room, in the presence of Turpin, requested complainant to look up all new evidence that would be of benefit to Turpin, and complainant was specially requested to find something, if it could be done, to contradict Miss Ella Lewis. Complainant found that Miss Lewis had told Miss Lucy Holden that immediately preceding the difficulty she (Miss Lewis) was talking to Mr. William Carter in front of Beebe's store, and she requested him not to go out and have any difficulty with Turpin,—that he would probably get hurt,—and that Carter replied that Turpin, not himself, would be the man who was hurt. This evidence was important to Turpin, and was used on the trial at Lebanon. That complainant ascertained from John Frakes that, a few days before the killing of Carter, Turpin had approached him (Frakes) and asked his protection, or showed from his actions that he wished Frakes to protect him from Carter (Frakes being an officer), and that a day or two after this Carter approached Frakes and asked him why he protected Turpin on that occasion, and Frakes replied, "Billy, you and Turpin are both my friends, and each of you are always cussing the other," and that he had done what he could to keep the peace, but told Carter, "If you attack Turpin, you had better shoot quick, or he will get you," as he is always prepared. That this was important testimony from the standpoint of Turpin's defense. Complainant was requested to go to Lebanon and aid the attorneys on the trial in bringing out these two exact points, and he went from Gallatin to Lebanon to the trial, on which these two points were brought out upon the examination of said two witnesses. Complainant received a letter from John J. Vertrees to investigate the character of Ed Hyde,—that he wished it before the next trial,—and requested complainant to look up the testimony to thoroughly impeach Hyde. Thereupon complainant investigated the records at Gallatin and Nashville, and found that Hyde had been repeatedly indicted for gambling and running gambling houses, and had a transcript of the same prepared and mailed to Mr. Vertrees. Mr. Vertrees wrote to complainant to ascertain, if possible, the whereabouts of a man here that had a patent wheat fan, who was supposed to know important facts in the defense of Turpin; but complainant was never able, after diligent search, to find this man. Complainant was requested to, and

did, have pictures taken of the north side of the square in Gallatin, Tenn., showing the position of the parties at the time of the shooting, in which a horse and wagon belonging to John Iss and a horse that some one had hitched to some of the posts was directly between one of the state's witnesses and the shooting. These pictures were delivered to Capt. Turpin in person, and he gave complainant the money to pay for taking them. This occurred while Capt. Turpin was in the Nashville jail. While Capt. Turpin was in jail at Nashville he frequently sent for complainant and conferred with him in reference to obtaining information and in reference to what evidence had been found, and with reference to investigating witnesses and other parties, so as to ascertain the statements of the witnesses. Complainant frequently demanded payment for his services from Capt. Turpin, but never received anything from him or any one else for said services. That complainant talked with the various witnesses, and ascertained what each witness would state, and by talking to other parties ascertained that facts could be proved by them which had not theretofore been developed on the former trial at Gallatin, where Turpin was convicted. The services of complainant, Callender, were valuable, and the facts ascertained by him were important and material to Turpin's defense. That compensation for the services of the complainant, Callender, is still due, owing, and unpaid, and that he is entitled to recover from the defendant F. B. Turpin, as administrator of E. B. Turpin, deceased, the amount due as reasonable compensation for the services sued for in the original bill. That said services rendered on and in reference to the motion for a new trial at Gallatin, Tenn., which alone are sued for in this cause, are reasonably worth \$250,—the amount allowed by the chancellor,—with interest from the date of the filing of complainant's original bill.

On the final trial of this cause the defendant excepted to all proof of complainant in complainant's deposition in which it was sought to prove any conversations or transactions of complainant with deceased, E. B. Turpin. We can give no effect to this exception, however, because (1) it is too general, vague, and indefinite; (2) because the chancellor never acted upon said exceptions one way or the other, as appears from the record, and said exceptions were waived by the party excepting.

Complainant on the trial of this cause offered to file an amended bill setting up services and value thereof after the new trial was granted at Gallatin; and the chancellor declined to allow said amended bill to be filed, and excluded all proof except as to services rendered in procuring new trial as sued for in the original bill, and sustained defendants' exceptions as to proof of any services rendered by complainant after the

motion for a new trial was granted, and the value of any such services. The defendants based their resistance to the motion for leave to file said amended bill on the grounds that complainant had not shown proper diligence, and the matters sought to be recovered for on the amended bill were barred by the statute of limitation of two years and six months and of six years. There is no bill of exceptions in this cause. The amended bill offered by complainant, and which the chancellor refused to allow filed, is not made a part of the record by bill of exceptions or by decree or otherwise. It is copied into the transcript by the clerk and master, but there is nothing making it part of the record, or showing that it was part of the record. Turpin died in December, 1896, defendant F. B. Turpin qualified as administrator December 30, 1896. Amended bill offered, and leave asked to file it December 8, 1899. Turpin was acquitted in June, 1893.¹ So the matters set up in amended bill, and sought to be recovered for, were barred by both the statutes of limitation of two years and six months and of six years. But we cannot look to this amended bill, or the action of the chancellor thereon, with the view to saying whether the chancellor was right or in error in refusing to allow said amended bill filed, as the amendment is not part of the record. The original bill only set forth services rendered on the motion by E. B. Turpin for a new trial, and sought to recover compensation for said services only; and the chancellor was correct in confining the proof to the issues as to said services and compensation therefor, and in excluding all proof as to other services and compensation not sued for. The chancellor decreed in favor of complainant and against defendant, as administrator of E. B. Turpin, deceased, the sum of \$250, and two-thirds of the costs of the cause, and in favor of defendant and against complainant the other one-third of said cost. From the entire decree of the chancellor, except that part refusing to allow complainant to file his amended bill, defendant F. B. Turpin, administrator, etc., of E. B. Turpin, has appealed and assigned errors.

The errors assigned by the defendant are that the chancellor erred: (1) In finding that complainant was counsel for defendant's intestate, or represented him in any way. (2) In finding that complainant was employed by defendant's intestate, or by any one authorized to employ complainant for him. (3) In finding that defendant's intestate was indebted to complainant in the sum of \$250, or any other sum. (4) In finding that complainant rendered defendant's intestate any services as attorney. (5) It was error to give complainant decree for any amount as attorney. The proof shows that, if he rendered any services, it was as detective, and not as attorney, and he sues to recover for services

rendered as attorney, and not as detective.

Turpin had been convicted for murder in the first degree, without mitigating circumstances, and a new trial was of the utmost importance to him; and this new trial was procured upon the efforts of complainant, almost alone, as appears from the record. He went to the neighborhood of two of the jurors who tried the case, and who lived in different parts of Sumner county, Tenn., looked up the neighbors of said two jurors, conversed with them, learned that each of said jurors had formed and expressed an opinion against Turpin,—one, at least, saying that Turpin was nothing but a murderer, and ought to be hanged; that these opinions were expressed by said jurors before they were taken upon the jury which tried Turpin. He took the affidavits of various neighbors of each of said jurors, and produced them upon the hearing of the motion for a new trial. The witnesses and jurors were brought before the court by the state for cross-examination as to the witnesses and examination as to the jurors, and Callender sat by and aided in this examination and cross-examination. He was employed to do this work, and did it. His services were valuable to Turpin on this motion for a new trial. The affidavits and statements of the witnesses were very material and important to this man Turpin, and we are of the opinion that the \$250 allowed by the chancellor to complainant for said services on and in reference to said motion for a new trial, in view of all that appears in the record, was very reasonable and little enough compensation for said services. We find from the record that complainant rendered much other valuable services for defendant during the time said case remained in court after the new trial was granted, reasonable compensation for which would augment his compensation considerably if the record was in such shape as to allow him to recover for services rendered under employment after the new trial was granted; but the condition of the record forbids any recovery for these services, because not averred in, or sought to be recovered in, the bill.

The result is that there is no error in the chancellor's decree, and the assignments of error are overruled and disallowed, and the chancellor's decree is affirmed, except as to the costs. In view of all that appears in the record, we are of opinion that the complainant ought not to be adjudged to pay the one-third of the costs as decreed by the chancellor, and to this extent the chancellor's decree is modified. The defendant will pay all the costs accrued in the court below out of the assets of the estate of his intestate, and execution will be issued therefor, to be levied on the goods and chattels, rights and credits, of his intestate in the hands of F. B. Turpin to be administered. Decree will be entered here in favor of complainant and against F. B. Turpin, administrator, etc., of E. B. Tur

¹ See rehearing, page 1063.

pin, deceased, and W. C. Dismukes, security on the appeal bond, for \$250, and against F. B. Turpin, administrator, etc., of E. B. Turpin, deceased, for \$43.75; the interest on said \$250 from March 4, 1896, the date of the filing of complainant's original bill, and also for the costs of the appeal in this case. All concur.

(Feb. 18, 1901.)

This case is again before us, on a petition to rehear and to correct alleged errors in the finding of facts.

The first error insisted upon is that this court found that the amended bill presented on December 5, 1896, was not properly in the record by bill of exceptions, or by the exceptions properly filed. This court did find and hold that the amended bill offered by complainant, and which the chancellor refused to allow filed, is not made part of the record by bill of exceptions, decree, or otherwise, and to this finding and holding we adhere. It was not allowed to be filed, and did not become part of the pleadings in the cause or part of the record, and it could only be made part of the record by bill of exceptions, or order or decree of the chancellor in lieu of bill of exceptions, making said offered amendment part of the record in the cause. The learned counsel for complainant seems to mistake the order refusing to allow the amendment filed for the amendment itself. The complainant did except to the action of the chancellor declining to allow said amendment filed, and this appears as part of the minute orders and decrees of the court; but this does not make, or have the effect to make, the amended bill itself part of the record. There is what purports to be an amended bill copied into the transcript, but this alone cannot make it a part of the record, and we cannot know whether this was the amended bill offered, and which the chancellor refused to allow filed, or not. Nor can we say that the chancellor should or should not have allowed the amended bill filed, or that he was in error in refusing to allow the proposed amended bill filed, unless it was before us for inspection. The amended bill itself must be made part of the record, so that it can be examined and inspected, before we can pass upon it and the chancellor's action in reference thereto, and before we can say that the chancellor was right or wrong in refusing to allow it filed. The opinion heretofore filed, as it read, did hold that the services rendered or claimed to have been rendered were rendered prior to June, 1893, and that Turpin was acquitted in June, 1893, which was an error in the date in typewriting the opinion, and has been corrected in the original opinion so as to give the true date found, to wit, in June, 1894, instead of June, 1893. The opinion, as it read, did, by leaving out part to be copied in original opinion, make the finding and holding read that the matters set up in the amended bill, and sought to be recovered for, were barred by

the statute of limitations of two years and six months and of six years, whereas, if the opinion had been copied as it should have been, it would have read "and it is insisted by the defendant that the matters set up in the amended bill, and sought to be recovered for, were barred by the statutes of limitations of two years and six months and of six years," and the opinion filed has been so corrected as to make it so read.

It is further insisted that the court erred in not granting a decree for sale of the real estate attached in this cause. This was real estate that descended to the heirs at law of E. B. Turpin, deceased, upon his death, and can only be subjected to payment of his debts after exhaustion of the personal estate. The personal estate is not shown to have been exhausted in the payment of debts, or to have been fully administered; but, on the contrary, it appears that there are in the hands of the administrator unappropriated assets in amount largely in excess of complainant's decree, and the court therefore declines to order a sale of said attached property. F. B. Turpin was appointed and qualified as administrator in December, 1896, moved from the state in December, 1897, and has ever since resided out of the state.

The court, of its own motion, corrects the opinion and decree so as to render decree in favor of complainant against F. B. Turpin, administrator of E. B. Turpin, deceased, for \$250, and \$43.75 interest thereon accrued, and the cost of the court below, and against F. B. Turpin, administrator, as before said, and W. C. Dismukes, security on the appeal bond, for the costs of the appeal. The petition is allowed to the extent hereinbefore indicated, and dismissed as to all other matters. The opinion and decree heretofore filed and entered will be corrected as herein indicated, and the decree, with this modification and correction herein indicated, is affirmed. All concur.

Affirmed orally by supreme court, March 16, 1901.

MOORE v. WOOD et al.

(Court of Chancery Appeals of Tennessee.
March 2, 1901.)

FRAUDULENT CONVEYANCES—FRAUDULENT CHATTEL MORTGAGE—SECRET AGREEMENT—VOID MORTGAGE—CONVERSION OF MORTGAGED PROPERTY—USE OF PROPERTY BY MORTGAGOR—RES JUDICATA.

1. A chattel mortgage, given in connection with a secret agreement to keep its existence a secret for the purpose of protecting the mortgagor's credit, is fraudulent as to creditors.

2. A chattel mortgage which authorizes the mortgagor to control the mortgaged property and to sell it in the regular course of business is void on its face.

3. Where a debtor and two creditors enter into an agreement by which a sawmill owned by the former is to be operated for the benefit of

all, and the debtor afterwards executes a chattel mortgage to one of the creditors, which is fraudulent by reason of a secret agreement, but the other, who has a valid chattel mortgage, does not rescind the contract when he learns of such fact, he cannot rescind after the full execution of the contract, and an adjustment of rights thereunder in the courts.

4. A mortgagor or his grantee has the right to use a mortgaged sawmill before the maturity of the mortgage, and hence a mortgagee cannot maintain an action for injuries resulting to the property therefrom, but must resort to a bill quia timet to restrain the conduct causing the injury.

5. Where a prior chattel mortgage is fraudulent, but the mortgaged property is operated under a contract for the benefit of the prior and a subsequent mortgagee and the debtor, which provides for the sharing of the proceeds, and the prior mortgage is afterwards declared fraudulent, and the rights under the contract adjusted, and the mortgaged property admitted to be in the subsequent mortgagee, who obtains possession thereof, such adjudication is conclusive, and the subsequent mortgagee cannot sue the prior mortgagee for the conversion of the property before such decree.

6. A subsequent mortgagee of a sawmill cannot recover damages against a prior fraudulent mortgagee who obtains possession and uses the property, for a depreciation in the value thereof, in the absence of a demand for the property, though the subsequent mortgagee does not know that the prior mortgage is fraudulent, since it is not property consumable by use, and the mortgagor or his grantee has a right to the use thereof until demand by the mortgagee.

Appeal from chancery court, Clay county; T. J. Fisher, Chancellor.

Suit by J. W. McD. Moore against J. L. Wood and others. From a decree dismissing the bill, the plaintiff appeals. Affirmed.

Geo. N. Tillman and Preston Vaughn, for appellant. McMillin & Harris, for appellees.

NEIL, J. The bill in this case was filed in the chancery court of Clay county on the 19th of May, 1890. Its gravamen is that on the 20th day of December, 1892, the defendant L. C. Marshall and William Strong, partners under the name of Strong & Marshall, executed a mortgage to the defendants J. L. Wood and W. C. Biles, whereby they assumed to manage and control a certain steam sawmill and other property, to be presently described, to secure the payment of a debt alleged to be due from Strong & Marshall to Wood & Biles; also that Strong & Marshall were then indebted to complainant, J. W. McD. Moore, in the sum of \$1,767.35; that on the 20th day of September, 1893, Strong & Marshall, for the purpose of securing this indebtedness to the complainant, executed to him a mortgage on the sawmill and property referred to; that this latter mortgage provided that the debt should be paid on or before the 1st day of January, 1895; that, in the event it was not paid then, the property so mortgaged should be subjected to the payment and satisfaction thereof, the property conveyed being a steam sawmill, consisting of boiler and engine, saw carriage, and fixtures belonging to the saw-

mill, and used in the operation thereof, and the said property known as the "Strong & Marshall Sawmill," other property conveyed also being a wagon used by Strong & Marshall in carrying on their sawmill business; that Wood & Biles, claiming that their mortgage was a valid one, went into possession of the sawmill property, boilers, engines, etc., and all the property mortgaged to complainant, and entered into an arrangement and agreement with Strong & Marshall whereby, on or about the 12th day of June, 1893, they took possession, used, and controlled all the property as owners and purchasers, and from that day assumed and pretended to be the owners of the same; that "the said property, when taken possession of by them, was very valuable, located in a good set of timber, and worth largely more than the debt due to complainant, who had furnished the means to move the mill to this set, and bought much timber, to enable Strong & Marshall to saw out his debt against them; that the said Wood & Biles, from the time they took possession of the said property as aforesaid, began to use the same as their own, and used it from that time until the filing of complainant's bill to enforce his mortgage, which he did on the 30th of May, 1895; that they practically wore out said property in the use thereof, until its value was greatly depreciated, and all the valuable timbers being used up so that it was not worth more than \$200 in cash at that time, all good timbers being consumed"; that Wood & Biles' mortgage was fraudulent, and known by them to be such, when they took possession of the property, and from that time forward, and that they so took possession to hinder and defeat the complainant of his just claims and liens against the property; that, in a subsequent litigation between the parties, the said mortgage of Wood & Biles was declared to be fraudulent in this court, and it was decreed that the mortgage executed by Strong & Marshall to complainant was valid and binding on the mortgaged property to the extent that his debt of \$1,767.35 was still unpaid, and that it was prior and superior to any debt or claims of Wood & Biles, or either of them, on said property, but, inasmuch as it did not distinctly appear how much of the debt due to complainant was still due and unpaid by the said decree, the cause was referred to the chancery court of Clay county to take and state an account, in order to ascertain the balance due upon the debt to complainant, and that it was also remanded to the chancery court referred to, to the end that the mortgaged property might be sold, and the mortgage lien in favor of complainant enforced; that the decree declaring complainant's priority and the fraudulent character of Wood & Biles' mortgage was unappealed from, and was final; that there has only been paid on complainant's mortgage \$648.86, and the balance remains due

and unpaid; that the defendants Wood & Biles are therefore indebted to the complainant in the amount so owing to him; that J. L. Wood has a judgment against complainant, part of the assets of Wood & Biles, rendered against complainant in the prior litigation referred to, on February 28, 1899, for \$1,113.16; that, by reason of the transactions before referred to, Wood & Biles owe him, and each of them owes him, more than sufficient to cover the judgment of \$1,113.16 and interest thereon; that he should have an offset against that decree, Wood & Biles being insolvent, and a decree over for the balance.

The bill states correctly, as above recited, the two mortgages; the date and amount of the decree in favor of J. L. Wood; the decree of this court adjudging that Wood & Biles' mortgage was fraudulent and void, and that the complainant's mortgage was good, and that he was entitled to satisfaction out of the mortgaged property to the exclusion of Wood & Biles, or prior to their mortgage. It is not correct as to the financial condition of Wood & Biles. They were not insolvent. It states correctly the amount realized upon the complainant's debt, with the exception that \$165 should be added for the price of the mill purchased by Moore upon the sale made on the remand. It states the true amount of complainant's debt originally. The bill does not state correctly the facts concerning the possession taken of the mill, and it fails to state that complainant ever demanded possession under his mortgage, or that he sought possession prior to May 30, 1895, when complainant filed his bill, the date of which filing is truly stated. The facts concerning the taking possession of the mortgaged property are as follows: Strong & Marshall were indebted to the complainant, as stated, in the sum of over \$1,700. In order to collect this debt, the complainant's agent, one Comer, caused the mill of Strong & Marshall to be moved from a place called "Union Hill" to the land of one J. B. Moore. The expectation of Comer was that, by the operation of the mill, the amount of the debt due to the complainant would be realized, however. After the mill was set up, and about the time operations were begun, Wood & Biles, who, as stated, had a mortgage on the property, said to Comer, in substance, if they were not allowed to participate in the proceeds of the mill they would foreclose their mortgage. But, in order to properly understand the bearing of this fact, it should be stated that, before the mill was moved to the "J. B. Moore set," Comer was fully acquainted with the fact that Wood & Biles had a mortgage, and also that they had a debt against Strong & Marshall. Some talk was had between them to the effect that there was enough lumber in sight to pay off Wood & Biles, if they could get it. However, it was then agreed between Comer and Wood & Biles that the latter

should have a certain portion of the proceeds of the mill (perhaps one-half or one-third,—the exact amount is not now material), upon its removal to the "J. B. Moore set." When the mill was set up at that place and ready to run, or about that time, Comer said, or Wood & Biles heard that he said, he could not let them have so much of the proceeds of the mill. Thereupon they went to see Comer, and said to him, in substance, that they must have some money out of the mill; if not, they would foreclose their mortgage. Comer said he could not let them have so much as had been agreed and run the mill. In this situation of affairs, a contract was entered into between the parties, on the 12th of June, 1893, for the purpose of providing means to pay, not only the debt which Strong & Marshall owed Wood & Biles, but also the debt which they owed to the complainant. In this contract complainant's interest was represented by Comer. The contract reads as follows: "We, the undersigned, agree to the following contract: Strong & Marshall agree to saw all logs delivered on their mill yard, situated near J. B. Moore, in district No. 3, Clay county, Tennessee, Cumberland river log measure, 25 cts. per hundred feet for soft timber, 40 cts. for hard. J. L. Wood binds himself to furnish out of his store all necessary expenses to run said mill, hauling, cutting said logs at the mill, and W. C. Biles agrees to work at said mill as manager, and look after the interest of Strong & Marshall and all concerned in the sawing of the logs delivered on the mill yard, for which he is to have \$1 per day for his services and board himself. Samuel Comer binds himself to furnish on the mill yard sufficient amount of logs to keep the mill running, and have full control of the logs, and Wood & Biles are not to have anything to do with the log matter until the 1st of December, 1893. J. L. Wood is to have his pay for furnishing as the mill makes it, and W. C. Biles is to have his pay for his labor, and for all necessary expenses so paid, out of the mill, and Mr. Comer is to have \$25 saw bill for each month said mill runs, which is to be credited on Strong & Marshall's indebtedness with Comer [the same debt which the complainant is now seeking to collect] for all necessary expenses so deducted for Strong & Marshall from the earnings of the mill, and the balance is to be credited on an indebtedness of Strong & Marshall to Wood & Biles, until the amount due from Strong to Wood & Biles is settled. Mr. Comer is to have full control of Strong & Marshall's timber and rig, and is to pay for the use of said team \$2 per day for all days the weather will admit, suitable to run the team, and the team is able to work, \$1.25 of which is to go as a credit on the indebtedness to Mr. Comer [the debt complainant is now suing for], and 75 cts. of the amount is to go to Wood & Biles, and be credited at the end of each month. Comer is to have \$127 in saw

bill, which is to be credited on the amount due from Strong & Marshall to Comer. Comer is to have Strong & Marshall's team taken good care of, and not responsible for unavoidable expense; and Strong & Marshall are to be at no expense for the team and rig while Comer has control of it." Signed, etc.

It is thus seen that Comer, as agent of the complainant, had entered into a contract with Strong & Marshall for the purpose of collecting the debt of the complainant by operation of the mill, and that this possession was not under complainant's mortgage at all (which, in fact, was not then in existence), but was an independent contract, although it was for the purpose of collecting the debt subsequently secured by the mortgage of September 27, 1893. It is also seen that the possession taken by all the parties, as stated, was under a contract of that date (June 12, 1893), and not under a mortgage, although Wood & Biles secured their place in the contract under the circumstances already stated. It was under the operation of this contract that the debt of \$1,113.16 due to Wood & Biles, or J. L. Wood, for which judgment was rendered, arose. Therefore it cannot be said that Wood & Biles took possession of the property and ran it as charged in the bill, but, on the contrary, all had possession. It is true, as stated, that the Wood & Biles mortgage was fraudulent, and that its fraudulent character arose by reason of an agreement to keep its existence a secret between Strong & Marshall and Wood & Biles, to protect the credit of Strong & Marshall; also that this mortgage was void upon its face, because it secured a benefit to Strong & Marshall, in that it allowed them to handle the timber and sell it in the ordinary course of business. It also appears that complainant knew of this mortgage, but he did not know of the secret agreement referred to, which was one of the grounds which made it fraudulent. He could, however, have acquired knowledge of the fraud upon the face of the instrument. It is probably true that if the complainant had filed his bill for rescission in time, upon the discovery of the secret agreement referred to, leaving out of view the fraudulent character of the instrument on its face, he might have had rescission, but it is too late now, after the operations under that contract have been finally settled and closed by a decree rendering judgment against the complainant in this cause for an overplus of lumber he got under the contract. As the case now stands, it is only a bill by a subsequent mortgagee, alleging that the mortgaged property was used by a prior mortgagee, whose mortgage was voidable for fraud, and who in using the property had somewhat injured its value, and not alleging that the subsequent mortgagee ever had the right to take possession, or that he had sought such possession. In short, complainant's bill does not state a cause of action. Pending the maturity of the com-

plainant's mortgage, the mortgagor could lawfully use the property, and so could authorize another to use it. If the property was being injured by such use, that was matter for a bill quia timet to restrain the conduct causing the injury, but the use itself was not illegal under the facts stated. And as a matter of fact, as already stated, the use from June 12, 1893, to the maturity of that contract, December 1, 1893, was not under the Wood & Biles mortgage, but under the contract before referred to between all the parties.

During the year 1894, Wood & Biles filed their bill against Strong & Marshall to foreclose their mortgage. This suit pended some time. But finally, about March, 1895, Wood & Biles made a verbal agreement with William Strong, of the firm of Strong & Marshall, whereby it was contracted, so far as they were able to contract, in the absence and without the consent of Marshall, that Wood & Biles should have the mortgaged property for their debt, but that Strong & Marshall should keep possession of it, and pay to Wood & Biles \$50 per month, for which credit should be entered upon their debt, supposed to be canceled by the agreement. This arrangement was not consented to by Marshall, and Strong & Marshall still remained in possession of the property. So matters continued until May 30, 1895, when the complainant filed his bill to foreclose his mortgage. Up to that time he had never made any demand upon any one for the possession of the mortgaged property, or questioned the right of the mortgagee and Wood & Biles to use it, and the only demand he then made was in the form of a bill for foreclosure. After this time, and pending the latter bill, also pending the proceedings of Wood & Biles for foreclosure, the latter took from William Strong, of the firm of Strong & Marshall, a writing, the substance of which was that Wood & Biles and Strong & Marshall agreed to a foreclosure by which Wood & Biles were to become the owners of the property, and the mortgage debt was to be considered canceled. This agreement also failed to receive the assent of Marshall. It is dated June 30, 1895. A few days thereafter the property was placed in the hands of a receiver (in July), and was rented out. It was subsequently decreed, as already stated, that Wood & Biles' rights were inferior to those of Moore, and the property was ordered to be sold for the payment of the debt of the latter, and upon remand of the cause it was so sold.

So far as the use of the property by Wood & Biles in the interval referred to, between December 1, 1893, and May 30, 1895, is concerned, there was no wrong done to the complainant, because he had not sought any possession under his mortgage. So far as concerned the conversion by the attempt of Wood & Biles, by a prior agreement or otherwise, to foreclose their mortgage and obtain

possession of the property, that matter was settled in the former proceedings, in which the Wood & Biles mortgage was declared to be fraudulent, and complainant allowed to take the property and sell it. But it should be stated that the weight of the testimony shows that Wood & Biles never had possession of the mill at any time. From December 1, 1893, to the time the property was put in the hands of a receiver in July, 1895, it was in the hands of Strong & Marshall. They operated it a part of the time in 1894, and were supplied by J. L. Wood, and he got the saw bills, and the agreement was that, if there should be any surplus, such surplus should go on the debt, but the possession was with Strong & Marshall. It is true, as already stated, that there were some abortive efforts on the part of Wood & Biles to get the ownership of the property by the attempted contracts of March, 1895, and June, 1895, but they eventuated in nothing. It thus appears that all that was done with regard to the rights of the complainant, with reference to the mortgaged property, has been already redressed by the turning over of the property to him and by its sale. It further appears that the taking possession on the 12th of June, 1893, was by all the parties, and that the matters of the contract thus resulting have been settled by decree of the court, and cannot now be disturbed. It further appears that such possession as was taken by Wood & Biles, if there could be said to be any at all, after complainant's mortgage accrued, was done in the absence of any claim of possession asserted by complainant; and, further, that, in so far as the matter could be regarded as a conversion, it has been already settled by turning over the property itself to the complainant.

The complainant's case seems to be based on the assumption that inasmuch as he had a valid mortgage, and Wood & Biles had not, therefore a cause of action arose in his favor against them if they used the property, and in so using it impaired its value. That this is a mistaken conception is apparent from the considerations already stated. If the complainant had the right to demand the property at any time, and did not demand it, but permitted it to be used by the mortgagors or their assignee, fraudulent or otherwise, it was his own fault, and he must be treated as consenting to such use. Certain it is that the mortgagors, in the absence of a provision in the mortgage to the contrary, had the right to use the property until it was demanded by the complainant, the property not being of the character denominated in our authorities as property consumable in the use.

But if it be said that the complainant forbore to demand the property, because he was ignorant of the facts upon which the fraud rested that tainted the Wood & Biles trust deed, it must be answered that this does not

mend his case, because he cannot now, from whatever cause it was forborne, supply the essential ingredient of demand for property which was needed to put in the wrong the mortgagors or any assignee of theirs who should keep it thereafter. If it be said he did not exercise this right because he did not know that he had such right, the answer is the same; it was not exercised at the time, and it is now too late to exercise it. All the reparation that could be made has been made; that is, the property has been turned over to the complainant.

The chancellor put the case on a question of evidence. This appears from a recital contained in the bill of exceptions, as follows: "On the trial of this cause complainant proposed to read the depositions of H. S. Reneau, J. C. Smith, J. M. Odle, F. H. Reecor, M. C. Compton, A. J. Odle, P. M. Moore, Wm. Strong, L. C. Marshall, J. W. McD. Moore, and J. T. Rush. The defendants excepted to the reading of all the answers to the questions, and all the proof, except such as involved the question as to whether or not defendants went into possession of the mill in controversy after January 1, 1895, the date at which the mortgage to complainant, Moore, from Strong & Marshall was foreclosable, up to the date of the appointment of a receiver in this cause; also excepted to such evidence as showed, or tended to show, that Wood & Biles, or either of them, kept possession of said mill over the demand of complainant for possession to him after January 1, 1895. The court sustained the exceptions, and only permitted the complainant to read that portion of the evidence unexcepted to." We think there was no error in the chancellor's decree upon this point. But, notwithstanding this view, we have stated the facts connected with the matter as above set out, and find that the facts before the court do not furnish a ground for complainant's recovery.

We should add, however, to the facts already stated, so that the complainant may have the benefit of it in case there should be an appeal to the supreme court, the following fact, viz.: That if the complainant, through his agent, Comer, had been allowed to proceed with the operation of the mill under the contract made with Strong & Marshall, prior to June 12, 1893, without complying with the agreement made with Wood & Biles before the mill was moved, and had not entered into the contract of June 12, 1893, he would have realized a sufficient amount to pay the whole of his debt. We should also add the fact that the testimony shows that the mill property on June 12, 1893, was worth about \$800, and that on May 30, 1895, when complainant filed his bill, it was not worth more than \$600. These facts, however, are immaterial, in view of what has already been said. It results that the chancellor's decree dismissing the bill must be affirmed, with the costs of this court

and of the court below. All the judges concur.

Affirmed orally by supreme court, March 7, 1901.

PAGE v. KNIGHTS AND LADIES OF AMERICA.

(Court of Chancery Appeals of Tennessee.
Dec. 22, 1900.)

INSURANCE—MUTUAL BENEFIT SOCIETY—ACCEPTANCE OF CERTIFICATE—STIPULATION ON BACK OF CERTIFICATE—EVIDENCE—COPY OF BY-LAWS NOT BEST EVIDENCE—MINUTES OF SOCIETY—STATUTES—SOCIETY A CORPORATION.

1. An acceptance on the face of a benefit insurance certificate of "all the conditions therein named" did not carry a reference to matters on the back of the certificate, and make them a part thereof.

2. In an action on a benefit insurance certificate issued in 1897, which stated that the certificate was issued subject to the constitution, by-laws, rules, and regulations of the organization that thereafter might be enacted by the supreme lodge or board of directors, evidence of the treasurer of the organization as to the number of assessments, and from whom collected, and that he had on the stand with him the constitution and by-laws of the order which went into effect in 1898, and that he filed it as an exhibit to his deposition, was improperly received, in the absence of any proof of the action of the supreme lodge, since such evidence was a statement of a legal conclusion.

3. A pamphlet purporting to be a copy of the constitution and by-laws of a fraternal insurance organization may be received in evidence without showing on its face that they were enacted by the proper authorities of the organization, since such facts could be otherwise shown.

4. Shannon's Code, § 5569, and Mill. & V. Code, § 4537, providing that in actions between corporations and their stockholders a copy of the proceedings of the board of directors and the subscription and other books of the company, certified by the secretary under the corporate seal, shall be evidence, apply to actions by the beneficiaries of a benefit insurance certificate against a benefit society; and hence a printed copy of the constitution and by-laws of such organization was improperly received in evidence in such an action, the same not being the best evidence.

5. In an action on a benefit insurance certificate, where the defendant organization was alleged to be a corporation, and both parties treated it as such on the trial and in the presentation of the case to the appellate court, the court will treat the defendant as such, though there was no evidence on the subject, nor admissions of the fact in the answer.

Appeal from chancery court, Davidson county; H. H. Cook, Chancellor.

Bill by Mrs. Ella Page against the Knights and Ladies of America. From a decree in favor of defendants, plaintiff appeals. Reversed and decree entered for plaintiff.

W. R. Chambers and T. A. Street, for appellant. I. L. Pendleton, for appellees.

NEIL, J. The bill in this case was filed to collect an insurance policy in a beneficial order. The chancellor dismissed the bill, and complainant has appealed and assigned errors. The policy or certificate was issued by

the Knights and Ladies of America to Robert Edward Page on the 23d day of June, 1897. It recites that Robert Edward Page is, "while in good standing as a member of the beneficial department of this fraternity, entitled to participate in its beneficiary fund to the amount of two thousand dollars, payable at his death to his wife, Ella Page." The certificate closes with the following language: "This certificate is issued and accepted subject to all the conditions named in the constitution, laws, rules, and regulations of this fraternity now in force, or that may hereafter be enacted by the supreme lodge, or board of directors of the same,"—signed by the supreme president and supreme secretary. Immediately succeeding the signatures above mentioned occurs the following: "I hereby accept this certificate, subject to all the conditions therein contained. [Signed] Robert Edward Page." Immediately following is a receipt from the treasurer of Nashville Lodge, No. 1, for \$2.05, in full of all claims due on the certificate to the date of its issuance. On the back of the certificate appears the following: "Provisions of the Laws. Assessments: Members are required to pay but one assessment per month as long as they are in good standing. One assessment is due on the first day of each month, and must be paid on or before the last day of the month, or the member stands suspended for nonpayment of assessment, without notice. How reinstated: Members under suspension for nonpayment of assessments may be reinstated on or before the 10th day of the month on the first day of which their suspension occurred, by the treasurer of the lodge, upon the payment of all dues and assessments then due and owing by said member, provided said member is in good health at the time of reinstatement; but, after the 10th of the month in which said suspension occurred, all applications for reinstatement must be made to the supreme lodge, accompanied by a physician's certificate of good health, and the assessment for which said member was suspended, and one extra assessment, and a certificate from the treasurer that said member is in good standing: provided, that after six months' suspension members can only be reinstated as new members."

The first question arises upon the admissibility of this writing on the back of the certificate. The materiality of this evidence arises from the fact that Robert Edward Page died on November 11, 1898. The assessment for October was not paid, and the 10th day of the following month passed without payment. It results that, if we can look to the entry above mentioned, he stood suspended at the time of his death. We are, however, of the opinion that this cannot be looked to. In 16 Am. & Eng. Enc. Law (2d Ed.) p. 864, it is said: "An indorsement on the back of a policy may be regarded as a part of the contract, provided it is referred to in the policy as constituting a part there-

of; but if there be no reference whatever to it in the policy, and nothing to show that the parties meant it to be a part of the contract, it will be regarded merely as an act of the insurer, and therefore not binding on the insured,"—citing *Ferrer v. Insurance Co.*, 47 Cal. 416; *Insurance Co. v. Rowland*, 66 Md. 236, 7 Atl. 257; *Kingsley v. Insurance Co.*, 8 Cush. 393; *Stone's Adm'rs v. Casualty Co.*, 34 N. J. Law, 371; *Loan Co. v. Snyder*, 16 Wend. 481, 30 Am. Dec. 118. It is observed that the reference on the face of the policy is to "all the conditions therein contained." This does not carry a reference to matters on the back of the paper.

It is insisted, however, by the defendants that the defense that would have been made out by a proper reference to the indorsement above mentioned is covered by the putting in evidence of the "constitution, rules, and regulations," referred to in the language which we have quoted from the body of the instrument. Upon this subject the record shows the following: J. W. Thompson was introduced. After testifying that he was the treasurer of the lodge, and had been since it was organized, in 1897, and that his duties were to collect the assessments for the beneficiary fund of the order from the members of Nashville Lodge, No. 1, and report to the supreme secretary, he was asked: "Q. 4. State the number of assessments to be collected each month, and from whom; and, if you have before you the constitution and laws of the order, please make an exhibit of the same to this your deposition, and mark it 'Exhibit A.' A. It is my duty to collect one assessment from each member per month, and I have before me the constitution and by-laws of the order, which went into effect May 1, 1898, and here mark it 'Exhibit A' to my deposition." Exhibit A, referred to, is a printed pamphlet having on its face the following: "Revised Constitution and Laws of the Knights and Ladies of America. Chartered and incorporated under the laws of the state of Tennessee. To take effect May 1, 1898." There is nothing further to indicate that it was published by authority. On the hearing the defendants offered to read the following portion of the above answer: "I have before me the constitution and by-laws of the order which went into effect May 1, 1898, and file it as Exhibit A to my deposition." This testimony was objected to by complainant's solicitor on the ground that the statement to the effect that the document referred to was the constitution and by-laws of the order, and the statement that it went into effect on the day mentioned, involved a conclusion of the witness. This objection was overruled by the chancellor, and the complainant excepted. The defendants then offered to read the whole of question 4 and the answer thereto. Complainant's solicitor objected to the reading of this question and answer, and to the reading in evidence of the purported constitution and by-

laws, or any part thereof, on the following grounds: (1) Because the purported constitution and by-laws were not properly authenticated, nor was the execution of the same proved according to law. (2) Because the purported constitution and by-laws were not shown to have been enacted by the supreme lodge or board of directors of the defendant order, Knights and Ladies of America. (3) Because the purported constitution and by-laws did not appear on their face to have been enacted by the supreme lodge or board of directors of the defendant order. (4) Because the due enactment and promulgation of the constitution and by-laws by the supreme lodge or the board of directors of the defendant order was not proven by the minutes of the supreme lodge or board of directors of the defendant order, authenticated as required in Shannon's Code, § 5569 (Mill. & V. Code, § 4537). (5) Because the printed copy of the said purported constitution and by-laws, which is filed as Exhibit A to the deposition of J. W. Thompson, is not the best evidence of the said constitution and by-laws. Question 5 of Mr. Thompson's deposition and the answer thereto are as follows: "Q. 5. Please refer to said constitution and by-laws, and give article and section that refer to the number of assessments to be collected from each member; also the time of collection, and, if any, the manner of reinstatement of suspended members; also how members are suspended. A. As to the number of assessments from each member, see article 17, § 6, and article 19, § 1. As to the time of collection, see article 19, § 1. As to the reinstatement of members, see article 18, §§ 3, 4, 5, and 6. As to the suspension by limitation, see article 18, § 4, of Exhibit A to my deposition." Complainant objected to the reading of question 5 and the answer thereto on the following grounds: "(1) Said purported constitution and by-laws are not properly authenticated, nor is the execution of the same proved according to law; (2) nor is said purported constitution and by-laws shown to have been enacted by the supreme lodge or board of directors of the defendant order of Knights and Ladies of America; (3) the said purported constitution and by-laws does not appear on its face to have been enacted by the supreme lodge or board of directors of said defendant order; (4) the due enactment and promulgation of said constitution and by-laws by the supreme lodge or by the board of directors of the defendant order is not proven by the minutes of the said supreme lodge or board of directors of the defendant order, authenticated as required in Shannon's Code, § 5569 (Mill. & V. Code, § 4537); (6) the printed copy of the purported constitution and by-laws which is filed as exhibit to the deposition of J. W. Thompson is not the best evidence of said constitution and by-laws." The chancellor overruled these objections, to which complainant excepted. The portions of the

pamphlet referred to in the above answer are as follows: "Article 17, § 6. The treasurer of the subordinate lodge on receiving a certificate from the supreme secretary shall record the same upon a book of record kept for that purpose, and deliver it to the proper person, after he has indorsed the date of delivery upon the certificate, and shall collect one advance assessment, one month's supreme lodge dues, and the subordinate lodge dues due thereon." Article 19, § 1, reads: "The following shall be the assessment rates on certificates in the (ordinary) benefit fund, which shall not change as the member grows older: For the purpose of paying death claims, one assessment from each member must be collected in advance, and thereafter one each month; same to be paid to the treasurer of the subordinate lodge to which you belong on or before the last day of the month. The treasurer shall remit all funds collected for the benefit fund and the supreme lodge dues to the supreme secretary on or before the 16th day of the month following the one in which said funds were collected." Article 18, §§ 3-6, read as follows: "Sec. 3. The board of directors may reinstate a delinquent member at any time within six months of suspension upon receipt of satisfactory proof of good health, and the payment by the member of the last assessment due which had not been paid, of all dues to the general fund, and of one extra assessment. But after six months' suspension members must come in as new members and pay assessment at advanced age, but the initiation fee will not be required if the supreme lodge dues and the local lodge dues are paid during such suspension. Sec. 4. Members failing to pay the assessment and supreme lodge dues due for the ensuing month, on or before the last day of the month, to the treasurer of the subordinate lodge, shall stand suspended, and, under the law, not hold the order responsible for any liabilities whatsoever, and thereby surrender all their rights as beneficial members in this fund. Sec. 5. It shall be the duty of the treasurer of the subordinate lodge, when a member fails to pay, to notify the supreme secretary of the name, and number of the certificate, and date of such surrender; but the treasurer of the subordinate lodge may accept payment of the assessment at any time within ten days after such nonpayment and surrender, provided the treasurer is satisfied the member is in good health. Sec. 6. But, after the 10th of the month in which said suspension occurred, all applications for reinstatement must be made to the supreme lodge, accompanied by a physician's certificate of good health, and the assessment for which said member was suspended, and a certificate from the treasurer of his lodge that he has paid his local dues, subject to approval or rejection by the supreme medical examiner and the board of directors."

Defendant's solicitor offered to read in evi-

dence question 8, and the answer thereto, in the deposition of J. W. Thompson, as follows: "Ques. 8. State whether K. E. Page was in good standing in his lodge at the time of his death, and, if not, why not. A. He was not in good standing at the time of his death. He was suspended by limitation, he not having paid his assessment for the month previous." To this question and answer complainant objected on the ground that the question asked for and the answer gave the conclusion of the witness. This objection was overruled by the chancellor, and the complainant excepted.

The first exception (that made when the defendant offered a portion of the answer to question 4 of Mr. Thompson's deposition) is sustained on the ground stated. The witness says in the portion of his answer offered: "I have before me the constitution and by-laws of the order which went into effect May 1, 1898, and file it as Exhibit A to my deposition." They could not be the constitution or by-laws of the order, binding upon the complainant insured, or in the sense of his contract, taking effect May 1, 1898, after the date of the contract (June 23, 1897), unless "enacted by the supreme lodge or board of directors of the same," as provided in the face of the contract. It is obvious, therefore, that when the witness made the statement copied he was stating merely an inference or conclusion of his that the paper offered was legally the constitution and by-laws of the order. But this cannot be done. *Supreme Lodge v. I. a Malta*, 95 Tenn. 166, 167, 31 S. W. 493, 30 L. R. A. 838. The court would have to have before it legal evidence of the action of the supreme lodge or of its board of directors in the passage or attempted passage of such constitution and by-laws, and from this a conclusion could be drawn as to whether the paper offered was in truth the constitution and by-laws of the order, and legally binding as such. But this would be a legal conclusion, and one for which the court could not rely upon the opinion of a witness in the cause. *Id.*

We also sustain the first and second objections to answer No. 4, offered as a whole, on the grounds already stated. These objections are, in substance, the same as the one already considered. We overrule the third objection. It was not necessary that the constitution and by-laws of the order should, on their face, show that they were enacted by the supreme lodge or its board of directors. This fact could be shown notwithstanding the absence of such statement on the face of the pamphlet.

The fourth and fifth objections to question and answer No. 4 will be considered together. The original books of a private corporation, containing its minutes, are the best evidence of the corporate action. 6 *Thomp. Corp.* §§ 7734, 7738. The same rule obtains in this state, even as to municipal corporations. *Rutherford v. Swink*, 90 Tenn. 152,

155, 16 S. W. 78. It follows, therefore, that the fifth objection must be sustained.

As to the fourth objection: The section of the Code referred to reads as follows: "In actions between corporations and their stockholders, a copy of the proceedings of the board of directors, and the subscription and other books of the company, certified by the secretary under the corporate seal, shall be evidence." This is not technically a suit between the corporation and a stockholder, but it is in substance that, and we are of opinion the statute applies; that is, that a certified copy made according to the statute would have been evidence. It would not have been the only evidence, but the original books might have been produced, as above indicated. It was necessary, however, that one or the other should have been offered, in order to satisfy the rule as to the best evidence. The exception, therefore, is sustained, to the effect that the evidence offered was not the best evidence, and the testimony was therefore improperly received.

Upon the argument it was insisted that even if the original books had been offered, or the copy above referred to, it might have been shown by oral evidence that the supposed minutes were not in truth the acts of the corporation, because of failure to carry out certain requirements. This is true, but in no way impeaches the application of the rule. Because what is apparently the best evidence may be impeached, and shown to be no evidence, does not destroy the primary character of such best evidence, until the impeachment is actually effected.

We should add that in disposing of the foregoing exceptions we have treated the defendant as a corporation. This was alleged in the bill, and it has been treated as such and assumed to be such by both sides in the discussion of the cause before this court, although there is no evidence upon the subject in the record, nor does the answer admit the fact. The only thing appearing on the subject, outside of the allegations of the bill, is the face of the pamphlet, which the defendant offers as testimony. But, as we have stated above, both sides treated the defendant as a corporation, and we, therefore, shall so treat it. The exceptions show that the matter was so treated in the court below.

The objections to question 5 and the answer thereto are the same as those we have already considered, and they are sustained, except No. 3, which is overruled, as the similar exception was to question and answer No. 4.

The exception to question and answer No. 8 is sustained on the same ground on which we sustained the first exception considered in this opinion. The same reasoning there appearing applies to this.

It follows, therefore, that there is nothing in the record to show that the assured was not in good standing at the time of his death, and there is no obstacle to the enforcement

of the contract. *Stewart v. Grand Lodge*, 100 Tenn. 267, 46 S. W. 579; *Insurance Co. v. Hyde*, 101 Tenn. 396, 48 S. W. 968.

It was insisted by the complainant that an agreement was made by Mr. Thompson, the treasurer, with Mr. Page, that he might pay the assessment on the 11th of November. Upon a careful reading and re-reading of the proof, however, upon this point, we do not think the contention is made out.

It should further be stated that the face of the policy shows the following up at the left-hand corner: "\$1.30 rate." We assume this to be the monthly assessment rate, and the receipt cards filed with the testimony show that this was the rate collected. It should also be stated that if the supposed constitution and by-laws, which we have rejected above, could be looked to, they would show a table fixing rates for various ages, from 16 to 55 years, inclusive, and that for the age of 33 (that shown to be the age of Mr. Page at the time he took out his policy) the rate would be \$1.40. But, as stated, it seems he only paid \$1.30 even after May 1, 1898, when the supposed constitution and by-laws are claimed to have gone into effect.

These additional findings are made in order that there may be a fair presentation of the cause in the supreme court in case there should be an appeal by the defendant. But, as this court is of opinion that the testimony offered by the defendant is incompetent, therefore there is nothing to show that Mr. Page was not a member in good standing at his death. The decree of the chancellor must be reversed, and a decree entered here for the amount of the policy, with interest from the 11th day of November, 1898, the date of the death of the assured; the policy, on its face, being payable at his death. The costs of this court and of the court below will be paid by the defendant. All the judges concur.

Affirmed orally by supreme court, January 26, 1901.

ARMISTEAD v. ARMISTEAD.

(Court of Chancery Appeals of Tennessee.
Jan. 21, 1901.)

TRUSTS—REMAINDERS—CHARGE AGAINST LIFE TENANT—APPEAL—RIGHTS OF REMAINDER-MEN.

1. A defaulting clerk of court was also a receiver of a trust fund belonging to a certain beneficiary for life, remainder to her heirs. The clerk assigned his fees for the benefit of his sureties, and the assignees brought a creditors' bill to determine the fees due and indebtedness of the clerk and master as receiver, in which it was determined that he was indebted in rents payable to the life tenant of the trust estate for a certain sum; and a payment was made thereon, though the estate was indebted to the clerk in a greater sum for the collection of such rents. After the determination of the creditors' bill and the payment of such sum, the life tenant died. *Held*, that the sum so paid by mistake could not be recovered from

rents accruing on the trust estate after the death of the life tenant, since the fund of the remainder-men could not be taken to pay debts of life tenants.

2. The remainder-men who were served with notice in the trust case of an application by the assignees to determine from which fund the surplus due the clerk should be paid were entitled to assume that it was not intended to charge such sums from rents accruing after the death of the life tenant, and hence they may first appear and object thereto in the court of chancery appeals on a general appeal by the assignees from an order that such sum be charged to such life tenant, and making distribution thereof.

Appeal from chancery court, Davidson county; H. H. Cook, Chancellor.

Suit by Robena Armistead against W. B. Armistead. Application that a certain indebtedness be paid from trust property; and from an order that such indebtedness be paid therefrom, and that a certain distribution be made, the applicants appeal. Reversed.

Stokes & Stokes, for G. K. Whitworth, clerk and master. Thos. H. Malone, Jr., for Thomas S. Weaver, clerk and master.

NEIL, J. The matter for consideration here arose in the court below upon motion to ascertain and allow the compensation of a receiver, and, in order to a proper understanding of the matter, the following statement of facts is necessary to be considered: Several years ago George K. Whitworth was clerk and master of the chancery court of Davidson county, and as such became a defaulter. He thereupon assigned the fees of his office to Messrs. Jordan Stokes and Percy D. Maddin, for the benefit of the sureties on his bond. This assignment was entered on the minutes of the chancery court of Davidson county, and made the decree of that court. After that the sureties of Whitworth filed a bill in the chancery court to wind up the affairs of the office of the clerk and master, so far as the same concerned the management of Whitworth. The bill was in the nature of a general creditors' bill, and was sustained by the court as such. The clerk and master being a party to the cause, a special commissioner was appointed, and the cause was referred to him, with instructions, among other things, to report the amount owing by Whitworth in each and every case in court, first deducting all fines and commissions owing to Whitworth as clerk and master or receiver in each cause that were chargeable against the fund in such cause. Many months were consumed in making this report. When filed it was, with a few changes, confirmed by the court, and judgments were rendered against Whitworth's sureties for the amounts shown to be owing in each case. This decree was rendered some five years ago. The liabilities of Whitworth as clerk and master and receiver exceeded the assets on hand and the penalty of the bond. The sureties thereupon paid the penalty of the bond into court and received their dis-

charge. In the present cause of Armistead against Armistead, Whitworth had acted as receiver, and in the above-mentioned report the amount found to be owing to the cause was \$181.08, and judgment was rendered therefor. There has been paid on this indebtedness \$166.39, leaving a balance due of \$14.69. A few months ago it was discovered that Whitworth had not been allowed all the commissions due to him in the present cause, and on motion of his sureties a decree was entered directing the clerk and master to report what, if anything, more was owing by way of commissions, and to whom owing. This report was made, and showed the sum of \$223.40. The clerk's report further showed that from this sum should be deducted the \$14.69 owing in this particular case as above stated, and that the balance should be paid to Stokes and Maddin, attorneys for the sureties of Whitworth. Before this report was confirmed, the clerk and master was requested to make a supplemental report as to whether this balance of \$208.71 should go to the sureties of Whitworth under the above-mentioned assignment, or should go to the office, to be applied generally on balances remaining unpaid in other cases. The clerk and master again reported that the fund should go to Stokes and Maddin for the benefit of the sureties. To this report exceptions were filed by Mr. Weaver. The chancellor sustained the exceptions, set aside the report of the clerk and master, and directed that the fund should go to the office, to be applied generally on unpaid balances owing to the various parties in various causes. Thereupon the sureties of Whitworth appealed.

The report of the master shows that George K. Whitworth, as clerk and master in the present cause, collected rents belonging to the parties therein entitled to the amount of \$8,667.98, and that he should have received as compensation 5 per cent. on this amount, or \$433.40, but that he actually retained and received only \$210, leaving due to him the above-mentioned balance of \$223.40. It also shows that at the time of the report there was in the hands of the then clerk and master, T. S. Weaver, \$333.09 of rents, which could be used in paying the balance of compensation to George K. Whitworth, receiver; that this rent was derived from the same property that was in the hands of Mr. Whitworth as receiver.

At the risk of a little repetition, we will copy that part of the master's report on which were based the exceptions that were filed in the court below, and on which the contest arises here. This portion of the report is as follows: "To the Chancellor: Since making and filing the report herein on September 18, 1900, the question has been made as to the proper disposition of the compensation reported as due for the services rendered by G. K. Whitworth, receiver, and I have

been requested to supplement the report in this particular. By decree entered in the cause of Whitworth v. Weaver, it was adjudged that fees due to G. K. Whitworth in any particular cause should be set off against the amount that said Whitworth might owe said cause. Thereafter a reference was had to the clerk and master, requiring him to state an account showing the amounts due to each cause in this court by said Whitworth. In pursuance of said reference a report was made and confirmed by which it was adjudged that said G. K. Whitworth, clerk and master, owed this cause of Armistead v. Armistead \$181.08, and that there had been paid on this amount \$166.39. These payments were made out of the assets of the office, including cash in bank, and amounts paid in by the sureties of said Whitworth. Prior to his death said G. K. Whitworth assigned all his fees, etc., to Stokes and Maddin, trustees, for the benefit of his sureties, and this assignment was upheld by decree in said cause of Whitworth v. Weaver. The amount of additional compensation, if any, due said Whitworth as receiver in this cause was not fixed, ascertained, or suggested until recently, and long after the report was confirmed, fixing and determining the amounts due by said Whitworth to the various causes in this court, including this cause. It is now contended on the one hand that, under the first decree mentioned above, the commission now ascertained to be due said G. K. Whitworth, receiver in this cause, should have been set off against the amount he owed this cause, thus entirely extinguishing the debt to this cause, and increasing the funds or assets with which to pay the liabilities to other causes in this court by a like amount, to wit, \$181.08. On the other hand, the sureties on the official bonds of G. K. Whitworth, O. & M. and receiver, insist that they, having paid the full penalty of the clerk and master and receiver's bonds, are, under the assignment to Stokes and Maddin, trustees for them, entitled to said compensation now ascertained to be due. They contend that the report and decree confirming same, which determined the amount that said Whitworth, C. & M. and receiver, owed this cause, to be \$181.08, and which report was presumably made in accordance with the principles and adjudications heretofore determined by the court, was a final adjudication and determination of this matter, which cannot now be opened, changed, or set aside. It appears to me that the contention of the sureties on the official bond of G. K. Whitworth, C. & M. and receiver, should prevail. I therefore find and report that the compensation due said Whitworth, C. & M. and receiver, as ascertained in the report filed September 18, 1900, should be paid to Stokes and Maddin, trustees, for said sureties, after first paying the small balance due this cause as therein reported." This report was signed by Thomas S. Weaver, clerk and master, and filed No-

vember 14, 1900. Thereupon this report was excepted to by Mr. Weaver personally, "for the benefit and on behalf of the valid claimants against Geo. K. Whitworth, clerk and master and receiver," the following grounds being assigned: "(1) Because said report finds that the entire fund in question, less the sum of \$14.69, should be paid over to the assignees of G. K. Whitworth, whereas it should be distributed as follows: First, the amount heretofore paid out to the beneficiaries herein, to wit, \$166.39, should be retained for the benefit of the valid claims against Whitworth, C. & M. and receiver, and should be prorated among such claimants; secondly, the assignees of said Geo. K. Whitworth should be paid the sum of \$42.32, the amount properly due said Whitworth on a settlement between him and the said beneficiaries; thirdly, the balance of said fund should be paid to the beneficiaries herein. (2) Because said report finds that the decree of the court in the cause of Whitworth v. Weaver is a binding adjudication of the matters in controversy between Geo. K. Whitworth and the Armistead beneficiaries, so that other claimants against said Geo. K. Whitworth are precluded from showing that there was then due from said beneficiaries a sum more than sufficient to offset the sum owed by said Whitworth to them, but at the same time finds that G. K. Whitworth's assignees, parties to the same settlement, are not precluded from setting up the fact of such existing indebtedness. (3) If said decree is to be taken as a final adjudication as between the Armistead beneficiaries and G. K. Whitworth or his assignees, then, as appears from said report, it has been formally adjudicated that G. K. Whitworth owed them \$181.08, and they owe him nothing, and the master was therefore in error in allowing anything to said G. K. Whitworth or his assignees." All of the foregoing exceptions were overruled by the deputy clerk and master.

The chancellor's decree reads as follows: "And thereupon the court was pleased to sustain said exceptions, and to order, adjudge, and decree that the fund mentioned in said reports, to wit, the sum of \$333.09, be distributed as follows: First. The amount heretofore paid out to the beneficiaries herein, together with the sum of \$166.39, shall be retained for the benefit of the valid claims against G. K. Whitworth, C. & M. and receiver, in the cause of Whitworth et al. v. Weaver et al., and shall be prorated among the proper claimants in the manner directed by the decrees in said cause. Second. The clerk and master will then pay to Jordan Stokes and P. D. Maddin, assignees of said G. K. Whitworth, the sum of \$62.32, being the difference between the amount owed to G. K. Whitworth by the beneficiaries herein, and the amount of his indebtedness to them at the time of taking the account between them in said cause of Whitworth v. Weaver. Third. The balance of said sum will be paid

to the beneficiaries herein according to their respective interests."

The report of the master above copied had correctly set out the decrees therein referred to, and we should state that the record also shows that the balance owing in this cause was arrived at by counting interest on the amount owing from the death of Whitworth up to the decree, which amount in this cause was about \$20. It should also be stated that by decree entered in July, 1898, in the said cause of James K. Whitworth et al. against Thomas S. Weaver, clerk and master, and others, it was ordered that the report of the clerk and master stating an account between said G. K. Whitworth and the respective beneficiaries in each suit should be confirmed in so far as the same was unexcepted to, subject, however, to such exceptions as were then filed or such additional exceptions as might be filed prior to the 5th day of October, 1896; that said report with respect to the Armistead beneficiaries showed an indebtedness to them from said G. K. Whitworth, clerk and master and receiver, of \$181.08; that no exceptions were ever filed by the sureties of G. K. Whitworth or his assignees to said report.

The following additional facts appear in this case by agreement of counsel, namely: That Messrs. Stokes and Maddin, trustees of G. K. Whitworth, never appeared in this cause of Armistead against Armistead until they entered a motion herein on the 8th day of June, 1900,—the reference set out in the record. That Mrs. Armistead, the original complainant in the cause, possessed only a life estate in the property from which the fund in this cause was derived as rents, and that said fund is made up of rents collected in the year 1900. That the children of Mrs. Armistead—the same parties notified to appear in this cause for the taking of the account—were the remainder-men or owners in fee of said property, and that they were parties to this cause by petition filed against them by the trustee of the life tenant. The order of reference referred to in the agreement of counsel just mentioned, and also in a former part of the present finding of facts, was entered in this cause on June 12, 1900, and is in the following words: "This cause came on for hearing on motion of the sureties of G. K. Whitworth, former clerk and master, when the court is pleased to order that this cause be referred to the clerk and master, who will from the records on file in his office, as well as any other proof the parties may offer, report to this court, what, if any, commissions were owing the said Whitworth for services rendered by him in this cause, the amount of same, to whom such commissions now belong, and what fund, if any, out of which the same can be paid; * * * also what amount was reported and allowed as the cash balance in Armistead v. Armistead in the cause of Whitworth v. Whitworth et al., and what was the pro rata

paid thereon." We infer that the parties referred to in the report as those who were notified to appear in this proceeding as remainder-men or owners in fee of the property, and as persons who had been made parties to the cause by petition filed against them by the trustees of the life tenant, were W. B. Armistead, Jr., and J. W. Armistead; the master's report showing that notice was served upon these parties as well as upon J. Washington Moore, Thomas M. Andrews, Stokes and Maddin, and D. R. Johnson. It does not appear from the master's report what connection Mr. Moore and Mr. Johnson had with the matter. Mr. Andrews appears as counsel for the remainder-men. The names of the remainder-men are fully shown below. As stated, the chancellor sustained the exception to the master's report, and rendered the decree above mentioned upon that subject; and thereupon Messrs. Jordan Stokes and P. D. Maddin excepted to the action of the chancellor and prayed an appeal. It was granted upon their giving bond for cost. The entry then proceeds: "By agreement, it is ordered that the sum of \$62.32, above referred to, be paid at once to said Stokes and Maddin, assignees."

The foregoing shows what was done in the chancery court. It is observed that it does not appear that the Armisteads made any objection in the court below to what was done, or that any appeal was prayed by them. When the cause reached this court, Messrs. Stokes & Stokes filed the following assignment of errors: "It was error in the court to notice these exceptions. They are made by T. S. Weaver, and he does not show that he is interested in any way in the matters involved. If they had been made by him in his official capacity as clerk and master, the court had no right to notice them. He does not show any interest as clerk and master in the subject-matter of legislation, and the law does not impose upon a clerk and master the duty of becoming guardian or attorney for every party litigant in his court. Second. The exceptions are fatally defective, and should not have been noticed by the court. They are not specific, but general, and no error is pointed out. Third. It was error in the court to order that this fund be applied to the payment of balances owing in other causes. The fees composing this fund had been transferred to the sureties of Whitworth. That transfer had been upheld by decree of the court, and the right and title to same vested in the assignees, subject alone to the rights of the parties in this cause; and, when the amounts owing them were paid, the balance they owed to Whitworth as fees passed under the assignment to his sureties."

The chancellor was of opinion that it was the duty of the sureties to have presented this claim for fees, and had it allowed, when the report was made and confirmed, some five years ago; that, if they had done so

then, there would have been nothing owing in this cause, and there would have been that much more for the other creditors of the office; that, because the sureties did not do this, they will not now be permitted, as against the creditors of the office, to retain this fund. This position is wholly untenable. It must be borne in mind that the parties paying these fees make no objection to paying, and, by not excepting to the report, show their willingness for the sureties to have them. The objection comes alone from Mr. Weaver. The assignment contains the following additional points: "That the fees involved in this case were commissions due Whitworth as receiver; that they had been allowed and the amount had been fixed at the time of the report in Whitworth v. Weaver was made; that some five years after that report had been confirmed by the court they were allowed and the amount fixed; that these fees had been transferred to Whitworth's sureties; that the indebtedness was therefore not mutual; that the sureties had paid the full amount owing by them under the bonds, and the fees transferred to them were their property, and they had the right to collect them; that, if the doctrine of set-off should be held applicable, it was operative alone between the parties to the present suit and Whitworth's sureties, and that there is no controversy between said parties and Whitworth's sureties; that the other creditors of the office have no right to force the doctrine of set-off upon the parties to this suit and Whitworth's said sureties." The assignment closes with the following, as a correct summary of the matter: "That in the case of Whitworth v. Whitworth a report was made as to the amount owing in each case by Whitworth and his sureties; that this amount was ascertained, and judgment taken against the sureties; that they paid the full amount of the recovery against them; that this was all done some five years ago; that all fees owing to Whitworth that did not go into this settlement belonged to the sureties of Whitworth, and to permit a reinvestigation of this question would open up all decrees settling these matters, rendered some five years ago."

In reply to the points made in the assignment of errors filed by Messrs. Stokes and Maddin, Mr. Weaver, by counsel, presented the following considerations, namely: That the exceptions show on their face that they were made "for the benefit and on behalf of the valid claimants against Geo. K. Whitworth, C. & M. and receiver"; that said claimants were parties in interest, and Mr. Weaver's right to represent them would be presumed, nothing to contradict such right appearing in the record; that, while the chancellor might refuse to notice the exceptions, still the fact that he has noticed them for the purpose of correcting a manifest error will not be a ground for putting him in error; that the chancellor would have the

right to set aside a report manifestly erroneous, no matter how the fact might be brought to his attention; that he might have done so on his own motion or on that of a mere *amicus curiæ*; that he is not required to sit still and see A. get R.'s money. The reply of Mr. Weaver to the second assignment is that the exceptions filed below are specific, in that they show an erroneous distribution, and the reason why it is erroneous, and it should be corrected. In reply to the third assignment it is said that the whole fund was not ordered to be applied to the payment of balances owing in other causes, but, on the contrary, was ordered to be distributed as set forth in the decree. In addition the following points are made by Mr. Weaver, namely: That George K. Whitworth had already earned his fees when the account was taken between him and the Armistead beneficiaries; that the amount was a matter of simple calculation; that it was clearly the duty of Mr. Whitworth's assignees to have set up this counterclaim when the account was taken, but they failed to do this, and thereupon paid the Armisteads money to which they were not entitled, to the prejudice of the other claimants against the fund in the Whitworth case; that the question now comes up, as between said claimants and Whitworth, who must suffer this loss on account of the omission? and that those whose acts made possible or caused the loss should suffer such loss. In conclusion it is said: "If the account stated between the parties (that is, between Whitworth and his assignees and the Armisteads) is to be opened up at all, then the chancellor's apportionment of the fund is just and equitable. And, if it is to be taken as final, then it is equally binding on both sides; and the assignees of Whitworth, having thereby admitted that they owed the Armisteads and that the Armisteads owed them nothing, cannot now be permitted to go behind such account, and to show that, as a matter of fact, there was an indebtedness to them from the Armisteads then existing."

While the contest was thus waging between Messrs. Stokes and Maddin, on the one hand, and Mr. Weaver, assuming to represent all of the claimants in the clerk and master's office, under the before-mentioned general creditors' bill, on the other hand, on the assumption that the Armisteads were not objecting to the withdrawal of the particular funds in controversy here from this case, and their application either to Stokes and Maddin, assignees, or to such other claimants, Mr. W. B. Armistead, Jr., appeared in this court and filed an affidavit purporting to contain a history of the litigation and of the property involved. The substance of this affidavit is that this case was begun on the 20th day of November, 1869, for the administration of a trust fund; that the parties were Robena Armistead, by next friend, Joseph W. Walker, who were the complain-

ants, and James Wood, executor of Robert Wood, deceased, the father of Mrs. Armistead, and W. B. Armistead, her husband, who were the defendants; that the property involved was \$40,000, which was to be invested for the benefit of Robena Armistead for life; that W. B. Armistead was appointed trustee; that the cause was then stricken from the docket; that it was subsequently reinstated for the purpose of enabling Mr. Armistead to pass his accounts and resign, and to place the property under the care of the court; that it then appeared the money had been invested in a certain storehouse or storehouses; that this realty was the source from which came the rents in controversy; that all the parties to the cause were dead; that W. B. Armistead died many years ago, and that his wife, Robena Armistead, died in June, 1897, and that there has been no revivor as to any of the parties; that none of the Armistead heirs were parties to the general creditors' bill; that the rents now in the hands of the clerk and master, and which are sought to be applied to the benefit of Stokes and Maddin, assignees, accrued after the death of Mrs. Armistead, and belonged to the remaindermen. It is obvious, however, that no part of this affidavit is pertinent at this stage of the proceeding, except so much of it as suggests and proves the death of the parties to the cause; that is, Mrs. Armistead and her next friend, and Jas. Wood, executor of Robert Wood, and W. B. Armistead, the husband of Mrs. Robena Armistead. It is observed that nothing is said in the affidavit concerning the death of the children of Mrs. Armistead, who were notified to appear in the cause in the present proceeding, and who were made parties to the cause by petition filed against them by the trustee of the life tenant. This affidavit, therefore, can be treated only as modifying the situation to the extent of showing that the original parties to the proceeding are dead. It is apparent that this leaves still in the cause the children of Mrs. Armistead, who, it seems, are the remaindermen.

In support of the Armistead interest a brief was filed in this court by Mr. Andrews as solicitor for the Armistead heirs. The following errors are assigned in this brief: "(1) That it was error on the part of the chancellor to entertain the motion of Stokes and Maddin in the present cause, for the reason that they were not parties to it by either bill, answer, or petition, and could not appear by a mere motion such as is shown in the record to have been the foundation of the proceeding. (2) The chancellor erred in holding that Stokes and Maddin, assignees of Whitworth, and Thos. Weaver, clerk and master, or either of them, was entitled to a decree for any part of the fund set out and described in the report of the clerk and master filed herein, because it is shown by the record that on

the 1st of July, 1896, four years previous to the motion made in this cause by the said Maddin and Stokes (said motion being the foundation of this proceeding), that a decree had been rendered settling the rights of the parties in the subject-matter embraced in the motion, and that said decree adjudged that said Whitworth owed the cause of Armistead v. Armistead the sum of \$181.06, and that the cause of Armistead v. Armistead owed Whitworth nothing, and that said decree was founded upon and confirmed a report of the clerk and master, and that said report covered and settled the identical matter between the parties to this proceeding that is embraced in the motion entered in the cause of Armistead v. Armistead by Maddin and Stokes on the 8th day of June, 1900, and that the report of the clerk and master, upon which was based the decree entered by the chancellor on the — day of July, 1896, settling the entire matter in controversy here, was unexcepted to, and the decree was not appealed from. (3) The chancellor erred because the fund attempted to be reached by this proceeding is composed of rents collected after the death of Mrs. Robena Armistead and after the falling in of her life estate; said rents having been collected by Thos. Weaver during the year 1900, and hence constitute a fund that belongs to the remaindermen or owners of the estate in fee, the children of Mrs. Robena Armistead; and said fund cannot be appropriated to pay any balance that may exist or be owing by the cause of Armistead v. Armistead to G. K. Whitworth, receiver; the rule being well established that the life tenant cannot incumber the remaindermen's interest, nor can a trustee or receiver, in his dealings with a cestui que trust or with the trust estate, do any act or thing that will incumber the estate of the remaindermen or owners in fee." Continuing, the brief proceeds: "More than three years elapsed after the death of Mrs. Robena Armistead before the commencement of this proceeding by Stokes and Maddin. Hence the rents or fund attempted to be reached in this proceeding belong to the remaindermen, and are not subject to seizure for any balance that may be due Whitworth. If there ever was anything due Whitworth from the trust estate in the cause of Armistead v. Armistead, he should have protected himself by passing his accounts and making his settlement with the court, and in this way have received credit for such sums as might have been found due him, and settle the matter with the estate." The brief further continues: "This is a matter that directly affects the personal estate of Mrs. Armistead, and it is disclosed by these proceedings that Mrs. Armistead died in 1897, three years before Stokes and Maddin made their motion in this cause, and that, so far as her interests in the matters involved in this cause of Armistead v. Armistead are

concerned, the decree of the chancellor is void, because there was no revivor against her personal representative, and any decree rendered by this court would for the same reason be void. It cannot be contended with any show of reason that the money of the remainder-men, Mrs. Armistead's children, can be taken to pay this claim set up by the assignees of Whitworth. So, if any money is taken, it must be money that belongs to the estate of Mrs. Armistead, and this cannot be done without her personal representative being before the court." As touching the position taken in the brief of Messrs. Stokes and Maddin, to the effect that the chancellor erred, because the parties whose money was being taken did not object, the brief of Mr. Andrews calls attention to the third exception of the report of the master, and continues: "This exception shows that objection was made and the attention of the chancellor was challenged, and the impropriety of rendering a decree against the fund in this cause of Armistead v. Armistead, in favor of Stokes and Maddin, was pointed out; and it matters not by whom or how it came to the knowledge of the chancellor; his honor should have considered it; for this money is a trust fund held by the court, administered by the court through a receiver, who is an officer of the court, and it is the duty of the court to see that no waste is permitted, and that the fund is properly paid out."

The case comes before us in a rather singular condition. The record itself contains nothing but the motion, the report of the master, an agreement of counsel agreeing to the correctness of the master's recitals to decrees in the cause, and some other points which we have embodied in the finding of facts, the exceptions to the master's report, and the rulings thereon. In addition to this there is another agreement of counsel filed, embracing certain other facts which we have stated *supra*. Even with the aid of the agreement, the case is left in almost bare outline. Enough can be seen, however, from the record and from the agreements, by their direct terms and by reference, to enable us to ascertain that the property under the control of the court was a trust estate; that the property involved was realty; that it was being rented out by the clerk and master and receiver of the court for the benefit of Mrs. Robena Armistead during her life; that during her lifetime rents amounting to \$8,067.98 were collected by George K. Whitworth as clerk and master and receiver of the court; that, at the rate of 5 per cent., he was entitled to \$433.40 commissions; that he retained only \$210 of these commissions, leaving a balance due of \$223.40 as commissions on the rents collected by him; that this was the status of the matter at the time of his death and at the time the assignment of his fees was made to Messrs. Stokes and Maddin; that after his

death the general creditors' bill above referred to was filed, and that the present case, together with all other cases in the chancery court of Davidson county in which any funds had been collected by Whitworth, entered as a factor into that general creditors' bill; that a general reference was had to ascertain what was due to each case by Whitworth; that, as a means of ascertaining the said amount due to each case, there was a direction that Whitworth should be credited with fees due to him in each such case, and only the balance left after such credit should be charged against him as an indebtedness; that pursuant to this order a report was made in July, 1896, which showed an indebtedness due from Whitworth to this case of \$181.08, and this sum included interest amounting to \$20, the actual apparent indebtedness being \$161.08; that Whitworth's sureties, who are the beneficiaries under the assignment of fees made to Stokes and Maddin, were parties to the general creditors' bill; that they omitted to have ascertained and brought forward the balance of \$223.40; that ample time was allowed for the filing of the exceptions; that no exceptions were filed; that the report was so confirmed; that this was all done during the lifetime of Mrs. Robena Armistead, for whose benefit the collection of rents was made; that it was thus determined between Mrs. Robena Armistead and the sureties of Whitworth that there was due from Whitworth to her the sum of \$181.08; that thereupon there was paid on this indebtedness out of the cash on hand belonging to Whitworth, and out of the amount paid in by the sureties on Whitworth's bond, the sum of \$166.39, leaving a balance owing of \$14.69; that four years after this transaction the present motion was made by Messrs. Stokes and Maddin, seeking to have allowed compensation in addition to that which Whitworth had already retained in the present case, and to have the same paid over to said sureties or to the assignees for their benefit; that at this time Mrs. Robena Armistead, the person for whom the services had been performed, was dead; that the funds now in court, and out of which it is sought to collect such balance of indebtedness existing against the estate of Mrs. Robena Armistead, if the same is not barred by the adjudication, belongs, not to the estate of Mrs. Robena Armistead, but to the persons to whom the trust estate went in remainder after the death of Mrs. Armistead (that is, to her children); that these remainder-men had already been made parties to this cause by proceedings previous to the time the motion in the case was made, to wit, R. L. Armistead, W. B. Armistead, Jr., J. W. Armistead, D. R. Johnson, Roberta Johnson, Julia W. Andrews, James W. Hughes, and Mary Hughes; that of these parties W. B. Armistead, Jr., and J. W. Armistead and D. R. Johnson had notice of the account; that

none of these parties excepted to the master's report, unless the exception made by Mr. Weaver can inure to their benefit; that the chancellor, in disposing of the report and the exceptions, proceeded to rip up the settlement made under the general creditors' bill four or five years ago, to the extent of ordering that there should be paid back the sum of \$166.39, to be used for the benefit of various claimants against G. K. Whitworth's estate in other cases in court in the cause of Whitworth against Weaver, and for pro rata among such claimants, and that \$62.32 should be paid to Messrs. Stokes and Maddin, assignees; that these sums should be taken out of the \$333.09 now in court belonging to the remainder-men's fund, which has come into court since the transactions took place out of which the indebtedness to and from Whitworth arose, and which belongs to parties not concerned in those transactions,—and further decreed that the balance of the fund should go to the beneficiaries of the trust.

This full statement of facts shows clearly the injustice of the decree below. It can never be right that the fund of the remainder-men should be taken to pay the debts of the life tenant, except by consent of such remainder-men. The only question to be determined upon this branch of the case is whether the remainder-men are before the court in such an attitude as that they cannot insist upon their rights. It is said they did not object in the court below. This is true, unless they can have the benefit of the objection made by Mr. Weaver. But we pass this latter point with the remark that it does not appear that part of them had any right to make objection, inasmuch as it is not shown that they were served with notice of taking the account (that is, R. L. Armistead, Roberta Johnson, Julia W. Andrews, James W. Hughes, and Mary Hughes); the only parties served with process being W. B. Armistead, Jr., James W. Armistead, and D. R. Johnson. But, aside from this, the issue tendered, so to speak, by the decree of reference did not concern the funds now in controversy. The inquiry directed to be instituted under the order of reference was for the ascertainment of commissions due to George K. Whitworth for services performed by him, and as "to what fund, if any," there was out of which such amount could be paid. These remainder-men, as remainder-men, had no concern with an inquiry as to services performed for the life tenant. It is true, as distributees of the estate of the life tenant they did have such interest, but not as remainder-men of the trust estate. The inquiry as to the "fund, if any," out of which such indebtedness could be paid, could not reasonably have been understood to refer to a fund belonging to people representing different interests altogether. So it could not have been anticipated by the remainder-men that a decree would

be entered directing an application of their funds to the payment of a debt due from another person, and for which they were not bound. It follows, therefore, that it was not incumbent upon any of the remainder-men to notice the reference in order to file an exception to the master's report. Whether the estate of the life tenant had a debt against Mr. Whitworth for \$181.08, or whether no such debt ever existed, and whether Mr. Whitworth or his assignees had a debt against the estate of the life tenant for \$223.40, was wholly immaterial to them as remainder-men and as owners of the fund now in court. As stated, they could not anticipate that their funds would be taken for the payment of the debt of another. Therefore they were not interested in the inquiry as to the existence of that debt or the contrary. The only thing that concerns them in the present inquiry is that money due to them has been directed by the chancellor to be turned into a general fund for distribution among the various claimants in the general creditors' bill already referred to, and the balance to be paid over to the assignees of Whitworth; in other words, in both senses for the benefit of Whitworth's estate. This, of course, was clear error of law. The remainder-men are enabled to make this question here because the appeal of Messrs. Stokes and Maddin, assignees, is a broad one, and brings up all parties to this case, and it appears from the finding of facts that the remainder-men are parties to the cause. Having then thus determined that the fund disposed of by the chancellor was not subject to such disposition as he made of it, and therefore not available for settlement of the controversy raised between Messrs. Stokes and Maddin, on the one side, and Mr. Weaver, as the assumed representative of the creditors concerned in the general creditors' bill, on the other, it is unnecessary that we should determine the points raised between the assignees and Mr. Weaver in their briefs, which points we have fully catalogued above. The fund being withdrawn from the contest, the bottom drops out of the case. It results that the decree of the chancellor must be reversed, and the cause remanded, to the end that the fund may be distributed among its owners, the remainder-men. The costs of the motion in this court and in the court below will be paid by Messrs. Stokes and Maddin, assignees. All the judges concur.

Affirmed orally by supreme court, March 16, 1901.

BOURNE v. DARDEN et al.

(Court of Chancery Appeals of Tennessee.
Feb. 12, 1901.)

CREDITORS' SUIT—EVIDENCE.

Where a judgment debtor and a third person contracted to rent certain land and to

raise a crop thereon, one-half of the crop to belong to the landlord, and the balance to be divided equally between the debtor and such third party, and the agreement was carried out in good faith, each party thereto performing half the labor of raising the crops, such third party is entitled to a one-fourth share of the crop as against the creditor of the judgment debtor.

Appeal from chancery court, Montgomery county; J. S. Gribble, Chancellor.

Bill by E. W. Bourne against Ike Darden and others. Decree for plaintiff, and defendants appeal. Affirmed.

A. A. Gardner, for appellants. H. P. Gholson, for appellee.

MURRY, J. This suit was brought by bill filed in the chancery court at Clarksville, on January 31, 1900, to recover on a judgment which complainant had recovered before S. A. Caldwell, a justice of the peace for Montgomery county, on March 17, 1899, for the sum of \$165, and \$1.65 cost of suit, and also to attach and impound a one-fourth interest in a crop of tobacco raised by Darden and others on the lands of J. O. Langford in said county, which had been sold to one Warneken, which one-fourth interest was claimed by Caladonia Washington as her property, but which was averred to be the property of Ike Darden, and was sought to be subjected to the payment of said judgment, interest and cost, which complainant held against the said Ike Darden.

The bill states and avers as follows: "(1) That complainant recovered said judgment, and that an execution had been issued thereon and returned nulla bona. (2) That in the year 1898 said Darden made a large crop of tobacco on the farm of J. O. Langford in district No. 5 of said county; that said crop of tobacco was sold and delivered to defendant Warneken in the spring or early part of the summer of 1899; that the whole crop brought about \$662; that defendant Darden was the owner and entitled to one-half of said amount, or half of the proceeds of said crop; that on or about September 12, 1898, defendant Darden went to the storehouse of complainant, and represented to him that he was going to make a mortgage on his one-half interest in said crop of tobacco to secure complainant's debt, and a debt he owed Mr. T. M. Williams of about \$40, and that he wanted to get the amount of complainant's debt, as he had arranged with Mr. Williams to write the mortgage; that complainant gave Darden the amount of his debt on a piece of paper; that Darden went back to Williams, and, without the knowledge or consent of complainant, executed and recorded a mortgage to Williams on a one-fourth interest instead of a half interest in said crop of tobacco, to secure said debts; that, after said Darden left complainant, Darden conceived the idea to undertake in some way to establish a one-fourth interest in said crop of tobacco in defendant Caladonia Washing-

ton, who is the mistress of said Ike Darden, and has several illegitimate children by him, and that they have been virtually living together for the past 10 or 15 years; that the said Caladonia never, as a matter of fact, had any interest in said crop of tobacco, and never claimed any interest until after Darden's visit to complainant; that said Ike and Caladonia fraudulently combined together and set up a pretended claim or ownership of Caladonia to a one-fourth interest in said crop for the fraudulent purpose of hindering, delaying, and defeating the creditors of the said Ike Darden in the collection of their debts, and especially this complainant. (3) That when said tobacco was bought by said Warneken he knew nothing of said Caladonia claiming an interest therein; that said Warneken never knew of her claim thereto until the crop was delivered, and this complainant had brought suit on his debt, and was trying to subject said tobacco to the payment of his debt against Ike Darden; that said Warneken refused to pay Caladonia one-fourth of the proceeds of said crop of tobacco, and she brought suit therefor before S. A. Caldwell, J. P.; that the suit was decided against her, and she appealed to the circuit court, where said suit is now pending on said appeal. (4) That the questions involved in this suit, as well as those involved in said suit of Caladonia Washington, are purely equitable; that this complainant is hampered by difficulties and complications too confusing and perplexing for investigation and solution by a jury, and that said plaintiff to said suit now pending by appeal has an unfair advantage at law, whereby she may make the court of law an instrument of injustice, and obtain a judgment therein contrary to equity and good conscience, thereby hindering, delaying, and defeating the creditors of said Ike Darden in the collection of their debts, and especially this complainant; that any and all conveyances by Ike Darden to Caladonia Washington of an interest in said crop are fraudulent and void, and have been made for the fraudulent purpose of hindering, delaying, and defeating creditors of Ike Darden in the collection of their debts. (5) That one-fourth of the proceeds of said crop of tobacco is still retained by said Warneken or his agent, and it is charged that this one-fourth is the property of Ike Darden, and should be subjected to the payment of complainant's judgment against Darden, and that the said Caladonia Washington has no interest therein." The prayer of the bill is that injunction issue restraining Caladonia Washington from further prosecuting said suit at law, and from attempting to collect any judgment she has or may obtain therein, or from pledging or disposing of her claim on said proceeds of said crop; that an attachment issue to attach one-fourth of the proceeds of said crop in the hands of Warneken or his agent, and for decree that Caladonia Washington has no interest in "

crop, and that all claims made by her to any part thereof, and all conveyances by said Darden to her, are fraudulent and void, and that the same be set aside, and that said interest in the proceeds held by Warneken or his agent be decreed to be the property of Ike Darden, and that it be subjected to the satisfaction of complainant's judgment, interest and cost; and for general relief.

On April 14, 1900, defendants Ike Darden and Caladonia Washington filed their joint and separate answer to complainant's bill, in which it is stated and averred as follows: "(1) It is admitted that complainant recovered the judgment before S. A. Caldwell, J. P., as stated in the bill, but that no return of nulla bona was made on the execution issued therefrom, but that said execution was served by garnishing defendant G. H. Warneken, who answered, in substance, this: 'There is to the credit of J. O. Langford on the Ike Darden crop \$——, which Darden claims belongs to some woman. Ed R. Beach, Agent. This return cannot be copied literally, as it was destroyed in the burning of the court house, but the words used are almost, if not the exact, language thereof.' Upon this answer, judgment was rendered against the said G. H. Warneken as garnishee for the amount of complainant's judgment against Ike Darden. Complainant Caladonia Washington was not a party to these proceedings, and knew nothing of them until after the judgment had been rendered against said Warneken as garnishee. (2) That these defendants made the crop of tobacco on the farm of J. O. Langford in 1898, under a contract by which each was to furnish an equal number of hands, and on one-half of the crop after the landlord had gotten one-half for the rent of the land, or one-fourth of the entire crop; that Ike Darden was not the owner of one-half the crop, as charged in the bill; that the crop was sold to G. H. Warneken for \$662, one-half of which belonged to the landlord for rent, and one-fourth each to the defendants Ike Darden and Caladonia Washington. (3) Ike Darden denies that he at any time said to the complainant that he would make him a mortgage on half of the crop, but that he made the mortgage on one-fourth of the crop, which was the only interest he had in it. Defendants deny that the claim of ownership to one-fourth the crop by Caladonia Washington is an afterthought, and state that the contract between them was entered into at the first of the year, before the crop was planted, and was in all respects in good faith. Defendants Darden and Washington deny that they are living together, and say that the defendant Ike Darden is a married man with several children, and lived and now lives in a different house from the one occupied by defendant Caladonia Washington. They deny that the claim of ownership by Caladonia Washington is the result of connivance, or that it was made for the purpose of defeating the collection of complain-

ant's debt against Ike Darden, or that of any other creditor. (4) That at the time the tobacco was delivered to G. H. Warneken the defendant Caladonia Washington sent a notice to him of her interest in the same, and notifying him not to pay her part to Ike Darden, but to send it to her by J. O. Langford; that this took place before the suit of complainant against Ike Darden before S. A. Caldwell, J. P., and before the said Warneken was sued as garnishee for the purpose of subjecting the interest of Caladonia Washington to the payment of the judgment against Ike Darden in said suit. Warneken refused to pay the proceeds of said one-fourth interest to defendant Washington, and allowed a judgment to be taken against him as garnishee, notwithstanding the fact that he had received notice of her claim; and defendants charge that he allowed this judgment to be taken upon an agreement between himself and complainant that complainant would save him harmless in the event he had to account to the defendant Caladonia Washington for the amount of the interest claimed by her. They charge that the proceeds of said interest were paid to H. P. Gholson, attorney for complainant in this case, for that purpose, and that he now holds the same. Caladonia Washington brought suit before S. A. Caldwell, J. P., against Warneken to recover the proceeds of her one-fourth interest, and the complainant employed H. P. Gholson, attorney, to represent the said Warneken. The suit was decided against her by the said justice, and she appealed to the circuit court, and a judgment had been rendered in her favor for \$135 before the filing of the bill in this case. They deny that the questions involved in the suit of Caladonia Washington against Warneken are purely equitable, and state that all the facts set out in the bill were submitted to the jury when said suit was tried in the circuit court, and judgment rendered against Warneken, as above set out. It is true that complainant is not nominally a party to said suit, but he has been present with his attorney at every trial, and given his testimony. In fact, he alone has contested the suit, the nominal defendant, Warneken, never even having been present at any trial thereof. They deny the existence of any difficulties and complications in the suit of Caladonia Washington against Warneken, and state that the only question involved in said suit is whether there was a contract between defendants Caladonia Washington and Ike Darden, as set out in this answer. No conveyance of any kind or character has been made by Ike Darden to Caladonia Washington. She claims under the contract referred to above, which was entered into at the first of the year in which the crop was made, the one-fourth interest referred to in the bill as being still in the hands of G. H. Warneken or his agent is not the property of Ike Darden, but the property of Caladonia Washington. All allegations in the bill not already

denied or admitted are here denied as if specifically referred to and denied."

We find the facts to be as follows: "(1) That in the latter part of the year 1897 there was an agreement or contract between Ike Darden and Caladonia Washington that Ike Darden should rent the land upon which the crop mentioned in the pleadings in this cause was raised in the year 1898, and that Ike Darden and Caladonia Washington were each to furnish equal numbers of hands, and perform, or have performed, equal parts of the labor necessary to raise said crop of tobacco, and that each was to have one-half of the remainder of said crop of tobacco or its proceeds after paying J. O. Langford one-half of said crop of tobacco or its proceeds for the rent of the land upon which said tobacco was to be grown in the year 1898. (2) That Ike Darden did rent from J. O. Langford the land upon which said tobacco crop was grown in the year 1898, and agreed to pay Langford one-half of the crop or its proceeds for the rent of said land for the year 1898. (3) That Ike Darden, his wife and 14 year old boy worked in said crop on Darden's part, and that Caladonia Washington and her two grown daughters worked in said crop on the part of Caladonia Washington, and that each—Darden and Washington—performed and furnished about equal portions of the labor in making and taking care of said crop; that one-half of the crop or its proceeds was paid to J. O. Langford for the rent of said land, and that Ike Darden was entitled to one half of the remaining half of said crop or its proceeds after having paid said rent, and that Caladonia Washington was entitled to the other half of said remainder of said crop or its proceeds after paying one-half to J. O. Langford for the rent as aforesaid. (4) That Caladonia Washington was and is entitled to one-fourth of the \$662 which Warneken agreed to pay for said crop of tobacco; that the contract between her and Darden was bona fide, and that she was justly entitled to one-fourth of said tobacco crop or its proceeds by virtue of said contract between her and Ike Darden, and by virtue of the fact that she and her two grown daughters performed one-half of the labor in producing and taking care of said tobacco crop; that her interest of the one-fourth is the direct result of the labor performed by her and her two grown daughters, and does not result from any transfer, sale, conveyance, or scheme, fraudulent or otherwise, on the part of Ike Darden; that she has been guilty of no fraud, so far as this record discloses, and has done nothing to aid Ike Darden in covering up any property of his to prevent the collection of debts due from him to his creditors."

The chancellor decreed that Caladonia Washington was the owner and entitled to one-fourth of the proceeds of said tobacco crop which was sold to Warneken for \$662, and dismissed complainant's bill, discharged

the attachment, and disallowed the injunction in so far as they affected her rights to said one-fourth of said \$662, and adjudged the cost of the cause against the complainant and H. P. Gholson, security on the prosecution bond. From this decree, complainant appealed, and assigned errors as follows: "First. The court erred in virtually finding that Caladonia Washington had an interest in said crop of tobacco. Second. The court erred in virtually finding that Ike Darden has been guilty of conspiracy, and has perpetrated a fraud upon the rights of the complainant by setting up an invalid and fraudulent claim to one-fourth interest in said crop of tobacco in Caladonia Washington, and in the same breath holding that she is perfectly innocent. Third. The court erred in not finding that the claim of Caladonia Washington to said interest in said crop was set up by her in bad faith, that it was fraudulently made and was therefore void, and that said interest was the property of Ike Darden, and should be subjected to the payment of complainant's debt. Fourth. The court erred in not holding that the facts as shown to exist in the record were sufficiently strong to raise such a presumption of fraud as to throw on the defendants Darden and Washington the burden of proof that there is nothing fraudulent or invalid in the claim of Caladonia Washington to said interest in said crop. Fifth. The court erred in not going sufficiently into the record, and making a decree that would have determined the rights of all of the parties to this suit, instead of speaking as to the rights of one of the parties, and leaving the balance of the case untried."

The first, second, third, and fourth assignments of error are not well taken, and are therefore overruled and disallowed. The complainant, upon the allegations in the bill and admissions in the answer of Ike Darden under the prayer for general relief, was entitled to a decree if he had desired to take the same against Ike Darden for the amount of his judgment before Caldwell, J. P., in favor of complainant and against Ike Darden for \$165, with interest from the date of said judgment, and cost of justice's proceedings, amounting to \$1.65, and the decree of the chancellor under the fifth assignment of error will be so modified as to allow a decree in favor of complainant against Ike Darden personally for said sum of \$165, with interest from the date of the justice's judgment, together with the sum of \$1.65 cost, if complainant shall desire to have such judgment rendered here, and the decree of the chancellor is modified to this extent only. The decree of the chancellor, with this modification, is in all things affirmed. It does not appear that there was any specific prayer for personal decree against Ike Darden, nor that complainant asked for such decree in the court below, which he might have had for the mere asking, and, having declined, neg-

lected, or refused to ask for this decree in the court below, the result as to costs will not be affected or changed, as there is no contest over this question in this court, and no decree is asked for or insisted upon in oral argument or briefs. But the main contention is over the right of complainant to subject the one-fourth interest hereinbefore found to belong to Caladonia Washington to the payment of complainant's judgment against Ike Darden. The complainant will pay the cost accrued in the court below as decreed by the chancellor, and the cost of the appeal in this case. All concur.

Affirmed orally by supreme court, March 23, 1901.

ROBNETT v. HOWARD et ux.

(Court of Chancery Appeals of Tennessee.

Feb. 7, 1901.)

VENDOR AND PURCHASER—TENANTS IN COMMON—GUARDIAN—RIGHT TO POSSESSION OF PROPERTY—RIGHT TO LAND—ACTION TO RECOVER POSSESSION—DIVISION—PARTITION DEED.

1. The owner of land sold and conveyed it to purchasers in common, but reserved a life estate in a portion thereof, but the deed contained a provision that, in case he left the premises before his death, the vendees should have the use of the property free of rent. The vendees partitioned the land, by which one received the portion subject to the life estate. *Held*, that such vendee was entitled to possession of the property on the removal of the vendor therefrom.

2. Where the other vendee enters into and continues in possession of such property after the removal of the life tenant, the vendee entitled to the possession is entitled to recover rent therefor.

3. A judgment of the circuit court adverse to the plaintiff on an appeal from a justice court of a suit for the possession of certain real estate is not a bar to a subsequent suit in equity by plaintiff to recover the same property, though it is based on the same facts.

4. A deed partitioning land held in common is valid as to the land included therein, though it may not include all of the tract held in common.

Appeal from chancery court, Lewis county; A. J. Abernathy, Chancellor.

Suit by James Robnett against E. B. Howard and wife to recover certain real property. From a decree in favor of plaintiff, defendants appeal. Modified and affirmed.

W. P. Clark, for appellants. John H. Cunningham, for appellee.

MURRY, J. This suit was brought by bill filed in the chancery court of Lewis county, Tenn., on the 18th day of April, 1899, to recover certain portions of lands and improvements embraced in a partition deed executed by E. B. Howard to James Robnett on the 24th day of January, 1896. The parts of said lands and improvements sought to be recovered, together with the possession thereof, by the bill in this cause, is a certain piece of land on the western boundary of the lands described in the partition deed

of Howard, which is made Exhibit B to complainant's bill, consisting of about 8½ acres of land, and known as the "Picket Field," and also a certain barn, barn lot, and garden, situated on the east side of the lands described in said Exhibit B, and marked on plat filed with the record as Exhibit D to the deposition of James Robnett, "Disputed Barn," etc.; and also to recover rents for said lands and improvements sought to be recovered from the time that J. A. Gullick and wife moved away from the house, garden, orchard, field, etc., to the time of the filing of complainant's bill. The bill states and avers as follows: That complainant and his sister, Margaret Robnett, and defendant E. B. Howard purchased the lands described in the bill and exhibits thereto, and took deed therefor, July 11, 1890, as tenants in common of said lands. That on the 21st of January, 1895, complainant, James Robnett, purchased and took deed Exhibit A to complainant's bill from his sister, Margaret Robnett, for her one-third interest in said lands. That shortly after the purchase of the interest of his sister, Margaret, he and defendant E. B. Howard divided said lands between themselves by deed of partition, except a body of timbered lands on the north of said tracts, consisting of about 92 acres; and each executed to the other a deed for the portion agreed on in the division, and the deed from E. B. Howard to complainant for the part allotted complainant in said partition is filed as Exhibit B to complainant's bill. That defendants are in possession of a portion of the second tract described in Exhibit B, to wit, a field known as the "Picket Field," consisting of about 8½ acres on the western end of said tract on the waters of Buffalo river, and certain improvement on the eastern end of said tract, consisting of a barn, barn lot, and garden. That the southern part of said 100-acre tract embraces the improvements and tillable land, the boundaries of which have been definitely ascertained and described above, as shown by Exhibit B, and that in these boundaries are included the said improvements and picket field, of which defendants are in possession, and to which complainant is entitled as owner in fee, and that he is entitled to the immediate and exclusive possession of same; and that defendants are lawfully detaining same from him, and are unlawfully occupying and using said property, and have been since about January 1, 1898, ever since which time complainant has been entitled to the use and possession thereof. The prayer of the bill is that the title and right of possession of the lands allotted to complainant by Exhibit B be decreed to him, and that he have a decree for the value of the rents and profits of that part of said lands of which defendants are in possession from the time said possession has been unlawfully detained from the complainant, and for general relief.

On the 25th day of April, 1899, the defend-

ants filed two separate and distinct pleas to complainant's bill, which are in the words and figures following: "The defendants, for plea to the bill filed against them in the above-styled cause, say that heretofore, and before the complainant filed his present bill in this court, he brought suit before Geo. Churchwell, J. P., an acting justice of the peace of Lewis county, for the possession of the premises described in his bill, and said suit was appealed regularly from the judgment of said justice of the peace to the circuit court of Lewis county, and said appeal coming on for trial was at the February term, 1899, heard and tried by the Honorable Sam Holding, judge of said court. Said suit in said circuit court was brought by this complainant against these defendants, and for the possession of the same premises as described in his present suit, and for the same matters and to the same effect as the complainant now seeks by his bill; to which suit in said circuit court these defendants made defense, and judgment rendered therein in their favor for the possession of said premises and a writ of possession was awarded on said judgment in their favor, and said judgment was not appealed from, and is now in full force and effect, and therefore these defendants do plead the said former proceedings and judgment in bar of the present bill, and demand the judgment of this court whether they shall make any other or further answer thereto, and they pray to be hence dismissed with their costs. (2) And for further plea defendants say that the bill does not show jurisdiction as to complainant's demand for rents to the extent of \$50.00, and they plead this failure to allege the necessary fact to confer jurisdiction, and they demand the judgment of this court whether they shall make any further answer thereto, and they pray to be dismissed with their costs." At the April term, 1899, on the 27th day of April, upon motion of complainant, the said pleas were set down for argument and hearing as to their sufficiency, when the court was of opinion, and so adjudged and decreed, that said pleas were insufficient in law, and overruled and disallowed the same, but allowed defendants to rely upon the same in their answer, and they were allowed 30 days in which to answer. On the 25th day of September, 1899, the defendants filed their answer to complainant's bill, in which he sets out his said pleas in *hæc verba*. That answer to the residue of the bill states and avers that the deed Exhibit B to complainant's bill was never completed, and this fact is evident from a mere writing of the deed, because the description of the premises intended to be conveyed was not completed, and could not be until the division of the timbered land had been agreed upon. Hence this deed could not be operated, because no lands were inclosed by said boundaries, and because it was agreed and understood that

said deed should not become operative until the undetermined line of division should be fixed and determined. That the complainant was entitled to the possession of said premises on January 1, 1898, or at any time before the filing of his bill is denied, and respondent says that the right of possession of complainant does not accrue until the death of J. A. Gullick and wife. It is denied that he is indebted to complainant in any amount for the rent of the Pickett field, or the other premises described in his bill. The deed from Gullick and wife to James Robnett, E. B. Howard, and Margaret Robnett is made Exhibit A to the deposition of James Robnett. The lands conveyed are fully described in said deed, and it is not necessary to copy the said deed in full, but we here copy that portion of said deed under which the controversy in this case arises: "But it is expressly understood and agreed between the said J. A. Gullick and wife, Fannie Gullick, and the said E. B. Howard, James S. Robnett, and Margaret Robnett, that the said J. A. Gullick and wife are to have possession of the mansion house, barn, and stables, garden, horse lot, apple orchard, and five acres of ground in the field adjoining said orchard and horse lot, during their natural lives on said lands, together with the privilege of water and wood necessary for fuel and repairs: provided, said E. B. Howard, James Robnett, and Margaret Robnett are to have possession of said premises free of rents what time the same is not occupied by said J. A. Gullick and wife, or either of them." At the time of the execution and delivery of Exhibit B, being partition deed from Howard to Robnett, there was a certain other agreement in writing between said Howard and Robnett in reference to the possession of the respective portions of lands and improvements allotted to each in the partition of said land. This agreement is made Exhibit B to the deposition of James Robnett, and is as follows: "This agreement, made and entered into between James Robnett and E. B. Howard, to wit: (1) The said James Robnett do agree that the said E. B. Howard shall have possession and continue the use of his barn, lot, and garden, and also the possession and use of what is known as the 'Pickett Field' on Trace creek to cultivate free of rent, until Gullick and Evans give the said Howard possession of the houses, barn, orchard, and ground on which they now live. Then the said Howard shall give the said Robnett possession of his barn, lot, garden, and picket field. The agreement being made between us in the division of the tract of land purchased by us from J. H. Gullick and wife on the 11th day of July, 1890. Given under our hands this January 24, 1895. E. B. Howard. James Robnett. Sallie F. Robnett." There was also another written agreement, which is filed as Exhibit C to deposition of James Robnett, and is as follows:

Upper field	30 acres.
Lane "	17 ¹ / ₁₈ A.
Evans "	6 ⁵⁵ / ₁₀₀ A.
Barn, excluding garden, horse lot	18 and ¹ / ₈ A.
Picket field	8 ⁷² / ₁₀₀ A.
Add for garden lots and orchard	2
Total	82 ⁸⁰ / ₁₀₀ A.

In the division Robnett gets the upper field, the barn field, and picket field, and Howard the lane field and the Evans lot. Howard gets one-third in value, and Robnett gets two-thirds in value. The timber land yet to be divided is 92 acres in the hills north of the farm and 8 acres in the bottom between Trace and Rock House creeks and Buffalo river and the Picket field. Howard retains possession of his barn, lot, and garden, and is to have the Picket field; also to cultivate till Gullick gives up the houses and lot he lives on. Then Howard is to give Robnett possession of the barn, lot, garden, and picket field, and take the Gullick lot, with all the improvements and orchard, without any compensation to Robnett.

We find the facts to be as follows: (1) That James Robnett and his sister, Margaret Robnett, and E. B. Howard, purchased a tract of land from J. H. Gullick and wife, and took deed thereto from said Gullick and wife on July 11, 1890. (2) That James Robnett purchased the one-third interest of his sister, Margaret Robnett, in said lands, and took a deed from her for her said interest, thus leaving James Robnett owner of two-thirds interest and E. B. Howard owner of one-third interest in said land. (3) That James Robnett and E. B. Howard agreed upon a partition and division of all of said lands except about 92 acres of timbered land, which is not divided, but left to be divided in the future, and that the said James Robnett and E. B. Howard executed deeds pro and con for the lands allotted to each in the partition and division of the lands so divided and partitioned between them. (4) That there fell to James Robnett the lands and improvements in controversy in this case in the partition between them, and that they are embraced within the boundaries of the partition deed executed by E. B. Howard to James Robnett. (5) That the lands in controversy in this case are the field known as the "Picket Field," of 8 ¹/₂ acres, on the west side, and the barn, barn lot, and garden on the east side of the lands allotted to James Robnett in the partition of said lands between them, and conveyed to him by the partition deed to said E. B. Howard; that J. A. Gullick and wife moved from and gave up possession of said land in July, 1898, moving from there to one Evans, their son-in-law, who lived on what is known as the "Jones Farm." (6) That they gave up the possession of said land permanently, and did not desire to move back, they being much more comfortably situated at Evans'. (7) That under the agreement between James Robnett and E. B. Howard, Howard was to

have possession and use of the lands and improvements in controversy in this case rent free until Gullick and wife should give up possession of the house, barn, barn lot, and garden, and five acres of ground reserved by Gullick and wife in their deed during the time that they should live thereon, even to the extent of their natural lives, if they should so desire to live on said land. (8) That defendant Howard was in possession of the property in controversy in this case, and using the same at the time this lawsuit was brought, and had been so in possession and use of the same since January, 1891.

From the reservation in the deed of J. A. Gullick and wife, heretofore copied in this opinion, it will be seen that Gullick and wife are to have possession of the mansion house, barn, stables, garden, horse lot, apple orchard, and five acres of ground in the field adjoining said orchard and horse lot, during their natural lives on said lands: provided, said E. B. Howard, James Robnett, and Margaret Robnett are to have possession of said premises free of rents what time the same is not occupied by said J. A. Gullick and wife, or either of them; and in this connection it becomes necessary to state that we find as a fact that Gullick and wife not only left said premises, but emphatically declared their intention not to return to them, they being better situated and suited at Evans'. We are therefore of opinion, and so hold, that the said J. A. Gullick is the owner and has been the owner of the lands described in Exhibit B to complainant's bill, being the partition deed executed and delivered to him by E. B. Howard for the lands allotted to said James Robnett in the partition of the lands between the said Howard and Robnett since the date of Exhibit B, and that the lands in controversy in this case are included in the boundaries of said partition deed, and that complainant, as such owner, is and has been entitled to the possession of the lands in controversy in the case, to wit, the picket field of 8 ¹/₂ acres, barn, barn lot, and garden, since the 1st of July, 1898, the time when Gullick and wife left the premises theretofore occupied by them. We are further of the opinion that said James Robnett is entitled to recover reasonable rents for the property involved in this suit from the time that Gullick and wife moved from the premises occupied by them in July, 1898; and it appears to the court that E. B. Howard executed bond with securities for the rents of said land pending this suit, and the appeal in the supreme court to the clerk and master of the court below, and that it would be necessary to remand this cause for settlement of the question of rents. Upon the foregoing state of the pleadings and the facts, the chancellor decreed from the whole record that complainant's title was superior to defendants' and that of all other persons, and that complainant is entitled to possession of the lands and premises in contro-

versy, and that writ of possession issue, and the defendants pay the costs of the cause. The chancellor recited in his decree this: "Nothing in this decree shall be taken as a bar to complainant's right to maintain the action for mesne profits; that question not being adjudicated in this cause." From this decree there was a broad appeal by defendants, and they have assigned error. The first and second assignments are that the chancellor erred in overruling the pleas filed by defendants to complainant's bill. The third assignment is that the chancellor erred in holding that Exhibit B to complainant's bill was an executed instrument, and binding upon the parties. We are of the opinion, and so hold, that the pleas were properly overruled, and that the assignments are not well taken, and are therefore overruled and disallowed. We are further of opinion, and so hold, that the partition deed executed by Howard to Robnett, and filed as Exhibit B to complainant's bill, was a perfectly executed, valid, and binding instrument, and that it was binding upon both Howard and Robnett as to the lands, which were attempted to be and were partitioned between them, and that the same had no application to the 92 acres of timbered land not partitioned or attempted or intended to be partitioned. We are therefore of opinion that the third assignment of error is not well taken, and the same is overruled and disallowed. The chancellor's decree is modified so as to allow complainant to recover of defendant Howard and of Howard and his securities on the bonds executed for rents in the court below reasonable rents for said lands from the time said Gullick and wife left the premises occupied by them in July, 1898, and that with this modification the decree of the chancellor is affirmed, there being no error therein. The defendants will pay the costs accrued in the court below up to this time, and the defendants and their securities on the appeal bond are to pay the costs of the appeal, and the costs that may hereafter accrue in the court below will be paid as hereafter decreed by the chancellor. This cause is remanded for settlement of the question of rents by the court below in accordance with this opinion and decree of this court herein. All concur.

Affirmed orally by supreme court, March 8, 1901.

HETTERMAN et al. v. YOUNG et al.

(Court of Chancery Appeals of Tennessee.
Nov. 27, 1900.)

RECEIVERSHIP—EXPENSES—PAYMENT—FILING BILL—JUSTIFICATION—COSTS—TAXATION—OBJECTION—REVIEW.

1. Complainant filed a bill to set aside a sale of goods as fraudulent, and had a receiver ap-

pointed, who sold the goods and deposited the proceeds in court. The supreme court dismissed the bill, and remanded the cause to ascertain defendant's damages, and decreed costs in favor of defendant. While the matter was pending before a master, the parties agreed that the master should report \$200 as damages chargeable to the complainant, and that the costs of the cause should be paid as adjudged by the court, and that, if any costs had been paid out of the fund in court, such amount should be refunded by complainant. *Held*, that the costs of the receivership were included in the adjudication of costs against complainant, and hence must be paid by him under the agreement between the parties.

2. Where, on a prior appeal, complainant's bill to set aside a sale of goods as fraudulent was dismissed, and costs were adjudged in favor of defendant, and an appeal was taken from a decree entered on a motion to assess defendant's damages, the question whether the conduct of defendant was so suspicious as to justify complainant in filing the bill, and hence to throw the costs on defendant, cannot be considered, since the first appeal and the appeal from the order on the motion for damages are separate, and the original appeal was not before the court.

Appeal from chancery court, Davidson county; H. H. Cook, Chancellor.

Bill by Hetterman Bros. & Co. and others against Young & Trousdale and others to set aside the sale of a stock of merchandise as fraudulent. From a decree that complainants should pay the costs of a receivership, complainants appeal. Affirmed.

For former appeal, see 52 S. W. 532.

Stokes & Stokes, for appellants. W. R. Chambers, for appellees.

NEIL, J. The solution of the problem presented in this case turns upon the construction to be given an agreement entered into by the respective counsel in settlement of those matters in the cause remaining undisposed of at the time the agreement was entered into. The facts are as follows: The complainants, as creditors of Young & Trousdale, filed their bill attaching certain property which it was alleged defendants had fraudulently disposed of. The attachment issued, and was levied upon the property in Wilson county, to which county the alleged purchaser had carried it. A lengthy litigation followed, and was finally settled by the decree of the supreme court. In which the bill of complainants was dismissed, and they were taxed with the costs of the appeal, the costs of the lower court to be as adjudged by that court, and the case was remanded to the chancery court of Davidson county to ascertain the damages sustained by the defendant William Odum, the purchaser of the property. The case was referred to the clerk and master to ascertain these damages. While the matter was pending before the master, the following agreement was entered into between counsel, being the agreement above referred to as standing for construction, viz.:

"It is agreed in the cause that under the decree of reference in the cause the clerk and master will report as damages charge-

able to the complainants the sum of \$200.00, which shall be taken in full thereof. The cost of the cause is to be paid as adjudged by the court, and, if any of the said cost has been paid out of the fund in court, such cost is to be refunded by complainants. This report of the C. & M. is not to be made until the cause has been revived against the estate by Wm. Odum, and complainants are to have judgment on their claims against Young and Trousdale. This Mar. 9, 1899. [Signed] Stokes & Stokes, for Compts. W. R. Chambers, Col.

"As agent for Mrs. Wm. Odum, I direct W. R. Chambers to sign the within. Nov. 9, 1899. J. T. Odum."

The clerk and master thereupon reported the damages at \$2,000, and this report, being unexcepted to, was confirmed by the chancellor, December 5, 1899. A misunderstanding having arisen between counsel, subsequent to the entry of the foregoing decree, concerning its true meaning (we infer when settling time came), in view of certain facts now to be stated, and which are embodied in the following additional agreement of counsel, they made this additional agreement, and submitted the matter to the chancellor. This additional agreement is as follows: "It is agreed in this cause that the property attached in the bill was placed in the hands of Thos. S. Weaver as receiver in the cause; that said goods, when attached, were at Lebanon, Tennessee, and the great bulk of same were brought back to Nashville and disposed of by the receiver; that the gross amount received by him was the sum of \$1,370.18; that a decree was taken in the cause directing the receiver to loan out the fund pending the litigation, which he did, and received in the way of interest on the fund the sum of \$191.68, less \$9.57 commissions; that the expense of the receivership amounted to the sum of \$177.51, which the receiver paid out of the funds in his hands, and the balance of the fund was paid out to the party entitled to them under the decree of this court; that these items appear on the ledger of Mr. Weaver, as clerk and master and receiver; that in addition to this book he keeps a regular execution docket, upon which is entered the regular costs of the cause, and items of expense paid by him as receiver do not appear upon the execution docket. Said sum of \$177.51 went to pay for hauling the goods, for storing them, the compensation of an agent employed by the receiver to take charge of the goods, and selling them, and the like." Other facts are as follows: The receiver was appointed on application of the complainants. The order to lend out the funds was made by agreement of parties. The costs of the court below were never at any time adjudicated in that court or in the supreme court, although it is apparent from the decree of the court, copied below, that the chancellor was under the impression that they had been adjudicated against complain-

ant. William Odum purchased the goods on January 18, 1896, at the price of \$1,398, which was 75 cents on the dollar of their value, the total value of the goods then being \$1,747.50. The goods were sold by the receiver for \$1,370.18. There was realized from interest on the first fund, while in the receiver's hands, \$182.11 net. With these facts before him, the chancellor decreed as follows on the 13th of December, 1899: "This cause came on for hearing upon motion of the counsel to construe the agreement made in the decree made in the cause on December 5, 1899, and determine whether the expenses of the receiver in this cause are part of the costs of the cause and covered by the adjudication heretofore providing for the payment of said costs, and, said motion being heard upon the record in the cause and agreed statement of facts [copied above] signed by the counsel, the court, after due consideration thereof, does adjudge and decree that all the expenses of said receivership are part and parcel of the costs of the cause, and that the adjudication of this court and of the supreme court in taxing the complainants with the costs of the cause carried with it the expenses of said receiver, and that complainants and their surety for costs are required to pay the amount of said expenses back to the clerk and master, in addition to the \$200 allowed as damages on the regular bill of costs, as set out in the execution docket of this court." From this action of the court the complainants appealed, and have assigned errors.

The line of argument pursued by the complainants' counsel in their brief is as follows: That the measure of damages in attachment suits is the value of the goods wrongfully taken, and the deprivation, in value, of their use; that, if the goods are delivered over at the end of the lawsuit, then the measure of damages would be the depreciation in their value and damages for their detention; that if, on the other hand, the goods have been sold, then the damages would be the value of the goods, with interest on that amount from the date they were taken (citing 2 Suth. Dam. 59); that in the present cause the goods were sold, and the party against whom the attachment ran recovered the proceeds derived from the sale of the goods, together with interest on the fund while it was in the clerk and master's hands, and \$200 in addition, and that this was full compensation to him for all damages sustained; that the amount paid out by the receiver in the way of expenses was in no sense costs of the cause, but that, as these expenses were paid out of the proceeds derived from a sale of the goods, the amount, in some way, must be made up to the party whose goods were wrongfully taken, and that this was done by the agreed payment of \$200. A table is then presented by the complainants to show the result according to their theory as above outlined, viz.:

Wm. Odum purchased goods at.....	\$1,898 00
The goods were sold by Rec. for....	\$1,370 18
Realized interest from amt. col. by master (should be \$182.11).....	185 06
	\$1,555 24
Deduct expenses of Rec.....	177 51
	\$1,377 73
Add amt. paid on damages.....	200 00
And we have amt. to reimburse owner	\$1,577 73

"It will thus be seen," continues the complainants' counsel, "that Mr. Odum has received full compensation for all damages sustained by him. We therefore insist that it is neither law nor equity for complainants to contribute anything further to the purchaser, William Odum."

On the other hand, counsel for Odum says: That the intention of the parties, as shown by the contract, must govern its construction; that the contract clearly shows on its face that the parties understood that the chancellor had ordered that complainants should pay all the costs; that this is shown by the fact that the agreement provided, first, that the costs should be paid in accordance with the decree theretofore rendered, and, immediately afterwards, that if any costs had been paid out of the fund they should be refunded by the complainants; that this last statement shows also that it was understood by the parties that complainants should refund any expenses of the receivership, "because they were the only costs which, in the ordinary course, would be paid out of the fund in the progress of the cause"; that thus, whether the expenses of the receivership were technical costs or not, they were embraced in the understanding of the parties, and that it was thus agreed that complainants would pay them; that the above construction is manifestly correct, because by the agreement William Odum got only \$200, when, as now insisted by his counsel, he had been damaged to the extent of about \$600; that, although the stock of goods cost him only \$1,398, the testimony shows that it was really worth about \$2,000 (or, as we have found above, \$1,747.50); that, if the construction insisted upon by the complainants should be adopted, William Odum would be required to pay the expenses of the receivership forced upon him, and would thereby be deprived by construction of nearly the entire \$200 which the complainants promised him by the contract. Thereupon the counsel for William Odum cites and quotes the following authorities to sustain his general contention: "All costs, which includes both those usually incident to litigation, and the compensation of the receiver, and other expenses incurred by reason of the receivership, are, as a rule, taxed according to the common principle governing costs, namely, against the unsuccessful party." 17 Eng. Enc. Pl. & Prac. 840. And further: "If the ap-

pointment of the receiver is erroneous and void, and the adverse party does not acquiesce therein, but continues to contest it to a successful termination by whatever means the law affords, any compensation which may have accrued to the receiver in the meantime, and expenses incurred in the administration of the estate, should be taxed to the applicant." Id.

We adopt the views presented by the defendants' counsel as stating the true theory of the case. We shall only add that upon complainants' theory substantially the same result becomes apparent when we deduct the \$185.06 interest, which, as we think, suggests a fallacious argument. The defendants were entitled to the fund in court by the terms of the decree, and hence to all interest accrued upon it in the hands of the master. The complainants should not, therefore, have been credited with it (the interest) in the statement, unless also charged with it, which is tantamount to saying it should not have entered into the statement at all. Leaving this out, it appears that the true amount of damages sustained by the defendants is thus ascertained:

Value of goods attached.....	\$1,747 50
Same goods sold by the receiver at..	1,370 18

Amount of damages sustained... \$ 377 32

This was the sum (\$377.32) which was compromised by the parties at \$200. The \$200 interest collected by the master on the \$1,370.18 while it was in his hands does not rightly enter into the calculation at all. Being interest accrued on a fund while it was in court and under the control of the court, it merely followed the direction of the parent fund. Now, to say that the complainants should pay the defendants \$200 (by way of compromise) to cover the difference between the value of the goods attached and what they sold for, and thus then indirectly, but no less really, \$177.51 of this \$200 should be repaid to the complainants, thus reducing the sum to be paid for damages down to \$22.49, manifestly produces a result that never could have been contemplated by the parties. So, if we take another view, the same result follows. We could hardly presume, in the absence of an express agreement, that it was contemplated by the parties that the defendants should pay the expenses of the receivership after having been successful in the litigation. The law contemplates these as expenses which ordinarily must be paid by the losing party; and, as pointed out by the defendants' counsel, they ordinarily go under the name of "costs," though not as technical costs taxed by law under statutory fee bills. Then, if any agreement be relied upon to change the rule, that agreement should be clear. To say the least, the agreement before us does not clearly support the complainants' contention; rather the contrary, we think. It results that the chancellor's decree must be affirmed, with costs of this

court, and the costs of the court below so far as pertains to this motion.

There is another matter. The complainants contend that, inasmuch as the chancellor omitted to adjudicate the taxable costs of the court below, they should be adjudicated here, and, because there were many suspicious circumstances, that seemed on the face of them to justify the filing of the bill, the defendants should be taxed with the costs. In a case at Knoxville we held that where the vendee in a conveyance attacked as fraudulent is guilty of such conduct as would naturally, on the face of things, unexplained, justify the filing of an attachment bill, he should pay the costs, although his acts, when explained, fall short of sustaining the charge of fraud. We are unable, however, to apply this principle here, because the original case is not now before us, but only matters arising upon a motion for damages. This is a separate case from the original. *Macheca v. Panesi*, 4 Lea, 544; *Winslow v. Mulchey* (Tenn. Ch. App.) 35 S. W. 763; *Rouss v. Kendrick* (Tenn. Ch. App.) 41 S. W. 1077. We cannot, therefore, make either a finding of fact or of law upon the point suggested, as applied to the original cause.

BARTON, J., concurs. WILSON, J., absent on account of illness.

Affirmed orally by supreme court, January 19, 1901.

COLLIER et al. v. PRIMM et ux.

(Court of Chancery Appeals of Tennessee.
March 6, 1901.)

VENDOR AND PURCHASER—DEED—REDELIVERY—ACTION FOR PURCHASE PRICE—DECREE—TECHNICAL OBJECTIONS.

Where the purchasers of land redelivered the deed therefor, claiming that it did not embrace all the tract purchased, and in an action for the balance due on the purchase price the chancellor gave a decree for the balance due, declaring the same to be a lien on the land, and ordering a sale of the land to pay the recovery and costs unless the same were paid within 60 days, the objection that the decree did not order a delivery of the deed or vest title in defendants in case they paid the amount and costs was merely technical.

Appeal from chancery court, Cheatham county; J. S. Gribble, Chancellor.

Bill by W. R. Collier and another against J. W. Primm and wife. From a judgment in plaintiffs' favor, defendants appeal. Affirmed.

R. S. Turner and W. B. Leech, for appellants. Morris & Cook and J. E. Justice, for appellees.

WILSON, J. The original bill in this case was filed August 23, 1898, by the complainants, as executors of B. A. Collier, to collect a balance due on a note for \$875 al-

leged to have been given for a tract of land described in the bill by an enforcement of the vendor's lien and a sale of the land. The note sued on is as follows: "875. Dec., 1890. Two years after date, we promise to pay to the order of W. R. and C. C. Collier, executors, \$875, value received, with interest. Mary E. Primm. J. W. Primm. B. F. Hall." This note is credited by a payment of \$600 January 7, 1893. The bill alleges that the proceeds of the note belonged to C. C. Collier, and this fact is not disputed, as, in the settlement and distribution of the estate of B. A. Collier under his will, C. C. Collier took this note as money in part of his share of the estate. The bill alleges that complainants, as executors, soon after the sale of the land to defendant Primm, and the execution of the note in suit, and another for a like amount, due in 12 months, and which was paid about its maturity or shortly thereafter, executed, acknowledged, and delivered to defendant Primm a regular deed to the land sold him and described in the bill, and that defendant kept this deed for some time, when he returned it to complainants, to be held by them until all the purchase money was paid. This deed is exhibited with the bill, and is tendered in the bill to defendant Primm. A decree is asked for the balance due on the note, with interest; that it be declared a vendor's lien on the land; and that the land be sold on time free from the equity of redemption to satisfy the recovery sought, and the costs of the cause. Primm and wife answered the bill September 2, 1898. The substance of the answer, so far as need be stated to present the questions raised by it, is that complainant did not sell them the tract of land set out in the bill and in the deed tendered with the bill, but a tract described in the boundaries contained in a paper filed as Exhibit A to the answer. They allege that they purchased the land embraced in Exhibit A, which was represented by the auctioneer crying the sale as containing 500 acres, at \$3.50 per acre, and gave their two notes, for \$875 each, covering the purchase price due, in one and two years. They admit that they received the deed exhibited with the bill, but say that they returned it in a short time because of the indefiniteness of its boundaries, and because it did not purport to convey any given number of acres, nor did it embrace all the Rape tract of land, which they bought as containing 500 acres, at the price stated per acre. They aver their willingness to pay the balance of their note when the complainants convey to them the land they bought,—500 acres; and they ask an abatement of the purchase price they agreed to give, to the extent the land tendered falls short of the 500 acres. After a part of the proof was in, defendants obtained leave of the court to file a cross bill. In this cross bill they seek affirmative relief, and say, in

substance, that they bought at the sale of the executors the Rape tract of land, represented to contain 500 acres, at \$3.50 per acre; that in the deed tendered they have not included all the Rape tract, but had excluded an island in the Harpeth river, of some 10 acres, and some 50 or 60 acres on Flat creek, which were the most valuable parts of the Rape tract; and that much less than 500 acres were embraced in the said deed tendered. They ask for an abatement of the purchase price, and for a recovery for the excess of payments made. This cross bill was answered, and its contentions denied. In brief, the contention of complainants was and is that the tract of land sold defendants was sold as a tract, and not by the acre, and that defendants got the land that they bought, at \$1,750; that they had gone on it soon after the purchase, cut the valuable timber from it, and cultivated it; and that the defense of a purchase by the acre, after this long lapse of time, was but a mere pretense. Additional proof was adduced by the parties. The cause was heard by Chancellor Gribble October 30, 1900. He dismissed the cross bill of defendants, and gave complainants a decree for the balance due on the note sued on, with interest amounting to \$568.15, declared the same a lien on the land described in the bill, and ordered a sale of the land on a credit of 6 months, free from the equity of redemption, to pay the recovery and costs, unless the same are paid to the master within 60 days. From this decree defendants prayed, were granted, and perfected an appeal to the supreme court, and the cause is before this court.

Defendants assign, in effect, the following errors: First, the chancellor erred in dismissing their cross bill asking an abatement of the purchase price they agreed to give for the land, because the evidence shows that they bought by the acre, at so much per acre, and the land was represented as 500 acres, and because it further shows that the land tendered does not exceed 373 acres; second, he erred in dismissing their cross bill because the deed tendered by complainants in this cause does not embrace all the Rape tract, admittedly sold to defendants, but leaves out an island in the river, containing 10 acres, and about 50 acres on the other side of the tract; third, he erred in not giving them the affirmative relief asked under their cross bill. A further error is presented, to the effect that the decree of the chancellor does not vest them with the title to the land tendered in the event they paid the recovery granted the complainant, and hence they were left no alternative but an appeal.

The cause was ably and thoroughly argued before us on both sides, and in addition full briefs were filed with the record, clearly pointing out all the evidence tending to support the contentions of the parties. We have

read the whole record, and weighed and analyzed all the evidence, reading the larger portion of it more than once. It is needless to set it out and discuss it, or that part which leads us to the conclusions we have reached. It would benefit neither party. It is sufficient to say that the evidence is quite conflicting on the material points in the case, and this is not unusual where parties purport to detail what was said eight or ten years in the past. No question is made as to the right of the executors of B. A. Collier to sell his lands, and that they did sell to defendant Primm, at a public sale, land of their testator at the price of \$1,750. There is no question that Primm executed two notes, for \$75 each, due in one and two years, in compliance with his purchase. There is no question that he paid the first note at or shortly after its maturity, and that he paid \$800 on the second note January 7, 1898, shortly after its maturity. There is no question that the land was sold at public sale in December, 1890. There is no question but that the Rape tract was sold to him. So far there is no real dispute in the evidence. The first and fundamental question in the case, over which a real conflict arises, is, was the Rape tract sold to him by the acre, as containing 500 acres, at so much per acre, or was it sold to him in gross, as a tract of land, without any warranty or guaranty or statements as to the number of acres it contained? And the second disputed question in the case is, did complainants tender in their deed all the Rape tract. As before stated, we have carefully reviewed the evidence in the record, and, after doing so, we believe, and find as a fact, from the weight of the testimony, that the Rape tract was sold to defendants in gross and as a tract, and not by the acre. We further find that the Rape tract sold to defendants was the tract tendered by the deed exhibited with the bill filed in this case. It was all the Rape tract, as appears from the proof, owned by B. A. Collier. As we gather from the evidence, the island in Harpeth river mentioned in the cross bill of defendants was never a part of the Rape tract. The 50 or more acres on Flat creek mentioned in the cross bill was never a part of the Rape tract, as owned by B. A. Collier. These findings of fact dispose of all the material questions in the case.

We do not think that there is any serious merit in the objection that the decree of the chancellor does not vest title in defendants to the land tendered, in the event they pay his decree, nor provide in terms for the delivery of the deed tendered to them on payment of the decree. This complaint is merely technical. As before stated, the finding that the land sold defendant was as a tract in gross, and not by the acre, as contended for by the defendants, and that the deed tendered with the bill embraces all the tract that was sold defendants, settles the real

points at issue between the parties. The Rape tract sold defendants was generally supposed in the neighborhood to contain 500 acres, and this estimation of its quantity was doubtless mentioned on the day of sale, and it is quite probable that these facts led the defendant and some of his witnesses to believe that he was buying 500 acres at so much per acre. It is proper to state that, before the hearing of the cause by the chancellor, both complainants, executors of B. A. Collier, died, and the cause was revived in the name of their representative; the chancellor decreeing, in accordance with the averments of the bill and the facts, that the proceeds of the recovery belonged to the administrator of O. C. Collier, to be distributed as a part of his estate. There is no error in the decree of the chancellor, and it will be affirmed, with costs. A decree will be entered in this court for the amount of the decree of the chancellor, with interest, and the costs of the appeal will be paid by defendants and the sureties on their appeal bond, for which execution may issue. Said decree will also be declared a lien on the land described in the original bill and tendered in the deed exhibited therewith, and the same will be sold to pay the decree and costs, unless paid without a sale. In the event of a sale of the land as herein provided for, it will be sold by the clerk of this court at the court-house door at Charlotte, Cheatham county, Tenn., on a credit of six months, free from the equity of redemption, taking notes with good personal security, and retaining a lien on the land to secure the payment of the same. He will advertise the time and place of sale, and give notice of same as required by law. If a sale is made by him, he will report his action in reference thereto at the next term of this court. An execution will issue for the costs below, and if said costs are not paid, being a lien on the land, as decreed by the chancellor, they will be included and collected by the sale herein ordered.

Affirmed orally by supreme court, March 21, 1901.

CAMPBELL v. PROVIDENT SAVINGS & LOAN SOC. et al.

(Court of Chancery Appeals of Tennessee. Nov. 24, 1900.)

ATTORNEY AND CLIENT-BUILDING AND LOAN ASSOCIATIONS—INSOLVENCY—CREDITORS' BILL—GENERAL FUND—ATTORNEY'S FEES—PAYMENT.

Where attorneys filed a bill in the name of C. for the benefit of the general creditors of a building and loan association, and as a result certain funds were realized, which were not covered by any mortgage or fixed lien, and were apportioned for the benefit of general creditors, the fact that the funds were exhausted in paying prior adjudications before C.'s claim was reached did not defeat the attorneys' right to the payment of their fees out of the sum realized.

Appeal from chancery court, Davidson county; H. H. Cook, Chancellor.

Bill by J. D. Campbell against the Provident Savings & Loan Society and others. From a decree refusing Ruhm & Son a certain sum out of the funds in court for their fees as complainant's counsel, Ruhm & Son appeal. Reversed.

J. W. Judd and John Ruhm, for appellants.

BARTON, J. The question involved in this case is as to the right of John Ruhm & Son, solicitors and counsel for the original complainant, to have their fees paid out of a fund impounded in the case. The original bill was filed on November 12, 1897, by Ruhm & Son, who are lawyers and practicing solicitors, for and in the name of James D. Campbell, against the defendant Provident Savings & Loan Society, as a general creditors' bill to wind up the defendant corporation as an insolvent corporation. The bill alleged that the complainant had been a member and stockholder in the defendant association; that, under the rules and regulations of the association, he had given notice to its officers to withdraw, and that under this notice he was entitled to withdraw the value of his stock, the amount of which he set out, and that by reason of the notice he had become a creditor, but that the officers of the association had failed and refused to pay him the amount claimed and due to him, and had failed and refused to take any steps; that he had also applied to the treasurer of the state, and had been informed that the corporation was an insolvent and nongoing corporation. The bill also charged that the corporation was insolvent, had ceased to do business, and its officers and agents neglected and refused to pay its debts. By amendments it was shown that there were certain assets belonging to the corporation, and that certain foreclosure suits had been brought in its behalf against parties who had borrowed from it. It was charged that the bill was filed on behalf of complainant and all other creditors and stockholders of the corporation to wind up the defendant corporation as an insolvent corporation, and it was asked that the bill be allowed to be filed as a general creditors' bill; that all other suits against the corporation be enjoined; that a receiver be appointed to collect all of its assets; and that all of its assets be collected by the receiver to be appointed, and distributed among its creditors and stockholders according to law. This application was resisted. But the chancellor, by a decree, directed the bill to be filed, and it was sustained as a general creditors' bill. All other suits against the corporation were enjoined, and a receiver was appointed under this bill, and directed to collect all of its assets, and the receiver so appointed did proceed to collect the assets belonging to the corporation; and it is shown by an agreement filed to this record that the

receiver had collected some \$2,482.18, which had been disbursed under orders and decrees of the court in this cause. The court proceeded to wind up the defendant corporation as an insolvent corporation in this case, and to disburse the funds collected. An application was made by Ruhm & Son, counsel for the complainant, to be allowed fees out of the funds brought into the case, as counsel for the general creditors. A reference was had to the master, who reported that a reasonable fee to Ruhm & Son would be the sum of \$200. No exception was made as to the amount. But the receiver in the case objected to the fee being allowed to Ruhm & Son on the ground that Campbell, the complainant, in whose name they had filed the bill, was a general creditor, and that the funds collected in the case had all been consumed by creditors who had prior claims. The chancellor sustained the position of the receiver, and disallowed the fees claimed. From this decree Ruhm & Son have appealed and assigned errors.

Besides the facts above stated, the only material facts necessary to be found are that we find that all of the funds which have been brought into this case were brought in under the original bill, and collected by the receiver under his appointment made under the original bill. It appears to have been decreed in the court below (upon what authority or what ground we are not informed, though there is no appeal) that the complainant, Campbell, in whose name the original bill was filed, was what was known as a "free shareholder," and that for this reason his claim was postponed until other creditors and shareholders were paid in full, the result of which was that there was nothing left to pay on the debt of Campbell, in whose name the bill was originally filed. It does not appear that the funds which were realized were under any mortgage or lien, but we simply infer from what we see in the record (and it is an agreed record and very meager) that the funds were paid out upon other series of stock or claims, which, under the arrangement, appear to have been preferred. So that the result reached was that, although all the funds were collected by the receivership established under this bill in process of distribution, they were all used up before the complainant's claim could be reached. But at the same time, so far as we can see from this record, all of these funds were collected by the receiver, and all were brought into court under this bill. But for the filing of the bill, so far as it appears from this record, they might not have been realized upon, and they certainly all were brought into court, as we say, under this bill. Upon this state of facts, we are of the opinion that the solicitors for the complainant (the appellants, Ruhm & Son) were entitled to be paid their reasonable fees, which it is agreed should be fixed at the sum of \$200, out of the funds collected by the receiver, and

should be a charge upon such general funds, notwithstanding, under the decree of the chancellor, nothing was realized to pay the original complainant. This case does not belong to that class of cases of which *Kelly v. Mountain City Club*, 101 Tenn. 286, 47 S. W. 426, is an example. That case and the other cases there cited in the opinion of the court are cases where a fund has been appropriated by a mortgage or fixed lien, and is so secured that no action on behalf of the beneficiaries is needed, and where general creditors come in seeking a sale of the property belonging to the corporation, and a foreclosure of the mortgage. In such cases it is evident that the complainant in a general creditors' bill confers no benefit upon the beneficiaries under the mortgage. He secures nothing for them, and it would be an obvious injustice to allow such a creditor or his counsel to reduce the fund already secured by contract by costs and charges which are of no benefit. And in these cases, too, it appears that the beneficiaries under the first mortgage came in themselves, asking active relief and seeking an enforcement of their security, and did not accept and did not receive any real benefit under the general creditors' bill. Such cases, in our opinion, in no sense resemble the case at bar. Here all the assets that were administered upon in this case were brought in by reason of and under the general creditors' bill, and it does not appear that there was any mortgage or other fixed lien upon the assets. As we say, the record is meager, and we are not accurately informed why it was that the original complainant was unable to realize anything out of the assets. He claims in his bill to have been a creditor, and in one sense he was; but, under our decisions, the association having become insolvent, he would be placed upon a par with other stockholders, and treated as such. There is an intimation in the record, or a recitation, from which we infer that the assets which were brought in were paid to creditors and to preferred stockholders. We know of no law in this state authorizing preferred stock in building and loan associations, but we do not regard it as making any material difference, as the question now stands before us, as to why the complainant did not receive anything. It appears that, under decrees which have not been appealed from, such is his status. But, whether he was a stockholder or a creditor, it appears that the result of the filing of his bill was to bring into court for the benefit of all a considerable fund; that on this fund no liens were fixed, but that, as being funds of an insolvent corporation, certain priorities were adjudicated; and that by this adjudication the funds were all appropriated before complainant's claim was reached. But he and his counsel brought the funds into court for the benefit of all, and as it does not appear, as we say, that the funds had been covered by any mortgage or fixed lien, his bill was not

an interference with fixed rights, but was an attempt to save the assets for all the creditors and stockholders of the corporation, to be properly administered and distributed according to their several rights. It appears that the work was done for the benefit of all, and it is clearly proper and right that this work should be paid for out of the general fund brought into court. The result is, therefore, that the decree of the chancellor is reversed, and the cause will be remanded to the chancery court to be further proceeded with, with directions to pay Ruhm & Son a fee of \$200 out of the funds in court impounded under this bill. The costs of this proceeding will also be paid out of such funds, and a decree will accordingly be so entered. All concur.

Affirmed orally by supreme court, January 15, 1901.

CHILDS et ux. v. DENNIS.

(Court of Chancery Appeals of Tennessee. Feb. 16, 1901.)

MORTGAGES—DEEDS—RENTS—REDEMPTION—RES ADJUDICATA—FINAL JUDGMENT.

1. Where the grantor of land sued his grantee, and in determining the amount of the judgment in favor of the grantor the grantee was allowed rent for the land, the grantor remaining in possession, and subsequently the grantor sued to have the deed established as a mortgage, and items claimed in the former suit allowed as credits thereon, the former judgment was not res adjudicata as to the rents; a mortgagee being accountable for rents on redemption.

2. Where a judgment in justice court was appealed, but the appeal was not prosecuted, and it appeared that the papers were lost before transmission to the circuit court, or never taken up, or lost after their transmission, the judgment was not res adjudicata as to the issue involved, in that it was not final, since, if the papers were lost in the circuit court, there was no final disposition, and, if not returned in order to make an end of the case, appellee would have to produce the same, under Shannon's Code, § 4874, declaring that, if the papers are not duly filed, appellee on their production may have judgment, and, if they were lost in justice court, steps would have to be taken to supply the lost record.

Appeal from chancery court, Montgomery county; J. S. Gribble, Chancellor.

Suit by Ben Childs and another against E. F. Dennis. From a decree in favor of defendant, complainants appeal. Reversed.

Fort & Scales, for appellants. Leech & Savage, for appellee.

NEIL, J. This is a contest between a colored preacher and two of his parishioners. In outline, the case is this: The defendant was for several years pastor of a colored church at Guthrie, in Montgomery county, preaching there twice a month, and sometimes holding there long revivals or other protracted services. He boarded with the complainant Childs; also boarded his daughter there, and kept his horse there a portion

of the time. The complainant's wife washed the defendant's clothes and mended for him; likewise, performed the same services for his daughter. While there the defendant also bought from the complainant 1,400 potato slips, worth 20 cents per 100. During this period the complainant, being in debt for his house, and not being able to pay the purchase money, induced the defendant to pay it, and allowed him to take the title, to hold as security therefor. After a time the defendant claimed to be the owner of the property, and brought a suit of forcible entry and detainer against the complainant Ben Childs. The latter thereupon filed the present bill to enjoin the execution of the writ obtained in that case, and to have the mortgage declared satisfied by reason of the amount due him for the items above referred to. The particulars of these matters appear in the pleadings and proof.

In order to a proper understanding of the case, it is necessary that we should set out the substance of the pleadings, as well as the particular amounts of money alleged to be due under the state of facts above set out. Before going into the matters just referred to, it is proper to say that, while the complainant's wife joins in the bill, it does not seem that she has any legal interest in the controversy; and further consideration of the matter as to her may be dispensed with, except in so far as she is a witness in the cause.

The bill alleges: That on the 17th of December, 1890, complainant Ben Childs purchased of D. B. Smith, W. D. Merryweather, and R. Lester certain real estate described. That the consideration was \$550, part cash, and part evidenced by promissory note. That of this amount \$375 was actually paid by the complainant, including principal and interest, but that complainant failed to meet the deferred payments, and in the fall of 1895 a bill was filed against him by his vendor for the purpose of enforcing the lien retained in the deed. That the defendant, E. F. Dennis, agreed to pay off this balance, and to secure himself with the land. It was agreed between the complainant and the defendant that the defendant would discharge the debt; that, to secure him, a legal title should be conveyed to him, which he should hold until reimbursed the amount of his payment; and that, upon being so reimbursed, the title was to be reconveyed to complainant. That the amount at this time due to complainant's vendor was \$249.84. That, to secure this, the complainant executed a deed to Dennis. That the consideration recited in the deed is \$249.89. Since the time referred to, the complainants have repaid to Dennis in cash \$88.62. That the defendant also boarded his daughter with the complainant for one year. That, in addition to boarding this daughter, the complainant's wife did all of her washing, ironing, and sewing, be-

sides furnishing her with oranges, apples, cakes, etc., to take to school. That a reasonable charge for the board and services referred to would be \$5 per month. That Dennis made the house of complainant his home for more than four years whenever he was in Guthrie, which was two Sundays in each month. That he required an extra quality and extra quantity of food, being a very hearty eater. That he would often bring a preacher with him, staying frequently as long as a week, and the defendant sometimes, during revivals, would stay as long as two months at a time. That it was his habit to come about Friday and remain until Tuesday. That he frequently had a horse, and on one occasion his horse remained for five months. That complainants were necessarily put to heavy expense and to much trouble by reason of the defendant's presence. That no definite or specific sum was ever agreed upon as to board, but Dennis always said he would pay what was right for everything. That complainants had perfect confidence in Dennis at that time, as their preacher, and believed his accounts would be settled upon a fair and just basis, but that they had never received anything therefor. That \$10 per month for the time he was with them each month would be exceedingly reasonable, and would scarcely reimburse them for their actual expenditures on his account. They further believed that a charge of \$5 per month for the board and care of his horse would be a reasonable charge, and that 50 cents per month for his washing, ironing, patching, and sewing, which complainant's wife did for the defendant, would be a reasonable charge. Further, that on one occasion defendant's wife was by the complainants nursed through a spell of sickness lasting six weeks or more, and that this was expensive and burdensome, and that a charge of \$10 would be reasonable for this. Complainants also claim \$2 for conveying the defendant's horse to Clarksville from Guthrie on two occasions, \$1 for a saddle skirt, and \$3.50 for 1,400 potato slips, at 25 cents per 100. The bill then proceeds to recite the proceedings of the forcible entry and detainer suit already referred to, and asks for an injunction; also that the deed be declared a mortgage, and that the following credits be allowed thereon: Cash, \$38.62; board for daughter, \$60; board for defendant himself, \$240; washing done for defendant, \$24; nursing for defendant's wife, \$10; services in conveying the defendant's horse from Guthrie to Clarksville, \$2; price of one saddle skirt, \$1; price of 1,400 potato slips, \$3.50,—and for general relief.

The answer of the defendant, Dennis, admits that the complainant purchased the tract of land referred to in the bill from D. B. Smith and others, and avers that on the 11th of December, 1895, complainants executed to the defendant a warranty deed to the property; that the consideration re-

cited in the deed was \$249.80, but that, as a matter of fact, because of mistake made in the calculation, the real balance due was more than \$275, which was paid by the defendant. The answer further avers that the complainants were unable to pay for the property, and urged the defendant to lend them the money; that he was not able to do this at the time, and the security offered was not such as satisfied him, but, after repeated efforts on the part of the complainants to induce him to take up the Smith debt, he finally agreed that he would purchase the property and give them one year in which to repay him the purchase money, and it was agreed that if they failed to do so the property should then become his own; that the complainants did not repay the defendant the purchase money, and consequently he took steps to get possession of the property. The answer further says: "It is true, complainants have paid to respondent in the neighborhood of about \$80, and possibly the amount stated in the bill is correct; but respondent is just now unable to state the correct amount, but his receipts show what the amount is." The defendant denies that he contracted to pay board for his child; also that she remained with the complainants for one year. He avers that the complainants' action in taking care of his child was purely voluntary, and was intended to be without any compensation. He denies that he boarded with the complainants, but admits that he stopped there from time to time, and avers that it was not understood that there was to be any charge. He admits his horse was in possession of complainants for some time, but avers that he furnished money to pay for the animal's feed, and that the complainants were to have the use of him for their services in attending to him. The answer continues: "In February, 1898, complainants brought suit against respondent before Finis Ewing, a justice of the peace living in the First civil district, Montgomery county, claiming respondent was indebted to them in the sum of about \$450, and said suit involved precisely the same items they are now insisting that respondent is indebted to them for, and the justice of the peace heard the case and gave to complainants a judgment against this respondent for the sum of \$34.50; and this judgment, as respondent understood, was to cover some expenses claimed for keeping his horse, and also cost of some services rendered to his wife, and which is also claimed in complainants' bill. From that judgment, respondent is informed that, these complainants, or complainant Ben Childs, prayed an appeal to the circuit court of Montgomery county, Tennessee; and he is informed that the papers in said cause have never been filed in the office of the said circuit court, and he is not, therefore, able to state whether the appeal was perfected or not. Respondent did r

appeal from said judgment, because he felt that it would be easier to pay that sum than it would be to prosecute an appeal, and be at the trouble and expense of going from Clarksville to Nashville, where his work is, and therefore did not appeal, but, as a matter of fact, he is indebted to them in the sum for which the justice of the peace gave judgment against him." The answer further denies that the complainants are entitled to anything for services rendered to defendant's wife, but avers that the complainants never indicated any purpose to charge anything, and, further, that the services performed for his wife were purely voluntary. Continuing, the answer says: "Respondent denies that he has been paid in full the debt due to him from complainants, or any part of it, except as above stated, namely, about \$90; and he denies any and all other allegations not specifically denied or admitted in this answer." The answer is also filed as a cross bill, and prays that the court determine, "first, whether or not this respondent in the cross bill is entitled to retain the land described in the deed, under his contract with the defendants to this cross bill; and if not, and if said deed is to be declared or construed to be a mortgage, he asks that said mortgage be foreclosed, and that the property be sold for cash, free of the equity of redemption or repurchase, and that the proceeds be applied to the satisfaction of his debt and interest, and the costs of this suit, and a reasonable attorney's fee, and for general relief."

The original complainants answered the cross bill, and denied all indebtedness to the cross complainant. Upon the subject of the suit before the justice of the peace this answer says: "It is true that an appeal was prayed and perfected from a judgment rendered in their favor by Esquire F. Ewing in a case involving some of the same points raised by this suit; that they appealed for the reason that they considered the amount of the judgment wholly inadequate and unjust, and that their case could be made much stronger by additional proof. The papers in this case were, as the defendants to the cross bill are informed, lost, and through no fault of theirs. It was defendants' intention, after consulting an attorney, had these papers not been mislaid, to dismiss without prejudice their case in the circuit court, and seek redress in your honor's court of chancery, where the question as to title to the land could be passed on." The answer denies all other allegations in the cross bill.

Leaving out of view for the present the consideration of the case before the justice of the peace, we find: That the defendant boarded with the complainant Ben Childs about 4 years. That he should be charged for half of this, 24 months, at \$10 per month, \$240. That his child boarded with the com-

plainant for 12 months, and that he should be charged for this \$5 per month, \$60. That the complainant's wife did washing and mending for him 24 months, and that he should be charged for this at the rate of 50 cents per month, \$12.50. That the defendant bought of the complainant 1,400 potato slips, worth 20 cents per hundred, \$2.80. That the complainant paid the defendant at various times prior to the filing of the bill, on the mortgage debt, \$88.62. These various sums aggregate \$363.92. The complainant should be allowed interest on this sum from May 18, 1898, the date of the filing of the bill, down to February 16, 1901, the date of the decree herein, which would be \$38.20, all aggregating \$402.12. That the defendant should be allowed as a mortgage debt, as of date December 11, 1896, \$249.89. That interest should be counted on this debt from the date just mentioned down to February 16, 1901, which amounts to \$62.50, making altogether the amount due to the complainants \$311.84. This subtracted from the amount paid by the complainants to the defendant would leave a balance of \$90.28 in favor of the complainants. We further find that at the time that the defendant assumed the vendor's lien, and took the deed to himself as security, it was the agreement between the complainant and the defendant that the arrangement was merely by way of security; that the deed was merely to mortgage it, and that the defendant would be indulgent with the complainant about repaying the money; that no specified time was fixed within which the money should be repaid. It thus results that the mortgage debt must be declared satisfied, and a judgment rendered in favor of the complainant Ben Childs against the defendant, Dennis, for \$90.28, unless we are precluded from taking this course by reason of the suit before Finis Ewing, the justice of the peace referred to. The defendant's contention about this matter is that all of the items of the account sued upon in the bill, except the credit of \$88.62, were involved in the suit before Mr. Ewing, and they are concluded by the judgment in that case. That is to say, as we understand the defendant's contention, it is that in any event the complainant cannot have credit upon his mortgage debt for anything more than the \$88.62, and the \$34.50 as judgment rendered against him by the justice of the peace; that all of the special items of the account are now res adjudicata. It should first be stated with regard to the judgment referred to that the justice of the peace, in reaching the sum of \$34.50 as the balance due to the complainant on the account, allowed the defendant two years' rent for the house and lot. It would follow that in any event the defendant would have to account for this rent on the mortgaged property in the present proceeding brought for exoneration of the property. That is to say, even though the

judgment should be treated as *res adjudicata* upon the items of the account, it would not be *res adjudicata* upon the complainant's right to redeem the mortgage; and in effecting such redemption he would have the right to treat the rents adjudged against him in behalf of the mortgagee as a credit to be used in redemption of the mortgage, just as though he had paid the rent as rent on the mortgaged property. The principle governing this matter is that, where the mortgagee collects rents on the mortgaged property, he must allow therefor when the mortgagor comes to redeem. However, the amount of the rents so allowed by the justice of the peace does not appear in this case, and, if it were necessary to place the rights of the parties upon this basis, the cause would have to be remanded to ascertain the amounts of the rents so allowed.

We are unable to determine from the pleadings whether a bond was given for prosecution of the appeal to the circuit court from the justice of the peace office or not. We infer from what is said in the pleadings that either a bond was executed or an oath taken, and that the justice of the peace either failed to carry up the papers, or that after being carried into the circuit court they were lost. The matter is left equally indefinite in the testimony. The only thing upon the subject is contained in an agreement of the parties filed with the record. This agreement is in the following terms: "It is agreed in this case that the items of account filed by the complainant against the defendant, and testified to by the witnesses, are the same items and constitute the same account that was sued on by plaintiff before Finis Ewing, a justice of the peace, and from which no appeal has been prosecuted; judgment being rendered there against defendant, Dennis, for an amount his docket will show. An appeal was prayed by plaintiff Childs from Ewing's judgment, but the papers were never returned to the circuit court, and if returned were lost. At any rate, plaintiff Childs has never taken any steps to further prosecute this case begun before Ewing, J. P. The case before Ewing, J. P., was decided some months before the commencement of this suit." It thus appears that the suit before Ewing was between the same parties and involved the same items of account, but it does not appear that there has been a final determination of the matter, and this later point is essential before the defense of *res adjudicata* can be made out. To sustain such a defense the defendants must aver and prove that the former judgment was final. *Railroad v. Brigham*, 95 Tenn. 624, 629, 630, 32 S. W. 762. The defendant in his answer says that he is unable to state "whether the appeal was perfected or not."

As already stated, the agreement just quoted leaves the matter in equal doubt. If an appeal was prayed and granted, and the papers carried to the circuit court, and there lost, this would not show a final disposition of the matter; or if the appeal was prayed and granted, and the bond executed or oath taken, and the papers were not returned to the circuit court by the justice of the peace, still the matter would not be at an end, because, under such circumstances, to make an end of the case the appellee would have to produce the papers in the circuit court, and move to have the judgment affirmed. Shannon's Code, § 4874. If after the appeal was prayed and granted before the justice of the peace, and a bond executed or oath taken, the papers were lost before they were transmitted to the circuit court, this would not end the matter, because some steps would have to be taken to supply the lost record. But we need not pursue this matter further. It is apparent that there is not anything in the record to enable us to say, as a matter of law, that the proceedings instituted before the justice of the peace have been brought to a conclusion. The burden of the proof was upon the defendant to show sufficient facts upon this subject to justify the court in finding that there had been a final termination of the proceedings referred to. This not being shown, the plea of *res adjudicata* must fail.

The practical result is that the parties have, by the shape of their pleadings and condition of the proof just referred to, agreed to go into a reinvestigation of the amount of the account, and we find the balance as above stated; that is, \$90.23 in favor of the complainant. A decree will therefore be entered reversing the chancellor's decree; also rendering a judgment in favor of the complainant against the defendant for \$90.23; also declaring the mortgage satisfied; also enjoining the complainant from collecting or attempting to collect the amount of the judgment of \$34.50 rendered in his favor in the suit before Finis Ewing, a justice of the peace, and adjudging that, as between the complainant and the defendant, the complainant is liable for the costs of that proceeding, and directing that the clerk and master of the chancery court will, before paying over to the complainant the amount of the recovery herein allowed to him, deduct therefrom a sufficiency to pay the costs in the proceedings before Mr. Ewing. The cause will be remanded for collection of the judgment and execution of this decree. The defendant will pay the costs of this court and of the court below. All the judges concur.

Affirmed orally by supreme court, March 16, 1901.

STATE ex rel. v. LEBANON & N. TURNPIKE CO.

(Court of Chancery Appeals of Tennessee.
Nov. 27, 1900.)

TURNPIKES AND TOLL ROADS — STATUTORY PROVISIONS—CONSTRUCTION—REGULATION OF CORPORATE FRANCHISES—VALIDITY.

1. Act 1835-36 authorized a turnpike company chartered thereunder to build a toll road from Lebanon to Nashville, and to place two gates thereon, one not nearer than one mile from Nashville, and the other not nearer than five miles from the first. Stewart's Ferry arm of the road, built under the authority conferred by Acts 1837-38, c. 217, which provided that there should be no gate on such arm, had become part of the system prior to Acts 1847-48, c. 200, which authorized the company to relocate its gates, "provided, first, that no gate shall be placed nearer than three miles to another; and, second, that the gate shall not be so located that travel on the Stewart's Ferry arm shall have to pay at more than two gates to Nashville, and if a gate should be placed on said arm, it shall not be more than 100 feet from its junction, nor shall the travel upon said arm which may turn upon the east end of the main road pay at the first gate on the same, nor shall the travel on the main road from the east which may turn upon said arm pay upon the same. There shall never be but two gates from the point of intersection of the said arm and the main road to the city of Nashville, nor shall there be any gate on said arm, except as herein provided." *Held*, that the act of 1847-48, though construed strictly, gave the company the right to relocate its gates, and that in doing so it had the right to place a gate at a distance of 100 feet or less from the junction of the Ferry arm with the main road.

2. The act of 1849-50 which requires of a turnpike company, as a condition of the exercise of its franchises granted by the act of 1835-36, that it shall build a bridge from the river beyond the line of its road as fixed by its charter, is not a valid exercise of the police power of the state to regulate and exercise corporate franchises, since it impairs the obligation of the contract between the state and the company.

Appeal from chancery court, Davidson county; H. H. Cook, Chancellor.

Bill by the state of Tennessee ex rel. against the Lebanon & Nashville Turnpike Company. From a decree for defendant, complainant appeals. Affirmed.

J. A. Cartwright, for the State. R. T. Smith and Morton B. Howell, for appellee.

NEIL, J. This bill was filed for two purposes: First, to forfeit the defendant's charter; and, if that could not be done, secondly, to compel it to close and keep closed the gate on its Stewart's Ferry branch. The solution of the case turns upon the effect of certain statutes. The defendant was chartered under the act of 1835-36. It was authorized to build a pike from Lebanon to Nashville. Among other things, it was authorized by section 8 of that act to erect two toll gates, one not nearer than one mile of the limits of the corporation of Nashville or Lebanon, and the other not nearer than five miles of the first, and to appoint a toll gatherer for each gate. By chapter 217 of the

Acts of 1837-38, the charter was amended as follows: "That the Lebanon and Nashville Turnpike Company be authorized to construct a macadamized road from Stewart's Ferry on Stone river, so as to intersect the Lebanon & Nashville Turnpike road at or near Harding's plantation, thereby making a turnpike road from Nashville to said ferry. Said addition to be, in all respects, equal to the road now constructed, and to conform to the provisions of the charter of said company: provided, that no gate for the collection of toll shall be erected on said addition to said road." On the 5th of February, 1848, by chapter 200, Acts 1847-48, the charter was again amended, and an act was passed to amend the same as follows: Section 1: "Be it enacted," etc., "that the directors of said company may remove and change the location of the gate on said road, by the action of the board, as they may think proper from time to time: provided, first, that no gate shall be placed nearer than three miles to another; and, second, that the gate shall not be so located that travel upon the Stewart's Ferry arm will have to pay at more than two gates to Nashville, and if a gate should be placed on the said arm, it shall not be more than one hundred feet from its junction, nor shall the travel upon said arm which may turn upon the east end of the main road pay at the first gate on the same, nor shall the travel on the main road from the east which may turn upon the said arm pay upon the same. There shall never be but two gates from the point of intersection of the said arm and the main road to the city of Nashville, nor shall there be any gate on the said arm, except as herein provided." The next section provides that the board of directors after the next election shall be six, one half to be appointed by the governor, and the other half by the stockholders, as theretofore. Section 3 provides that the stock in the road shall be personal property, and only transferable on the books of the secretary by the owner, under his own hand, or by the secretary in pursuance of written authority, to be filed, from the owner, to said officer or the president. Section 4: "Be it enacted, that the amendment of the said charter shall not take effect until the stockholders, meeting as they do in the election of directors, shall give their written assent to the same, which shall be copied upon their minutes and filed."

On the 14th of November, 1849, an act was passed (chapter 49 of the Acts of 1849-50) as follows:

"Section 1. Be it enacted," etc., "that the first section of an act passed on the 5th of February, chapter 200, entitled 'An act to amend the charter of the Lebanon and Nashville Turnpike Company,' be, and the same is, hereby repealed.

"Sec. 2. Be it enacted, that the stockholders in said road shall be entitled to one gate

on the Stewart's Ferry arm: provided, first, that the gate shall not be so located that the travel upon said arm will have to pay at more than two gates, to the city of Nashville, and, second, that said stockholders build a free bridge across Stone's river at Stewart's Ferry."

The defendant organized under its charter and constructed its road. It accepted the amendment of 1837-38, and built the Stewart's Ferry branch. It also accepted the amendment of 1847-48, and erected the gate on the Stewart's Ferry branch in accordance therewith. It did not accept the act of 1849-50, nor build the free bridge across Stone's river therein mentioned. The company has been exercising the franchises conveyed by the acts of 1835-36, 1837-38, 1847-48, for more than 50 years.

The chancellor dismissed the bill, and the complainant has appealed and assigned errors. Two questions are made: The first is that the act of 1847-48, under the strict construction which the law requires should be placed upon charters, did not pass the right to erect a gate on the Stewart's Ferry arm of the pike. The rule upon this subject was early laid down in this state in the case of *State v. Clarksville & R. Turnpike Co.*, 2 Sneed, 80, 92, in the following manner: "Public grants like the one now before us are to be construed strictly, and that nothing passes against the state or the public by implication." No other citation of authority upon this particular point is needed. The rule is stated very fully and explicitly. It is observed that by section 8 of the charter the defendant was allowed to place a gate one mile distant from the corporate limits of Nashville, and another not nearer than five miles of the first, and, further, that by the time the act of 1847-48 was passed the Stewart's Ferry branch had become a part of the system. Now, the legislature, by the act of 1847-48, having the whole system in view, and regarding the Stewart's Ferry branch as a part of it, provided that the company might relocate its gates so as to put them three miles apart. But, to protect such parts of the public as should travel upon the Stewart's Ferry arm of the pike, it was provided that they should not pay at more than two gates on their way to Nashville, and that, if a gate should be placed on the Stewart's Ferry arm, it should not be more than 100 feet from its junction with the main line; and, to still further protect the travel, the act provided that those persons who should turn upon the east end of the main road should pay at the first gate on the main road, and that the travel on the main road from the east which should turn upon the arm should not pay upon the latter; and, still further to protect the public, it is provided that there shall never be more than two gates from the point of intersection of

the arm with the main road and the city of Nashville, and that there should not be any gate on the arm except at a distance of 100 feet or less from the junction with the main line. We do not think it is possible to give this act any other construction than that the defendant should have the right to relocate its gates, and in doing so should be allowed to place a gate on the Stewart's Ferry arm at the place indicated. If this be not the true construction, then the act is not capable, it seems to us, of a reasonable interpretation. No degree of strictness, it seems to us, can construe out of the act the intention to confer this benefit upon the company. This view is made even stronger when we consider this act in connection with the act of 1837-38, which distinctly provided that there should be no gate on the Stewart's Ferry arm.

It is next insisted that the provisions of the act of 1849-50 are valid as an exercise of the police power. The defendant, on the other hand, insists that this act is void because it impairs the obligation of the contract entered into by the state and the defendant in the charter and the amendments, and by the acceptance of the acts by the defendant. At this late day there is no need of the citation of authority to support the proposition that a charter is a contract, and that its binding force cannot be impaired by subsequent legislation not assented to by the corporation. It is true, however, that under the police power the legislature may enact regulations for the exercise of the franchises of the company, looking to the protection of the public health, safety, and convenience. The state, however, cannot, under the guise of regulating a corporation, take its franchises from it; nor can it, by way of regulation of the exercise of the franchises of the corporation, compel it to donate to the county or the state a sum of money, or to undertake public improvements beyond its line. These principles, we think, cannot be controverted. Now, to apply them to the present case, the act of 1849-50 required of the defendant, as a condition of the exercise of its franchises, that it should build beyond the end of its road a bridge across Stone's river. This requirement, we think, if enforced, would be but a form of confiscation of the property of defendant. It results that the decree of the chancellor must be affirmed, with the costs of this court and of the court below.

BARTON, J., concurs. WILSON, J., did not participate in the decision of the cause, being absent on account of illness. Nor did MURRY, J., commissioned to serve during Judge WILSON's disability, take part in the decision; the case having been argued before he went upon the bench.

Affirmed orally by supreme court, December 22, 1900.

MEMORANDUM DECISIONS.

ASHER v. BECKNER. (Court of Appeals of Kentucky. March 20, 1901.) Appeal from circuit court, Madison county. "Not to be officially reported." Action by W. M. Beckner against A. J. Asher to recover compensation for services rendered. Judgment for plaintiff, and defendant appeals. Affirmed. James D. Black and N. B. Hays, for appellant. Bronston & Allen, for appellee.

GUFFY, J. This is the second appeal in this case. The first judgment was rendered in the Clark circuit court in favor of plaintiff, now appellee, for the sum of \$12,000. Appellant prosecuted an appeal, and the judgment was reversed. The opinion may be found in 41 S. W. 35, which opinion is referred to for a detailed statement of the matters in controversy. One of the reasons for reversal was the refusal of the court to grant to appellant a change of venue. Upon return of the case a change of venue was granted to Madison county. A trial there resulted in a verdict and judgment in favor of the plaintiff for the sum of \$5,000. Each party filed grounds and moved the court for a new trial; but the court overruled both motions, and appellant only prosecuted an appeal. We deem it unnecessary to review the various contentions of appellant. After a careful consideration of this case, we are of opinion that the trial below conformed to the principles and rulings announced in the opinion rendered upon the former appeal. We do not think that the rulings of the court below as to the admission or rejection of testimony were prejudicial to the substantial rights of appellant, and the same may be said as to the giving and refusing of instructions. It seems to us that the law and facts were properly submitted to the jury, and the verdict rendered cannot be said to be flagrantly against the evidence. The judgment appealed from is affirmed, with damages.

COLE v. COLE. (Court of Appeals of Kentucky. March 14, 1901.) Appeal from circuit court, Fayette county. "Not to be officially reported." Action by John W. Cole against Lena Cole for divorce. Judgment for defendant, and plaintiff appeals. Affirmed. Hobbs & Farmer, for appellant. W. P. Kimball, for appellee.

PAYNTER, C. J. The appellant sought to obtain a divorce from the appellee upon the alleged grounds of lewd and lascivious conduct. She denied that she was guilty of the offense charged, and pleaded that the appellant was guilty of such cruel and inhuman treatment of her as to indicate a settled aversion to her and to permanently destroy her peace and happiness. The court sustained her claim and granted her a divorce and alimony. The appellant urges that the court erred in adjudging that he was not entitled to a divorce and in granting the wife alimony. He asked to destroy the reputation of his wife, the mother of his children, on very unsatisfactory testimony. He only introduced one witness that proved any act which reflected upon her character or tended to sustain the charge. Lucy Brooks, who was a domestic in the family where appellant and appellee lived for a time, testified that she saw one Dixie Spurr kiss her. This was denied by Spurr. There was testimony tending to show that the wife's conduct was uniformly good and such as became a wife. He sought to

prove by Howard Piersall some facts which tended to establish the charge against her, but he wholly failed to do so. On cross-examination that witness testified that appellant had offered him \$10 to testify that he had seen the appellee and Spurr in bed together. The testimony of this witness shows that the appellant would resort to any improper means to destroy the character of his wife, and under such circumstances it is the especial duty of a court to see that the character of a woman, the mother of children, is not destroyed, except by testimony which is worthy of belief. We fully agree with the court below in the judgment which it rendered. The judgment is affirmed.

GRIFFIN v. COMMONWEALTH (two cases). (Court of Appeals of Kentucky. March 22, 1901.) Appeal from circuit court, Knox county. "Not to be officially reported." Grant Griffin was convicted under each of two indictments for the offense of selling liquor, and he appeals in each case. Reversed. B. B. Golden, for appellant. R. J. Breckinridge, for the Commonwealth.

PAYNTER, C. J. We are of the opinion that the trial court erred in not granting the appellant a continuance. On another trial the court should give an instruction on reasonable doubt in the usual form. The judgment in each case is reversed for proceedings consistent with this opinion.

HAGINS v. WHITAKER. (Court of Appeals of Kentucky. March 15, 1901.) Appeal from circuit court, Breathitt county. "Not to be officially reported." Action by D. B. Hagins against W. J. Whitaker for trespass. Judgment for defendant, and plaintiff appeals. Affirmed. J. J. C. Bach, for appellant. Cope & Marcum, for appellee.

BURNAM, J. This is the second time that appellant has brought this case before this court by appeal. The former opinion is found in 43 S. W. 224. The sole question involved, then and now, is the true location of the second call in appellant's patent. This is purely a question of fact, which was submitted to the jury under proper instructions, after all of the testimony which would throw light upon the subject had been introduced. Their verdict and the judgment rendered pursuant thereto seem to us to be in conformity with the decided preponderance of the testimony. The amount involved is inconsiderable, and we do not believe that we would be justified in disturbing the verdict of the jury. Judgment affirmed.

J. I. CASE MACH. CO. v. WHITLOW et al. (Court of Appeals of Kentucky. March 12, 1901.) Appeal from circuit court, Ballard county. "Not to be officially reported." Action by the J. I. Case Machine Company against A. T. Whitlow and others to recover the price of a machine sold to defendants and to enforce a lien thereon. Judgment for plaintiff for only a part of its claim, and it appeals. Affirmed. Bugg & Wickliffe, for appellant.

GUFFY, J. The appellant in this case sought to recover judgment against the appellees for \$1,800, the price of a certain threshing machine sold to defendants, and for enforcement of their lien upon the machine sold. The de-

fense interposed was that the appellant warranted the machine to be a good machine, and to thresh 1,500 bushels per day, and averred that the machine was worthless for the purpose for which it was sold, and that they were damaged in a large sum for breach of warranty. This defense was traversed by appellant. After the issues were fully made up and proof taken, the court below adjudged in effect that the defendants were entitled to a credit of \$600 upon the purchase price, and rendered judgment against defendants for the residue of said debt, and adjudged a sale of the machine to satisfy same; and from that judgment the appellant prosecutes this appeal. We deem it unnecessary to notice the various contentions of appellant, or to review the evidence in detail. Suffice it to say that the evidence is conflicting; but the court below considered the same, and perhaps was acquainted with the various witnesses, and therefore well qualified to weigh and determine the evidence. And, besides, it seems to us that the evidence sustains the judgment of the court below. The same is therefore affirmed.

McCHRISTIAN v. McCHRISTIAN. (Court of Appeals of Kentucky. April 10, 1901.) Appeal from circuit court, Ballard county. "Not to be officially reported." Action by S. H. McChristian against Joseph A. McChristian for divorce and alimony. Judgment for plaintiff for only a part of the amount claimed as alimony, and she appeals. Affirmed. Bugg & Wickliffe, for appellant. J. M. Nichols & Son, for appellee.

PAYNTER, O. J. After a careful examination of the record in this case, we are of the opinion that the judgment of the court below should not be disturbed. The judgment is affirmed.

MURPHEY v. CITIZENS' SAV. BANK OF OWENSBORO. (Court of Appeals of Kentucky. March 5, 1901.) Appeal from circuit court, Daviess county. "Not to be officially reported." Action on a bill of exchange by the Citizens' Savings Bank of Owensboro against W. B. Rudd, agent, and John Murphey. Judgment for plaintiff, and defendant John Murphey appeals. Affirmed. Walker & Slack, for appellant. J. A. Dean, for appellee.

BURNAM, J. This suit is between the same parties, and identically the same defenses are relied on, as in case No. 1 (this day decided) 61 S. W. 25, and for reasons therein given the judgment is affirmed, with damages.

MURPHY'S CREDITORS v. JONES. (Court of Appeals of Kentucky. March 14, 1901.) Appeal from circuit court, Whitley county. "Not to be officially reported." Action by the creditors of John Murphy against him, in which attachments were issued and levied. Judgment sustaining claim of J. D. Jones to the attached property, and plaintiffs appeal. Affirmed. Crawford & Moore, for appellants. Tye & Denham, for appellee.

PAYNTER, O. J. John Murphy was a merchant in Corbin, and in addition to a general mercantile business he carried on the illicit sale of whisky. Prosecutions were instituted against him and he was afraid to submit to arrest. He reached the conclusion that it was necessary to sell his store, which he did to the appellee, Jones, the agreed consideration being \$900, \$200 of which was cash in hand paid, and for the balance of the purchase money Jones executed his two notes to him for \$300 each, payable in six and twelve months. After this sale was completed Murphy made an assignment of these notes with others for the benefit of his creditors, but the question as to the validity of that assignment is not here.

Certain creditors sued out attachments against him and had them levied upon the property which Jones purchased from him. It was sold and the proceeds awaited the disposition of the court. Jones intervened by filing a petition, claiming that he was the owner of the property. After a trial before a jury, under proper instructions of the court, it returned a verdict to the effect that Jones was the owner of the merchandise levied upon under the attachments, and the court so accordingly adjudged. The testimony which Jones offered tended to show that he was solvent and abundantly able to pay for the merchandise which he purchased. While he was made aware of the circumstances under which Murphy sold the merchandise, he did not know that he was in debt, and especially did he not know that his property was not abundantly sufficient to meet his obligations. The court approved the finding of the jury, and rendered judgment in favor of Jones for the proceeds of the merchandise which was sold. So we have both a verdict of the jury and the judgment of the circuit court that the sale was not made by Murphy with an intent to defraud his creditors. We are of the opinion that the facts proven in this case will not justify us in reaching a contrary conclusion. The judgment is affirmed.

STILL v. STEVENS et al. (Court of Chancery Appeals of Tennessee. Feb. 19, 1901.) Appeal from chancery court, Williamson county; H. H. Cook, Chancellor. Bill by S. J. Still against Lewis Stevens and others. From a decree dismissing the bill, complainant appeals. Affirmed. Henderson & Berry, for appellant. R. N. Richardson, for appellees.

MURRY, J. This suit was brought by bill filed in the chancery court of Williamson county, Tenn., on May 26, 1896, seeking to recover from defendant Lewis Stevens the amount of a note for \$100 and accrued interest thereon, and also to collect from Lewis Stevens and Dr. W. A. Paschall an order or duebill for \$45 and interest thereon, and also to collect from Lewis Stevens the sum of \$55 and interest, alleged to be due from him as the balance of purchase money on a stock of goods which Lewis Stevens is alleged to have purchased from C. A. Still for \$200, which \$200 was to be paid to S. J. Still, and was paid to him by said note for \$100, and an order drawn by Lewis Stevens on Dr. W. A. Paschall for \$45, and \$45 to be paid in cash. The statements and averments in the bill are as follows: That about 1891 complainant sold to the firm of Whitfield & Still a stock of goods at Clovercroft, Tenn., including a lease upon the storehouse in which the goods were contained. That the sale was made to the members of the firm separately, each agreeing to pay complainant one-half the price of \$400, or \$200 each. After this C. A. Still, of Whitworth & Still, agreed to sell and did sell his undivided one-half interest in said stock of goods to defendant Lewis Stevens, and it was agreed between C. A. Still and Lewis Stevens that the latter would pay the whole of the \$200, less about \$12, which complainant owed to Whitfield & Still, directly to complainant in discharge of the indebtedness of C. A. Still to complainant. This was agreed to and understood by all the parties. That in pursuance of this agreement, about October, 1892, defendant Lewis Stevens, with the defendant David Stevens as surety thereon, executed a note to the complainant in the sum of \$100, and also about the same time gave to complainant an order on the defendant Dr. W. A. Paschall for \$45; the balance of the purchase price having been agreed to be paid by Stevens to complainant in cash within the next few days thereafter. As an explanation of the reason why these payments were to be made as above stated, complainant states the following: Complainant was indebted to

one John E. Tulloss in the sum of \$100, and it was agreed between complainant and Lewis Stevens that the latter would execute the above note for \$100, with surety, in order that the complainant might deliver the note to Tulloss, and take up his own note. That W. A. Paschall owed said Stevens the sum of \$45, and Stevens agreed to give and did give to complainant an order on Paschall therefor, and it was understood that Stevens would pay complainant the balance in cash within a few days. The said note and order were turned over by complainant to his attorney, William House, with the instructions for him to proceed with the collection thereof, and said attorney did on December 20, 1893, take from Paschall his duebill for \$45, payable to complainant, and said duebill was in possession of said attorney at the time of his death in October, 1895. That said duebill is now in the hands of defendant H. P. Fowlkes, administrator of William House; Fowlkes claiming to hold the duebill in order to secure the indebtedness of complainant to his intestate. That this note is the individual property of the complainant, and that said Fowlkes, as administrator, has no interest therein nor claim thereto. That the claim of Fowlkes is made in perfect good faith, but the facts are as above stated. That defendant Paschall has been ready all along to pay the amount of said order or duebill of \$45, but the defendant Lewis Stevens contends that the money should be paid to him, instead of to complainant, and all parties are brought before the court in order that the rights of all may be protected. That defendant Lewis Stevens owes to complainant said note for \$100 and interest, upon which David Stevens is his surety. That he and Paschall owe also said \$45 and interest, and that no part of the same has ever been paid. That defendant Lewis Stevens owes also said balance of \$43 and interest. That said note for \$100 has been mislaid. That complainant expects to find it and will produce it on the hearing. If not found, he will make the necessary affidavit of its loss. The prayer of the bill is for decree against Lewis Stevens for the amount of his indebtedness for the purchase of the one-half interest in the stock of goods from C. A. Still, and for decree against said Stevens and David Stevens, surety for said note and interest, and decree against Paschall and Lewis Stevens for \$45, the amount of said order or duebill and interest, and for decree against Lewis Stevens for the remaining \$53 and interest, and that the rights and equities of all parties be protected by proper decree, and for general relief.

Lewis and David Stevens filed their answer to complainant's bill June 2, 1896, in which it is stated and averred that they know nothing of the sale and stock of goods to the firm of Whitfield & Still, that they had nothing to do with that transaction, know nothing of its terms, conditions, etc. The respondent Lewis Stevens denies that he bought the undivided one-half interest in said stock of goods from C. A. Still, one of the members of Whitfield & Still, and agreed to pay \$200, less \$12 that complainant owed to Whitfield & Still. He denies that he agreed to pay this amount to complainant S. J. Still. He denies that in pursuance of said agreement, about October, 1892, he, with defendant David Stevens as surety, executed his note to complainant in the sum of \$100, and also about the same time gave to complainant an order on the defendant Dr. W. A. Paschall for \$45; the balance of the purchase price having been agreed to be paid by Stevens to complainant in cash in a few days thereafter. Some time in the year 1892 Lewis Stevens agreed to purchase from C. A. Still his undivided one-half interest in the stock of goods in the storehouse at Clovercroft, and agreed to give \$200; and he agreed to execute a note to him for \$100 as part of the \$200, and

to give him an order on Dr. W. A. Paschall for \$45, and the rest of the \$200 was to be cash. He did execute his note to him, and turned over to him the order on Dr. W. A. Paschall. This transaction was entirely with C. A. Still, and if complainant, S. J. Still, had anything to do with it, or ever had any interest in it in any manner, respondent never knew it. On the next day after this trade was made Whitfield, one of the members of the firm of Whitfield & Still, came to the town of Franklin, and, unbeknown to respondent and without his consent, made a deed of trust on the stock of goods of the firm of Whitfield & Still, and nominated Thomas Jameson as trustee or assignee. Upon hearing of this assignment respondent went immediately to see C. A. Still, and they then and there rescinded their trade. C. A. Still gave back to respondent the \$100 note, and the order on Dr. Paschall was canceled. The stock of goods was turned over to the assignee, who took them and sold them out under the assignment. Respondent never had the goods in his possession and never realized a cent from them. Respondent immediately went to Dr. Paschall, and told him that the order on him was handed back to respondent, that it was now respondent's property, and told Paschall not to pay the order to C. A. Still, or any one else, but to respondent. Respondent now has the original order, and will produce it on the trial. This transaction was all with C. A. Still, and S. J. Still was not known to them. Respondent charges that Paschall now owes him the \$45 and interest thereon, and neither S. J. Still nor H. P. Fowlkes, administrator of William House, has any interest in the same, but it is respondent's property. He denies that he ever gave to them the order on Paschall, or ever agreed to do so. He denies that this note or order was turned over by complainant, S. J. Still, to his attorney, William House, because he never had it to turn over, neither did he ever own it, nor was it his property. The note was returned to respondent, and he destroyed it, and he still has in his possession the order on Paschall. Therefore complainant could not have placed said note in the hands of his attorney, and all such allegations are false. He denies that he owes complainant the \$100 note, denies that he owes the \$45 order on Paschall, denies that he owes the \$43 and interest, and denies owing complainant any sum whatever. He charges that Dr. Paschall owes respondent the sum of \$45 and interest on the same, and asks a decree for this amount against Dr. W. A. Paschall, and he asks that this be taken as a cross bill as to this amount against Paschall. David Stevens denies owing complainant as surety on the \$100 note, or that he is indebted to him in any sum; says that he did sign a note for Lewis Stevens as security, payable to C. A. Still, and, as he understood, it was for the purchase money of C. A. Still's interest in the stock of goods; but he emphatically denies owing it to S. J. Still, or any one else, and states that shortly after the signing of said note Lewis Stevens brought the note to him (David Stevens) and stated that the trade about the goods between him and C. A. Still was broken up, and "he destroyed the note that he and I had executed. I have never heard of the note since, till this bill was filed." Respondent Lewis Stevens says that he knows nothing of the transaction between complainant and William House, in which he states that he turned over to House the note for \$100 and the order on Paschall; "but respondent knows one thing, that complainant could not have turned over the note that was executed by Lewis and David Stevens, for that note had been destroyed by defendant, and was his property, and he could not have turned over the order on Mr. Paschall, for he (Lewis Stevens) now has that order in his possession, and has had it ever since the trade was canceled.

and if Dr. Paschall executed to William House or complainant a duebill, he did it without authority from Lewis Stevens and without his knowledge or consent."

We find the facts to be as follows: (1) That complainant, S. J. Still, was the owner of a stock of goods at Clovercroft, Tenn., in the year 1891, at which time he sold said goods to Tom Whitfield and C. A. Still, composing the firm of Whitfield & Still, for the agreed consideration of \$400. Whitfield paid for one-half of said goods \$200, and C. A. Still executed his note to S. J. Still for \$185, which note is as follows: "Due S. J. Still \$185, with interest at 6 per cent. from date until paid. One-half of the above amount is to be paid on the 1st day of January, 1892, and the remainder the 1st day of January, 1893; the same being for one-half interest in the storehouse and stock of goods and fixtures and proceeds that are therein. The title to the above property is to remain in the said S. J. Still until this note is paid, and if I should sell the said property, or any part thereof, before or after the maturity of this note, I agree to apply the proceeds of said sale to the payment of this note. The aforescribed property is on the land of J. D. Wilson, known as the Clovercroft Post Office. This Feb. 13, 1891. C. A. Still." (2) After this sale by S. J. Still to Whitfield & Still, to-wit, about October, 1892, C. A. Still sold his one-half interest in said stock of goods to Lewis Stevens, who was at that time, and had been for some time before, clerking for C. A. Still in said store, and that the said Lewis Stevens was to execute to C. A. Still a note, with security, for \$100, and to give him an order on Dr. Paschall, who was owing Lewis Stevens, for \$45, and to pay him the balance of said \$200 in cash. (3) That the said Lewis Stevens did execute and deliver to C. A. Still said note for \$100, with David Stevens as security thereon, and that he drew an order on Dr. W. A. Paschall for \$45, and delivered that to C. A. Still, and that he was to pay the balance of said \$200 agreed to be paid for the goods within a few days. (4) That soon after this agreed sale, and the execution and delivery to C. A. Still of said note for \$100 and the \$45 order on Paschall, Tom Whitfield went to Franklin,—perhaps the next day, the precise time not being shown, but it being shown that it was within a few days of said agreed sale,—and made an assignment or trust deed to one Jameson, as trustee or assignee, of the entire stock of goods as the goods of Whitfield & Still; that Lewis Stevens, on learning that the trust deed was being made, went immediately to C. A. Still and demanded a cancellation and rescission of said sale of said goods, and also demanded of said Still said note for \$100, with Dave Stevens as security thereon, and also the order on Dr. Paschall for \$45; that thereupon C. A. Still agreed to rescind and cancel said trade, and did deliver up to said Lewis Stevens said \$100 note, and told him to go to Dr. Paschall and get the \$45 order, which Lewis Stevens did, and thus the entire transaction and trade between C. A. Still and Lewis Stevens for the interest of C. A. Still in said goods was canceled, rescinded, and ended. (5) That on the day the assignment was made to Jameson C. A. Still was in possession of the storehouse and goods, and that on that day the said C. A. Still was selling and disposing of the goods as rapidly as possible for prices far below cost, and for just such prices as he could sell for, without any regard to the cost of the goods, and remarking, at the time he was so disposing of the goods, that he wanted to sell as many as he could in order to raise money to go to Texas; and in fact it appears that he offered to sell the entire stock during that day for \$75, and later on on the same day for \$60. He had exclusive and entire control and possession of the goods, and Lewis Stevens, as appears from

the testimony, was not there on that day. (6) That Jameson, the trustee, took immediate possession of said goods, and sold them out, and applied the entire proceeds to the payment of debts of the firm of Whitfield & Still, and that the said Lewis Stevens never received one cent from said goods for C. A. Still's interest therein in any way. (7) That said \$100 note of Lewis Stevens, with Dave Stevens surety, was never delivered to complainant, S. J. Still, nor was it ever his property. He says himself that he never got the note from Lewis Stevens. When asked this question, "Did you ever get the \$100 note from Lewis Stevens, and state what became of it?" he says: "I got it afterwards. I got it. A fellow found it in a book and gave it to me. John Vaughn found the book, and gave me the book and note." When asked this further question, "Why didn't Lewis Stevens give you the note when he brought it back after he had seen Maj. Tulloss?" he makes this answer: "He told me that he believed that he wouldn't take the store; that they were going to make a deed of trust to somebody. I forgot how he did state that, and didn't give me the note. I know that he didn't give it to me." Thus complainant clearly shows that the note was never delivered to him and never was his property. He further shows that the note was lost, or at least says that Vaughn found it and gave it to him, and that he gave it to his attorney, House, and directed him to proceed to collect it. Now, it appears that this note was never heard of from the time that complainant claims that the trade was made between Lewis Stevens and C. A. Still, so far as complainant is concerned, until he puts it in the hands of his attorney, which he says was from one to three months after the execution of said note. Lewis Stevens was never called upon to pay said note, nor was anything ever said to him about said note by complainant, or by William House, his attorney, until the bill in this case was filed, on May 23, 1896, a period of nearly four years after the execution of said note and after it was due. The first notice that Stevens ever had after the trade was rescinded that complainant claimed the note or that he desired its payment was by the filing of the bill in this case. The complainant says himself in his deposition that he needed money very badly, and was sorely pressed. Yet he lets this note, which is shown to be amply solvent, sleep, so to speak, for nearly four years without ever asking for payment, or without any attempt to enforce collection of the same. (8) That this note could not be found among the papers of said William House after his death, after diligent search both by his law partner and administrator. Mr. House died in 1895, a period of three years after complainant says he delivered the note to him for collection. This neglect on the part of the complainant and his attorney, Mr. House, if complainant's statements are true, seems indeed strange, especially in view of the fact that complainant so badly needed money. Defendant Lewis Stevens swears positively that Still delivered to him the note when the trade was canceled, that he carried it to Dave Stevens' house and showed it to him, and then burned it up. Dave Stevens swears positively that Lewis Stevens, a short time after the execution of the note, did bring said note to his house and show it to him (Dave Stevens) and that he (Lewis Stevens) told him that he had burnt the note up; and this statement as to the burning of said note by Lewis Stevens to David Stevens is not excepted to. Complainant swears that he had the original order on Paschall, and delivered it also to William House for collection, while Lewis Stevens swears positively that complainant never did have said original order, that he (Lewis Stevens) has had it in his possession ever since the cancellation of said trade between him and C. A. Still, and he produces the same and files it

part of the record in this case. (9) We find that complainant was never the owner and holder of said note and order on Paschall, nor was either said note or order ever his property, nor was he ever entitled to recover either on said note or order. If the same was found and delivered to him as stated by Vaughn, this would not entitle him to said note or to collect the same. We find that there is nothing due from any of the defendants, and especially Lewis and Dave Stevens and W. A. Paschall, to complainant on account of any of the matters sued for or mentioned and set forth in the face of his bill; and we further find that W. A. Paschall owes Lewis Stevens said sum of \$45 and interest thereon from the date of said order. The chancellor so found as we find, or at least reached the same results as to the facts, and decreed that complainant's bill be dismissed, and that he pay the cost accrued in this cause.

From this decree complainant appealed and has assigned the following errors: "(1) The purchase by Stevens of C. A. Still's one-half interest in the firm of Whitfield & Still was made with the consent and approval and for the benefit of complainant, and for the purpose of discharging and paying off C. A. Still's indebtedness to complainant, and Stevens made the purchase with that understanding. (2) The note of Lewis and David Stevens for \$100 was delivered to complainant in part payment of said purchase by Stevens. Said note has not been canceled, but has been mislaid or lost, or destroyed by Stevens, and is the property of complainant, upon which he is entitled to judgment against the two Stevenses. (3) The order on Paschall for \$45 is the property of complainant, and complainant is entitled to judgment for that amount against Paschall, and to judgment against Lewis Stevens for the remainder of the \$200, to wit, \$55."

We are of opinion, and so hold, that there is no error in the decree of the chancellor, that the assignments of error are not well taken, and the same are overruled and disallowed, and the decree of the chancellor is affirmed. The complainant and his surety on the prosecution bond will pay the cost of the court below, and complainant and his surety on the appeal bond will pay the cost of the appeal. All concur.

Affirmed orally by supreme court, March 14, 1901.

CITY OF SAN ANTONIO v. PIZZINI et al. (Supreme Court of Texas. March 18, 1901.) Error to court of civil appeals of Fourth supreme judicial district. Action by Francisco Pizzini against the city of San Antonio and others. From a judgment of the court of civil appeals (58 S. W. 635) affirming a judgment of the district court in favor of the plaintiff and the other defendants, the defendant city brings error. Affirmed in part and reversed in part. Geo. C. Altgelt and I. C. Baker, for plaintiff in error, Carlos Bee, Ingram & Davis, and Clark, Ball & Fuller, for defendant in error Pizzini.

WILLIAMS, J. This case is like that of City of San Antonio v. Smith, 50 S. W. 1109, recently decided by this court, except that in the present case the judgment of the district court in favor of defendant in error Pizzini, as well as that in favor of defendants Hildebrand & Hamilton, against the city, was affirmed by the court of civil appeals (58 S. W. 635), and the city assigns error upon both parts of the judgment of affirmance. We are of opinion that the assignments of error by which the city seeks to reverse the judgment in favor of Pizzini were correctly decided by the court of civil appeals, but that there was error in the affirmance of the judgment in favor of Hildebrand & Hamilton, and upon this the writ of error

was granted. The opinion in the case referred to states the reasons for this opinion. The judgment in favor of Pizzini is affirmed, but the judgments of the district court and of the court of civil appeals in favor of Hildebrand & Hamilton are reversed, and the cause, as between the city and those defendants, is remanded. Affirmed in part and reversed and remanded in part.

NORTH BRITISH MERCANTILE INS. CO. v. KEMENDO. THURINGIA INS. CO. v. SAME. ROYAL INS. CO. v. SAME. (Supreme Court of Texas. Feb. 11, 1901.) Error to court of civil appeals. Actions by V. Kemendo against the North British Mercantile Insurance Company, the Thuringia Insurance Company, and the Royal Insurance Company. Judgments for defendants were reversed by the court of civil appeals under an agreement that the cases were to abide the decision in the case of the same plaintiff against the Western Assurance Company, 57 S. W. 293. From the judgment of reversal, defendants bring error.

PER CURIAM. Opinion of court of civil appeals reversed, and of district court affirmed, under decision in 60 S. W. 661, under an agreement that the decisions in these cases were to abide the decision in such case.

Ex parte ALLEN. (Court of Criminal Appeals of Texas. March 13, 1901.) Appeal from district court, Red River county; Ben H. Denton, Judge. Habeas corpus by Gus Allen, arrested for murder, for the purpose of securing bail. Judgment refusing the writ affirmed. Johnson & Chambers and N. A. Shaw, for appellant. D. E. Simmons, Acting Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was arrested for murder, and resorted to the writ of habeas corpus for the purpose of securing bail. Upon the hearing under the writ the court remanded him to custody. We have carefully examined the facts and believe the action of the court is correct. The judgment is affirmed.

CHAPPELL v. STATE.¹ (Court of Criminal Appeals of Texas. March 13, 1901.) Appeal from Kaufman county court; O. M. Crumbaugh, Judge. Della Chappell was convicted of assault, and she appeals. Appeal dismissed. W. H. Jack, for appellant. D. E. Simmons, Acting Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted in the justice court of precinct No. 2 of Kaufman county of an assault, and appealed to the county court. There the appeal was dismissed for want of a proper appeal bond, and from this judgment appeal is prosecuted to this court. The recognizance on this appeal is defective, and is an exact copy of the recognizance in Chappell v. State (just decided) 61 S. W. 928. In that case we said: "After reciting the offense, the recognizance states that appellant has been convicted in the county court, but does not state the amount of the punishment. As a matter of fact, the appeal was dismissed, and there was no conviction. We have frequently dismissed appeals in this character of case where the recognizance was the same as here. This recognizance should have stated that the party stood charged with a misdemeanor, had been convicted in the justice court and appealed to the county court, and the appeal was there dismissed, and from this judgment the appeal was prosecuted. However, we are not prescribing any form of recognizance, simply stating that the recognizance should be in accordance with the judgment." For the reasons stated, the appeal is dismissed.

¹ Rehearing denied April 10, 1901.

CLOPTON v. STATE.¹ (Court of Criminal Appeals of Texas. March 6, 1901.) Appeal from Midland county court; E. R. Bryan, Judge. Walter Clopton was convicted of violating the local option law, and he appeals. Affirmed. Finley, Etheridge & Knight, for appellant. D. E. Simmons, Acting Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted for violating the local option law, and appeals. This is a companion case to cause No. 2,171, Truesdell v. State (just decided) 61 S. W. 935. The questions are the same, and on the authority of that case the judgment is affirmed.

ESTES v. STATE. (Court of Criminal Appeals of Texas. Feb. 27, 1901.) Appeal from Hale county court; W. C. Mathes, Judge. Claude Estes was convicted for playing cards, and appeals. Affirmed. Wilson & Kinder, for appellant. D. E. Simmons, Acting Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted for playing cards under an indictment similar to that passed on in Williams v. State (Tex. Or. App.) 60 S. W. 248. Such indictment was held valid. It is the only question presented for revision in this case. The judgment is affirmed.

Ex parte KENNEDY et al. (Court of Criminal Appeals of Texas. March 6, 1901.) Appeal from district court, Harris county; A. C. Allen, Judge. Habeas corpus proceedings by W. L. and Lee Kennedy. From a judgment remanding them to custody, they appeal. Reversed. A. W. Boyd and M. G. Fakes, for appellant. D. E. Simmons, Acting Asst. Atty. Gen., for the State.

HENDERSON, J. Under a charge of murder appellants were held by the sheriff of Galveston county, and they resorted to the writ of habeas corpus before Hon. A. C. Allen, judge of the criminal district court of Harris county, for bail. Upon the hearing of the application they were remanded, and appeal. We have examined the record carefully, and in our opinion the facts show appellants are entitled to bail; and we hereby fix the amount of the bail of each at \$10,000. Upon the giving of bail in the sum stated, conditioned in the terms of the law and as required thereby, appellants will be released from custody. Judgment is reversed, and appellants admitted to bail in the sum of \$10,000 each.

MOORE v. STATE. (Court of Criminal Appeals of Texas. March 20, 1901.) Appeal from district court, Kaufman county; J. E. Dillard, Judge. Ed. Moore was convicted of burglary, and he appeals. Affirmed. D. E. Simmons, Acting Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted under an indictment charging him with burglarizing a private residence, and his punishment assessed at 25 years' confinement in the penitentiary. The record is before us without statement of facts, bills of exceptions, or motion for new trial, and as presented to us no error is apparent. The judgment is affirmed.

WADSWORTH v. STATE. (Court of Criminal Appeals of Texas. March 13, 1901.) Appeal from Parker county court; I. N. Roach, Judge. J. B. Wadsworth was convicted for selling liquor without a license, and he appeals. Affirmed. D. E. Simmons, Acting Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted for selling liquor without obtaining a license in a local option territory, and his punishment assessed at a fine of \$300. This record brings in review the decisions beginning with Searley v. State, 40 Tex. Cr. R. 507, 52 S. W. 547, 53 S. W. 696. These decisions are sufficiently familiar to the profession to require no further discussion. I dissented in that case, and have not changed my views. It is unnecessary, therefore, to enter into a discussion of the questions urged for reversal; they having been decided adversely to appellant in the cases supra. The judgment is affirmed.

BIRD CANNING CO. v. COOPER GROCERY CO. (Court of Civil Appeals of Texas. March 20, 1901.) Appeal from McLennan county court; J. N. Gallagher, Judge. Action between the Bird Canning Company and the Cooper Grocery Company. From a judgment in favor of the latter, the former appeals. Affirmed. H. P. Jordan and J. T. Sluder, for plaintiff in error. John W. Davis, for defendant in error.

FISHER, C. J. We have carefully examined into every question raised by plaintiff in error's assignments of errors, and have reached the conclusion that they are not well taken. Therefore the judgment of the trial court is affirmed. Affirmed.

GRACE v. WALKER et al. (Court of Civil Appeals of Texas. April 10, 1901.) Appeal from district court, Fannin county; E. S. Chambers, Judge. Injunction by C. D. Grace against Emily Walker and others. From a decree in favor of the defendants, the plaintiff appeals. Affirmed. P. C. Thurmond and C. D. Grace, for appellant. Richard B. Semple, for appellees.

KEY, J. We approve and adopt the conclusions of fact and law filed by the trial judge, and affirm the judgment. It was not shown by the testimony that the obstructions complained of by appellant were placed in a public street as alleged. The conclusion of the court that the land upon which the improvements referred to were placed was not shown to be a public street is sustained by the evidence and justified the judgment against appellant, who as plaintiff sought an injunction against appellees. Judgment affirmed.

GULF, C. & S. F. RY. CO. et al. v. HOLLAND. (Court of Civil Appeals of Texas. April 3, 1901.) Appeal from Runnels county court; C. H. Willingham, Judge. Action by J. H. Holland against the Gulf, Colorado & Santa Fé Railway Company and another. From a judgment in favor of plaintiff, defendants appeal. Affirmed. Oswald S. Parker, Harris & Smith, J. W. Terry, and Chas. K. Lee, for appellants. John I. Guion, for appellee.

FISHER, C. J. We are of the opinion that the evidence is sufficient to support the verdict and judgment of the trial court. We have carefully examined into all the questions raised and find no reversible error. Therefore the judgment is affirmed. Affirmed.

MISSOURI, K. & T. RY. CO. OF TEXAS v. MARTIN. (Court of Civil Appeals of Texas. March 13, 1901.) Appeal from district court, Hill county; W. Poindexter, Special Judge. Action by John E. Martin against the Missouri, Kansas & Texas Railway Company of Texas. From a judgment in favor of plaintiff, defendant appeals. Affirmed. T. S. Miller and Ramsey & Odell, for appellant. T. S. Smith,

¹ Rehearing denied April 10, 1901.

Nelson Phillips, L. A. Carlton, and Humphreys & McLenn, for appellee.

FISHER, O. J. This is an action for damages by the appellee against the railway company. Judgment in the trial court was rendered in favor of the appellee. We find that the facts stated and the acts of negligence alleged in the plaintiff's petition are substantially proven, with the exception of the averment to the effect that the engineer in charge of the locomotive that struck the plaintiff discovered his peril in time to prevent running him down, and with this exception the appellant was guilty of negligence as alleged. The only question raised in this appeal by the propositions presented by appellant in its brief is that the appellee was guilty of contributory negligence in going upon the track and placing himself in a position of danger. Much could be said upon this subject, and an extended argument, based upon the facts, could be made in support of our conclusion that the appellee was not guilty of contributory negligence; but upon this question we are content simply with the statement of our conclusion to the effect that there are facts and circumstances in the record which authorized the conclusion that appellee was not guilty of contributory negligence. We find no error in the record, and the judgment is affirmed. Affirmed.

WESTERN UNION TEL. CO. v. SNODGRASS.¹ (Court of Civil Appeals of Texas. Feb. 6, 1901.) Appeal from district court, Bexar county; S. J. Brooks, Judge. Action by William C. Snodgrass against the Western Union Telegraph Company. From a judgment

¹ Rehearing denied March 6, 1901, and writ of error denied by supreme court.

in favor of the plaintiff, the defendant appeals. Affirmed. Norman G. Kittrell and Webb & Finley, for appellant. Keller & Williams, for appellee.

NEILL, J. A statement of the nature of this case and the conclusions of fact reached by us precede in our certificate of the question of law certified to the supreme court. 60 S. W. 308. Therefore it is not necessary to reiterate them here. The answer of the supreme court to the question of law certified settles this case in appellee's favor, and upon its authority the judgment is affirmed.

STATE v. HUFF. (Supreme Court of Missouri, Division No. 2. March 26, 1901.) Dissenting opinion. For majority opinion, see 61 S. W. 900.

GANTT, J. (dissenting). In my opinion the judgment must be reversed, and the cause remanded, because the court erred in the admission and rejection of evidence as pointed out in the opinion. I do not concur in holding there was no evidence upon which to base the verdict. In my opinion it is not the province of this court to determine the weight of evidence when there is a conflict of testimony. It was for the jury, who saw the witnesses and heard them deliver their evidence, to say whether the prosecutrix was impeached to such an extent that her evidence must be wholly discarded. Neither do I agree that the return on a subpoena must state that the officer went to the residence of the witness in his efforts to serve the writ. When he returns that after diligent search he is unable to find the witness in his county, it is sufficient, and the presumption attending all official conduct is that he has done his duty. I do not agree to the criticisms upon court or counsel.

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ABANDONMENT.

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Right of action by or against personal representative, see "Executors and Administrators," § 6.

§ 1. Waiver of grounds of abatement and time and manner of pleading in general.

Under Sayles' Civ. St. art. 1269, and rule 24 (20 S. W. xiii.), governing practice in county courts, a plea to the jurisdiction is waived by permitting three terms of court to pass without calling the court's attention to it.—Watson v. Mirike (Tex. Civ. App.) 538.

Where defendant had filed a plea in abatement and an answer to the merits of the case, and on the appearance day requested plaintiff's counsel to have the hearing of the plea and on the merits set for a day certain, which was done, the defendant did not waive his right to be heard on his plea of abatement.—Bennett v. Stratton (Tex. Civ. App.) 949.

ABSENCE.

Suspension of running of statute of limitation, see "Limitation of Actions," § 2.

ABUTTING OWNERS.

Assessments for expenses of public improvements, see "Municipal Corporations," § 7.
Compensation for taking of or injury to lands or easements for public use, see "Eminent Domain," §§ 2, 4.

ACCESSORIES.

See "Homicide," § 1.

ACCIDENT.

Cause of death, see "Death," § 1.

ACCOMMODATION PAPER.

See "Bills and Notes."

ACCOMPLICES.

Testimony, see "Criminal Law," §§ 4-10.

ACCORD AND SATISFACTION.

See "Compromise and Settlement"; "Release."

ACCOUNT.

Accounting between partners, see "Partnership," § 5.
— by executor or administrator, see "Executors and Administrators," § 7.

ACCRUAL.

Of right of action, see "Limitation of Actions," § 2.

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ACKNOWLEDGMENT.

Of indebtedness barred by limitation, see "Limitation of Actions," § 8.
Operation and effect of admissions as evidence, see "Evidence," § 6.

§ 1. Taking and certificate.

A finding *held* insufficient to show a compliance with Code, § 2082, providing for the correction of the certificate of privy examination of a married woman on execution of a deed.—Madden v. Mason (Tenn. Sup.) 54.

That the acknowledgment of a trust deed by a married woman was taken by the trustee is not alone sufficient ground for annulling it at her instance.—Weidman v. Templeton (Tenn. Ch. App.) 102.

Under Rev. St. arts. 635, 4618, no title passes where the acknowledgment of a married woman's deed to her separate estate is taken by the husband of the grantee.—Silcock v. Baker (Tex. Civ. App.) 989.

§ 2. Operation and effect.

In trespass to try title to land, *held*, that the inserting of the description of the property in a deed after the same had been signed, sealed, and acknowledged did not render the recording thereof inoperative as against subsequent purchasers.—Henke v. Stacy (Tex. Civ. App.) 609.

ACTION.

Abatement, see "Abatement and Revival."
Actions between parties in particular relations, see "Master and Servant," §§ 2, 7; "Partnership," § 5.

— co-tenants, see "Partition," § 1.

— joint debtors, see "Contribution."

Accrual, see "Limitation of Actions," § 2.

Bar by former adjudication, see "Judgment," § 6.

Commencement within period of limitation, see "Limitation of Actions," § 2.

Criminal prosecutions, see "Criminal Law."

Jurisdiction of courts, see "Courts."

Laches, see "Equity," § 2.

Limitation by statutes, see "Limitation of Actions."

Malicious actions, see "Malicious Prosecution."

Particular forms of action, see "Replevin";

"Trespass to Try Title."

— remedies in or incident to actions, see "Attachment"; "Garnishment"; "Injunction"; "Receivers."

Review of proceedings, see "Appeal and Error"; "Certiorari"; "Exceptions, Bill of"; "Judgment," § 2; "Justices of the Peace," § 4; "New Trial."

Suits in equity, see "Equity."

— in justices' courts, see "Justices of the Peace," § 3.

Actions by or against particular classes of parties.

See "Brokers," §§ 1-5; "Corporations," § 3; "Executors and Administrators," § 6; "Husband and Wife," § 3; "Municipal Corporations," § 12; "Partnership," § 4; "Receivers," § 2; "Schools and School Districts," § 1.

Foreign executor, see "Executors and Administrators," § 8.

Heirs, see "Descent and Distribution," § 3.

Reorganized Corporation, see "Corporations," § 5.
Trustees, see "Trusts," § 3.

Particular causes or grounds of action.

See "Bills and Notes," § 4; "Contribution"; "Death," § 1; "Ejectment"; "Forcible Entry and Detainer," § 1; "Insurance," §§ 9, 10; "Libel and Slander," § 3; "Malicious Prosecution," § 1; "Money Paid"; "Negligence," § 4; "Taxation," § 4.

Breach of contract, see "Sales," § 6.
— of warranty, see "Sales," § 6.
Foreign judgment, see "Judgment," § 10.
Personal injuries, see "Carriers," § 4; "Master and Servant," § 7; "Railroads," §§ 2-4.
Price of goods, see "Sales," § 5.
— of land, see "Vendor and Purchaser," § 5.
Recovery of tax paid, see "Taxation," § 3.
Services, see "Master and Servant," § 2.
Taking of or injury to property in exercise of power of eminent domain, see "Eminent Domain," § 4.
Wages, see "Master and Servant," § 2.
Wrongful attachment, see "Attachment," § 4.

Particular forms of special relief.

See "Creditors' Suit"; "Divorce"; "Injunction"; "Interpleader"; "Partition," § 1; "Quieting Title"; "Specific Performance."
Admeasurement or assignment of dower, see "Dower," § 2.
Alimony, see "Divorce," § 3.
Cancellation of written instrument, see "Cancellation of Instruments."
Dissolution of partnership, see "Partnership," § 5;
Establishment and enforcement of right of homestead, see "Homestead," § 5.
— of trust, see "Trusts," § 3.
Establishment of will, see "Wills," § 4.
Foreclosure of mortgage, see "Mortgages," § 6.
Reformation of written instrument, see "Reformation of Instruments."
Setting aside fraudulent conveyance, see "Fraudulent Conveyances," § 2.

Particular proceedings in actions.

See "Appearance"; "Continuance"; "Costs"; "Damages"; "Depositions"; "Dismissal and Nonsuit"; "Evidence"; "Execution"; "Judgment"; "Jury"; "Limitation of Actions"; "Parties"; "Pleading"; "Process"; "Trial"; "Venue."

Verdict, see "Trial," § 8.

§ 1. Nature and form.

Under Civ. Code Prac. § 11, subsec. 4, the court may in its discretion transfer an ordinary action to the equity docket, without motion, if the action involves complicated accounts.—*Brashears v. Letcher County Court* (Ky.) 285.

§ 2. Joinder, splitting, consolidation, and severance.

Where a creditor sued to have certain preferential acts of the debtor declared to operate as an assignment for the benefit of creditors, making the debtor and the preferred creditors defendants, the court properly refused to permit him to be made a party defendant to an action by the preferred creditors against the debtor in which an attachment was issued and levied; it being the duty of the court to have the two actions consolidated.—*Steitler v. Helmbush's Ex'rs* (Ky.) 701.

Where several parcels of land were assessed against defendants as separate tracts, it was not error to refuse to consolidate separate suits against each tract.—*Watkins v. State* (Tex. Civ. App.) 532.

An exception that a plea for damages in the alternative in an action to recover land constitutes a misjoinder of actions is without merit.—*Schneider v. Sellers* (Tex. Civ. App.) 541.

ADJOINING LANDOWNERS.

See "Boundaries."

ADJUDICATION.

Of courts in general, see "Courts," § 1.
Operation and effect of former adjudication, see "Judgment," § 7.

ADJUSTMENT.

Of loss within insurance policy, see "Insurance," § 7.

ADMINISTRATION.

Of estate of decedent, see "Executors and Administrators."

ADMISSIONS.

As evidence, see "Evidence," § 6.

ADOPTION.

Breach of agreement to adopt, see "Contract," § 3.

An adopted son held not entitled to recover the estate of his adopted father, as against the testamentary disposition thereof.—*Steele v. Steele* (Mo.) 815.

Facts held to show an executed parol contract of adoption, enforceable as against a foster father's estate, though the adoption was not by deed as required by statute.—*Lynn v. Hockaday* (Mo.) 885.

An adopted child is not within a conveyance to "bodily heirs."—*Balch v. Johnson* (Tenn. Sup.) 289.

Adoption proceedings instituted by a married woman and her husband, under Shannon's Code, § 5409, make the child hers, as well as his, for the purpose of inheritance.—*Balch v. Johnson* (Tenn. Sup.) 289.

ADULTERATION.

See "Food."

ADULTERY.

Ground of forfeiture of dower, see "Dower," § 1.

Evidence held not sufficient to support a conviction of adultery.—*Bradshaw v. State* (Tex. Cr. App.) 713.

ADVERSE CLAIM.

To real property, see "Quieting Title."

ADVERSE POSSESSION.

See "Limitation of Actions."

Against co-tenant, see "Tenancy in Common," § 2.

§ 1. Nature and requisites.

One of several vendors being an infant when she undertook to convey, the possession of the purchaser did not become adverse to her until she became of age, and, as she was then and has ever since been a married woman, the statute has never commenced to run against her.—*Pope v. Brassfield* (Ky.) 5.

Where a title bond purporting to be the obligation of several joint owners of land referred to therein was not signed by all the owners named, the possession of the obligees, who

claimed the entire tract, was adverse to the owners who did not sign the bond, and also to one of the signers who was a married woman and therefore not bound.—*Pope v. Brassfield* (Ky.) 5.

Ignorance of one's rights does not prevent the running of the statute.—*Pope v. Brassfield* (Ky.) 5.

Where defendant had been in adverse possession of land for more than 15 years when plaintiff bought the land and accepted a deed for it, the title thus acquired by defendant was not defeated by his subsequent agreement to the appointment of processioners by the county court and the fixing of the line by them so as to give the land to plaintiff.—*Fulton v. Borders* (Ky.) 1001.

A deed need not be recorded to be color of title, where land is known as grantee's land and the true owner knows of such fact.—*Plaster v. Grabeel* (Mo.) 589.

One going into possession under recorded deed and cultivating part of land for 10 years acquires title by adverse possession, though he lives on other land.—*Plaster v. Grabeel* (Mo.) 589.

Where a minor made a parol sale of land, and the vendee took possession and paid the purchase price, his possession was adverse; and he was not a vendee in possession under an executed contract merely because the minor had promised to execute a deed at majority.—*Ogle v. Hignet* (Mo.) 596.

Where a father who conveys real property to his children remains in possession thereof, but does not claim any interest therein adverse to the children, their interest therein is not defeated by limitation.—*Bozarth v. Watts* (Tenn. Ch. App.) 108.

Sayles' Ann. Civ. St. 1897, art. 3351, held to preclude the obtaining of title to an artificial lake dedicated to public use by adverse possession.—*Gilleen v. City of Frost* (Tex. Civ. App.) 345.

Where defendant, under a deed covering land in controversy and adjoining land, enters into possession and actually occupies the adjoining land, claiming the whole, for more than 20 years, his possession should be deemed co-extensive with the description in his deed, so as to give defendant title by adverse possession.—*Coleman v. Florey* (Tex. Civ. App.) 412.

All the incidents mentioned in the statute conferring title by five years' adverse possession under a registered deed and payment of taxes must concur and be continued for the time prescribed in order to complete the bar of the statute.—*Gillum v. Fuqua* (Tex. Civ. App.) 935.

If a grantee in possession of land fails to record his deed in a reasonable time, the adverse possession of his grantor under a registered deed is lost, and the grantee's adverse possession will not begin until his own deed is registered.—*Gillum v. Fuqua* (Tex. Civ. App.) 935.

The fact that defendant asserted title to land as a part of a particular survey *held* not to defeat the adverse character of his possession, though the land in fact was not a part of that survey.—*Daughtrey v. New York & T. Land Co.* (Tex. Civ. App.) 947.

Where there was no evidence that the land claimed by plaintiff was surrounded by other land of the defendant, it cannot be contended that plaintiff was entitled to a judgment for its possession under Rev. St. 1896, art. 3345, making possession not adverse where the land is so surrounded.—*Daughtrey v. New York & T. Land Co.* (Tex. Civ. App.) 947.

The fact that defendant in 1882 signed an agreement that the land in controversy was not a part of a certain survey *held* not to defeat his subsequent title by adverse possession under that survey.—*Daughtrey v. New York & T. Land Co.* (Tex. Civ. App.) 947.

§ 2. Pleading, evidence, trial, and review.

Where defendant asserted title by adverse possession, his testimony that he claimed the property as a part of a certain survey *held* admissible to show the nature of his possession.—*Daughtrey v. New York & T. Land Co.* (Tex. Civ. App.) 947.

AFFIDAVITS.

See "Depositions."

AGENCY.

See "Principal and Agent."

AGREEMENT.

See "Contracts."

AGRICULTURE.

The contention that a farm laborer was entitled, under *Sess. Laws 1897, p. 218*, to maintain a lien on the crop produced by his labor for only the last 30 days' work, *held* not sustainable.—*Cash v. First Nat. Bank* (Tex. Civ. App.) 723.

ALIMONY.

See "Divorce," § 3.

ALLOWANCE.

To surviving wife, husband, or children of decedent, see "Executors and Administrators," § 3.

ALTERATION.

Of geographical or political divisions, see "Counties," § 1; "Schools and School Districts," § 1.

ALTERATION OF INSTRUMENTS.

See "Reformation of Instruments."

The admission of an altered note in evidence on the mere proof of the maker's signatures, without explanation of the alterations, did not shift the burden of proof.—*Klein v. German Nat. Bank* (Ark.) 572.

Where the indorsee of a note altered on its face proved the signatures of the defendants in a suit on the note, the instrument was admissible in evidence without explanation of the alterations.—*Klein v. German Nat. Bank* (Ark.) 572.

AMENDMENT.

Of pleading, see "Equity," § 3; "Pleading," § 3; "Process," § 2.

Of record on appeal or writ of error, see "Appeal and Error," §§ 6-9.

AMOUNT IN CONTROVERSY.

Jurisdictional amount, see "Appeal and Error," § 1; "Courts," §§ 2, 3; "Justices of the Peace," § 2.

Review in criminal prosecutions dependent on extent of penalty, see "Criminal Law," § 19.

ANIMALS.

Carriage of live stock, see "Carriers," § 2.
Stabling and hiring of horses, see "Livery Stable Keepers."

If a tenant, after breach of his contract and after the landlord has assumed control of the cultivated land, turns his cattle into the inclosure he has rented, and they go upon the cultivated lands, he is liable under Pen. Code, art. 794, for causing stock to go on the inclosed land of another.—*Gartrell v. State* (Tex. Cr. App.) 487.

ANSWER.

In pleading, see "Pleading," § 2.

APPEAL AND ERROR.

See "Certiorari"; "Exceptions, Bill of"; "Justices of the Peace," § 4; "New Trial."

Appellate jurisdiction of particular courts, see "Courts," § 3.

Assessment of taxes, see "Taxation," § 2.

Condemnation proceedings, see "Eminent Domain," § 3.

Costs, see "Costs," § 3.

Probate proceedings, see "Wills," § 4.

Proceedings to establish drain, see "Drains," § 1.

Review in particular civil actions, see "Divorce," § 2; "Trespass to Try Title," § 2.

— of criminal prosecutions, see "Criminal Law," §§ 10-23; "Homicide," § 8.

§ 1. Decisions reviewable.

Under Shannon's Code, § 4889, an appeal may be taken from a decree dismissing a bill in equity as to a part of the defendants, where the defendants against whom the bill still stood had not been served with process and had not entered an appearance.—*Jones v. Stewart* (Tenn. Ch. App.) 105.

Under Shannon's Code, § 4889, no appeal lies from a decree overruling a demurrer to a cross bill.—*Neely v. Neely* (Tenn. Ch. App.) 1033.

The supreme court *held* to have no jurisdiction to grant a writ of error to a judgment of the court of civil appeals reversing and remanding a cause for the insufficiency of the evidence.—*Dawson v. St. Louis Expanded Metal Fireproofing Co.* (Tex. Sup.) 118.

Under Rev. St. art. 2540, an appeal will not lie from a judgment of a county court dismissing an appeal from a justice's judgment allowing no damages in an action of forcible entry and detainer.—*Lane v. Jack* (Tex. Civ. App.) 422.

§ 2. Right of review.

In a contest between a county and taxpayers as to money alleged to have been illegally collected by the sheriff, the sheriff is entitled to appeal from a judgment against him in favor of the taxpayers for that part of the tax held to be illegal, and in favor of the county for the balance.—*Whaley v. Commonwealth* (Ky.) 35; *Ratliff v. Same, Id.*; *Same v. Nicholas County, Id.*

Remainder-men of a trust estate *held* entitled under the notice served in the trust case to object for the first time on appeal to an order charging a debt of the life tenant against their estate.—*Armistead v. Armistead* (Tenn. Ch. App.) 1071.

§ 3. Presentation and reservation in lower court of grounds of review.

Where defendant failed to move for judgment on a counterclaim, because of omission to reply thereto, such omission could not be taken advantage of on appeal.—*Young v. Gaut* (Ark.) 872.

In an action by husband and wife, the husband having died pending the action, the objection that there was no revivor cannot be made for the first time on appeal; the husband not having been a necessary party.—*Kice v. Porter* (Ky.) 268.

An error cannot be urged in the appellate court, where no exception was taken thereto at the time, nor any assignment thereof made in the motion for a new trial.—*Chance v. Jennings* (Mo.) 177.

Where defendants did not plead an estoppel in pais, or interpose the same as a defense in the trial court, such defense cannot be urged in the appellate court for the first time.—*Chance v. Jennings* (Mo.) 177.

A ruling by the trial court, on overruling a demurrer to the evidence, that a corporation had not transacted business within the state which would require compliance with Act April 21, 1891, will not be considered on appeal, where no objection or exception is taken thereto.—*Missouri Coal & Mining Co. v. Ladd* (Mo.) 191.

An issue as to the priorities of holders of corporate bonds secured by trust deed and attaching creditors not raised in the trial court cannot be raised in the appellate court.—*Riesterer v. Horton Land & Lumber Co.* (Mo.) 238.

Where an action is brought to set aside a deed as fraudulent, without tendering issue that it was never delivered, and no evidence was introduced that it was not, the question of non-delivery cannot be raised on appeal.—*Studybaker v. Cofield* (Mo.) 248.

Where cause is tried on theory that petition alleges plaintiff was rendered insane by an accident, objection that petition did not do so cannot be first raised on appeal.—*Smiley v. St. Louis & H. Ry. Co.* (Mo.) 667.

A question as to the sufficiency of a pleading cannot be raised for the first time on appeal.—*Stark v. Publishers: George Knapp & Co.* (Mo.) 669.

An objection that evidence was improperly admitted cannot be raised for the first time on appeal.—*Board of Trustees of Westminster College v. Piersol* (Mo.) 811.

Ruling on demurrer may be reviewed on appeal without an exception.—*Newton v. Newton* (Mo.) 881.

Where no exceptions were taken to the admission of testimony, assignments of error based on such admission cannot be considered.—*Stacker v. Louisville & N. R. Co.* (Tenn. Sup.) 766.

An exception to all the proof in complainant's deposition in regard to any conversations or transactions with plaintiff's intestate *held* too vague to be considered on appeal.—*Callender v. Turpin* (Tenn. Ch. App.) 1057.

In an action on a benefit insurance certificate, where the defendant organization was alleged to be a corporation, and both parties treated it as such on the trial and in the presentation of the case to the appellate court, the court will treat the defendant as such, though there was no evidence on the subject nor admission of the fact in the answer.—*Page v. Knights & Ladies of America* (Tenn. Ch. App.) 1068.

Where the error in an instruction was a positive one, it was assignable, without a request of a special charge stating the true rule.—*San Antonio Traction Co. v. White* (Tex. Sup.) 706.

That verdict is contrary to evidence, when not raised on motion for new trial, cannot be made basis of assignment of error.—*Missouri, K. & T. Ry. Co. of Texas v. Ball* (Tex. Civ. App.) 327.

Where a motion for a new trial stated that the verdict was contrary to the law and evidence, such statement was too general to call the attention of the court to the question raised; and hence the court of civil appeals will not review the question on appeal.—*Voelcker v. McKay* (Tex. Civ. App.) 424.

Exceptions not shown from the record to have been presented to and ruled upon by the trial court will not be considered on appeal.—*Holmes v. Thomason* (Tex. Civ. App.) 504.

Where limitations are not specially pleaded as a bar to a cause of action, the question is waived, and cannot be raised on appeal.—*Boyd v. Ghent* (Tex. Civ. App.) 723.

Where a special charge was not asked covering an omission in the court's charge, it cannot afterwards be complained of as not being sufficiently specific.—*Schneider v. Sanders* (Tex. Civ. App.) 727.

§ 4. Parties.

Where a city, appealing from a judgment denying its claim for taxes out of the proceeds of property sold to satisfy various liens, made only one of the lien creditors a party, it can require that creditor to pay only his proportion of the taxes.—*Board of Councilmen of Frankfort v. Farmers' Bank* (Ky.) 458.

No person is a party to the appeal unless he is named in the statement.—*Board of Councilmen of Frankfort v. Farmers' Bank* (Ky.) 458.

Under Rev. St. art. 1391, where judgment was rendered against the maker of a vendor's lien note for the amount thereof and foreclosing the lien against him and his grantee, who had assumed the payment, and the grantee brought error, not making the maker a party, the petition was dismissible for defect of parties.—*Yarnell v. Burnett* (Tex. Civ. App.) 153.

§ 5. Requisites and proceedings for transfer of cause.

The limitation of two years applicable to original appeals does not apply to a cross appeal, which, under Civ. Code Prac. § 755, may be obtained any time before trial.—*Elizabethtown, L. & B. S. R. Co. v. Catlettsburg Water Co.* (Ky.) 47.

Under Rev. St. art. 1393, declaring that, on filing a petition in error, citation must issue for the defendant in error, failure to serve a defendant in error with a citation is ground for the dismissal of the petition.—*Yarnell v. Burnett* (Tex. Civ. App.) 153.

That creditors of an estate gave notice of an appeal from a probate order, but filed no bond, was no reason for dismissing an appeal by the executrix.—*Erwin v. Erwin* (Tex. Civ. App.) 159.

Under a statute authorizing an executor to appeal without bond, unless the appeal personally concerns him, the appeal of an executrix in the interest of the estate, though she was sole devisee and legatee, should not be dismissed for lack of bond.—*Erwin v. Erwin* (Tex. Civ. App.) 159.

Under *Sayles' Civ. St.* art. 1670, requiring appellant to file a bond within 10 days from the judgment, a bond filed after 10 days does not give the appellate court jurisdiction, though it is dated back as within 10 days by consent.—*McMahon v. City Bank* (Tex. Civ. App.) 952.

§ 6. Record and proceedings not in record.

The record on appeal held to sufficiently show the parts of an affidavit which the court refused to allow to go to the jury.—*St. Louis, I. M. & S. Ry. Co. v. Faist* (Ark.) 374.

The action of the trial court in refusing to permit a pleading to be filed cannot be reviewed, unless the pleading is made a part of the

record by order of the court or bill of exceptions.—*Manire v. Hubbard* (Ky.) 463.

An objection that the record on appeal was not filed within the proper time, nor the errors assigned within the proper time, made after the case was called and heard, held too late.—*Home Ins. Co. v. Webb* (Tenn. Sup.) 79.

A bill of exceptions, filed after the time allowed by the court, is too late, and cannot be considered.—*Jones v. Moore* (Tenn. Sup.) 81; *Tucker v. Same*, *Id.*

Where, on a petition for rehearing, the question of a diminution of the record is raised for the first time, and its amendment would not change the judgment, the cause will not be remanded for amendment of the transcript.—*Gass v. Waterhouse* (Tenn. Ch. App.) 450.

Where depositions, suppressed on trial, would not change the result, if admitted, the appellate court will not remand the case for a perfection of the record.—*Carter v. Norton* (Tenn. Ch. App.) 561.

§ 7. — Matters to be shown by record.

Under *Mansf. Dig.* § 1310 (*Ind. T. Ann. St.* 1899, § 812), error assigned which might have been corrected by motion for a new trial will not be considered on appeal, where none of the grounds on which a new trial was asked are set forth in the bill of exceptions.—*Smith v. Simpson* (*Ind. T.*) 986.

Under Acts 1899, c. 275, the record must show affirmatively that a bill of exceptions was filed within 30 days from overruling the motion for new trial, or it cannot be considered.—*Jones v. Moore* (Tenn. Sup.) 81; *Tucker v. Same*, *Id.*

Where the record did not show that the chancellor acted on an exception to evidence, the exception will not be reviewed on appeal.—*Callender v. Turpin* (Tenn. Ch. App.) 1067.

Where the evidence is not in the record, on an appeal from an order denying the relief sought by a writ of habeas corpus, the decision of the trial court will be sustained.—*Ex parte Whitney* (Tex. Cr. App.) 714.

An assignment that the court refused to give a requested instruction will not be considered, where the record did not disclose whether it was given or refused.—*Lindsey v. White* (Tex. Civ. App.) 438.

§ 8. — Necessity of bill of exceptions, case, or statement of facts.

An order by the court of appeals, before the submission of the appeal, striking the bill of exceptions from the record, will not be reviewed on the final hearing of the appeal, where more than five years elapsed after the motion for a new trial was made before it was overruled.—*White v. Louisville & N. R. Co.* (Ky.) 279.

An exception recited in the record proper does not preserve the matter thus recited.—*Newton v. Newton* (Mo.) 881.

Where there was no bill of exceptions to the action of the lower court, the fact that the record showed the court's action and the grounds therefor did not bring the question before the court on appeal.—*Carter v. Norton* (Tenn. Ch. App.) 561.

A paper in the record on appeal, designated "a wayside bill of exceptions," signed by an attorney, but not by the judge, cannot be considered.—*Carter v. Norton* (Tenn. Ch. App.) 561.

On appeal, in the absence of a statement of facts or bill of exceptions, rulings on evidence and instructions cannot be reviewed.—*Moore v. State* (Tex. Cr. App.) 487.

Where, on appeal, there is no statement of facts, the findings will be accepted as established.

ed by the testimony.—*Lovejoy v. Townsend* (Tex. Civ. App.) 331.

§ 9. — Questions presented for review.

On an assignment, as a ground for new trial, that the court refused to permit plaintiffs to conclude their argument, the refusal and plaintiffs' exception thereto must appear from the bill of exceptions or the orders of court.—*Simmons v. Pearson* (Ky.) 259.

There can be no reversal for misconduct of counsel in argument, unless the objectionable argument appears from the bill of exceptions.—*Illinois Cent. R. Co. v. Josey's Adm'r* (Ky.) 703.

Where a bill of exceptions does not show the presentation and denial of a motion in arrest of judgment, the action of the court in overruling the motion will not be considered on appeal.—*Missouri Coal & Mining Co. v. Ladd* (Mo.) 191.

The statement by counsel for plaintiff to the jury, in an action against a railroad company for an injury on its tracks, that the defendant was a "law breaker from the jump," is not sufficient to warrant a reversal of a judgment for plaintiff, where all the statements made by counsel are not shown by the record.—*Anderson v. Union Terminal R. Co.* (Mo.) 874.

Where there was nothing in the record, except in the motion for a new trial, to show that a judgment was based on defendant being estopped, an assignment that the court erred in so doing will not be considered on appeal.—*Litterer v. Timmons* (Tenn. Sup.) 72.

Where all evidence as to a resulting trust was held properly excluded by the court of chancery appeals, and not preserved by bill of exceptions on appeal, the question will not be considered by the supreme court.—*Lucas v. Malone* (Tenn. Sup.) 82.

Record on appeal held to show special request made after delivery of the regular charge.—*Oliver v. City of Nashville* (Tenn. Sup.) 88.

Assignments of error on the court's refusal to allow witnesses to answer cannot be considered, when it does not appear what the witness would have stated.—*Stacker v. Louisville & N. R. Co.* (Tenn. Sup.) 766.

Copying an amended bill in the transcript held not sufficient to present for review the ruling of the trial court in refusing to allow the amendment.—*Callender v. Turpin* (Tenn. Ch. App.) 1057.

Where there is no bill of exceptions showing the failure of the trial court to file conclusions of fact, its failure so to do will not be considered on appeal.—*Barrett v. Barrett* (Tex. Civ. App.) 951.

The appellate court can only look to the transcript in determining the rights of parties, and must be governed thereby except in cases involving its jurisdiction.—*American Cent. Ins. Co. v. Murphy* (Tex. Civ. App.) 956.

§ 10. Assignment of errors.

Where the pages of the appeal record on which evidence rejected by the trial court and exceptions to the rejection are to be found are not given, assignments of error on such rulings cannot be considered.—*Stacker v. Louisville & N. R. Co.* (Tenn. Sup.) 766.

The refusal of special charges will not be considered on appeal, when the contents of such special charges are not set out in the assignment of error or briefs.—*St. Louis S. W. Ry. Co. of Texas v. Laws* (Tex. Civ. App.) 498.

An assignment of error containing objections to different issues which are grouped is insufficient to authorize a review thereof.—*Western Union Tel. Co. v. Bryson* (Tex. Civ. App.) 548.

§ 11. Briefs.

An appeal held properly taken where the briefs were filed by the appellant in the trial court on June 28th, and the record filed in the court of civil appeals on August 27th; the term of the court of civil appeals having expired on July 1st, and the next term not beginning until October.—*Lynch v. Munson* (Tex. Civ. App.) 140.

Under rule 29 for courts of civil appeals (47 S. W. v.) an assignment of error not copied in the brief will not be considered on appeal.—*Gebhart v. Gebhart* (Tex. Civ. App.) 964.

§ 12. Dismissal, withdrawal, or abandonment.

Where appellant, having failed to file his transcript in time, abandoned an appeal granted by the lower court and had a new appeal granted by the clerk of the court of appeals, the abandoned appeal will be dismissed, with damages, if the judgment was for money and was superseded, provided the motion therefor was made before the new appeal is submitted.—*Reed v. City of Louisville* (Ky.) 11.

Where one arrested resorted to habeas corpus to procure bail, and pending an appeal from a decision on the writ he was indicted, convicted, and sentenced, his appeal will be dismissed on motion.—*Ex parte Messer* (Tex. Cr. App.) 405.

§ 13. Review.

A judgment locating a dividing line in exact accordance with the mandate of the court of appeals, though erroneous, must be affirmed, as the opinion on the former appeal is the law of the case.—*Simmons v. Samuels* (Ky.) 17.

Where the court held, upon appeal by defendant, that the allegations of the answer presented a complete defense and were not denied by the reply, on a second appeal, the former opinion is the law of the case.—*Pentecost v. Manhattan Life Ins. Co.* (Ky.) 29.

Where, in an action to set aside a deed by a husband to his wife as fraudulent and without consideration, the evidence was conflicting, the order granting a new trial to plaintiff, because a judgment for defendants was against the weight of the evidence, will be affirmed.—*Taliaferro v. Evans* (Mo.) 185.

Findings by the court of chancery appeals held to be findings of fact, which were rendered conclusive by the express terms of Shannon's Code, § 6822.—*Madden v. Mason* (Tenn. Sup.) 54.

Findings of the court of chancery appeals on questions of fact will not be reviewed on appeal.—*Maury Nat. Bank v. McAdams* (Tenn. Sup.) 773.

On an appeal from a motion to assess the damages occasioned by the attachment and sale of defendant's goods by plaintiff, the question whether defendant's conduct justified plaintiff in bringing the original action cannot be considered.—*Hetterman v. Young* (Tenn. Ch. App.) 1085.

A writ of error will not be granted to review a judgment of the court of civil appeals which is correct, even if the reason therefor was erroneous.—*Davis v. Lanier* (Tex. Sup.) 385.

Where, in a divorce, the only appeal was from the award of property, exclusion of evidence material only on the divorce issues and the custody of a child will not be reviewed.—*Gebhart v. Gebhart* (Tex. Civ. App.) 964.

A trial court's refusal of a new trial for newly-discovered evidence would not be disturbed unless clearly wrong.—*Phifer v. Mansur & Tebbetts Implement Co.* (Tex. Civ. App.) 968.

§ 14. — Parties entitled to allege error.

The court having rejected an account book offered by plaintiff as evidence, defendant cannot complain of evidence as to what the book contained which he brought out upon cross-examination.—*Jackson-Vanarsdall Distilling Co. v. Moore* (Ky.) 368.

Defendant cannot object to instructions adopting the theory of defendant's instructions.—*Pheips v. City of Salisbury* (Mo.) 582.

Appellant cannot object to instructions based on theories presented in instructions requested by him.—*Wolfe v. Supreme Lodge, Knights and Ladies of Honor* (Mo.) 637.

A party cannot complain of erroneous rulings on the admission of evidence from which he does not appeal.—*Board of Trustees of Westminster College v. Piersol* (Mo.) 811.

§ 15. — Presumptions.

In the absence of a bill of exceptions, it will be presumed that a peremptory instruction for defendant was proper; the pleadings supporting the judgment.—*White v. Louisville & N. R. Co.* (Ky.) 279.

Where the evidence is not in the record, and there is no finding as to a contract, in a suit in equity, it will not be presumed that the evidence was sufficient to authorize the chancellor in finding the terms thereof.—*Nichols v. Cecil* (Tenn. Sup.) 768.

Where the evidence is not in the record on appeal, the appellate court will presume that it was sufficient to support the findings of the jury.—*Nichols v. Cecil* (Tenn. Sup.) 768.

Where the jury makes no findings as to the nature of a contract, and the evidence is not in the record, findings that there has been a breach thereof are not sufficient to support a judgment for plaintiff.—*Nichols v. Cecil* (Tenn. Sup.) 768.

The objection that the affidavits and applications to purchase certain public lands were not in conformity with any legal classifications and appraisements *held* not sustainable, where certain classifications and appraisements appeared by the statement of facts as duly made, and it did not appear that such applications and affidavits were not in conformity with them.—*Clark v. McKnight* (Tex. Civ. App.) 349.

§ 16. — Questions of fact, verdicts, and findings.

Where there was evidence to support a finding on conflicting evidence, it will not be disturbed on appeal.—*Young v. Gaut* (Ark.) 372; *Schneider v. Sanders* (Tex. Civ. App.) 727.

Where evidence as to the alteration of a note was conflicting, the jury's finding would not be disturbed on appeal.—*Klein v. German Nat. Bank* (Ark.) 572.

Findings of a master in chancery which are confirmed by the trial court will not be disturbed on appeal.—*Carder v. Wallace* (Ind. T.) 988.

A finding of the trial court that a deed absolute on its face, given to secure a note, was not executed for the purpose of defrauding the grantor's creditors, will not be set aside by the appellate court.—*Chance v. Jennings* (Mo.) 177.

Where improper remarks of counsel to the jury were made the basis of a motion for a new trial, and there is dispute as to whether or not the objectionable remarks were made, the ruling of the trial judge on the motion will not be disturbed on appeal.—*Kansas City S. B. Ry. Co. v. McElroy* (Mo.) 871.

Where plaintiff's evidence made out a clear case of liability, a judgment in his favor will not be disturbed on appeal.—*Litterer v. Timmons* (Tenn. Sup.) 72.

A decree awarding complainant \$250 for legal services *held* not unreasonable under the evidence.—*Callender v. Turpin* (Tenn. Ch. App.) 1057.

A verdict in a suit for damages to cattle in transportation will not be disturbed on the ground that the jury might have found for a less sum.—*Gulf, C. & S. F. R. Co. v. Porter* (Tex. Civ. App.) 343.

Trial court's findings will not be disturbed on appeal, where evidence tends to support them.—*Neely v. Grayson County Nat. Bank* (Tex. Civ. App.) 559.

Under Rev. St. art. 1332, a verdict to which no complaint was made at the trial or in the motion for a new trial *held* conclusive on appeal.—*Robertson v. Kirby* (Tex. Civ. App.) 967.

Evidence in an action for personal injuries *held* not to show that the jury were actuated by improper influences in returning a verdict of only \$500.—*McCormick v. Missouri, K. & T. Ry. Co. of Texas* (Tex. Civ. App.) 983.

§ 17. — Harmless error.

In an action for injuries received in a railroad accident, evidence that the railway company had settled with another passenger injured in the same accident, though improperly admitted, was not reversible error, where there was evidence establishing the defendant's negligence.—*St. Louis, I. M. & S. Ry. Co. v. Stewart* (Ark.) 169.

While, in an action for deceit, it must be shown that the representation was false and known to be so, and that plaintiff relied on the representation, yet the failure to fully instruct to that effect was harmless error, where the only dispute was as to what representations were made.—*Kice v. Porter* (Ky.) 266.

The error in permitting a witness to state that she "thought" that a wagon loaded with barrels was going to defendant's distillery was harmless, it appearing from the cross-examination of the witness that she had no personal knowledge as to the matter.—*Jackson-Vanarsdall Distilling Co. v. Moore* (Ky.) 368.

Error in an interlocutory order *held* not ground for reversal, as it cannot be presumed that the court on final hearing would not correct the error.—*Little v. Bishop* (Ky.) 464.

Where the jury found for defendants upon their plea of payment, any error in overruling plaintiff's demurrer to another plea of defendants was harmless.—*Rice's Adm'r v. Hurst* (Ky.) 1009.

The failure of the court to expressly state to the jury that the measure of damages was the diminution in value of plaintiff's property by reason of the acts complained of is not reversible error, where the instructions fairly conveyed that idea.—*City of Louisville v. Bohlson* (Ky.) 1014.

Omission at end of an instruction of the words "you will find for defendant" *held* not a ground for reversal.—*Wolfe v. Supreme Lodge, Knights and Ladies of Honor* (Mo.) 637.

The submission to the jury as a special issue in ejectment of the question whether the parties entered into a contract to exchange the land in controversy for mining stock *held* erroneous.—*Cockrell v. McIntyre* (Mo.) 648.

Error in admitting evidence of opinion *held* harmless, the fact being conceded.—*Smiley v. St. Louis & H. Ry. Co.* (Mo.) 667.

The exclusion of evidence of plaintiff's previous good character as bearing on the question of damages for libel was not prejudicial error, when the question of damages was never reached.—*Stark v. Publishers: George Knapp & Co.* (Mo.) 669.

The admission of erroneous evidence in a jury case is harmless error, where the court afterwards instructs that such evidence should be disregarded.—*Anderson v. Union Terminal R. Co.* (Mo.) 874.

Where it affirmatively appeared from the verdict that an erroneous instruction had not misled the jury, the error was not reversible.—*Texas & N. O. R. Co. v. Anderson* (Tex. Civ. App.) 424.

Where an instruction erroneously submitted an improper element of damages, and the verdict did not specify the items of damage, there was reversible error.—*Texas & N. O. R. Co. v. Anderson* (Tex. Civ. App.) 424.

The improper admission of evidence held harmless, where other evidence to the same effect, and directly infringing the rule alleged to have been violated, was admitted without objection.—*Lindsey v. White* (Tex. Civ. App.) 438.

§ 18. Determination and disposition of cause.

A certain judgment held to be no bar to a recovery against the sureties of a defaulting assignee of an estate.—*Hindman v. Lewman* (Ky.) 470.

Where it is contended that an unauthorized item of damages is included in a judgment, but no such question is presented in the instruction, and the judgment is for a gross sum, in excess of such amount and less than plaintiff's claim, the judgment will not be reversed therefor.—*Missouri Coal & Mining Co. v. Ladd* (Mo.) 191.

Where the whole title of the respective parties in ejectment was before the supreme court, and the judgment of the trial court was reversed, judgment would be directed for defendant, where it was evident plaintiff could not recover on another trial.—*Sanford v. Heron* (Mo.) 839.

Where a married woman sued to set aside a sheriff's deed to her real estate on the ground that the return showing service of process on her was false, and answer took issue thereon, and defendants introduced evidence to show service in fact on her by knowledge of the suit and delivery of process to her husband, on a trial de novo defendants should be allowed to amend so as to admit such evidence.—*Smoot v. Judd* (Mo.) 854.

Where a complainant prosecutes an appeal from a judgment in his favor, his bill will be dismissed if there is nothing in the record to warrant the decree rendered.—*Osborne v. Boswell* (Tenn. Ch. App.) 96.

Where suit was brought to establish a note as a claim against a decedent's estate, and on appeal to the court of civil appeals judgment of the district court in favor of plaintiffs, for the amount of the note, interest, and attorney's fees, was affirmed, on motion for rehearing, the appellee's request that the court file conclusions of fact and law would be granted.—*George v. Ryon* (Tex. Civ. App.) 138.

Where the facts were undisputed, the court, on appeal, would render judgment for the party in whose favor the questions of law were decided on appeal.—*Hartford Fire Ins. Co. v. Ransom* (Tex. Civ. App.) 144.

The contention that a married woman had no right to acquire school lands, because she was not a "person" within the contemplation of the statute authorizing the sale of such lands to "any person," held not maintainable.—*Anderson v. Neighbors* (Tex. Civ. App.) 145.

Where it appeared that defendant's liability for injury to a passenger was not fully developed at the trial, the court of civil appeals, on reversing a judgment for plaintiff, will not render judgment for defendant, but will re-

mand the cause for a new trial.—*Houston & T. O. R. Co. v. Graves* (Tex. Civ. App.) 324.

Where whether a section hand should recover for injuries because received in an effort to save life and property was not submitted to jury, the contention that he should recover on that ground, notwithstanding error in the instructions, cannot be sustained.—*Ft. Worth & D. C. Ry. Co. v. Gilstrap* (Tex. Civ. App.) 351.

On reversing a judgment for plaintiff, the appellate court should not order judgment for defendant, unless the case appears to have been fully developed at the trial.—*Whitaker v. Zeihme* (Tex. Civ. App.) 499.

The evidence on which the court of civil appeals bases its finding that there is no evidence on an issue need not be set out as a part of the finding.—*Masterson v. Mansfield* (Tex. Civ. App.) 505.

APPEARANCE.

Where defendant answered the petition, and submitted to the jurisdiction of the court, and went to trial, he cannot afterwards complain that he was not served with process.—*Mankameyer v. Egelhoff* (Mo.) 836.

It was not error to set aside a decree pro confesso and permit a plea to be filed to the jurisdiction, on the ground that the entry of appearance was a submission to the jurisdiction.—*Mark Twain Lumber Co. v. Lieberman* (Tenn. Sup.) 70.

APPLIANCES.

Liability of employer for defects, see "Master and Servant," § 4.

APPLICATION.

Of payment, see "Payment," § 1.

APPOINTMENT.

Of executor or administrator, see "Executors and Administrators," § 1.

Of health officer, see "Health," § 1.

Of officers in general, see "Officers," § 1.

Of receiver, see "Receivers," § 1.

ARBITRATION AND AWARD.

§ 1. Award.

An award, on adjustment of claims existing between partners, is binding on the parties thereto, in the absence of fraud, accident, or mistake.—*Needham v. Bythewood* (Tex. Civ. App.) 426.

In an action on a compromised claim, where the question of limitations was in issue, but not included in the charge, held error to refuse a charge in regard to such question, whether accurate or not, as such charge called the court's attention to the question of limitations.—*Needham v. Bythewood* (Tex. Civ. App.) 426.

ARGUMENT OF COUNSEL.

See "Trial," § 3.

In criminal prosecutions, see "Criminal Law," § 13.

ARREST.

See "Bail."

ARREST OF JUDGMENT.

In criminal prosecutions, see "Criminal Law," § 17.

ARSON.

The instructions in a prosecution for arson should define the meaning of the word "will-

ful" as therein used.—*Erwin v. State* (Tex. Cr. App.) 390.

ASSAULT AND BATTERY.

Assault with intent to kill, see "Homicide," § 3.
— to rob, see "Robbery."

§ 1. Criminal responsibility.

Where conversations in which the prosecuting witness reflected on the character of a sister of defendant's wife were not shown to have been communicated to defendant prior to the assault such conversations *held* not admissible in mitigation of the offense.—*Grammer v. State* (Tex. Cr. App.) 402.

ASSESSMENT.

Of compensation for property taken for public use, see "Eminent Domain," § 3.
Of damages, see "Damages," § 5.
Of expenses of public improvements, see "Municipal Corporations," § 7.
Of tax, see "Taxation," § 2.

ASSIGNMENT OF ERRORS.

See "Appeal and Error," § 10.

ASSIGNMENTS.

For benefit of creditors, see "Assignments for Benefit of Creditors."
Fraud as to creditors, see "Fraudulent Conveyances."
Transfers of particular species of property, rights, or instruments, see "Bills and Notes," § 2; "Bonds," § 1; "Covenants," § 2; "Mortgages," § 3.
— corporate shares, see "Corporations," § 2.

§ 1. Requisites and validity.

The assignment by a public officer of salary to be earned in future is void as against public policy.—*Dickinson v. Johnson* (Ky.) 267.

As no personal duty was imposed upon the vendors, except to make a deed when all of the purchase price had been paid, the contract was assignable.—*Baker v. Smith* (Ky.) 1014.

After service of garnishment on a bank, it properly paid a check, drawn by defendant's wife and delivered to his creditor prior to such service, out of community funds of husband and wife in its hands.—*Neely v. Grayson County Nat. Bank* (Tex. Civ. App.) 559.

ASSIGNMENTS FOR BENEFIT OF CREDITORS.

See "Bankruptcy."

§ 1. Requisites and validity.

A trust deed, which embraced all the debtor's assets except his equity of redemption in the real estate conveyed, and directed the trustee to execute his trust as speedily as possible and to close up all the business within 18 months, and authorized him to sell the real estate on 6 or 12 months' time, *held* not fraudulent, as hindering and delaying creditors.—*Robinson v. Baugh* (Tenn. Ch. App.) 98.

§ 2. Construction and operation in general.

Where a trust deed directed the payment of the first four classes of debts in full, and that any other debts should be paid ratably until paid in full, a creditor for \$4,000, \$1,500 of which belonged to the fourth class, *held* entitled to a pro rata payment of the balance.—*Hightower v. Wray* (Tenn. Sup.) 88.

§ 3. Rights and remedies of creditors.

Evidence *held* to show that failure of bank to present its claim against an assignee within the time limited was for "good cause," within Rev. St. 1899, § 342.—*National Bank of Commerce v. Ripley's Estate* (Mo.) 587.

Under Rev. St. 1899, § 342, the time for presenting claims against an assigned estate may be extended for any good cause.—*National Bank of Commerce v. Ripley's Estate* (Mo.) 587.

ASSOCIATIONS.

See "Building and Loan Associations."

ASSUMPSIT, ACTION OF.

See "Money Paid."

ASSUMPTION.

Of risk by employé, see "Master and Servant," § 5.
— by licensee, see "Railroads," §§ 2-4.

ATTACHMENT.

See "Garnishment."

§ 1. Property subject to attachment.

Property in the possession of a pledgee is not subject to attachment for the pledgor's debts.—*Sabel v. Planters' Nat. Bank* (Ky.) 367.

§ 2. Levy, lien, and custody and disposition of property.

Where a defendant in attachment gave a replevy bond, and retained possession of the attached property, and then sold the same to complainant, it was error for the court to dismiss a bill alleging such facts, and seeking to restrain a sale of such goods in pursuance to the judgment rendered in attachment, for want of equity.—*Jones v. Stewart* (Tenn. Ch. App.) 105.

§ 3. Quashing, vacating, dissolution, or abandonment.

Where the ground of attachment is that defendant has not enough property in the state subject to execution to satisfy plaintiff's demand, the attachment should be sustained, in the absence of any denial of such allegation, as the presumption of danger from delay follows from the admitted fact.—*Steidler v. Helenbush's Ex'rs* (Ky.) 701.

§ 4. Wrongful attachment.

An action does not lie to recover damages for wrongfully suing out an attachment for rent until the attachment has been discharged.—*Watts v. Hurst* (Ky.) 261.

A petition alleging that defendant caused "an attachment and distress" to be issued against plaintiff, and wrongfully caused "said attachment to be levied" on the property of plaintiff, alleges only the issuance and levy of an attachment, and not that of a distress warrant.—*Watts v. Hurst* (Ky.) 261.

ATTENDANCE.

Of witness, see "Witnesses," § 1.

ATTORNEY AND CLIENT.

Admission of attorney, see "Evidence," § 6.
Argument and conduct of counsel at trial in civil actions, see "Trial," § 3.
— in criminal prosecutions, see "Criminal Law," § 18.
Attorney's fees as costs, see "Costs," § 2.
— fees on interpleader, see "Interpleader," § 1.
— in fact, see "Principal and Agent."

Privileged communications, see "Witnesses," § 2.
Right of garnishee to allowance for attorney's fees, see "Garnishment," § 1.

§ 1. Compensation and lien of attorney.

A petition by plaintiff's attorneys for a lien on property attached in a divorce suit for their fees, which was filed six months after the dismissal of the action for divorce, will be dismissed.—Payne v. Payne (Tenn. Sup.) 767.

Where complainant sued for services in securing plaintiff's intestate a new trial, evidence as to services rendered on a second trial of the intestate *held* properly excluded, as not within the issues.—Callender v. Turpin (Tenn. Ch. App.) 1067.

The contention that a decree was erroneous because it awarded complainant a certain amount as attorney for services which were rendered as detective *held* without merit under the evidence.—Callender v. Turpin (Tenn. Ch. App.) 1067.

Evidence *held* sufficient to sustain a finding that complainant was employed as counsel for plaintiff's intestate.—Callender v. Turpin (Tenn. Ch. App.) 1057.

Complainant's attorney in creditors' suit *held* entitled under the evidence to the payment of their fees out of the general fund realized by the bill.—Campbell v. Provident Savings & Loan Soc. (Tenn. Ch. App.) 1090.

An action by an attorney against a client, for having compromised a claim without notice to the plaintiff wherein the client had assigned an interest to the attorney in consideration of conducting the suit, is an action for damages, and the plaintiff must prove his damages.—Lynch v. Munson (Tex. Civ. App.) 140.

AUTHORITY.

Of agent, see "Principal and Agent," §§ 1, 2.
Of justice of the peace, see "Justices of the Peace," § 2.

AWARD.

See "Arbitration and Award," § 1.

BAIL.

§ 1. In criminal prosecutions.

\$250 is not excessive bail for one charged with burglary.—Ex parte Bishop (Tex. Cr. App.) 308.

Bail required of one arrested for prize fighting *held* excessive.—Ex parte Choyinski (Tex. Cr. App.) 891.

BAILMENT.

See "Banks and Banking," § 1; "Carriers," § 1; "Livery Stable Keepers."

BANKRUPTCY.

See "Assignments for Benefit of Creditors."

§ 1. Assignment, administration, and distribution of bankrupt's estate.

Objection that a trustee in bankruptcy could not intervene in an action without leave of court cannot be first made after verdict.—Jones v. Meyer Bros. Drug Co. (Tex. Civ. App.) 553.

One intervening in his capacity as trustee in bankruptcy need not prove his appointment and qualification, unless his right to recover in that capacity is denied under oath, as required by Rev. St. art. 1265, since Bankr. Act 1898, § 70, vests the title to the bankrupt's estate in the trustee.—Jones v. Meyer Bros. Drug Co. (Tex. Civ. App.) 553.

Under Bankr. Act 1898, § 38, *held*, that an allegation by a trustee that he was duly appointed by the referee was equivalent to a declaration that the circumstances existed which empowered the referee to make the appointment.—Jones v. Meyer Bros. Drug Co. (Tex. Civ. App.) 553.

§ 2. Rights, remedies, and discharge of bankrupt.

Indian bankrupts *held* entitled to their improvements on lots in an incorporated town in the Creek Nation as exemptions.—In re Grayson (Ind. T.) 984.

Under Bankr. Act 1898, § 6, and Act Cong. May 2, 1890, Indian bankrupts *held* entitled to their improvements on Indian lands as exemptions.—In re Grayson (Ind. T.) 984.

A discharge in bankruptcy is a bar to the enforcement of a judgment for alimony previously rendered against the bankrupt.—Fits v. Fits (Ky. App.) 26.

BANKS AND BANKING.

See "Taxation."

Equitable assignment of deposit, see "Assignments," § 1.

§ 1. Functions and dealings.

A garnishee bank, holding notes of insolvent defendant secured by personal indorsements and not yet matured, can set them off against a deposit of such defendant in its hands.—Neely v. Grayson County Nat. Bank (Tex. Civ. App.) 559.

§ 2. National banks.

Where a national bank purchases the bonds of a corporation secured by trust deed, and to conform in appearance with Rev. St. U. S. § 5137, takes a note from one not indebted to it, indorsed by the corporation, the note does not represent any indebtedness, and the bonds and trust deed are not collateral to it.—Riesterer v. Horton Land & Lumber Co. (Mo.) 238.

BAR.

Of action by former adjudication, see "Judgment," § 6.

BASTARDS.

See "Slaves."

BATTERY.

See "Assault and Battery."

BAWDY HOUSE.

See "Disorderly House."

BENEFICIAL ASSOCIATIONS.

Building or loan associations, see "Building and Loan Associations."

BEQUESTS.

See "Wills."

BEST AND SECONDARY EVIDENCE.

In civil actions, see "Evidence," § 5.

BETTING.

See "Gaming."

BIAS.

Of juror, see "Jury," § 4.

Of witness, see "Witnesses," § 4.

BILL OF EXCEPTIONS.

See "Exceptions, Bill of."

BILL OF EXCHANGE.

See "Bills and Notes."

BILLS AND NOTES.

See "Alteration of Instruments"; "Bonds."

Application of payments, see "Payment," § 1.

Consideration, see "Contracts," § 1.

Estoppel of sureties to question validity, see

"Principal and Surety," § 2.

Parol evidence, see "Evidence," § 9.

Statutes of limitation, see "Limitation of Actions," § 2.

§ 1. Construction and operation.

A note secured by a trust deed *held* to have been controlled by the deed as to the date of its maturity for the purpose of enforcing the security.—Board of Trustees of Westminster College v. Piersol (Mo.) 811.

§ 2. Rights and liabilities on indorsement or transfer.

A bank advancing money to the president of a hotel company on a note executed for the accommodation of such company, but payable to such president, was not responsible for the latter's diversion of the money.—Klein v. German Nat. Bank (Ark.) 572.

That a bank placed money to the credit of the president of a hotel company in exchange for a note executed for the accommodation of such company, did not tend to show the bank responsible for such president's diversion of the money.—Klein v. German Nat. Bank (Ark.) 572.

The indorser of an inland bill of exchange, executed in renewal of a previous bill, cannot escape liability on the ground that he had been released on the previous bill by the failure to give him notice of its nonpayment.—Murphey v. Citizens' Sav. Bank (Ky.) 25.

The maker of mortgage coupon notes *held* entitled, as against the assignee, to plead as a set-off the amount of a time deposit which he made with the payee after the assignment.—Huber v. Egner (Ky.) 353.

Mortgage coupon notes payable to a payee named therein, "or bearer," are subject in the hands of an assignee to any set-off which existed in favor of the maker at the time he received notice of the assignment.—Huber v. Egner (Ky.) 353.

Defendant was entitled to plead as a set-off to a mortgage coupon note an amount wrongfully withheld by the payee at the time defendant borrowed the money for which the notes sued on were executed.—Huber v. Egner (Ky.) 353.

The assignee of a note takes it subject to the defense of usury.—Stokeley v. Buckler (Ky.) 460.

Where a note for the price of land sold by devisees was executed to one of their number as curator of the estate under a mistake of law, the payee held the note in trust for the other devisees to the extent of their interest.—Dunn v. Duncan (Ky.) 1011.

§ 3. Presentment, demand, notice, and protest.

While the indorser of an inland bill of exchange is entitled to notice of its nonpayment, no protest is required.—Murphey v. Citizens' Sav. Bank (Ky.) 25.

§ 4. Actions.

The mere possession of the note sued on is not sufficient evidence of its assignment to au-

thorize a recovery; the assignment and delivery being denied.—Turner v. Mitchell (Ky.) 408.

In action on note, *held* not error under the evidence to refuse to charge that the burden was on plaintiff to show itself a bona fide holder for value.—Gill v. First Nat. Bank (Tex. Civ. App.) 146.

That a plea to an action on a note alleging fraud did not state the facts constituting the fraud did not render it insufficient, in the absence of demurrer.—Reed v. Corry (Tex. Civ. App.) 157.

A judgment for the full amount of a note *held* erroneous, where the record shows that the plaintiff had received money for the use of defendant to an amount nearly as great as the amount of the note and all other accounts owing by defendant.—Reed v. Corry (Tex. Civ. App.) 157.

In an action on notes by a purchaser, evidence *held* to authorize submission to the jury of the question of notice, bona fides, and date of purchase.—Masterson v. Mansfield (Tex. Civ. App.) 505.

Where defendants show note fraudulently put in circulation, the burden of proof is on the plaintiff to show that it is a bona fide holder.—People's Nat. Bank v. Mulkey (Tex. Civ. App.) 528.

Where plaintiffs are innocent holders of a note fraudulently put in circulation, they can recover only the amount paid for it, with interest from the date of payment.—People's Nat. Bank v. Mulkey (Tex. Civ. App.) 528.

In an action on a note, an agreement that the payee would furnish the maker with such sums as he might need to enable him to properly conduct his business, *held* properly excluded; no facts being given which could form a basis for determining what sum would be required.—Bailey v. Rockwall County Nat. Bank (Tex. Civ. App.) 530.

In an action on a note, an agreement that the payee would credit a debt due the maker so soon as the amount due on the note is reduced to the amount due on the debt *held* properly excluded; the maker not showing that he had paid the note down to that point.—Bailey v. Rockwall County Nat. Bank (Tex. Civ. App.) 530.

BOARD OF HEALTH.

See "Health," § 1.

BONA FIDE PURCHASERS.

Of land, see "Vendor and Purchaser," § 4.

BONDS.

Bonds in legal proceedings, see "Appeal and Error," § 5; "Attachment," § 2; "Bail"; "Injunction," § 3; "Replevin," § 1.

County bonds, see "Counties," § 2.

Of liquor dealers, see "Intoxicating Liquors," § 2.

On appeal from justice, see "Justices of the Peace," § 4.

Sureties on bonds, see "Principal and Surety." Tax collector, see "Municipal Corporations," § 11.

§ 1. Negotiability and transfer.

Bonds not payable at an incorporated bank cannot be placed on the footing of foreign bills of exchange.—Louisville Banking Co. v. Ogden (Ky.) 289; Mutual Life Ins. Co. v. Same, *Id.*

Where the purchaser of mortgage bonds payable to a trust company as "trustee," or bearer, placed them in the hands of the trust com-

pany for sale or exchange, one to whom the trust company pledged the bonds for its own debts took them with constructive notice that the trust company had no authority to pledge the bonds.—*Louisville Banking Co. v. Ogden (Ky.)* 289; *Mutual Life Ins. Co. v. Same, id.*

BOUNDARIES.

See "Counties," § 1.

§ 1. Description.

The rule that, where a deed calls for the meanders of a stream as a line, the line extends to the thread of the stream, does not apply where the grantor has by deed of record previously conveyed the bed of the stream to another.—*Penrod v. Bruce (Ky.)* 1.

Where marks on a survey line are newer than those on older surveys, but do not appear to be newer than other lines of the same survey, there is no presumption that they were not made by the same surveyor.—*Morgan v. Mowles (Tex. Civ. App.)* 155.

Where plaintiff's survey called for a definite corner, and the calls and distances fixed his east line, he is not entitled to the land between such line and the west line of another survey because his survey called for such west line.—*Morgan v. Mowles (Tex. Civ. App.)* 155.

Where plaintiff, in a suit to recover land, merely established a conflict between two calls in the survey of his land, he is not entitled to recover.—*Morgan v. Mowles (Tex. Civ. App.)* 155.

BREACH.

Of condition, see "Insurance," § 4.

Of contract, see "Contracts," § 3; "Vendor and Purchaser," § 3.

Of warranty, see "Sales," §§ 4, 6.

BRIEFS.

On appeal or writ of error, see "Appeal and Error," § 11.

BROKERS.

See "Principal and Agent."

Insurance brokers, see "Insurance," § 2.

§ 1. Actions for compensation.

In a suit by broker for commissions, a charge *held* erroneous, in that it excluded consideration of defendant's testimony, which, if true, was a defense.—*Largent v. Storey (Tex. Civ. App.)* 977.

§ 2. Rights, powers, and liabilities as to third persons.

Where the purchaser of property from a broker was induced to pay more than the owner asked by the fraudulent representation of the broker, the purchaser is entitled, in an action for deceit, to recover of the broker the excess.—*Kice v. Porter (Ky.)* 266.

BUILDING AND LOAN ASSOCIATIONS.

The fact that a sum taken as interest by a building association exceeds the legal rate does not show usury, when the amount of the excess is insufficient.—*Peightal v. Cotton States Bldg. Co. (Tex. Civ. App.)* 428.

BURDEN OF PROOF.

In civil actions, see "Evidence," § 8.

In criminal prosecutions, see "Criminal Law," § 5.

BURGLARY.

See "Bail," § 1.

Other offenses as part of *res gestæ*, see "Criminal Law," § 6.

§ 1. Prosecution and punishment.

When an indictment is in the ordinary form charging burglary of a house, but the proof shows that it was a private residence, a conviction cannot be sustained.—*Williams v. State (Tex. Cr. App.)* 395.

Under Pen. Code, art. 889a, added by Acts 26th Leg. p. 318, an indictment charging burglary which does not allege the burglarized house to be a private residence is not supported by evidence of burglary from a private residence.—*Osborn v. State (Tex. Cr. App.)* 491; *Harvey v. State (Tex. Cr. App.)* 492.

Under Acts 1899, p. 318, adding articles 839a, 845a, and 845b to the Penal Code, an indictment for burglary under article 838 is not supported by proof of burglary of a private residence.—*Cleland v. State (Tex. Cr. App.)* 492.

Where, on trial for burglary, one of the alleged owners of the property stolen is a witness, and fails to give positive testimony to his want of consent to the taking of the property, it will not be inferred from other circumstances, though the other owner denies consent.—*Wisdom v. State (Tex. Cr. App.)* 926.

BY-LAWS.

Of municipal corporation, see "Municipal Corporations," § 2.

CANCELLATION OF INSTRUMENTS.

See "Reformation of Instruments."

Rescission of contract, see "Contracts," § 2; "Sales," § 2; "Vendor and Purchaser," § 2.

Setting aside fraudulent conveyances, see "Fraudulent Conveyances," § 2. Sheriff's deed, see "Execution," § 3.

§ 1. Right of action and defenses.

To rescind a settlement of a judgment for less than the amount due on the ground of fraud and want of consideration, a tender of the amount paid is not necessary to recover the balance due.—*Winter v. Kansas City Cable Ry. Co. (Mo.)* 606.

In a suit by a stockholder to set aside a sheriff's deed of corporate property to director of corporation on the ground of fraud, there was no error in requiring, as a condition precedent to the relief, that such director be reimbursed to the amount of debts paid by him and for which the corporate property was sold.—*Fleckenstein v. Waters (Mo.)* 615.

§ 2. Proceedings and relief.

The grantee in a deed, which was set aside for the grantor's mental incapacity, *held* not entitled to compensation for his improvements.—*Lillard v. Coffee (Tenn. Ch. App.)* 1037.

CARNAL KNOWLEDGE.

See "Rape."

CARRIERS.

§ 1. Carriage of goods.

Under a bill of lading a carrier *held* entitled to retain possession of property after the freight charges had been paid until such demurrage charges were paid.—*Swan v. Louisville & N. R. Co. (Tenn. Sup.)* 57.

A stipulation in a bill of lading that the carrier may make a reasonable charge for a failure of the consignee to unload cars within 24 hours after their arrival, and that the lien

would attach to the property, *held* a reasonable provision and enforceable.—*Swan v. Louisville & N. R. Co.* (Tenn. Sup.) 57.

Where goods are consigned over several connecting lines from a point outside the state, and are lost before they come into the state, or into the possession of the last connecting carrier, the latter is not liable therefor, either at common law or under Rev. St. art. 331a.—*Goldstein v. Sherman, S. & S. Ry. Co.* (Tex. Civ. App.) 336.

Where cotton delivered to a railroad company for transportation was destroyed by fire while in its possession, the origin of the fire being unexplained, the presumption that the carrier was negligent is not overcome by showing due care while the cotton was on moving trains.—*Texas & P. Ry. Co. v. Richmond* (Tex. Civ. App.) 410.

Under the statute of Texas, a railroad company receiving cotton in that state for transportation to Rhode Island cannot exempt itself from its common-law liability for loss from fire by conditions in its shipping receipt.—*Texas & P. Ry. Co. v. Richmond* (Tex. Civ. App.) 410.

§ 2. Carriage of live stock.

In an action against a carrier for the escape of cattle from pens into which they had been put for the purpose of shipment, an instruction under which the jury may have allowed plaintiff compensation for the time and expense incurred in trying to induce defendant's agent to collect the cattle for him *held* erroneous.—*Kansas City, P. & G. R. Co. v. Barnett* (Ark.) 919.

An instruction as to the measure of damages recoverable against a carrier for a failure to deliver cattle at their destination within a reasonable time after delivery to the carrier was erroneous, where based on an erroneous instruction as to the time when the cattle were delivered to the carrier.—*Kansas City, P. & G. R. Co. v. Barnett* (Ark.) 919.

In an action against a carrier for the escape of cattle from the pens into which they had been put for the purpose of shipment, an instruction as to the time when the cattle were deemed to have been delivered to the carrier *held* erroneous.—*Kansas City, P. & G. R. Co. v. Barnett* (Ark.) 919.

Averments in a petition in a suit against a carrier for damages to cattle in transportation *held* to support a charge authorizing a recovery for defendant's neglect to furnish feed and water.—*Gulf, C. & S. F. R. Co. v. Porter* (Tex. Civ. App.) 343.

A railroad company, receiving cattle for shipment, *held* bound to transport them in a reasonable time.—*Gulf, C. & S. F. R. Co. v. Porter* (Tex. Civ. App.) 343.

Plaintiff's evidence that injury to his cattle during transportation was due to want of feed and water *held* admissible under defendant's answer.—*Gulf, C. & S. F. R. Co. v. Porter* (Tex. Civ. App.) 343.

§ 3. Carriage of passengers.

Evidence in action for compelling plaintiff's wife, being a white woman, to ride in a negro coach, *held* not at variance with the pleadings.—*Missouri, K. & T. Ry. Co. of Texas v. Ball* (Tex. Civ. App.) 327.

Where white woman is compelled to ride in negro coach, she cannot recover for humiliation caused by profanity of negroes, where such misconduct was not called to the conductor's attention.—*Missouri, K. & T. Ry. Co. of Texas v. Ball* (Tex. Civ. App.) 327.

Where carrier compels white woman to ride in negro coach, it is liable for the distress or humiliation suffered, if the direct result of its neglect.—*Missouri, K. & T. Ry. Co. of Texas v. Ball* (Tex. Civ. App.) 327.

\$1,000 *held* excessive damages for compelling a white woman to ride 60 miles in a negro car.—*Missouri, K. & T. Ry. Co. of Texas v. Ball* (Tex. Civ. App.) 327.

In an action for injuries to a passenger, *held*, that plaintiff was not guilty of contributory negligence.—*Texas & P. Ry. Co. v. Elliott* (Tex. Civ. App.) 726.

The injury of a passenger while getting off a moving train before it reached the station *held* not to render company liable.—*Gulf, C. & S. F. Ry. Co. v. Cleveland* (Tex. Civ. App.) 951.

§ 4. — Personal injuries.

In an action by a postal clerk for injuries received in a railroad accident, evidence *held* sufficient to support a finding of the jury that the defendant was negligent.—*St. Louis, I. M. & S. Ry. Co. v. Stewart* (Ark.) 169.

In an action for injuries received in a railway accident, caused by defendant's engine striking a cow at a highway crossing in a small village, it was not error for the court to refuse to instruct in regard to maintaining gates or keeping a watchman at such crossing.—*St. Louis, I. M. & S. Ry. Co. v. Stewart* (Ark.) 169.

Instruction in action for injury to postal clerk on train *held* not erroneous because placing burden of proof on defendant without requiring a finding that plaintiff was without fault.—*Smiley v. St. Louis & H. Ry. Co. (Mo.)* 667.

Where the declaration in an action for injuries to a passenger while alighting from a train did not definitely aver that it had stopped, it was demurrable.—*Townsend v. Nashville, C. & St. L. Ry.* (Tenn. Sup.) 56.

An instruction not based either on the theory of plaintiff's declaration or defendant's theory is properly refused.—*Payne v. Nashville, C. & St. L. Ry. Co.* (Tenn. Sup.) 86.

Evidence *held* insufficient to show negligence on the part of the carrier, whereby passenger was injured.—*Payne v. Nashville, C. & St. L. Ry. Co.* (Tenn. Sup.) 86.

Where the evidence failed to show that the defendant company operated or controlled the connecting line on which the injuries to a passenger complained of occurred, it was error to refuse to direct a verdict for defendant.—*Houston & T. O. R. Co. v. Graves* (Tex. Civ. App.) 324.

That no box or stool was provided for passengers to alight *held* not proof of negligence authorizing a recovery for injuries sustained by a passenger in alighting from a train.—*Texas Midland R. Co. v. Frey* (Tex. Civ. App.) 442.

Negligence *held* not to be presumed from the happening of an accident to a passenger while alighting from a train, where none of the attending circumstances tended to show negligence in the carrier.—*Texas Midland R. Co. v. Frey* (Tex. Civ. App.) 442.

In an action for injuries to a passenger, *held* proper to instruct that the conductor had authority to contract to stop the train at or near a station.—*Texas & P. Ry. Co. v. Elliott* (Tex. Civ. App.) 726.

In an action for injuries to a passenger in alighting, *held*, that defendant's negligence caused the injury.—*Texas & P. Ry. Co. v. Elliott* (Tex. Civ. App.) 726.

Where the question of the portion of the train in which a passenger was in, or whether he was attempting to leave the train at the time when he was injured, is in issue, evidence of plaintiff's reason for being in a particular part of the train, or leaving it, is admissible.—*Gulf, C. & S. F. Ry. Co. v. Cleveland* (Tex. Civ. App.) 951.

§ 5. — Ejection of passengers and intruders.

An instruction that, if defendant put plaintiff off beyond the station, it was liable, no matter though the train stopped at the station a sufficient time to permit plaintiff to leave the train, *held* erroneous.—St. Louis, I. M. & S. Ry. Co. v. Lewis (Ark.) 163.

Where a passenger who had paid her fare failed to get off at her station, though an ample stop was made, the railway company *held* not liable, under Sand. & H. Dig. § 6172, for putting her off at a place not a station.—St. Louis, I. M. & S. Ry. Co. v. Lewis (Ark.) 163.

A person carelessly entering a train which he should have known did not stop at his destination *held* a passenger, within Sand. & H. Dig. § 6192, and hence entitled to damages for being ejected at a place other than a usual stopping place.—St. Louis S. W. Ry. Co. v. Harper (Ark.) 911.

Twenty-five dollars *held* not excessive damages for ejecting a passenger from a railroad train.—St. Louis S. W. Ry. Co. v. Harper (Ark.) 911.

Evidence in an action for wrongful ejection of a passenger *held* to authorize the submission of an issue whether it was the custom of a company to furnish permits to passengers after they got on the train.—Houston, E. & W. T. Ry. Co. v. White (Tex. Civ. App.) 436; Same v. Jackson, Id. 440.

A verdict for \$500 damages *held* not excessive in an action for wrongfully ejecting a passenger.—Houston, E. & W. T. Ry. Co. v. White (Tex. Civ. App.) 436; Same v. Jackson, Id. 440.

Where a passenger is wrongfully ejected from defendant's train and is sick as a result of exposure, he may recover for his pain, though there is no direct evidence thereof.—Houston, E. & W. T. Ry. Co. v. White (Tex. Civ. App.) 436; Same v. Jackson, Id. 440.

Where a passenger requests a permit to ride on a freight train, and is told by the ticket agent that the conductor will give him one, the company is liable for his ejection by the conductor for failing to have such permit.—Houston, E. & W. T. Ry. Co. v. White (Tex. Civ. App.) 436; Same v. Jackson, Id. 440.

Where a railroad has a rule forbidding the issuance of permits by conductors, and a passenger is ejected for want of such a permit, the company is not liable because its conductors have violated such rule.—Houston, E. & W. T. Ry. Co. v. White (Tex. Civ. App.) 436; Same v. Jackson, Id. 440.

CARRYING WEAPONS.

See "Weapons."

CASE ON APPEAL.

Necessity for purpose of review, see "Appeal and Error," § 8.

CATTLE.

See "Animals."

CAUSE OF ACTION.

See "Action."

CERTIFICATE.

Of acknowledgment of written instrument, see "Acknowledgment," § 1.

CERTIORARI.**§ 1. Nature and grounds.**

Where receivers of a building and loan association were appointed by a circuit judge in va-

cation, orders made by the court in term will not be reviewed on certiorari.—State ex rel. Ballew v. Woodson (Mo.) 252.

CHALLENGE.

To juror, see "Jury," § 4.

CHAMPERTY AND MAINTENANCE.

Where a vendor made a contract with another to give him one-half of what might be recovered on account of the deceit practiced upon her by the purchaser, he to pay all costs, which contract was afterwards rescinded, she did not thereby forfeit her right to recover damages for the deceit.—Akers v. Martin (Ky.) 465.

A deed conveying to the plaintiff in ejectment the land in controversy, which was executed after action brought and while defendant was in adverse possession of the land, was void.—Higgins v. Howard (Ky.) 1016.

CHANCERY.

See "Equity."

CHANGE OF POSSESSION.

Necessity as against creditors of grantor, see "Fraudulent Conveyances," § 1.

CHANGE OF VENUE.

Of civil action, see "Venue," § 2.

CHARACTER.

Of witness, see "Witnesses," § 4.

CHARGE.

To jury in civil action, see "Trial," §§ 5-7.

— in criminal prosecutions, see "Criminal Law," § 15.

CHATTEL MORTGAGES.

In fraud of creditors, see "Fraudulent Conveyances," § 1.

Priority over lien of liveryman, see "Livery Stable Keepers."

§ 1. Requisites and validity.

Parol evidence is admissible to show that a bill of sale absolute on its face was executed to secure the grantee by reason of the grantor having sold other mortgaged property securing such debt.—Watson v. Boswell (Tex. Civ. App.) 407.

§ 2. Rights and liabilities of parties.

A mortgagor or his grantee has the right to use a mortgaged sawmill before the maturity of the mortgage; and hence the mortgagee cannot maintain an action for injuries resulting to the property therefrom, but must resort to a bill quia timet to restrain the conduct causing the injury.—Moore v. Wood (Tenn. Ch. App.) 1063.

A subsequent mortgagee of a sawmill cannot recover damages against a prior fraudulent mortgagee, who obtains possession and uses the property, for injuries resulting therefrom, in the absence of a demand for the property, though the subsequent mortgagee does not know that the prior mortgage is fraudulent.—Moore v. Wood (Tenn. Ch. App.) 1063.

§ 3. Rights and remedies of creditors.

A chattel mortgage which authorizes the mortgagor to control the mortgaged property and to sell it in the regular course of business is

void on its face.—*Moore v. Wood* (Tenn. Ch. App.) 1063.

§ 4. Foreclosure.

Allegations *held* sufficient to constitute an equitable defense to an action to foreclose a mortgage.—*Case v. Ingle* (Ind. T.) 994.

CHEAT.

See "Fraud."

CHILD.

See "Adoption"; "Guardian and Ward"; "Infants."

CITATION.

On appeal, see "Appeal and Error," § 5.

CITIES.

See "Municipal Corporations."

CITIZENS.

Equal protection of laws, see "Constitutional Law," § 7.

CIVIL RIGHTS.

See "Constitutional Law," §§ 3, 7.

CLAIM AND DELIVERY.

See "Replevin."

CLAIMS.

Against estate assigned for creditors see "Assignments for Benefit of Creditors," § 3.

— of decedent, see "Executors and Administrators," § 4.

Against school district, see "Schools and School Districts," § 1.

To property levied on, see "Execution," § 2.

CLASS LEGISLATION.

See "Constitutional Law," § 6.

CLERKS OF COURTS.

Liability for illegal issuance of marriage license, see "Marriage."

Under Gen. St. c. 41, art. 2, the clerk of court was entitled, for orders discharging the panel at the close of the term, to 25 cents for each member of the panel; that being the construction placed upon the statute by the circuit judges of the state and the auditors of public accounts for many years.—*Auditor of Public Accounts v. Cain* (Ky.) 1016.

COLLATERAL AGREEMENT.

Parol evidence, see "Evidence," § 9.

COLLATERAL ATTACK.

On appointment of administrator, see "Executors and Administrators," § 1.

On judgment, see "Judgment," § 4.

COLLECTION.

Of estate of decedent, see "Executors and Administrators," § 2.

Of taxes, see "Taxation," § 4.

COLOR OF TITLE.

To sustain adverse possession, see "Adverse Possession."

COMBINATIONS.

See "Monopolies," § 1.

COMMERCE.

Carriage of goods and passengers, see "Carriers."

§ 1. Means and methods of regulation.

Defendant, who took orders to erect lightning rods on buildings, receiving rods and equipments from another state, *held* not engaged in interstate commerce, and liable for the occupation tax.—*Camp v. State* (Tex. Cr. App.) 401.

COMMON CARRIERS.

See "Carriers."

COMMON SCHOOLS.

See "Schools and School Districts," § 1.

COMMUNITY PROPERTY.

See "Husband and Wife," § 4.

COMPENSATION.

For property taken for public use, see "Eminent Domain," § 2.

For services, see "Master and Servant," § 2.

Of attorney, see "Attorney and Client," § 1.

Of clerk, see "Clerks of Court."

Of health officer, see "Health," § 1.

COMPETENCY.

Of evidence, see "Criminal Law," §§ 4-10.

— in civil actions, see "Evidence," § 4.

Of juror, see "Jury," § 4.

Of witnesses in general, see "Witnesses," § 2.

COMPLAINT.

In criminal prosecution, see "Criminal Law," § 3; "Indictment and Information."

COMPOSITIONS WITH CREDITORS.

See "Compromise and Settlement."

COMPROMISE AND SETTLEMENT.

See "Release."

In an action on an award, *held* not necessary to have the claim itemized.—*Needham v. Bythewood* (Tex. Civ. App.) 426.

Evidence in a suit on judgments *held* insufficient to set aside a settlement thereof for fraud.—*Baggs v. Hale* (Tex. Civ. App.) 525.

COMPUTATION.

Of period of limitation, see "Limitation of Actions," § 2.

CONCEALED WEAPONS.

See "Weapons."

CONCLUSION.

Of witness, see "Evidence," § 10.

CONDEMNATION.

Taking property for public use, see "Eminent Domain."

CONDITIONS.

In insurance policies, see "Insurance," § 4.

CONFESSION.

Admissibility in evidence, see "Criminal Law," §§ 8, 10.

CONFIDENTIAL RELATIONS.

Disclosure of communications, see "Witnesses," § 2.

CONFLICT OF LAWS.

See "Insurance," §§ 3, 4.

What law governs contracts, see "Contracts," § 1.
— damages for nondelivery of message, see "Telegraphs and Telephones," § 1.

CONSIDERATION.

See "Seals."

Of contracts, see "Contracts," § 1.
— for transfer of assets and assumption of liabilities of corporation, see "Corporations," § 5.
Of fraudulent conveyance, see "Fraudulent Conveyances," § 1.
Of release, see "Release," § 1.
Parol evidence, see "Evidence," § 9.

CONSOLIDATION.

Of actions, see "Action," § 2.

CONSPIRACY.

Combinations to monopolize trade, see "Monopolies," § 1.
Evidence of acts and declarations of conspirators, see "Criminal Law," § 8.

CONSTITUTIONAL LAW.

Provisions relating to particular subjects, see "Counties," § 1; "Eminent Domain," § 1; "Grand Jury"; "Jury," § 1; "Municipal Corporations," § 7; "Officers," § 1.
— enactment and validity of statutes, see "Statutes," § 1.
— special or local laws, see "Statutes," § 2.
— state appropriations, see "States," § 1.
— subjects and titles of statutes, see "Statutes," § 3.

§ 1. Construction, operation, and enforcement of constitutional provisions.

The governor alone, and not a person arrested on complaint of the board of examiners for barbers, can object to Rev. St. 1899, § 5035, as unconstitutional, in limiting the governor's power of appointment to the board to those designated by barbers' unions.—*Ex parte Lucas* (Mo.) 218.

§ 2. Police power in general.

Pen. Code, art. 199, making it an offense for a liquor dealer to keep open his place of business on Sundays for purposes of traffic, is not unconstitutional.—*Ex parte Brown* (Tex. Cr. App.) 396.

§ 3. Personal, civil, and political rights.

Acts 1897, c. 114, authorizing the imprisonment of one found guilty of selling property on which a landlord's lien existed, *held* not unconstitutional as authorizing an imprisonment for debt.—*State v. Hoskins* (Tenn. Sup.) 781.

§ 4. Vested rights.

Where the state acquires land at a tax sale while Sand. & H. Dig. §§ 4596, 6615, are in

force, the right of a minor to redeem, which is given thereby, cannot be taken away by a subsequent act of the legislature.—*Moore v. Irby* (Ark.) 371.

§ 5. Obligation of contracts.

The charter of a turnpike company (Acts Jan. 4, 1830, §§ 7, 8, and Acts 1831, c. 46) *held* to constitute a contract which was inviolable under Const. U. S. art. 1, § 10.—*Nashville, M. & S. Turnpike Co. v. Davidson County* (Tenn. Sup.) 68.

The act of 1849-50 which requires of a turnpike company, as a condition of the exercise of its franchises granted by the act of 1835-36, that it should build a bridge beyond the line of its road, is void, because it impairs the obligation of the contract between the state and the company.—*State v. Lebanon & N. Turnpike Co.* (Tenn. Ch. App.) 1096.

§ 6. Privileges or immunities, and class legislation.

Act Gen. Assem. 1897, §§ 1-3, being applicable to all street railroads, is not unconstitutional as class legislation.—*State ex rel. Gottlieb v. Metropolitan St. Ry. Co.* (Mo.) 603.

§ 7. Equal protection of laws.

Rev. St. 1895, art. 3071, requiring life insurance companies to pay a 12 per cent. penalty and attorney fees for failure to pay their policies, is not in violation of the fourteenth amendment to the United States constitution, when applied to a foreign insurance company.—*New York Life Ins. Co. v. Orlopp* (Tex. Civ. App.) 336.

CONTEST.

Of election, see "Elections," § 2.

CONTINUANCE.

In criminal prosecution, see "Criminal Law," § 11.

Where an application for a continuance disclosed a right to the same, and the facts adduced on the trial showed the materiality of the absent evidence, it was error for the court to refuse to grant it.—*Lynch v. Munson* (Tex. Civ. App.) 140.

CONTRACTS.

See "Mines and Minerals," § 1.

Agreements within statute of frauds, see "Frauds, Statute of."

Alteration, see "Alteration of Instruments."

Assignment, see "Assignments."

Cancellation, see "Cancellation of Instruments."

Contracts of particular classes of parties, see "Corporations," §§ 3, 5; "Insane Persons," § 1; "Master and Servant"; "Municipal Corporations," §§ 4, 5.

Damages for breach, see "Damages," § 3.

Impairing obligation, see "Constitutional Law," § 5.

Liquidated damages or penalties, see "Damages," § 2.

Making bequest or devise, see "Wills," § 2.

Operation and effect of champerty, see "Champerty and Maintenance."

— of gaming laws, see "Gaming," § 1.

— of usury laws, see "Usury," § 1.

Parol or extrinsic evidence, see "Evidence," § 9.

Particular classes of express contracts, see "Bills and Notes"; "Bonds"; "Covenants"; "Insurance"; "Joint Adventures"; "Partnership"; "Sales."

— agency, see "Principal and Agent."

— employment, see "Master and Servant."

— leases, see "Landlord and Tenant."

— mutual benefit insurance, see "Insurance," § 10.

— sales of realty, see "Vendor and Purchaser."

— suretyship, see "Principal and Surety."

Particular classes of implied contracts, see "Contribution"; "Covenants," § 1; "Money Paid."

— modes of discharging contracts, see "Compromise and Settlement"; "Release."

Specific performance, see "Specific Performance."

Subrogation to rights or remedies of creditors, see "Subrogation."

§ 1. Requisites and validity.

Where H., pretending to have authority to act for M., procured a contract from P. and A., in consideration of services to be rendered by M., who knew nothing of the contract and never assented to it, the contract, not being binding on M., was not binding on P. and A.—*Shuttleworth v. Kentucky Coal, Iron & Development Co. (Ky.)* 1013.

Where plaintiff was authorized to buy stocks without restriction as to the market in which the purchase was made, the contract will be governed by the law of the state where the stocks were purchased.—*A. G. Edwards Brokerage Co. v. Stevenson (Mo.)* 617.

Where defendant sold stock to plaintiffs, and they agreed to pool a certain amount of stock and share the benefits equally, there was sufficient consideration for defendant's agreement to divert to the pool the royalties on certain other stock owned by him.—*Green v. Higham (Mo.)* 798.

Where an insurance agent paid the premium on a policy, and took the note of the insured for the amount so paid, there was full consideration for the note, though the company was insolvent, and soon thereafter failed.—*Hudson v. Compere (Tex. Sup.)* 336.

A provision in a lease that the landlord shall not be liable for damages arising from any future distraint is against public policy and void.—*Watson v. Boswell (Tex. Civ. App.)* 407.

§ 2. Rescission and abandonment.

Delay of a chattel mortgagee to rescind a contract by which the property is to be used for the benefit of himself and a prior chattel mortgagee and the debtor, on learning that the prior mortgage is fraudulent, *held* to prevent a subsequent rescission of the contract.—*Moore v. Wood (Tenn. Ch. App.)* 1063.

§ 3. Performance or breach.

Where plaintiff performed services for defendant in consideration of defendant's promise to adopt him, plaintiff cannot, during the life of defendant, recover the value of the services rendered, though defendant acted fraudulently in making the promise.—*Pittman v. Pittman (Ky.)* 461.

Plaintiff's agreement to accept a lease *held* lapsed through defendant's refusal to perform a contract to exchange property with plaintiff.—*Scannell v. American Soda-Fountain Co. (Mo.)* 889.

CONTRADICTION.

Of witness, see "Witnesses," § 4.

CONTRIBUTION.

One who furnished to the purchaser one-half the money to pay for the land and shared the fruits of the purchase, though he was not present when the purchase was made and did not participate in the false representations, is liable to the purchaser for one-half the amount recovered against him by the vendor.—*Akers v. Martin (Ky.)* 465.

CONTRIBUTORY NEGLIGENCE.

See "Negligence," § 3.
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CONVEYANCES.

See "Homestead," § 2.

By or to particular classes of parties, see "Infants," § 1; "Insane Persons," § 1.

— married women, see "Husband and Wife," § 2.

— sheriffs, see "Execution," § 3.

In fraud of creditors, see "Fraudulent Conveyances."

In trust, see "Trusts," § 1.

Mortgaged property, see "Mortgages," § 4.

Particular classes of conveyances, see "Assignments"; "Assignments for Benefit of Creditors"; "Chattel Mortgages"; "Deeds"; "Mortgages."

Separate property of married women, see "Husband and Wife," § 2.

CONVICTS.

Pardon, see "Pardon."

CORPORATIONS.

Condemnation of property, see "Eminent Domain," § 1.

Constitution and by-laws as evidence, see "Evidence," § 8.

Particular classes of corporations, see "Building and Loan Associations"; "Municipal Corporations."

— banks, see "Banks and Banking."

— foreign insurance companies, see "Insurance," § 1.

— turnpike companies, see "Turnpikes and Toll Roads," § 1.

Taxation of corporations and corporate property, see "Taxation," §§ 1, 2.

§ 1. Corporate existence and franchise.

Where a party contracts with a corporation, it is a recognition of its existence which will estop such party from objecting to the contract as void for the reason that the corporation has no legal existence.—*West Missouri Land Co. v. Kansas City S. B. Ry. Co. (Mo.)* 847.

§ 2. Capital, stock, and dividends.

Bank stock held by a trustee having been sold by him under a judgment authorizing him to sell and reinvest in real estate, the bank in which the stock was held cannot refuse to transfer the stock on the ground that it may become liable to contingent remainder-men, who were not parties to the action.—*Bank of Kentucky v. Winn (Ky.)* 32.

Where a trustee has sold bank stock under a judgment authorizing him to make the sale, the bank in which the stock is held may be required by rule to transfer it to the purchaser, though the bank was not a party to the action.—*Bank of Kentucky v. Winn (Ky.)* 32.

§ 3. Corporate powers and liabilities.

An allegation that defendant is a corporation with full powers to contract is sufficient to bind it by the contract sued on, in the absence of a plea by defendant that the contract was ultra vires.—*Greene v. Middlesborough Town & Lands Co. (Ky.)* 288.

The stockholders of a corporation may, by all uniting in the action, waive the 60-day notice prescribed by Const. art. 12, § 8, and Rev. St. 1889, § 2499, and bonds issued as directed at a meeting held pursuant to such waiver are valid.—*Riesterer v. Horton Land & Lumber Co. (Mo.)* 238.

Defendant's pleading in an action by a corporation on a contract *held* to estop him from objecting to the introduction of the contract in evidence as void, as made by a corporation having no legal existence.—*West Missouri Land Co. v. Kansas City S. B. Ry. Co. (Mo.)* 847.

Under Shannon's Code, § 4542, service of process on an agent in a county where the suit was brought, the principal residing in another county, *held* to have given the court no jurisdiction; the agent not being a resident of the county.—*Mark Twain Lumber Co. v. Lieberman* (Tenn. Sup.) 70.

§ 4. Insolvency and receivers.

Though one man is president of two corporations organized for different purposes, and he and another own a majority of the stock of each, they are separate corporations, and on the insolvency of both payment of the claim of the creditor company should not be postponed till after other creditors of the debtor company are paid.—*Lange v. Burke* (Ark.) 165.

§ 5. Reincorporation and reorganization.

Transactions between the outgoing and incoming stockholders and a reorganized corporation *held* to authorize a suit by the new corporation on a demand belonging to the old one.—*St. Francis Electric Light Co. v. Electric Supply Co.* (Ark.) 912.

An undertaking by defendant corporation, in consideration of all the assets of another corporation, to assume all its liabilities, including its guaranty of dividends on certain stock, is supported by a sufficient consideration.—*Greene v. Middlesborough Town & Lands Co.* (Ky.) 288.

§ 6. Foreign corporations.

The renting of its coal lands by a foreign corporation *held* not doing business within the state, in the meaning of Act April 21, 1891, which would prohibit the company from bringing suit without compliance therewith.—*Missouri Coal & Mining Co. v. Ladd* (Mo.) 191.

CORRECTION.

Of assessment of taxes, see "Taxation," § 2.
Of record on appeal or writ of error, see "Appeal and Error," §§ 6-9.

COSTS.

See "Interpleader," § 1.

§ 1. Nature, grounds, and extent of right in general.

Where an amendment to a petition only changes the original by omitting a part of the amount claimed therein, all the costs up to the time of the filing of the original petition should not be taxed to plaintiff.—*Watson v. Boswell* (Tex. Civ. App.) 407.

§ 2. Amount, rate, and items.

Fees of an attorney for an absent victorious defendant, cited by publication, are properly taxed as costs against the plaintiff, under Rev. St. arts. 1212, 1346.—*Williams v. Sapieha* (Tex. Sup.) 115.

§ 3. On appeal or error, and on new trial or motion therefor.

Where a writ of error was sued for delay, the court, on affirming the judgment, will award damages.—*Fife v. Netherlands Fire Ins. Co.* (Tex. Civ. App.) 160.

CO-TENANCY.

See "Tenancy in Common."

COUNCIL.

See "Municipal Corporations," § 2.

COUNTERFEITING.

See "Forgery."

COUNTIES.

County courts, see "Courts," § 2.

— health officers, see "Health," § 1.

Mandamus, see "Mandamus," § 1.

Special or local laws, see "Statutes," § 2.

§ 1. Creation, alteration, existence, and political functions.

Under Const. art. 10, § 4, Acts 1831, c. 143, taking certain lands out of C. county, which contained but 310.8 square miles, and putting them in Dickson county, was unconstitutional and void.—*McMillan v. Hannah* (Tenn. Sup.) 1020.

The fact that C. county acquiesced for 14 years in legislative action transferring a portion of its territory to D. county does not estop C. county from asserting its claim at the end of that time, where the constitution prohibited such transfer.—*McMillan v. Hannah* (Tenn. Sup.) 1020.

§ 2. Fiscal management, public debt, securities, and taxation.

A vote by two-thirds of the voters of a county in favor of free turnpikes was a vote in favor of incurring the necessary indebtedness for that purpose, and authorized the county to incur an indebtedness in excess of the revenue provided for the year in purchasing the turnpikes in the county.—*Whaley v. Commonwealth* (Ky.) 35; *Ratliff v. Same, Id.*; *Same v. Nicholas County, Id.*

Where a county was prohibited by the constitution from levying a tax rate of more than 50 cents in one year, a levy of 25 cents, when 34 cents had been previously levied, was void only as to the excess.—*Whaley v. Commonwealth* (Ky.) 35; *Ratliff v. Same, Id.*; *Same v. Nicholas County, Id.*

Under Const. § 180, providing that "no tax levied for one purpose shall ever be devoted to another purpose," where a surplus remains from a particular levy, it may be appropriated for general purposes.—*Whaley v. Commonwealth* (Ky.) 35; *Ratliff v. Same, Id.*; *Same v. Nicholas County, Id.*

Bonds issued by a county in payment of its subscription to a railroad, pursuant to authority granted by the charter of the corporation, were valid, as were also bonds issued by the county in lieu thereof under an act authorizing the county to fund its outstanding indebtedness.—*Sparks v. Bohannon* (Ky.) 260.

Under Ky. St. § 1852, bonds issued by a county, pursuant to a resolution of the fiscal court, for the purpose of taking up bonds for a much larger amount legally issued by the county prior to September 28, 1891, and which had matured, are valid.—*Sparks v. Bohannon* (Ky.) 260.

An election to take the sense of the voters of a county as to free turnpikes was not invalidated by a mistake of the clerk in the form of the question submitted, where the mistake could not have increased the affirmative vote.—*Stone v. Gregory* (Ky.) 1002.

COURTS.

Clerks, see "Clerks of Courts."

Judges, see "Judges."

Jurisdiction of accounting by administrator, see

"Executors and Administrators," § 7.

— of motion to set aside execution sale, see "Execution," § 3.

Justices' courts, see "Justices of the Peace."

Review of decisions, see "Appeal and Error."

Right to trial by jury, see "Jury," § 1.

Rules of appellate courts, see "Appeal and Error," § 11.

Special or local laws, see "Statutes," § 2.

Trial by court without jury, see "Trial," § 9.

§ 1. Establishment, organization, and procedure in general.

Where, in ejectment, defendant excepted to a deed on the ground that it had been held that tax sales on a certain day were void, and that the deed showed it had been given for sales on that day, *held* error to sustain the exception; the judgment not being res judicata in the suit relied on.—*McWilliams v. Bonner* (Ark.) 378.

A construction by the supreme court of the terms of a statute should not be changed after the law has been re-enacted in the same words and such construction has become a rule of property.—*Hall v. White* (Tex. Sup.) 385.

Where the court of civil appeals is the court of last resort in a certain case, it would write no opinion on affirmance, in the absence of a good reason assigned.—*Needham v. Hickey* (Tex. Civ. App.) 433.

§ 2. Courts of limited or inferior jurisdiction.

County court *held* not to have jurisdiction, under Const. art. 5, § 16, over a suit for \$272 and plea in reconvention for \$1,255.—*Pennybacker v. Hazlewood* (Tex. Civ. App.) 153.

Where the plaintiff has amended his petition so as to claim a larger amount than that originally demanded, the amended petition fixes the amount in controversy for the purpose of determining the jurisdiction of the court.—*Watson v. Mirike* (Tex. Civ. App.) 538.

Where the petition in a justice court case was amended on appeal so as to claim an amount in excess of the appellate jurisdiction of the county court, such defect was cured by a subsequent amendment reducing the amount.—*Miller v. Newbauer* (Tex. Civ. App.) 974.

§ 3. Courts of appellate jurisdiction.

The supreme court has no jurisdiction of an appeal from a judgment for \$100 in an action for injuries between private persons; no constitutional question being before the court.—*Mankameyer v. Egelhoff* (Mo.) 836.

§ 4. United States courts.

Under Act Cong. March 1, 1895, the United States district court did not acquire jurisdiction of an appeal from the United States commissioners' court wherein an action on a note was determined in favor of the defendants.—*Butler v. Penn* (Ind. T.) 987.

COVENANTS.

§ 1. Requisites and validity.

Description of land, "fronting 4,574 feet on the line of the railroad, on mile 295 of the Henderson Division," *held* insufficient to support a contract containing a covenant running with the land.—*Louisville & N. R. Co. v. Webster* (Tenn. Sup.) 1018.

§ 2. Construction and operation.

A contract reciting that an owner of land fronting on a railroad desired "a fence along his line," and that the railroad for a certain consideration agreed to erect such fence, *held* not to create an easement.—*Louisville & N. R. Co. v. Webster* (Tenn. Sup.) 1018.

COVERTURE.

See "Husband and Wife."

CREDIBILITY.

Of witness, see "Witnesses," § 4.

CREDITORS.

See "Assignments for Benefit of Creditors"; "Bankruptcy"; "Creditors' Suit"; "Fraudulent Conveyances."

Remedies against surety, see "Principal and Surety," § 4.

Rights as to chattel mortgage by debtor, see "Chattel Mortgages," § 3.
Subrogation to rights of creditor, see "Subrogation."

CREDITORS' SUIT.

Remedies in cases of fraudulent conveyances, see "Fraudulent Conveyances," § 2.

As the constitution provides that no officer except the governor shall receive a greater compensation than \$5,000 per annum, public policy demands that the courts refuse to require any officer to set apart any part of his salary for the payment of his debts.—*Dickinson v. Johnson* (Ky.) 267.

The fact that real estate was purchased by the owner with his salary as a public officer does not exempt it from the payment of his debts.—*Dickinson v. Johnson* (Ky.) 267.

Evidence in an action to subject certain property to a judgment *held* to show that a part thereof only was subject.—*Bourne v. Darden* (Tenn. Ch. App.) 1078.

CRIMINAL LAW.

See "Habeas Corpus," § 2; "Jury."

Bail, see "Bail," § 1.

Fines, see "Fines."

Grand jury, see "Grand Jury."

Imprisonment for debt, see "Constitutional Law," § 3.

Indictment, information, or complaint, see "Indictment and Information."

Offenses by particular classes of officers, see "Justices of the Peace," § 1; "Officers," § 2.

Pardon, see "Pardon."

Particular offenses, see "Adultery"; "Arson"; "Assault and Battery," § 1; "Burglary"; "Forgery"; "Gaming," § 2; "Homicide"; "Larceny"; "Obstructing Justice"; "Perjury"; "Rape"; "Robbery"; "Seduction," § 1; "Usury," § 2.

—carrying weapons, see "Weapons."

—causing cattle to go on inclosed land of another, see "Animals."

—keeping disorderly house, see "Disorderly House."

—violations of liquor laws, see "Intoxicating Liquors," §§ 3, 5.

§ 1. Capacity to commit and responsibility for crime.

Instructions for the state in a prosecution for murder, defended on the ground of imbecility, *held* proper.—*State v. Palmer* (Mo.) 651.

§ 2. Former jeopardy.

A conviction for maintaining a nuisance is a bar to another prosecution for maintaining the same nuisance at a different period prior to the former indictment, where the offense was a continuous one.—*Cawein v. Commonwealth* (Ky.) 275.

§ 3. Preliminary complaint, affidavit, warrant, examination, commitment, and summary trial.

A complaint properly signed by the complainant and the information filed thereon are sufficient, though his name is not mentioned in the body of either instrument.—*Taul v. State* (Tex. Cr. App.) 394.

§ 4. Evidence.

Under Cr. Code Prac. § 241, providing that one accomplice cannot corroborate another, so as to authorize a conviction upon the testimony of the two accomplices alone.—*Porter v. Commonwealth* (Ky.) 16.

Where two accomplices testified, an instruction telling the jury that they could not convict upon the uncorroborated testimony of "an accomplice" was erroneous, in that it failed to present the idea that one accomplice cannot

corroborate another for the purpose of conviction.—Howard v. Commonwealth (Ky.) 756.

In a criminal case, evidence of prosecuting witness that she made no objection to being placed under bond for her appearance at court, and that she was glad, because she was afraid to leave the jail, is incompetent.—State v. Huff (Mo.) 900, 1104.

Evidence that a prosecuting witness was made to leave the neighborhood by persons other than accused is incompetent.—State v. Huff (Mo.) 900, 1104.

Conceding that it was competent for prosecuting witness to testify that she was made to leave the neighborhood, it was error to exclude further questions eliciting the names of those who made her go.—State v. Huff (Mo.) 900, 1104.

A county clerk's certificate held sufficient to render it admissible as evidence of a recorded cattle brand in a prosecution for theft of a cow.—Garrett v. State (Tex. Cr. App.) 129.

In a prosecution for theft of a cow, evidence held admissible to show how the brand on the cow claimed to have been stolen came to be unlike the recorded brand of the alleged owner.—Garrett v. State (Tex. Cr. App.) 129.

Where one of the alleged owners of property charged to have been burned is not a witness in a prosecution of another for the arson, it is error to permit the state to introduce in evidence indictments, charging such owner with arson and murder.—Erwin v. State (Tex. Cr. App.) 390.

Where the state offered evidence of experiments to show that the deceased's cap could be wedged under defendant's saloon door, proof that the conditions were nearly similar to those existing at the time of the murder was sufficient, without showing that the exact conditions existed.—Rupe v. State (Tex. Cr. App.) 929.

§ 5. — Judicial notice, presumptions, and burden of proof.

In a prosecution for murder, defended on the ground of imbecility, the burden is not on the state to show a lucid interval at the time of the killing.—State v. Palmer (Mo.) 651.

In a criminal case, testimony of a witness that he saw a certain state's witness at his home a few days before the trial is admissible to show the state's lack of diligence in securing his attendance.—State v. Huff (Mo.) 900, 1104.

Where the facts constituting the offense of unlawfully carrying arms have been proved, it devolves on defendant to establish justification.—Zion v. State (Tex. Cr. App.) 306.

Where one is in custody for a crime, his silence cannot be used against him as a confession of the truth of the statement made in his presence by a co-defendant.—Funderburk v. State (Tex. Cr. App.) 393.

§ 6. — Facts in issue and relevant to issues, and res gestæ.

Where defendant claimed that deceased had made a criminal assault upon his wife on the day before the killing, the declarations of the wife made at the time of the alleged assault were admissible as a part of the res gestæ.—Johnson v. Commonwealth (Ky.) 1005.

In a criminal case it is irrelevant to show whether accused or his wife owned the farm occupied by them, how much it sold for, and whether the wife had not mortgaged her property to secure the fees of accused's counsel.—State v. Huff (Mo.) 900, 1104.

Accused not being charged with eluding the prosecuting witness, it was error to admit evidence that accused owned the team and wagon in which the witness left the neighborhood.—State v. Huff (Mo.) 900, 1104.

Evidence offered by defendant in a prosecution for unlawfully carrying arms held properly excluded.—Little v. State (Tex. Cr. App.) 310.

On a prosecution for burglary, testimony as to an alleged assault at the same time as the burglary is admissible as part of the res gestæ.—Williams v. State (Tex. Cr. App.) 395.

Statements to an officer by one accused of assault, made several hours after the alleged offense, held inadmissible for defendant.—Little v. State (Tex. Cr. App.) 483.

On a prosecution for murder, held not error to refuse to allow the introduction of accused's habeas corpus proceedings on his application for bail.—De la Garza v. State (Tex. Cr. App.) 484.

§ 7. — Admissions, declarations, and hearsay.

It was error to permit a witness to testify as to a conversation between two unknown men in no wise identified as members of any conspiracy, or connected in any manner with those alleged as co-conspirators with accused.—Powers v. Commonwealth (Ky.) 735.

It was error to permit a witness to testify that he heard T. say to defendant, "I want to compliment you on what you did in Frankfort," that being the place where the killing occurred, and that defendant "just nodded and passed on"; there being no claim that T. had any connection with the homicide.—Howard v. Commonwealth (Ky.) 756.

In a criminal case, testimony of prosecuting witness that a person "representing accused" attempted to induce her not to testify is incompetent as being a legal conclusion, and hearsay.—State v. Huff (Mo.) 900, 1104.

It is error, in action of cattle theft, to allow a witness to testify to material statement of facts made subsequent to the transaction by an uninterested third party.—York v. State (Tex. Cr. App.) 128.

Testimony that, during the searching of defendant's room for stolen property, his roommate said that he did not know defendant possessed a diamond, and defendant's reply that it was one he had owned for more than six months, was not objectionable as hearsay.—McBroom v. State (Tex. Cr. App.) 481.

Evidence of statements before the trial by the person assaulted are inadmissible, where the latter does not testify.—Catlett v. State (Tex. Cr. App.) 485.

§ 8. — Acts and declarations of conspirators and co-defendants.

The confession of an accomplice, extorted from him by threats, was not admissible against accused.—Porter v. Commonwealth (Ky.) 16.

The confession of an alleged accomplice, implicating the accused, made in his presence when both were in custody of an officer, held not admissible against accused, though he remained silent.—Porter v. Commonwealth (Ky.) 16.

Declarations of members of a public meeting, indicating violent and improper intentions, were admissible as a part of the res gestæ to show the existence of a conspiracy charged.—Powers v. Commonwealth (Ky.) 735.

Where a conspiracy is charged, considerable latitude must be allowed in the admission of testimony tending to show that acts apparently isolated have sprung from a common object.—Powers v. Commonwealth (Ky.) 735.

Testimony, as to certain telegrams to show they were sent before the killing, held admissible.—Powers v. Commonwealth (Ky.) 735.

Declarations of one whom the evidence tended to connect with the conspiracy charged, to

the effect that the killing of deceased had been determined upon and pardons prepared for the perpetrators, were admissible.—*Powers v. Commonwealth (Ky.)* 785.

On the trial of one of several defendants jointly indicted, the declaration of a co-defendant, made in the absence of the defendant on trial, in furtherance of the common purpose, is admissible when a prima facie case of conspiracy has been made out, though there be in the indictment no express averment of a conspiracy.—*Howard v. Commonwealth (Ky.)* 756.

The admission of a confession of defendant's accomplice against defendant *held* reversible error.—*Short v. State (Tex. Cr. App.)* 305.

In a prosecution for burglary, *held* error to admit evidence that part of the goods shown to have been stolen was given to defendant's brother by defendant's accomplice.—*McHenry v. State (Tex. Cr. App.)* 311.

§ 9. — Opinion evidence.

A hypothetical question, based on a statement of facts of which there is no evidence, should be excluded.—*State v. Palmer (Mo.)* 651.

An expert, testifying for the defense, never having had an opportunity to examine the accused, cannot give his opinion whether, at the time of the homicide, he was capable of deliberating like a sane person.—*State v. Palmer (Mo.)* 651.

On a trial for murder, it is not error to permit a witness, not an expert, to testify as to the direction the ball took which made a hole in the floor.—*Spangler v. State (Tex. Cr. App.)* 314.

A witness was properly permitted to state that at the time of the assault accused seemed to be angry.—*Catlett v. State (Tex. Cr. App.)* 485.

In the absence of evidence that deceased was ever seen to take morphine, the question whether deceased was addicted to the morphine habit cannot be proven by general reputation.—*Rupe v. State (Tex. Cr. App.)* 929.

Where the evidence on which a hypothetical question was based was inadmissible, the opinion of the expert was properly excluded.—*Rupe v. State (Tex. Cr. App.)* 929.

§ 10. — Confessions.

Where the evidence is conflicting as to whether a confession was made voluntarily, or was procured by representations that it was the only way to save accused from mob violence, its admissibility is a question for the jury.—*State v. Moore (Mo.)* 199.

A confession procured by representations that it is the only way to protect accused from mob violence is not admissible.—*State v. Moore (Mo.)* 199.

A warning to a prisoner against confessing, made the day before an alleged confession, should have been repeated, where the prisoner was a mere boy.—*Perry v. State (Tex. Cr. App.)* 400.

A warning to a prisoner that his statements could be used against him "or for him" will not support the admission in evidence of a confession.—*Perry v. State (Tex. Cr. App.)* 400.

Where defendant, while testifying at a preliminary examination, was warned and continued to testify, such testimony *held* admissible against defendant on a charge of having committed the crime under investigation.—*Grammer v. State (Tex. Cr. App.)* 402.

Statements by the accused in a prosecution for murder *held* properly admitted as in the nature of a confession.—*Runnells v. State (Tex. Cr. App.)* 479.

The admissions or confessions of accused, made before the grand jury after being warn-

ed, *held* competent evidence against him on the trial.—*Wisdom v. State (Tex. Cr. App.)* 926.

§ 11. Time of trial and continuance.

Rev. St. 1899, §§ 2641, 2644, relative to the time in which a defendant must be tried after indictment found, do not include the term in which the indictment was found.—*State v. Haines (Mo.)* 621.

Rev. St. 1899, §§ 2641, 2644, relative to the time within which a defendant must be tried after indictment found, are intended to operate only in case of laches by the state.—*State v. Haines (Mo.)* 621.

Continuance for absent witness *held* properly denied.—*State v. Robinson (Tenn. Sup.)* 65.

An application for a continuance, showing due diligence in efforts to secure presence of an absent witness, whose testimony would prove an alibi, should be granted.—*Bajnes v. State (Tex. Cr. App.)* 119, 312.

Refusal of a continuance because of the absence of a witness who was inside the house at the time of the alleged shooting, but did not see it, *held* not prejudicial to defendant.—*Brice v. State (Tex. Cr. App.)* 121.

Where the testimony of an absent witness was neither material nor probably true, it was not error to refuse a continuance because of his absence.—*Garcia v. State (Tex. Cr. App.)* 122.

Statements in an application for a continuance to enable the accused to procure certain letters *held* too general.—*Taul v. State (Tex. Cr. App.)* 394.

The refusal to grant continuance *held* not error.—*Jackson v. State (Tex. Cr. App.)* 404.

Where alleged absent testimony was similar to that on which defendant was rightly convicted, a continuance was properly refused.—*Martin v. State (Tex. Cr. App.)* 486.

An application for a continuance to procure a witness to prove an alibi, which was so indefinite as not even to manifest such witness' opportunity to be able to testify as to the alibi, was properly denied.—*Villereal v. State (Tex. Cr. App.)* 715.

§ 12. Trial.

Exceptions not taken when instructions were given *held* waived.—*State v. Westlake (Mo.)* 243.

In the absence of specific objection, that cross-examination was not confined to matters gone into in chief *held* waived.—*State v. Westlake (Mo.)* 243.

It was not error for the judge to swear in a person to assist the officer in charge of the jury, in the absence of defendant, and without his knowledge or consent, or of his attorney.—*State v. Robinson (Tenn. Sup.)* 65.

Where defendant had delayed procuring counsel, there was no error in commencing a trial in the absence of the attorney with whom he was negotiating; he being given an opportunity to re-examine witnesses when he came in.—*Brice v. State (Tex. Cr. App.)* 121.

It was not misconduct for the jury to discuss accused's character, there being evidence on such question.—*Brice v. State (Tex. Cr. App.)* 121.

Objections by the accused to the evidence will not be considered, when no ground of objection is stated.—*Little v. State (Tex. Cr. App.)* 310.

Failure to charge as to the kind of circumstantial evidence required to corroborate an accomplice *held* error.—*McHenry v. State (Tex. Cr. App.)* 311.

No exception being taken to a statement by the district attorney in his argument to the jury that he believed defendant guilty of mur-

der, though the remark was improper, it was not reversible error to refuse to charge that the remark should be disregarded.—*Spangler v. State* (Tex. Cr. App.) 314.

Improper remarks of a prosecuting attorney in addressing the jury are not ground for reversal on appeal, when the trial judge was not requested to instruct the jury to disregard such remark.—*Tellis v. State* (Tex. Cr. App.) 717.

§ 13. — Arguments and conduct of counsel.

Where the regular commonwealth's attorney took no part in the prosecution because of his sickness, it was prejudicial error to permit the commonwealth's attorney pro tem. to say to the jury in his closing argument that he was commissioned by the regular commonwealth's attorney to say to them "that he thinks the defendant guilty, and hopes the jury will hang him higher than Haman."—*Howard v. Commonwealth* (Ky.) 756.

Where the court, to avoid a continuance, permitted the statements of defendant's affidavit as to the testimony of absent witnesses to be read as their deposition, it was improper for the attorney for the commonwealth to refer to those statements as the statements of defendant.—*Johnson v. Commonwealth* (Ky.) 1005.

It is no ground of complaint that defendant in his opening statement was confined to relevant matters.—*State v. Westlake* (Mo.) 243.

Where improper statements of the district attorney in presence of the jury were withdrawn, and the judge stated in open court that they were improper, there was no reversible error.—*State v. Robinson* (Tenn. Sup.) 65.

Under Bill of Rights, § 10, it is reversible error for the court to refuse defendant's counsel in a criminal case permission to argue and comment on testimony which has been received before the jury.—*Spangler v. State* (Tex. Cr. App.) 314.

§ 14. — Province of court and jury in general.

Where there is any evidence of guilt, it is error to give a peremptory instruction for defendant.—*Commonwealth v. Foster* (Ky.) 271.

Where there is sufficient evidence to convict the defendant in a prosecution for robbery, the question of the credibility of the evidence affirming or denying his presence when the crime occurred is for the jury.—*State v. Adair* (Mo.) 187.

An instruction that the fact that defendant had knowledge that the person to whom he sold liquor was a minor might be proved by circumstantial evidence *held* proper.—*Aston v. State* (Tex. Cr. App.) 307.

An instruction that the evidence on the cross-examination of defendant as to former charges against her could be considered only as affecting her credibility *held* not objectionable.—*Jasper v. State* (Tex. Cr. App.) 392.

§ 15. — Necessity, requisites, and sufficiency of instructions.

In instructing as to the right of accused to acquittal on the ground of insanity, it was error to omit to charge to acquit on that ground, if, as the result of mental unsoundness, he had not "sufficient will power to govern his actions by reason of some insane impulse which he could not resist or control."—*Jolly v. Commonwealth* (Ky.) 49.

Instead of instruction that, if the jury "entertain a reasonable doubt as to any facts necessary to constitute defendant's guilt, they must acquit him," it is better to instruct, in the language of Cr. Code Prac. § 238, that, "if there be a reasonable doubt of the defendant being proven to be guilty, he is entitled to an acquittal."—*Jolly v. Commonwealth* (Ky.) 49.

It was not improper for the court to amend an instruction after four of the five arguments on each side had been made to the jury.—*Powers v. Commonwealth* (Ky.) 735.

The words, "if the jury believe from the evidence beyond a reasonable doubt," being used in the beginning of an instruction, need not be repeated.—*Powers v. Commonwealth* (Ky.) 735.

Where several accomplices had testified, it was prejudicial error to instruct the jury that they could not convict upon the uncorroborated testimony of "an accomplice," as the court should, instead, have used the words "an accomplice or accomplices."—*Powers v. Commonwealth* (Ky.) 735.

An instruction as to credibility of witnesses in a prosecution for robbery *held* proper.—*State v. Adair* (Mo.) 187.

It is not error to instruct, in a prosecution for robbery, that the defendant is a competent witness in his own behalf, but that his interest in the result of the case may be considered in determining his credibility.—*State v. Adair* (Mo.) 187.

An instruction as to reasonable doubt as to the presence of defendant at the time and place where the crime was committed *held* proper.—*State v. Adair* (Mo.) 187.

An instruction as to reasonable doubt in a prosecution for robbery *held* not erroneous.—*State v. Adair* (Mo.) 187.

Where the evidence is conflicting as to whether a confession was made voluntarily, it is error to refuse to instruct as to the rules governing the admissibility of confessions.—*State v. Moore* (Mo.) 199.

Rev. St. 1899, § 2627, does not require the court to instruct as to credibility of defendant as a witness.—*State v. Westlake* (Mo.) 243.

An instruction referring to the law as declared in "instruction No. 2" *held* not bad as dependent on another instruction.—*State v. Haines* (Mo.) 621.

Instruction as to reasonable doubt *held* erroneous, as compelling defendant to prove his innocence.—*State v. Moss* (Tenn. Sup.) 87.

Where, in a prosecution for theft of a horse, the evidence that it was in possession of a certain person was conclusive, it was not error to refuse an instruction that, if the horse was in the possession of some other person, defendant should be acquitted.—*Garcia v. State* (Tex. Cr. App.) 122.

Where evidence did not raise the issue of alibi, it was not error to fail to instruct thereon.—*Benavides v. State* (Tex. Cr. App.) 125.

An instruction that defendant could not be convicted, unless he was present and aiding his confederates in the commission of the alleged assault, sufficiently presents the issue of alibi.—*Benavides v. State* (Tex. Cr. App.) 125.

The objection that the charge was insufficient because it nowhere mentioned the name of the defendant, except in the caption, but merely designated her as "defendant," *held* not sustainable.—*Jasper v. State* (Tex. Cr. App.) 392.

An instruction on the question of an aggravated assault *held* not objectionable, as not based on the exact evidence.—*Jackson v. State* (Tex. Cr. App.) 404.

Where a homicide is charged as the result of a conspiracy, and the evidence thereof is conflicting, the jury should be instructed that acts and declarations of an alleged co-conspirator of defendant cannot be considered, unless the conspiracy is shown beyond a reasonable doubt.—*Graham v. State* (Tex. Cr. App.) 714.

Where the issue of manslaughter was not raised by the evidence, it was not error to omit

to charge on that subject.—*Villereal v. State* (Tex. Cr. App.) 715.

Where the usual charge as to circumstantial evidence was given, *held* sufficient.—*Villereal v. State* (Tex. Cr. App.) 715.

An instruction as to conduct of jury *held* not improper, as a threat calculated to mislead and prejudice the jury.—*Villereal v. State* (Tex. Cr. App.) 715.

An instruction *held* not improper, as requiring exculpatory evidence to raise a reasonable doubt.—*Villereal v. State* (Tex. Cr. App.) 715.

§ 16. — Requests for instructions.

The request for an erroneous instruction requires the court to instruct as to the questions presented by such erroneous instruction.—*State v. Moore* (Mo.) 199.

A special charge requested by accused is properly refused, when it is embodied in the main charge given.—*Ramey v. State* (Tex. Cr. App.) 126; *Aston v. State* (Tex. Cr. App.) 307.

Where the defendant, in a prosecution for misdemeanor, does not request a written charge as to the weight of accomplice testimony, the failure to instruct thereon will not be reviewed.—*Tracy v. State* (Tex. Cr. App.) 127.

The refusal to give a requested charge is not error, where an adequate charge is given on the question so presented.—*Patton v. State* (Tex. Cr. App.) 309.

Where the court charged fully as to the law of principals, it was not error to refuse to charge that mere knowledge that an assault was to be committed would not make defendant a principal.—*Grammer v. State* (Tex. Cr. App.) 402.

§ 17. Motions for new trial and in arrest.

The rule that jurors will not be allowed to impeach their verdict by statements or affidavits is inflexible.—*State v. Palmer* (Mo.) 651.

It was not error to refuse a new trial on the ground of newly-discovered evidence which was merely impeaching.—*Brice v. State* (Tex. Cr. App.) 121.

A suggestion on a motion in arrest that negroes were discriminated against in the selection of grand and petit juries comes too late.—*Kennard v. State* (Tex. Cr. App.) 131.

Statements made by a juror after retirement of the jury *held* sufficient, under Code Cr. Proc. art. 817, to warrant a reversal of a judgment of conviction.—*Blocker v. State* (Tex. Cr. App.) 391.

Where due diligence was not used, an application for a new trial for newly-discovered evidence, not supported by affidavits, will be refused.—*Little v. State* (Tex. Cr. App.) 483.

§ 18. Judgment, sentence, and final commitment.

In a proceeding to test the sanity of one about to be sentenced for a crime, a charge authorizing the jury to find accused insane if he could not "intelligently reason" *held* erroneous, as requiring too great a degree of intelligence.—*State v. Helm* (Ark.) 915.

Under a statute providing that one convicted of a crime may show his insanity as a reason why judgment should not be pronounced against him, and authorizing the court to impanel a jury to determine the question, such insanity may be shown orally and without any formal plea.—*State v. Helm* (Ark.) 915.

§ 19. Appeal and error, and certiorari.

Under Cr. Code Proc. § 281, the action of the trial court in overruling a motion for new trial cannot be reviewed on appeal.—*Hanley v. Commonwealth* (Ky.) 288.

No appeal lies from a judgment imposing a fine of \$10.—*Bottom v. Commonwealth* (Ky.) 700.

Where, on a motion for rehearing in a criminal case, it is disclosed that no judgment was entered in the trial court, the supreme court will remand the cause with directions to the trial court to enter judgment.—*State v. Holland* (Mo.) 620.

Under Shannon's Code, § 7217, a conviction *held* not reversible because the record failed to show a plea of not guilty entered, where the record did show that a jury were shown to try the issues.—*Muse v. State* (Tenn. Sup.) 80.

§ 20. — Presentation and reservation in lower court of grounds of review.

Objections to evidence, made for the first time on appeal, will not be considered.—*State v. Haines* (Mo.) 621.

The defense, having asked wholly incompetent questions of experts as to defendant's condition of mind on the day of the homicide, cannot complain of error in the state pursuing a similar course.—*State v. Palmer* (Mo.) 651.

An objection to the court's failure to instruct on all questions cannot be raised for the first time on appeal.—*State v. Palmer* (Mo.) 651.

Evidence being incompetent as a conclusion and hearsay, its admission can be reviewed on appeal under general objections.—*State v. Huff* (Mo.) 900, 1104.

Objection cannot be considered on appeal that the jury were not instructed as to certain points, there being no exception saved to such failure to instruct.—*State v. Huff* (Mo.) 900, 1104.

§ 21. — Proceedings for transfer of cause, and effect thereof.

Where, on appeal from a conviction, the recognizance does not state the punishment assessed against defendant, the appeal will be dismissed.—*McClarney v. State* (Tex. Cr. App.) 122.

A recognizance which fails to state the amount of punishment assessed against the accused, as required by Code Cr. Proc. art. 887, will not support an appeal.—*Wellborn v. State* (Tex. Cr. App.) 306.

Where a recognizance fails to state the amount of the fine assessed, as required by Code Cr. Proc. art. 887, the appeal will be dismissed.—*Moore v. State* (Tex. Cr. App.) 396.

A recognizance which fails to state the amount of the fine, as required by Code Cr. Proc. art. 887, is insufficient.—*Murphy v. State* (Tex. Cr. App.) 405.

Under White's Ann. Code Cr. Proc. art. 884, it was error to allow a lost information to be substituted *nunc pro tunc*, after recognizance for appeal had been entered.—*Reed v. State* (Tex. Cr. App.) 925.

A recognizance *held* defective, not being in accordance with the judgment.—*Chappell v. State* (Tex. Cr. App.) 928.

§ 22. — Record and proceedings not in record.

Where an appeal has been taken from an order sustaining a motion to quash an indictment, but no bill of exceptions is filed, the appeal will be dismissed.—*State v. Hicks* (Mo.) 193.

Denial of an application for a continuance cannot be considered, if not in the bill of exceptions.—*State v. Palmer* (Mo.) 651.

Error in refusing to grant an application to pass on the question of accused's insanity must be preserved in a bill of exceptions.—*State v. Wade* (Mo.) 800.

Under Acts 1890, c. 275, in order that a bill of exceptions should become a part of the record on appeal, *held*, that it must affirmatively appear that it was filed within the time allowed for the preparation of the bill.—*Muse v. State* (Tenn. Sup.) 80.

Failure of the statement of facts, on an appeal from a conviction for a violation of the local option law, to contain the orders of the commissioners' court putting the law in force, is cured by a bill of exceptions which shows that such orders were introduced in evidence.—*Lyon v. State* (Tex. Cr. App.) 125.

Where the trial court, in preparing a statement of facts in an appeal from a conviction for violating the local option law, does not insert the orders of the commissioners' court putting the law in force, but makes a memorandum directing the clerk to insert such orders, the orders so inserted should be stricken out.—*Lyon v. State* (Tex. Cr. App.) 135.

Bills of exception predicated on questions asked *held* insufficient, where answers are not shown.—*Little v. State* (Tex. Cr. App.) 310.

Due diligence on the part of a convict in filing a statement of facts on appeal *held* to have been shown.—*McHenry v. State* (Tex. Cr. App.) 311.

That a substituted statement of facts on appeal was not substituted in the lower court at the next term after the notice of appeal, as provided by Code Cr. Proc. art. 884, but at the next succeeding term, *held* not sufficient ground for striking out the statement.—*McHenry v. State* (Tex. Cr. App.) 311.

Where, in a criminal case, the judge allows a bill of exceptions except as to statements of certain evidence, which he disallows because he does not recollect it, and the evidence is included in other bills which he has allowed, the several bills may be considered together.—*Spangler v. State* (Tex. Cr. App.) 314.

A bill of exceptions in a criminal case, which fails to show whether defendant's challenges for cause were overruled or sustained, is defective.—*Taul v. State* (Tex. Cr. App.) 394.

On appeal in a criminal case, in the absence of a bill of exceptions, remarks of the county attorney cannot be reviewed.—*Williams v. State* (Tex. Cr. App.) 395.

Assignments of error relative to the admission of testimony cannot be considered, in the absence of a bill of exceptions.—*Williams v. State* (Tex. Cr. App.) 395.

Argument of counsel cannot be considered on appeal, in the absence of a bill of exceptions.—*Douthitt v. State* (Tex. Cr. App.) 404.

Error in refusing a charge requested by the accused cannot be reviewed, in the absence of a statement of facts.—*Douthitt v. State* (Tex. Cr. App.) 404.

Though a bill of exceptions shows that the objection made to evidence of defendant's statements was that the statements were made while under arrest, but the bill did not disclose that he was under arrest, the objection will not prevail.—*McBroom v. State* (Tex. Cr. App.) 481.

Where a judgment of conviction recited that defendant was properly arraigned, such recital was conclusive on appeal.—*Villereal v. State* (Tex. Cr. App.) 715.

A bill of exceptions *held* not sufficient to present the objection that an experiment performed by the state was not made under the same conditions which existed when the event originally happened.—*Rupe v. State* (Tex. Cr. App.) 929.

§ 23. — Review.

Upon a trial for murder, defendant was not entitled to an instruction as to manslaughter,

where there was nothing to reduce the crime from murder to manslaughter.—*Jolly v. Commonwealth* (Ky.) 49.

There being no abuse of discretion in refusing application for change of venue, there can be no reversal on that account.—*Barnes v. Commonwealth* (Ky.) 733.

An error in failing to submit to the jury a certain view of the case by an instruction given cannot be said to be harmless, upon the ground that the testimony tending to support that view is not credible; the jurors being the sole judges of the weight of the evidence.—*Powers v. Commonwealth* (Ky.) 735.

Under Cr. Code Prac. § 281, the decision of the trial court upon the motion for new trial is not subject to exception.—*Howard v. Commonwealth* (Ky.) 756.

Error in a charge, in that it allowed a conviction for bigamy without requiring the jury to find that the name of defendant's first wife was as alleged in the indictment, *held* cured by undisputed proof of her name.—*State v. Edmiston* (Mo.) 193.

Where the court gave an instruction on manslaughter embodying one requested by defendant, the error, if any, in the court's instruction being invited by defendant, he could not complain.—*State v. Haines* (Mo.) 621.

Where defendant was convicted of unlawfully carrying a pistol, a bill of exceptions *held* not to show that the court had not properly charged on the doctrine of reasonable doubt.—*State v. Robinson* (Tenn. Sup.) 60.

The appellate court will not assume that the evidence of an alibi shown on motion for a new trial is untrue, though testimony adduced on the trial would strongly indicate its falsity.—*Baines v. State* (Tex. Cr. App.) 119, 312.

Accused cannot complain of a charge, given by the court on its own motion, not differing from one requested by himself.—*Harris v. State* (Tex. Cr. App.) 124.

A conviction will not be reversed for errors in the charge as to the punishment, where the punishment assessed is the lowest penalty authorized by law.—*Zion v. State* (Tex. Cr. App.) 306.

Where, pending appeal and prior to rendition of decision, the appellant escaped from jail, a motion for rehearing filed by the state, and to dismiss the appeal, will be granted.—*Wood v. State* (Tex. Cr. App.) 308.

Where an information contained two counts, and the defendant was convicted on the first, errors alleged in the charge of the court as to the second count will not be considered on appeal, as the same are immaterial.—*Witherspoon v. State* (Tex. Cr. App.) 396.

On a criminal prosecution for preventing an officer from seizing property under a voidable writ of sequestration, it was prejudicial error to admit evidence of defendant's sayings and doings in resisting arrest.—*Witherspoon v. State* (Tex. Cr. App.) 396.

Where proof on a trial for theft showed that the market value of stolen property was more than \$50, error in allowing the witness to state the amount paid for it in 1890 was harmless.—*McBroom v. State* (Tex. Cr. App.) 481.

Forcing the defendant to use his peremptory challenges by overruling challenges for cause *held* not cause for reversal, in absence of a showing that defendant was forced to take objectionable jurors.—*Villereal v. State* (Tex. Cr. App.) 715.

Instructions in prosecution for perjury *held* not erroneous.—*Tellis v. State* (Tex. Cr. App.) 717.

§24. Punishment and prevention of crime.

To authorize confinement in the penitentiary for life by reason of a third conviction of felony, it is not necessary that the penalty should have been increased upon the second conviction.—*Brown v. Commonwealth (Ky.) 4.*

CROPS.

See "Agriculture."

CROSS-EXAMINATION.

See "Witnesses," § 3.

CURTESY.

See "Dower."

CUSTODY.

Of jury, see "Criminal Law," §§ 12-16.

DAMAGES.

See "Death," § 1.

Breach by seller of contract for sale of goods, see "Sales," § 6.

— of contract of transportation, see "Carriers," §§ 3-5.

Compensation for property taken for public use, see "Eminent Domain," § 2.

Ejection of passenger, see "Carriers," § 5.

Failure to deliver goods sold, see "Sales," § 6.

— message, see "Telegraphs and Telephones," § 1.

Injuries caused by public improvements, see "Municipal Corporations," §§ 5-7.

Wrongful distress, see "Landlord and Tenant," § 3.

§ 1. Grounds and subjects of compensatory damages.

Estimated direct profits, which must have been in the contemplation of the parties at the time a contract was made, may be recovered as damages for breach of the contract.—*Blood v. Herring (Ky.) 273.*

§ 2. Liquidated damages and penalties.

Where there was unwarranted delay in completing a house, a disallowance of liquidated damages for such delay *held* error.—*Young v. Gaut (Ark.) 372.*

§ 3. Measure of damages.

The court properly refused to instruct that plaintiffs could not properly charge defendant with wages to their workmen while waiting for the lumber necessary to enable them to begin constructing the building.—*Clark v. Koerner (Ky.) 30.*

The measure of damages for defendants' refusal to permit plaintiffs to carry out a contract to saw lumber for defendants was the difference between the contract price and what it would have cost plaintiffs to carry out the contract.—*Blood v. Herring (Ky.) 273.*

As plaintiffs could not recover for breach of contract both estimated profits and damages for loss of time, the court properly instructed the jury to disregard plaintiffs' claim for loss of time.—*Blood v. Herring (Ky.) 273.*

Evidence that injury is permanent and that further pain is certain *held* a basis for compensation for future suffering.—*Smiley v. St. Louis & H. Ry. Co. (Mo.) 667.*

Instruction that defendant's profits, instead of plaintiff's loss, was the measure of damages in an action for breach of contract, *held* error.—*Noble v. Wilder (Tex. Civ. App.) 325.*

In an action for rent payable in products, the measure of damages is the market value of these products at the time the rent was due, with interest thereon from that date to the

date of trial.—*Watson v. Mirike (Tex. Civ. App.) 533.*

§ 4. Inadequate and excessive damages.

Injuries to a wife *held* to authorize a verdict for \$3,500 in favor of her husband.—*Sherman, S. & S. Ry. Co. v. Eaves (Tex. Civ. App.) 550.*

§ 5. Pleading, evidence, and assessment.

In an action for breach of a contract to furnish lumber for the construction of an elevator, instruction that, if defendant failed to perform his contract and by reason thereof plaintiffs were unable to procure other lumber and were compelled to keep their workmen idle, or were delayed in the construction of the building or put to additional expense, they should find for plaintiffs an amount that would compensate them for the loss so sustained, *held* correct.—*Clark v. Koerner (Ky.) 30.*

An instruction as to the measure of damages for breach of a contract, being without menning, *held* prejudicial to defendants.—*Blood v. Herring (Ky.) 273.*

Instruction relating to damages for breach of contract *held* erroneous.—*Noble v. Wilder (Tex. Civ. App.) 325.*

An instruction, in an action for personal injuries, authorizing the recovery of damages for the decreased earning capacity, *held* proper.—*St. Louis S. W. Ry. Co. of Texas v. Laws (Tex. Civ. App.) 498.*

Evidence of plaintiff's brooding over his crippled condition and his future prospects *held* admissible as evidence of mental anguish in an action for injuries.—*Missouri, K. & T. Ry. Co. of Texas v. Miller (Tex. Civ. App.) 978.*

DEATH.**§ 1. Actions for causing death.**

An instruction telling the jury that there could be no recovery for the death of plaintiff's intestate unless the negligence of the superior servant was gross was more favorable to defendant than it was entitled to have, as that rule applies only to actions for injuries not resulting in death.—*Illinois Cent. R. Co. v. Josey's Adm'r (Ky.) 703.*

In an action by a parent to recover for the death of her 12 year old son, an instruction that plaintiff could recover the contributions which she had a reasonable expectation of receiving from the son after his majority was erroneous.—*San Antonio Traction Co. v. White (Tex. Sup.) 706.*

DEBTOR AND CREDITOR.

See "Assignments for Benefit of Creditors"; "Bankruptcy"; "Creditors' Suit"; "Fraudulent Conveyances."

DECEDENTS.

Declarations against interest, see "Evidence," § 7.

Estates, see "Descent and Distribution"; "Executors and Administrators."

Testimony as to transactions with persons since deceased, see "Witnesses," § 2.

DECEIT.

See "Fraud."

DECLARATIONS.

Adverse possession of property dedicated to public use, see "Adverse Possession," § 1.

As evidence in civil actions, see "Evidence," § 7.

— in criminal prosecutions, see "Criminal Law," §§ 6-8.

Dying declarations, see "Homicide," § 6.

DEDICATION.

§ 1. Nature and requisites.

On an issue as to whether a park and lake had been dedicated to the public, the questions whether the public knew that the lake had been formed by the construction of a railway, or whether the city was bound by a deed of the owner to the railway company, *held* immaterial.—Gillean v. City of Frost (Tex. Civ. App.) 345.

Evidence *held* sufficient to show that a park and lake had been dedicated to the public.—Gillean v. City of Frost (Tex. Civ. App.) 345.

Where an owner dedicated a park and lake to the public, and a town was subsequently built up around the lake, the fact that the town was not created until after the dedication did not prevent it from asserting the rights of its citizens to use the property as a public park.—Gillean v. City of Frost (Tex. Civ. App.) 345.

§ 2. Operation and effect.

A deed to defendant *held* not sufficient to set in operation the statute of limitations as against the rights of a city to use the property as a public park.—Gillean v. City of Frost (Tex. Civ. App.) 345.

The fact that defendant paid taxes on property which a city claimed had been dedicated to the public as a park *held* not to impair the rights of the public or to estop the city from asserting the right of its citizens to the property.—Gillean v. City of Frost (Tex. Civ. App.) 345.

DEEDS.

See "Homestead," § 2.

Acknowledgment of execution, see "Acknowledgment."

Admissions by grantor, see "Evidence," § 6.

By or to particular classes of parties, see "Infants," § 1; "Insane Persons," § 1.

—married women, see "Husband and Wife," § 2.

—sheriffs, see "Execution," § 3.

Cancellation, see "Cancellation of Instruments."

Covenants in deeds, see "Covenants."

Deeds of lands held adversely, see "Champerly and Maintenance."

In fraud of creditors, see "Fraudulent Conveyances."

In trust, see "Trusts," § 1.

Of trust, see "Mortgages."

On partition, see "Partition," § 1.

Parol or extrinsic evidence, see "Evidence," § 8.

Reformation, see "Reformation of Instruments."

Seals, see "Seals."

Separate property of married women, see "Husband and Wife," § 2.

§ 1. Requisites and validity.

Where a deed was manifestly one of gift, the fact that a money consideration expressed therein was merely nominal *held* not to invalidate it.—Studybaker v. Cofield (Mo.) 246.

A warranty deed with a stipulation that at the death of the grantee the property or the proceeds thereof remaining in her should revert to the bodily heirs of the grantor, leaves no interest in the grantor subject to execution for his debts.—O'Neal v. Clymer (Tex. Civ. App.) 545.

§ 2. Construction and operation.

A married woman, by destroying a deed to her and consenting to the making of a deed by the grantor to another, *held* not estopped to claim the land.—Rittenhouse v. Clark (Ky.) 33.

A married woman cannot divest herself and her children of title to land by merely destroying the deed to them and consenting to the

making of a deed by the grantor to another.—Rittenhouse v. Clark (Ky.) 33.

Deed construed, and *held* to create a vested transmissible remainder.—Balch v. Johnson (Tenn. Sup.) 289.

A deed conveying land to a wife and her children, etc., *held* not to give the wife's children a vested remainder.—Benson v. Edwards (Tenn. Ch. App.) 1034.

An uncertain description of land in a deed *held* to have been cured by reference to a patent for further description.—League v. Scott (Tex. Civ. App.) 521.

§ 3. Pleading and evidence.

Evidence of a fiduciary relation between the grantor and grantee in a deed *held* not sufficient to cast the burden of proof on the grantee to show that the deed was not procured by undue influence.—Studybaker v. Cofield (Mo.) 246.

Evidence *held* not sufficient to sustain an allegation that a deed was procured by undue influence and by prejudicing the grantor against his other relatives.—Studybaker v. Cofield (Mo.) 246.

Evidence *held* not sufficient to show that the grantee in a deed fraudulently represented that the favorite nephew of the grantor was dead.—Studybaker v. Cofield (Mo.) 246.

Evidence *held* sufficient to show that grantor had sufficient mental capacity to make a deed.—Studybaker v. Cofield (Mo.) 246.

After the death of the parties to a deed absolute in form and the lapse of nearly 60 years, presumptions in derogation of legal title conveyed thereby cannot be indulged.—Laguerrenne v. Farrar (Tex. Civ. App.) 933.

DE FACTO OFFICERS.

See "Officers," § 1.

DEFAMATION.

See "Libel and Slander."

DELAY.

In transportation or delivery of goods by carrier, see "Carriers," § 1.

Laches, see "Equity," § 2.

DELIVERY.

Of goods sold, see "Sales," § 3.

DEMONSTRATIVE EVIDENCE.

In criminal prosecutions, see "Criminal Law," §§ 4-10.

DEPOSITIONS.

See "Witnesses."

Exceptions to depositions, going to their exclusion, will be considered as waived, unless disposed of before the commencement of the trial.—Dean v. Phillips (Ky.) 10.

Exceptions to depositions for failure to give notice to certain of the defendants, who had filed separate answers, should have been sustained.—Kentucky Union Co. v. Lovely (Ky.) 272.

Under Civ. Code Prac. § 585, it was error to permit the reading of depositions which were not filed until after the jury had been impaneled.—Kentucky Union Co. v. Lovely (Ky.) 272.

The cross-examination of a witness under deposition whose direct testimony has been incompetent does not render the testimony com-

petent; proper objection being taken thereto at the hearing.—*Mason v. Willhite* (Tenn. Ch. App.) 298; *Same v. Cooper, Id.*

Under Rev. St. art. 2274, a difference between the names given in a notice of the taking of depositions and those signed to the depositions is not cause for suppression, where it appears affirmatively that the party against whom the depositions were to be used was not misled by the misnomer.—*Galveston, H. & S. A. Ry. Co. v. Morris* (Tex. Sup.) 709.

Objection of defendant to interrogatories in deposition as leading, made on the trial of the cause, *held* too late.—*Gill v. First Nat. Bank* (Tex. Civ. App.) 146.

Depositions, taken in another case in which the parties and issues were substantially the same, cannot be used in evidence.—*People's Nat. Bank v. Mulkey* (Tex. Civ. App.) 528.

DEPOSITS.

In bank, see "Banks and Banking," § 1.

DESCENT AND DISTRIBUTION.

See "Dower"; "Executors and Administrators"; "Homestead," § 3.

Rights of adopted children, see "Adoption."

§ 1. Nature and course in general.

Under Shannon's Code, § 4163, subsec. 3, where a daughter inherits land from her father, leaving the complainants, a half brother, and a son, a deceased half brother of the maternal line, and a niece, daughter of deceased sister of the whole blood, the complainants inherit no interest in the land.—*Lucas v. Malone* (Tenn. Sup.) 82.

§ 2. Persons entitled and their respective shares.

Under Rev. St. 1889, § 4520, *held*, a wife, by electing to take one-half interest of the husband's property under section 4518, did not ratify conveyance by her husband, made with fraudulent intent to cut down her marital rights.—*Newton v. Newton* (Mo.) 881.

§ 3. Rights and liabilities of heirs and distributees.

Where the curator of an estate to whom a note was executed under a mistake of law sold the note before maturity without authority, the failure of the persons beneficially interested to file exceptions to the report of the curator, in which he charged himself with the proceeds of the note, did not estop them from repudiating the sale.—*Dunn v. Duncan* (Ky.) 1011.

Where an intestate left personalty and no debts, and the heirs assigned their interests to one of their number, who took possession, *held*, that the public administrator, 12 years later, could not recover the property from the heir receiving the same.—*Richardson v. Cole* (Mo.) 182.

DESCRIPTION.

Of debt secured by mortgage, see "Mortgages," § 2.

Of devisees or legatees in will, see "Wills," § 5.

Of property conveyed, see "Boundaries," § 1; "Deeds," § 2.

Of property mortgaged, see "Mortgages," §§ 1, 2.

DETINUE.

See "Replevin."

DEVISES.

See "Wills."

DILIGENCE.

Of party asking relief, see "Specific Performance," § 2.

DISABILITIES.

See "Slaves."

Effect on limitation, see "Limitation of Actions," § 2.

DISCHARGE.

From indebtedness, see "Bankruptcy," § 2; "Compromise and Settlement"; "Release."

From liability as surety, see "Principal and Surety," § 3.

DISCRETION OF COURT.

Review in civil actions, see "Appeal and Error," §§ 13-17.

— in criminal prosecutions, see "Criminal Law," § 23.

DISMISSAL AND NONSUIT.

Dismissal of appeal or writ of error, see "Appeal and Error," § 12.

— of suit in equity, see "Equity," § 5.

§ 1. Involuntary.

Where plaintiff, after the court had quashed the return on a summons, submitted the case for such judgment as the court might deem proper, a judgment dismissing the petition will be regarded without prejudice.—*Fox v. Blue-Grass Grocery Co.* (Ky.) 265.

DISORDERLY HOUSE.

Under Pen. Code, art. 360, a person traveling in wagon with prostitutes, and conducting the business of prostitution therein, may be convicted of keeping a disorderly house.—*Tracy v. State* (Tex. Cr. App.) 127.

Where the evidence in a prosecution for keeping a disorderly house did not show that defendant was either the owner, lessee, or tenant, it was insufficient to sustain a conviction.—*Cook v. State* (Tex. Cr. App.) 307.

DISQUALIFICATION.

Of judge, see "Judges," § 2.

DISSOLUTION.

Of attachment, see "Attachment," § 3.

Of partnership, see "Partnership," § 5.

DISTRESS.

For rent, see "Landlord and Tenant," § 3.

DISTRIBUTION.

Of estate of decedent, see "Descent and Distribution."

Of proceeds of foreclosure, see "Mortgages," § 6.

DISTRICT AND PROSECUTING ATTORNEYS.

Arguments at trial in criminal prosecutions, see "Criminal Law," § 18.

DISTRICT COURTS.

See "Courts," § 4.

DITCHES.

See "Drains."

DIVORCE.**§ 1. Grounds.**

A divorce will not be granted for antenuptial incontinence.—*Griggs v. Griggs* (Tex. Civ. App.) 941.

§ 2. Jurisdiction, proceedings, and relief.

Where plaintiff's evidence in a suit for divorce is conflicting, a decree for defendant will not be disturbed.—*Barrett v. Barrett* (Tex. Civ. App.) 951.

§ 3. Alimony, allowances, and disposition of property.

Where a judgment in divorce has fixed the status of certain property as community property, it is not error in a subsequent action to refuse to submit to the jury the question of the property being the separate property of the wife.—*Boyd v. Ghent* (Tex. Civ. App.) 723.

Judgment awarding personal property to defendant in a divorce action *held* not indefinite in specifying it.—*Gebhart v. Gebhart* (Tex. Civ. App.) 964.

DOCUMENTS.

As evidence in civil actions, see "Evidence," § 8.
— in criminal prosecutions, see "Criminal Law," §§ 4-10.

DOMICILE.

Of parties as affecting venue, see "Venue," § 1.

DONATIONS.

See "Gifts."

DOWER.**§ 1. Inchoate interest.**

Under Ky. St. § 2133, the wife, by living in adultery in the husband's home during his enforced absence, forfeits her right to dower.—*McQuinn v. McQuinn* (Ky.) 858.

§ 2. Rights and remedies of widow.

A defect in a petition to enforce dower in failing to show that the declaration of election was filed within 12 months, as required by Rev. St. 1889, § 4522, *held* cured by statement that the husband died less than a year before the suit.—*Newton v. Newton* (Mo.) 881.

DRAINS.**§ 1. Establishment and maintenance.**

The burden of proof was on one who filed a remonstrance to the report of viewlers, on establishment of drain, and he was entitled to the concluding argument to the jury.—*Lancaster v. Leaman* (Ky.) 281.

In a proceeding to establish a ditch, the judgment of the county court is, under Ky. St. § 2396, severable for the purpose of an appeal; and on appeal to the circuit court from a judgment awarding damages the court can consider only the question of damages, and the evidence should be confined to that question.—*Lancaster v. Leaman* (Ky.) 281.

DRUNKARDS.

Drunkenness as defense to assault with intent to kill, see "Homicide," § 3.

DYING DECLARATIONS.

See "Homicide," § 6.

EASEMENTS.

See "Dedication"; "Highways."

§ 1. Creation, existence, and termination.

Plaintiff having used a passway over defendant's land for more than 40 years, it will be presumed that the use has been as a matter of right.—*List v. Jacoby* (Ky.) 855.

EJECTION.

Of passenger, see "Carriers," § 5.

EJECTMENT.

See "Trespass to Try Title."

As condition precedent to partition, see "Partition," § 1.

Recovery of lands taken in condemnation proceedings, see "Eminent Domain," § 4.

§ 1. Right of action and defenses.

Where plaintiff at most had title to only an undivided interest in the land sued for, his remedy was a suit for a division of the land, and not ejectment.—*Higgins v. Howard* (Ky.) 1016.

§ 2. Pleading and evidence.

Evidence *held* sufficient to establish the genuineness of an ancient deed.—*Davis v. Wood* (Mo.) 695.

Where, in ejectment, defendant claims under the title derived through plaintiff, plaintiff need not in the first instance show title prior to the conveyance to himself.—*Worley v. Hicks* (Mo.) 818.

Where the evidence in an ejectment suit which was barred by limitations as to property in its entirety failed to designate which room in a certain house had been occupied within 10 years by one in privity with plaintiff, the latter could not recover any room.—*Sanford v. Herron* (Mo.) 839.

Findings *held* sufficient to overcome the presumption of title arising from plaintiff's prior possession.—*Robertson v. Kirby* (Tex. Civ. App.) 967.

§ 3. Trial, judgment, enforcement of judgment, and review.

Instruction in an action of ejectment *held* erroneous as ignoring matter of defense.—*Davis v. Wood* (Mo.) 695.

Where judgment in ejectment was rendered 10 years before commencement of another ejectment by privies of defendant in the first, the latter action was barred by limitations, notwithstanding the writ of possession under the first issued within 10 years.—*Sanford v. Herron* (Mo.) 839.

ELECTIONS.

For construction of county turnpike, see "Counties," § 2.

Local option elections, see "Intoxicating Liquors," § 1.

Of school officers, see "Schools and School Districts," § 1.

§ 1. Ordering or calling election, and notice.

Acts 1899, c. 218, § 1, does not authorize the election of school directors in May, instead of August, in a school district which is co-extensive with a civil district.—*State v. Banks* (Tenn. Sup.) 778.

§ 2. Contests.

The judgment of the legislature in a contest for the office of governor was final and conclusive, and the incumbent being adjudged not to be entitled, his powers immediately ceased.

the judgment being self-executing; and therefore a pardon thereafter issued by him was void.—*Powers v. Commonwealth* (Ky.) 735.

EMINENT DOMAIN.

Public improvements by municipalities, see "Municipal Corporations," §§ 5-7.

§ 1. Nature, extent, and delegation of power.

Whether land appropriated by a railroad as a right of way is within the limits necessary to the use and operation of the railroad is a matter to be determined by the company.—*McKennon v. St. Louis, I. M. & S. Ry. Co.* (Ark.) 383.

Where a railroad company is regularly organized as such, the fact that its officers and stockholders are the same as those of a mining company, which has loaned it the money to build the road and will probably furnish the majority of its business, does not make it a private road, so as to deprive it of the power of eminent domain.—*Kansas & T. Coal Ry. Co. v. Northwestern Coal & Mining Co.* (Mo.) 684.

Under Rev. St. 1889, § 2741, the "intention" of a mining company to make such use of its lands that a proposed railroad right of way will materially interfere with its business is not a good defense to an action for condemnation.—*Kansas & T. Coal Ry. Co. v. Northwestern Coal & Mining Co.* (Mo.) 684.

Rev. St. 1889, § 2741, does not forbid the appropriation of the lands of a corporation engaged in coal mining for use as a railroad right of way, even though such use materially interferes with their use by the coal company.—*Kansas & T. Coal Ry. Co. v. Northwestern Coal & Mining Co.* (Mo.) 684.

Facts held to show that the appropriation by a railroad of a right of way across the lands of a coal-mining company would not materially interfere with the business of the coal company.—*Kansas & T. Coal Ry. Co. v. Northwestern Coal & Mining Co.* (Mo.) 684.

Under Const. art. 2, § 20, the general course of judicial decision that use of land for a right of way by a regularly organized railroad company is a public use is a sufficient "judicial determination," so that such a company is entitled to exercise the power of eminent domain without a special investigation of the facts of the particular case.—*Kansas & T. Coal Ry. Co. v. Northwestern Coal & Mining Co.* (Mo.) 684.

Under Rev. St. art. 745, a foreign telephone company, after having obtained the required permit to do business from the secretary of state, could condemn a railway company's land for its use.—*Gulf, C. & S. F. Ry. Co. v. Southwestern Telegraph & Telephone Co.* (Tex. Civ. App.) 406.

§ 2. Compensation.

The measure of damages for the injury to plaintiff's property from a change in the course of a stream in the construction of a railroad was the injury to the soil and the diminution of the salable value of the land.—*Illinois Cent. R. Co. v. Smith* (Ky.) 2.

Evidence as to the damages to the remainder of defendant's property from the construction of the railroad, and from the obstruction of the ingress to and the egress from the property, was admissible.—*Elizabethtown, L. & B. S. R. Co. v. Catlettsburg Water Co.* (Ky.) 47.

The words "other property," in Rev. St. § 2734, have no reference to the words "or damaged," in Const. art. 2, § 21; and damages to personalty and business interests need not be compensated for in condemnation proceedings.

—*St. Louis, K. & N. W. R. Co. v. Knapp, Stout & Co. Company* (Mo.) 300.

In condemnation proceedings, inconvenience to the owner, injury to his business, loss of profits, damage to personal property, or the expense of removing it held not elements of damages.—*St. Louis, K. & N. W. R. Co. v. Knapp, Stout & Co. Company* (Mo.) 300.

The owner, in condemnation proceedings, was not entitled to the cost of removing lumber from the right of way and repiling it, or of constructing subways allowed by stipulation.—*St. Louis, K. & N. W. R. Co. v. Knapp, Stout & Co. Company* (Mo.) 300.

In condemnation proceedings held, that the jury could not consider speculative values in awarding damages.—*St. Louis, K. & N. W. R. Co. v. Knapp, Stout & Co. Company* (Mo.) 300.

In condemnation proceedings, an instruction that neither the value of the land to defendant, nor its value to plaintiff, nor the latter's necessity of acquiring it, must affect in any way the jury's determination of its market value, was proper.—*St. Louis, K. & N. W. R. Co. v. Knapp, Stout & Co. Company* (Mo.) 300.

Changes in the lay of certain ground held not too remote to permit a railroad, in condemning the land, to offer surface crossings, which only such changes could render useful, in mitigation of damages.—*St. Louis, K. & N. W. R. Co. v. Knapp, Stout & Co. Company* (Mo.) 300.

Jury's award in condemnation proceedings held not inadequate.—*St. Louis, K. & N. W. R. Co. v. Knapp, Stout & Co. Company* (Mo.) 300.

§ 3. Proceedings to take property and assess compensation.

Defendant, by accepting the amount awarded in the county court and executing bond for its return, was not estopped, on appeal to the circuit court, to claim more than that amount; but could not question the right to condemn the property.—*Elizabethtown, L. & B. S. R. Co. v. Catlettsburg Water Co.* (Ky.) 47.

Upon appeal by the plaintiff in a condemnation proceeding, the court did not abuse its discretion in refusing to permit plaintiff to file an amended petition seeking to condemn a smaller part of defendant's lot than that described in the original petition.—*Elizabethtown, L. & B. S. R. Co. v. Catlettsburg Water Co.* (Ky.) 47.

As an appeal from the county court to the circuit court in a proceeding to condemn a turnpike road must be tried de novo, no bill of exceptions is necessary.—*Winchester & S. Turnpike Road Co. v. Evans* (Ky.) 1008.

In proceedings to condemn a right of way through a farm, it is not error to charge as to what matters may be considered in determining the damages, when the charge also states what matters may not be considered.—*Kansas City & N. C. R. Co. v. Shoemaker* (Mo.) 205.

In proceedings to condemn a right of way through a farm, if plaintiff desires an instruction that the damage is the difference between the value of the farm before and after the appropriation, he should request it.—*Kansas City & N. C. R. Co. v. Shoemaker* (Mo.) 205.

Where an award was paid into court, and turned over to defendant in condemnation proceedings, and the final award was much less, the plaintiff had no right to interest on the balance.—*St. Louis, K. & N. W. R. Co. v. Knapp, Stout & Co. Company* (Mo.) 300.

Under St. Louis City Ordinance No. 14,078, the Terminal Railway Company, whose tracks were wholly in a street, was not required to connect them with a lumber yard which it neither ran through nor touched.—*St. Louis, K. & N. W. R. Co. v. Knapp, Stout & Co. Company* (Mo.) 300.

Where defendant in condemnation proceedings assumed the right to open and close the case on trial, and the burden of proving benefits was put on plaintiff at defendant's request, the burden of proving damages was properly put on the latter.—*St. Louis, K. & N. W. R. Co. v. Knapp, Stout & Co. Company (Mo.)* 300.

In an action by a railroad company to condemn a right of way over the lands of a coal-mining company, the fact that the right of way might just as easily be located on the land of another mining company, whose officers and stockholders are the same as those of the plaintiff company, and which will furnish the bulk of the plaintiff company's business, is not a defense.—*Kansas & T. Coal Ry. Co. v. Northwestern Coal & Mining Co. (Mo.)* 684.

In a proceeding by a railroad company to condemn a right of way over the lands of a coal-mining company, the fact that a coal company, which has the same officers and stockholders as the plaintiff railroad company, and which will furnish nearly all of the business of the railroad company, is authorized by statute to condemn land and build a tramway to transport its product to market, is not the defense to the action.—*Kansas & T. Coal Ry. Co. v. Northwestern Coal & Mining Co. (Mo.)* 684.

In a proceeding to reassess damages for condemnation of a railroad right of way, the report of the commissioners making the former assessment held admissible in evidence.—*Kansas City S. B. Ry. Co. v. McElroy (Mo.)* 871.

Instructions requested in proceedings to assess damage for land condemned by railroad company for right of way held properly refused, as covered by the charge.—*Kansas City S. B. Ry. Co. v. McElroy (Mo.)* 871.

Act April 15, 1899, held to apply to condemnation proceedings commenced before and pending at the time of the passage of the act.—*Gulf, C. & S. F. Ry. Co. v. Southwestern Telegraph & Telephone Co. (Tex. Civ. App.)* 406.

§ 4. Remedies of owners of property.

Where a railroad appropriates land for a right of way, as prescribed by Sand. & H. Dig. § 6175, remedy of the owner for damages given by section 2734 is exclusive.—*McKennon v. St. Louis, I. M. & S. Ry. Co. (Ark.)* 383.

Sand. & H. Dig. § 2734, held not to prevent an owner of land appropriated by a railroad as part of its right of way from maintaining ejectment, part of the land taken being beyond the statutory limit of the right of way.—*McKennon v. St. Louis, I. M. & S. Ry. Co. (Ark.)* 383.

Evidence as to the value of crops destroyed by change of stream by railroad held inadmissible under the pleadings as formed.—*Illinois Cent. R. Co. v. Smith (Ky.)* 2.

The exclusive right of a turnpike company under Act Jan. 4, 1830, and Acts 1831, c. 46, must yield to the public use on just compensation being paid for damages sustained by building a new road.—*Nashville M. S. Turnpike Co. v. Davidson County (Tenn. Sup.)* 68.

EMPLOYES.

See "Master and Servant."

ENTRY, WRIT OF.

See "Ejectment."

EQUITY.

Decisions reviewable, see "Appeal and Error," § 1.

Equitable assignment, see "Assignments," § 1.

— estoppel, see "Estoppel," § 1.

Particular subjects of equitable jurisdiction and equitable remedies, see "Cancellation of Instruments"; "Creditors' Suit"; "Fraudulent Conveyances"; "Injunction"; "Interpleader"; "Partition," § 1; "Quieting Title"; "Receivers"; "Reformation of Instruments"; "Specific Performance"; "Trusts."

— to wind up partnership, see "Partnership," § 5.

Relief against judgment, see "Judgment," § 3.

Transfer from ordinary to equity docket, see "Action," § 1.

§ 1. Jurisdiction, principles, and maxims.

Where an appeal has been taken from a judgment in attachment, it was error for the court to dismiss for want of equity a bill filed by a stranger to the attachment, who claimed title to the property attached, since complainant could not seek relief by petition in the court below, as the appeal had removed the cause from that court.—*Jones v. Stewart (Tenn. Ch. App.)* 105.

§ 2. Laches and stale demands.

Where, in an equitable proceeding to have a warranty deed declared a mortgage, the plaintiff had been induced to believe that the original contract, requiring a reconveyance of the premises on the payment of the debt, would be fulfilled by a subsequent grantee of the premises, the plaintiff was not precluded from equitable relief by failing to bring his action on the discovery of the transfer of the property.—*Chance v. Jennings (Mo.)* 177.

§ 3. Pleading.

An amendment to a petition, to make the petition conform to the facts as proven, not containing a new cause of action, was properly allowed before the entry of the final decree.—*Chance v. Jennings (Mo.)* 177.

§ 4. Evidence.

The grantor's answer, admitting the allegations of a bill to reform and correct his deed for mistake, filed long after he has parted with his title, is not of sufficient probative force to justify a decree granting the relief sought as against his minor co-defendants, to whom the deed conveys an interest.—*Sawyer v. Sawyer (Tenn. Sup.)* 1022.

§ 5. Dismissal before hearing.

That proofs were taken on matters set up only in an answer filed as a cross bill was not a waiver of the lack of a bond for costs, process under such answer, and an answer thereto, so that such answer could be treated as a cross bill.—*Moore v. Tilman (Tenn. Sup.)* 61.

ERROR, WRIT OF.

See "Appeal and Error."

ESTABLISHMENT.

Of counties, see "Counties," § 1.

Of drains, see "Drains," § 1.

Of highways, see "Highways," § 1.

Of trusts, see "Trusts," § 3.

Of turnpikes or toll roads, see "Turnpikes and Toll Roads," § 1.

Of will, see "Wills," § 4.

ESTATES.

Created by deed, see "Deeds," § 2.

— by will, see "Wills," § 5.

Decedents' estates, see "Descent and Distribution"; "Executors and Administrators."

Particular estates, see "Dower"; "Life Estates"; "Remainders."

Tenancy in common, see "Tenancy in Common."

Trusts, see "Trusts," § 2.

ESTOPPEL.

- Of surety to deny liability, see "Principal and Surety," § 2.
 To assert county boundary, see "Counties," § 1.
 To avoid or forfeit insurance policy, see "Insurance," § 5.
 To claim dedication, see "Dedication," § 2.
 To deny corporate existence, see "Corporations," § 1.
 — partnership, see "Partnership," § 1.
 To disaffirm infant's sale of land, see "Infants," § 1.
 To dispute attorney's unauthorized confession of judgment, see "Execution," § 3.

§ 1. Equitable estoppel.

An heir, by accepting his distributive share of the proceeds of intestate's land and receipting therefor, is estopped from asserting any title to the land conveyed by the administrator's deed.—*Cadematori v. Gauger* (Mo.) 195.

Where the allegations in an answer amount to an estoppel, though it does not plead an estoppel in so many words, it is sufficient.—*Cadematori v. Gauger* (Mo.) 195.

Defendant held not estopped, under the evidence, from maintaining that \$200 owing him from an insurance company was exempt.—*Fife v. Netherlands Fire Ins. Co.* (Tex. Civ. App.) 160.

Contention that a decree of partition was void for insufficiency of description of the allotments held without merit; it appearing that the parties making such claim had taken possession of the allotment under the decree.—*Taffinder v. Merrill* (Tex. Civ. App.) 936.

EVICTION.

- Of tenant of demised premises, see "Landlord and Tenant," § 2.

EVIDENCE.

- See "Depositions"; "Witnesses."
 Admissibility of altered instrument in evidence, see "Alteration of Instruments."
 — of evidence under pleading, see "Pleading," § 4.
 Applicability of instructions to evidence, see "Trial," § 6.
 As to particular facts or issues, see "Adverse Possession," § 2; "Boundaries," § 1; "Damages," § 5; "Deeds," § 3; "Fraudulent Conveyances," § 2; "Gifts," § 1; "Usury," § 1.
 — authority of agent, see "Principal and Agent," § 2.
 — defense of statute of frauds, see "Frauds, Statute of," § 5.
 — construction of judgment, see "Judgment," § 5.
 Parol evidence to show that absolute bill of sale was security, see "Chattel Mortgages," § 1.
 — proximate cause of injury, see "Railroads," § 3.
 — qualification for office, see "Officers," § 2.
 In actions by or against particular classes of parties, see "Carriers," §§ 2, 4, 5; "Executors and Administrators," § 6; "Partnership," § 4.
 In criminal prosecutions, see "Adultery"; "Assault and Battery," § 1; "Criminal Law," §§ 4-10; "Homicide," § 6; "Larceny," § 2; "Obstructing Justice"; "Perjury," § 1; "Seduction," § 1.
 — carrying concealed weapons, see "Weapons."
 — keeping disorderly house, see "Disorderly House."
 — violating local option law, see "Intoxicating Liquors," § 5.

In particular civil actions or proceedings, see "Ejectment," § 2; "Libel and Slander," § 3; "Negligence," § 4; "Rape," § 1; "Reformation of Instruments," § 2; "Trespass to Try Title," § 2.

— action against telegraph company for failure to deliver message, see "Telegraphs and Telephones," § 1.

— action by attorney for compensation, see "Attorney and Client," § 1.

— action for breach of contract of sale of goods, see "Sales," § 6.

— action for personal injuries, see "Master and Servant," § 7; "Railroads," §§ 2-4.

— action on benefit certificate, see "Insurance," § 10.

— action on fire policy, see "Insurance," § 9.

— action on judgment, see "Judgment," § 10.

— action on tax bill, see "Taxation," § 4.

— action to set aside a compromise, see "Compromise and Settlement."

— condemnation proceedings, see "Eminent Domain," §§ 2, 3.

— equity, see "Equity," § 4.

— suit to set aside judgment, see "Judgment," § 3.

Newly-discovered evidence as ground for new trial, see "New Trial," § 2.

— of criminal prosecutions, see "Criminal Law," § 17.

On appeal from justice's court, see "Justices of the Peace," § 4.

Reception at trial, see "Trial," § 2.

Review on appeal or writ of error, see "Appeal and Error," § 15.

Unstamped documents as evidence, see "Internal Revenue."

§ 1. Judicial notice.

The court of appeals takes judicial notice of the official signature of any officer of the state, and is presumed to know judicially who is the chief executive of the state when that fact is called in question.—*Powers v. Commonwealth* (Ky.) 735.

Where the petition in an action against a county to recover taxes paid on an alleged illegal assessment of property did not separate the amounts paid for state and county taxes, the court could take judicial notice of the rate of taxation fixed by general law for state purposes, and thereby determine the amount of county taxes due in determining the amount in controversy and jurisdiction of the county court.—*Texas Land & Cattle Co. v. Hemphill County* (Tex. Civ. App.) 333.

The refusal of the court to construe a life policy providing that it shall be construed by the laws of a foreign state, without regard to the construction placed on a foreign statute by the courts of such state, is not a violation of Const. U. S. art. 4, § 1, in the absence of evidence of such construction.—*New York Life Ins. Co. v. Orlopp* (Tex. Civ. App.) 336.

§ 2. Presumptions.

In the absence of evidence to the contrary, the law of a foreign state will be presumed to be the common law.—*A. G. Edwards Brokerage Co. v. Stevenson* (Mo.) 617.

§ 3. Burden of proof.

The burden was on a mortgagee to show that a note which did not correspond with the note described in the mortgage, either as to date or amount, was a renewal of that note.—*Funk v. Procter* (Ky.) 286.

Failure of defendant to produce the instrument sued on, the execution of which he denied by plea of non est factum, held not to shift the burden of proof, nor preclude defendant from introducing evidence to establish his plea.—*Laing v. Sherley* (Tex. Civ. App.) 532.

§ 4. Relevancy, materiality, and competency in general.

In an action for repairs to an engine purchased by defendant from plaintiff, in which de-

defendant pleaded as a counterclaim the damages from defective work, the original contract under which the engine was bought was admissible as matter of inducement to the making of the second contract.—*Buckeye Engine Co. v. Buckwalter* (Ky.) 263.

Statement made after occurrence of an accident, by motorman of a street car, held not admissible as *res gestæ*.—*Ruschenberg v. Southern Electric R. Co.* (Mo.) 626.

Where plaintiff sues for injury resulting in insanity, that he does not introduce depositions of doctors who treated him before he became insane held immaterial.—*Smiley v. St. Louis & H. Ry. Co.* (Mo.) 667.

It is competent to permit the parties to a transaction to testify to their intentions when the question of usury is in issue.—*Peightal v. Cotton States Bldg. Co.* (Tex. Civ. App.) 428.

§ 5. Best and secondary evidence.

Parol evidence as to the construction placed on a statute of a foreign state by the supreme court of that state held to have been properly rejected.—*St. Louis, I. M. & S. Ry. Co. v. Stewart* (Ark.) 169.

Shannon's Code, § 5569 (Mill. & V. Code, § 4537), applies to actions by the beneficiaries of a benefit insurance certificate against the benefit society; and hence a printed copy of the constitution and by-laws of such an organization was improperly received in evidence in such an action.—*Page v. Knights & Ladies of America* (Tenn. Ch. App.) 1068.

Evidence by a person not the owner or legal custodian held insufficient to lay the foundation for the introduction of secondary evidence as to writings.—*Pennybacker v. Hazlewood* (Tex. Civ. App.) 153.

Evidence that certain books of account show a certain indebtedness is a violation of the best evidence rule, and inadmissible.—*Watson v. Boswell* (Tex. Civ. App.) 407.

Where a contract was traced to the possession of defendants' attorneys, and it was not shown that any search was made for it, or that it could not be produced, parol evidence held not admissible to show its contents.—*Abeel v. Levy* (Tex. Civ. App.) 937.

§ 6. Admissions.

Where defendant pleaded as a counterclaim damages by a breach of warranty of a machine for the price of which plaintiff sued, a refusal to permit him to testify to conversations with W. as to the machine prior to the sale, there being nothing to show that W. was the agent of plaintiff, held proper.—*Bean v. Taylor* (Ky.) 31.

The answer of the surety who, as plaintiff claimed, had assigned the note to him was not admissible as evidence against the other sureties.—*Turner v. Mitchell* (Ky.) 468.

Entries made in a bank book tending to establish the allegations of plaintiff's petition that the note sued on had been assigned to him by one of the sureties therein, who had first taken an assignment of the note to himself, were not admissible against the other sureties.—*Turner v. Mitchell* (Ky.) 468.

In an action by a creditor to set aside a deed by husband to wife as fraudulent, it was proper to grant a new trial to plaintiff, because of exclusion of evidence of defendant's admissions that the deed made him insolvent.—*Talferro v. Evans* (Mo.) 185.

Where there is no evidence of a conspiracy between an insolvent debtor and a creditor to whom he conveys property to defraud other creditors, subsequent declarations of the debtor are hearsay and inadmissible in a suit to set aside the conveyance.—*Wall v. Beedy* (Mo.) 864.

A letter written by the attorney of a tenant to the landlord, stating that the tenant is willing to consider any reasonable proposition of settlement, is not admissible in an action by the landlord against such tenant.—*Watson v. Boswell* (Tex. Civ. App.) 407.

Statements made by testatrix's husband, before his decease, that testatrix was insane, held to have been properly excluded on a contested probate of the will, which named the husband as executor, where such statements were not made while he was actually clothed with his trust and acting within the scope of his duties.—*Lindsey v. White* (Tex. Civ. App.) 438.

§ 7. Declarations.

Where illegitimate sons, who had lived with their putative father before arriving at age, continued to live with and work for him after that time, permitting him to keep their earnings, his declarations as to what he owed them will be made the basis of a settlement after his death.—*Story v. Story* (Ky.) 279.

Statements made by testatrix's husband, before his decease, that testatrix was insane, held to have been properly excluded on a probate of the will, contested because of testatrix's mental incapacity, where the husband was not a beneficiary under the will.—*Lindsey v. White* (Tex. Civ. App.) 438.

Evidence of declarations of the deceased owner of land that he had paid certain vendor's lien notes thereon is not admissible in a suit to foreclose such lien.—*Cole v. Horton* (Tex. Civ. App.) 508.

§ 8. Documentary evidence.

A pamphlet purporting to be a copy of the constitution and by-laws of a fraternal insurance organization may be properly received in evidence, without showing on its face that they were enacted by the proper authorities of the organization.—*Page v. Knights & Ladies of America* (Tenn. Ch. App.) 1068.

In an action by an attorney against his client to recover an unascertained contingent fee for commencing an action against the client's guardians for misapplication of funds, receipts purporting to have been executed by the defendant's father as his guardian in a foreign state were properly excluded; there being no proof of their execution, or that the father was guardian at the time.—*Lynch v. Munson* (Tex. Civ. App.) 140.

§ 9. Parol or extrinsic evidence affecting writings.

Where the obligors in a note "jointly and severally promise" to pay, any one of them may, for the purpose of pleading limitations, show that he was merely a surety, without showing that the obligee had knowledge thereof.—*Craddock v. Lee* (Ky.) 22.

A mortgagee's entry of satisfaction on the record, reciting that the mortgage debt has been paid, is only prima facie evidence of payment, and may be consistently explained away by evidence showing that it was not paid in full, and that he only intended to release the property from the lien of the mortgage.—*Petway v. Matthews* (Tenn. Ch. App.) 1048.

Parol evidence is admissible to explain or remove a latent ambiguity in the description of the land conveyed by a sheriff's deed.—*Frazier v. Waco Bldg. Ass'n* (Tex. Civ. App.) 132.

Exclusion from evidence of a collateral written agreement stating the terms of the contract of sale and signed by the salesman of one of the parties, held reversible error.—*Brenck v. Eastern Mfg. Co.* (Tex. Civ. App.) 329.

Parol evidence is admissible to show that a note sued on is without consideration.—*Watson v. Boswell* (Tex. Civ. App.) 407.

Parol evidence showing the true character of a contract is admissible on an issue of usury,

though the contract is in writing.—*Peightal v. Cotton States Bldg. Co.* (Tex. Civ. App.) 428.

In an action on a note, proof of a contemporaneous parol agreement that the payee would credit on the note a certain debt due the maker *held* inadmissible as varying a written contract.—*Bailey v. Rockwall County Nat. Bank* (Tex. Civ. App.) 530.

Parol evidence *held* admissible to show that a bill of sale and chattel mortgage were given in full payment of a debt, and not for the consideration recited.—*Schneider v. Sanders* (Tex. Civ. App.) 727.

Parol evidence is admissible to show that a mortgage was given to secure future advances.—*Glenn v. Seeley* (Tex. Civ. App.) 959.

§ 10. Opinion evidence.

It was error to permit a witness to answer the question, "How much, in your opinion, was plaintiff's land damaged by this change in the stream?"—*Illinois Cent. R. Co. v. Smith* (Ky.) 2.

Where an expert was called to testify as to whether or not a street car was being operated in a reasonably skillful manner at the time of an accident, the question, "What means would you employ as a motorman to stop a car in the shortest time and space possible?" was improper.—*Ruschenberg v. Southern Electric R. Co.* (Mo.) 626.

Evidence of the treasurer of a benefit fraternal organization as to the number of assessments and from whom collected, and that he filed a copy of the constitution and by-laws of the organization as a part of his deposition, which laws went into effect after the date of the certificate in question, was improperly received in an action by the beneficiary of a benefit certificate against the organization.—*Page v. Knights & Ladies of America* (Tenn. Ch. App.) 1068.

On the probate of a will, contested because of the testatrix's mental incapacity, where testatrix's insane antipathy to her husband was proved, expert evidence as to her acting intelligently with reference to her husband *held* not to violate the rule that experts cannot testify as to the capacity of the deceased to do the very thing in issue.—*Lindsey v. White* (Tex. Civ. App.) 438.

The attending physician of a person injured in a railroad-crossing accident may give his opinion as to what caused the injury.—*St. Louis S. W. Ry. Co. of Texas v. Laws* (Tex. Civ. App.) 498.

Where there was no conflict as to the facts, an expert witness was properly asked the question, "Assuming the testimony given to be true, to what would you attribute the injuries of E.?"—*Sherman, S. & S. Ry. Co. v. Eaves* (Tex. Civ. App.) 550.

Hypothetical questions are not necessary where the evidence shows but one state of facts, about which there is no conflict.—*Sherman, S. & S. Ry. Co. v. Eaves* (Tex. Civ. App.) 550.

§ 11. Weight and sufficiency.

Evidence *held* to justify a finding that defendant made a parol contract for the sale of land.—*Love v. Burton* (Tenn. Ch. App.) 91.

Evidence in a suit to recover the proceeds of a note alleged to have been left with defendant for collection *held* to show that defendant was not liable for the proceeds thereof.—*Osborne v. Boswell* (Tenn. Ch. App.) 96.

EXAMINATION.

Of expert witnesses, see "Evidence," § 10.

Of witnesses in general, see "Witnesses," § 3.
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EXCEPTIONS, BILL OF.

In criminal prosecutions, see "Criminal Law," § 22.

Necessity for purpose of review, see "Appeal and Error," §§ 3, 8.

Taking exceptions at trial, see "Criminal Law," §§ 12-16.

§ 1. Nature, form, and contents in general.

A transcript of the evidence in a case, approved by the court as a bill of exceptions, ordered filed, and deposited with the clerk in due time, was a sufficient bill of exceptions.—*Young v. Gaut* (Ark.) 372.

§ 2. Settlement, signing, and filing.

The omission of the filing mark *held* not proof that a bill of exceptions was not filed.—*Young v. Gaut* (Ark.) 372.

EXCESSIVE DAMAGES.

See "Carriers," §§ 3-5; "Damages," § 4.

Ejection of passenger, see "Carriers," § 5.

EXECUTION.

See "Attachment"; "Garnishment."

Action against executor, see "Executors and Administrators," § 6.

Exemptions, see "Homestead."

§ 1. Lien, levy or extent, and custody of property.

Omission of fixtures from the notice of levy on a partner's interest in a stock of fixtures or merchandise *held* not to affect the validity of the levy as to the other property seized.—*Jones v. Meyer Bros. Drug Co.* (Tex. Civ. App.) 553.

§ 2. Claims by third persons.

A claimant who seeks to discharge a judgment against him on a trial of right of property by returning the property as required by his bond must return it in as good condition as he received it.—*Parlin & Orendorff Co. v. Coffey* (Tex. Civ. App.) 512.

A charge concerning the condition of property at the time a claimant in a trial of right of property offered to return it in discharge of the judgment against him *held* not to impose a greater liability than the law allowed.—*Parlin & Orendorff Co. v. Coffey* (Tex. Civ. App.) 512.

§ 3. Sale.

Where a married woman was not served with process, and her land was sold and a sheriff's deed executed, and the purchaser brought partition against the married woman's co-tenants, she was entitled to a cancellation of the deed and to an accounting.—*Smoot v. Judd* (Mo.) 854.

Where a judgment creditor purchased land of the debtor at the execution sale, and the land was afterwards sold on execution against such judgment creditor, and the first judgment was thereafter reversed on writ of error, the title of the second purchaser was thereby extinguished.—*Cordray v. Neuhaus* (Tex. Civ. App.) 415.

Judgment debtor *held* not estopped to dispute the validity of a judgment by confession, where the judgment was confessed by her attorney for a larger amount than was authorized.—*Cordray v. Neuhaus* (Tex. Civ. App.) 415.

The county court has jurisdiction of a motion to set aside an incomplete sale of lands under an execution on a judgment of such court.—*State Nat. Bank v. Hathaway* (Tex. Civ. App.) 525.

In an action by the purchaser at an execution sale against the interest of a partner, to

recover such interest, recovery is not limited to the goods bought at the sale and actually in stock at the time of trial, but the plaintiff is entitled to compensation for the property disposed of intervening the sale and trial, as for a conversion.—*Jones v. Meyer Bros. Drug Co.* (Tex. Civ. App.) 553.

§ 4. Return.

Under Rev. St. art. 2352, *held*, that the return on an execution against the interest of a partner in firm property is not insufficient for failure to show the manner in which the levy was made.—*Jones v. Meyer Bros. Drug Co.* (Tex. Civ. App.) 553.

EXECUTORS AND ADMINISTRATORS.

See "Descent and Distribution"; "Wills."

Necessity of bond on appeal by executor, see "Appeal and Error," § 5.

Testimony as to transactions with decedents, see "Witnesses," § 2.

§ 1. Appointment, qualification, and tenure.

In an action by the public administrator to recover personalty received by one of the heirs, *held*, that the defense of no debts and the rightful assignment of the property to the defendant was not a collateral attack on the judgment of the probate court directing plaintiff to take charge of the estate.—*Richardson v. Cole* (Mo.) 182.

Power of the probate court to compel a succeeding administrator to account for property in his hands *held* not defeated by the fact that there were no debts when he was appointed.—*Francisco v. Wingfield* (Mo.) 842.

Under Shannon's Code, § 3030, it was error to revoke the appointment of an administrator, made at the instance of a creditor, after an unexplained delay of five years by the widow or heirs in making their application.—*Rodes v. Boyers* (Tenn. Sup.) 776.

§ 2. Collection and management of estate.

A succeeding administrator *held* liable, under Rev. St. 1889, §§ 47, 48, to account for real estate belonging to testator and directed to be sold by the will of the latter.—*Francisco v. Wingfield* (Mo.) 842.

Where a will positively directs the executor to sell testator's realty, the power passes to a succeeding administrator on the removal or resignation of the executor named in the will.—*Francisco v. Wingfield* (Mo.) 842.

Where land was conveyed to a grantee, described as executor of an estate, and pursuant to order of the probate court he sold the land as property of the estate, it will be presumed that the conveyance was for the benefit of the estate, and that no title to or interest in the land descended to the executor's heirs.—*Coleman v. Florey* (Tex. Civ. App.) 412.

§ 3. Allowances to surviving wife, husband, or children.

Where deceased left three children and no widow, and an estate worth less than \$800, only the minor children were entitled to the exemption of \$300 allowed by Sand. & H. Dig. §§ 3, 4.—*Quattlebaum v. Triplett* (Ark.) 162.

§ 4. Allowance and payment of claims.

Distributees guilty of great laches in asserting their claim against a solvent administrator in his lifetime must produce clear proof of their claim when presented against his estate.—*Kernell v. Crutcher* (Tenn. Ch. App.) 1045.

§ 5. Sales and conveyances under order of court.

Where there were unappropriated assets in the hands of the administrator sufficient to discharge complainant's judgment, complainant

held not entitled to an order for the sale of the intestate's realty.—*Callender v. Turpin* (Tenn. Ch. App.) 1057.

§ 6. Actions.

A claim filed by distributees against the estate of a deceased administrator *held* not sufficiently proven, in view of their laches in asserting such claim during his lifetime.—*Kernell v. Crutcher* (Tenn. Ch. App.) 1045.

Where a widow answered, in a suit to subject land to debts, that it was a homestead, and asked for removal of the lien as a cloud on her title, notwithstanding that plaintiffs had not sought to establish their lien, they were entitled to resist the claim of homestead.—*George v. Ryon* (Tex. Civ. App.) 138.

Where suit was brought to establish a note as a claim against the estate of the deceased maker, the claim having been rejected by the administrator, *held* not necessary to make the heirs parties, even though the plaintiff had sought to establish the lien given by a trust deed on land securing the note.—*George v. Ryon* (Tex. Civ. App.) 138.

Where suit was brought to establish a note as a claim against the estate of the deceased maker, the note having been given for money to be used in payment of a judgment against the maker, *held* not necessary for plaintiff to show that the judgment had not been paid; there being no evidence connecting them with the judgment.—*George v. Ryon* (Tex. Civ. App.) 138.

In a suit to establish a note as a claim against the estate of the deceased maker, evidence *held* to justify a judgment in favor of plaintiff.—*George v. Ryon* (Tex. Civ. App.) 138.

A judgment in a suit to fix defendant's liability as executor and legatee under a will does not authorize execution for the sale of any property other than that received by defendant from the testator's estate.—*Texas Savings-Loan Ass'n v. Banker* (Tex. Civ. App.) 724.

§ 7. Accounting and settlement.

Where a claim not properly proved was paid by an administrator, but the amount was afterwards repaid to and accounted for by him, and the item appeared on both sides of the account, the court properly refused to again charge the administrator with the amount.—*Hatfield v. Steele* (Ky.) 999.

Under Rev. St. 1889, §§ 47, 48, the county court has jurisdiction, on the application of a succeeding administrator, to force the public administrator, who took charge of the estate on the removal of the executor thereof, to make a final accounting.—*Francisco v. Wingfield* (Mo.) 842.

An accounting by an executor *held* not a final accounting, terminating the administration of the estate.—*Francisco v. Wingfield* (Mo.) 842.

§ 8. Foreign and ancillary administration.

To authorize a nonresident executor to sue upon a debt contracted after the death of the testator, he need not execute bond as required by Ky. St. §§ 3878, 3879.—*Steidler v. Helenbush's Ex'rs* (Ky.) 701.

EXEMPTIONS.

See "Homestead."

Of bankrupt, see "Bankruptcy," § 2.

EXPERT TESTIMONY.

In civil actions, see "Evidence," § 10.
In criminal prosecutions, see "Criminal Law," § 9.

FACTORS.

See "Brokers"; "Principal and Agent."

FALSE IMPRISONMENT.

See "Malicious Prosecution."

FALSE SWEARING.

See "Perjury."

FEDERAL COURTS.

See "Courts," § 4.

FEEES.

Of attorney, see "Attorney and Client," § 1.

FELLOW SERVANTS.

See "Master and Servant," §§ 3-7.

FILING.

Bill of exceptions, see "Exceptions, Bill of," § 2.

Criminal information or complaint, see "Indictment and Information," § 1.

FINDINGS.

Review on appeal or writ of error, see "Appeal and Error," § 15.

FINES.

For usury, see "Usury," § 2.

Under Cr. Code Prac. § 301, a capias pro fine may be issued upon a judgment for a fine rendered in a penal action.—*Harp v. Commonwealth* (Ky.) 467.

FIRES.

See "Arson."

Caused by operation of railroad, see "Railroads," §§ 2-4.

Liability of city for fires, see "Municipal Corporations," § 10.

FOOD.

Act May 11, 1890, prohibiting sale of alum baking powders, held within the police power.—*State v. Layton* (Mo.) 171.

FORCIBLE DEFILEMENT.

See "Rape."

FORCIBLE ENTRY AND DETAINER.

§ 1. Civil liability:

To entitle one to maintain a proceeding of forcible entry, it is sufficient that the entry was within his boundary, though not within his inclosure.—*Howard v. Whitaker* (Ky.) 355.

FORECLOSURE.

Of mortgage, see "Chattel Mortgages," § 4; "Mortgages," § 6.

FOREIGN ADMINISTRATION.

See "Executors and Administrators," § 8.

FOREIGN CORPORATIONS.

See "Corporations," § 6.

Foreign insurance companies, see "Insurance," § 1.

FOREIGN JUDGMENTS.

See "Judgment," §§ 8, 10.

FORFEITURES.

Of dower, see "Dower," § 1.

Of insurance, see "Insurance," § 4.

Of lands purchased from state, see "Public Lands," § 1½.

Waiver of forfeiture of insurance policy, see "Insurance," § 5.

FORGERY.

Neither under the common law nor under Ky. St. § 1188, can a man be punished for publishing a writing, to which the name of a woman has been forged, purporting to be an invitation to him to come to her house at night for a private conversation.—*Colson v. Commonwealth* (Ky.) 46.

An indictment for forging a receipt is defective which contains no explanatory averment showing that the receipt discharged some obligation outside of the receipt itself.—*Black v. State* (Tex. Cr. App.) 478.

FORMER ADJUDICATION.

See "Judgment," § 7.

FORMER JEOPARDY.

Bar to prosecution, see "Criminal Law," § 2.

FORMS OF ACTION.

See "Action," § 1; "Ejectment."

FRAUD.

See "Assignments for Benefit of Creditors," § 1; "Brokers," § 2; "Fraudulent Conveyances."

Action by married woman, see "Husband and Wife," § 8.

Ground for vacating judgment, see "Judgments," § 8.

Liability to contribute for fraud, see "Contribution."

§ 1. Deception constituting fraud, and liability therefor.

Where the purchaser of land represented to the vendor, his sister, who lived in another state, that it had upon it no timber of any value, when in fact there were upon the land more than 200 poplar trees which he had already contracted to sell at \$5 per tree, the vendor is entitled to recover damages for the deceit.—*Akers v. Martin* (Ky.) 465.

FRAUDS, STATUTE OF.

§ 1. Agreements not to be performed within one year.

A parol contract extending for five years the time of payment of a note held within statute.—*Morgan v. Wickliffe* (Ky.) 13.

A contract to provide for another by will is not within the statute of frauds, as the event upon which it depends may happen within a year.—*Story v. Story* (Ky.) 279.

§ 2. Real property, and estates and interests therein.

Where an owner of land agreed in parol to trade it to defendant, possession taken by de-

fendant without the owner's consent *held* not a sufficient part performance to take the contract out of the statute of frauds.—Cockrell v. McIntyre (Mo.) 648.

§ 3. Requisites and sufficiency of writing.

Under Rev. St. 1889, § 5186, a note stating that the owner was not able to meet defendant, but that W. would attend to the matter for him, *held* not sufficient to take a parol contract consummated by W. trading the owner's land to defendant out of the statute of frauds.—Cockrell v. McIntyre (Mo.) 648.

§ 4. Operation and effect of statute.

Where a written contract for the sale of personality is modified as to the manner of payment by parol, and remains executory, the contract being one required by the statute of frauds to be in writing, a modification is unenforceable.—Warren v. A. B. Mayer Mfg. Co. (Mo.) 644.

A vendor who repudiates a parol contract for the sale of land as a nullity under the statute of frauds is bound to refund the purchase money paid to him by the vendee on the faith of the contract.—Love v. Burton (Tenn. Ch. App.) 91.

§ 5. Pleading, evidence, trial, and review.

A contract not alleged to be in writing must be *held* to be by parol.—Morgan v. Wickliffe (Ky.) 13.

FRAUDULENT CONVEYANCES.

Conveyances in fraud of wife, see "Husband and Wife," § 1.

§ 1. Transfers and transactions invalid.

Where property conveyed to the wife was paid for by the husband, it is subject to the payment of his debts; the evidence not being sufficient to show that the relation of creditor and debtor existed between them.—Dickinson v. Johnson (Ky.) 267.

In an action to have a warranty deed declared a mortgage in conformity to the intention of the parties, a contention that the deed was executed in fraud of creditors *held* without merit, since a homestead is not subject to the claims of creditors.—Chance v. Jennings (Mo.) 177.

Where an insolvent debtor conveys real estate worth \$6,000 to a creditor in consideration of the payment and assumption by the latter of debts aggregating \$6,413, the conveyance is not rendered fraudulent by the fact that it recites a consideration of \$6,750.—Wall v. Beedy (Mo.) 864.

The failure of the grantee of an insolvent debtor to record a conveyance for nine days *held* not sufficient to show that it was fraudulent.—Wall v. Beedy (Mo.) 864.

A conveyance of real estate by an insolvent debtor to a creditor is not rendered fraudulent by the fact that the vendor remains in possession of the premises as a tenant of the vendee.—Wall v. Beedy (Mo.) 864.

A conveyance by an insolvent debtor to a creditor of real estate of a less value than the indebtedness owing such creditor is not fraudulent as to other creditors, though the creditor knew of the fraudulent intent of the grantor.—Wall v. Beedy (Mo.) 864.

The validity of a trust deed which referred to a former mortgage, containing fraudulent reservations, *held* not to have been affected by the invalidity of the mortgage, though the debt secured by the mortgage was made a preferred debt in the deed.—Robinson v. Baugh (Tenn. Ch. App.) 98.

A mortgage of a stock of goods and real estate, which reserved to the mortgagor the right

to sell the goods at retail, *held* wholly void as to creditors.—Robinson v. Baugh (Tenn. Ch. App.) 98.

A chattel mortgage, given in connection with a secret agreement to keep its existence a secret for the purpose of protecting the mortgagor's credit, is fraudulent as to creditors.—Moore v. Wood (Tenn. Ch. App.) 1063.

A deed of gift by an insolvent to his wife, fraudulent as to his creditors, is not fraudulent as to a subsequent creditor, unless made with a view of contracting the subsequent debt and intent to defraud such creditor.—O'Neal v. Clymer (Tex. Civ. App.) 545.

Where A. loans B. money to buy property, and the purchase is made for B., though title is taken in A.'s name for the purpose of protecting the property from B.'s creditors, the property belongs to B., and is subject to his debts.—Jones v. Meyer Bros. Drug Co. (Tex. Civ. App.) 553.

§ 2. Remedies of creditors and purchasers.

Declarations by an alleged fraudulent vendor after the conveyance of the property are not admissible in the first instance to prove a conspiracy between the vendor and the vendee to defraud the creditors of the former.—Wall v. Beedy (Mo.) 864.

Assessment list, taxing real estate in the name of an insolvent debtor, who had conveyed the same to a creditor, *held* not to show that the property belongs to the vendor, when considered in connection with other evidence.—Wall v. Beedy (Mo.) 864.

The burden of showing that a conveyance of real estate by an insolvent debtor to a creditor is fraudulent *held* to be on the person attacking the conveyance, though the grantee is shown to have had knowledge of the grantor's intention.—Wall v. Beedy (Mo.) 864.

The laches of a creditor *held* a defense to an action to set aside a fraudulent conveyance of property by the debtor.—Wall v. Beedy (Mo.) 864.

Where a bill to reach notes of a judgment debtor was amended, alleging that the notes were transferred subsequent to filing the original bill to defraud complainant, and making the transferee a party, the burden of proof is on complainant.—Maury Nat. Bank v. McAdams (Tenn. Sup.) 773.

A suit by judgment creditors, more than four years after recovery of their judgments, to have lands previously conveyed to his daughter declared the property of the debtor, is barred by Rev. St. art. 3358.—Gans v. Marx (Tex. Civ. App.) 527.

A warranty deed of land from a husband to his wife cannot be adjudged to be a conveyance in trust for his benefit, at the suit of a subsequent creditor, unless it is clearly shown that the terms of the deed do not express the real transaction and that the wife accepted the conveyance as in trust.—O'Neal v. Clymer (Tex. Civ. App.) 545.

The rendering for taxation by a husband in his own name of land which he had conveyed to his wife is not evidence against his wife that the conveyance was in trust for his benefit.—O'Neal v. Clymer (Tex. Civ. App.) 545.

The management and control by a husband of land which he had conveyed to his wife by a warranty deed is not evidence against her that the conveyance was in trust for his benefit.—O'Neal v. Clymer (Tex. Civ. App.) 545.

Where a debtor has conveyed land to his wife in trust for himself, she may be joined as defendant in an action to collect a debt due from him, in which the land has been attached,

to determine her rights in the land.—O'Neal v. Clymer (Tex. Civ. App.) 545.

On question whether A. was the real purchaser of property, or whether B. was the purchaser and it was taken in A.'s name to protect it from B.'s creditors, evidence that B., though insolvent, had some money, was admissible.—Jones v. Meyer Bros. Drug Co. (Tex. Civ. App.) 553.

On the question whether A. was the real purchaser of property, or whether B. was the purchaser and it was taken in A.'s name to protect it from B.'s creditors, evidence as to A.'s financial condition, and statements made by him in relation thereto, *held* competent.—Jones v. Meyer Bros. Drug Co. (Tex. Civ. App.) 553.

On the question whether A. was the real purchaser of property, or whether B. was the purchaser and it was taken in A.'s name to protect it from B.'s creditors, evidence as to B.'s failure in business and insolvency is admissible.—Jones v. Meyer Bros. Drug Co. (Tex. Civ. App.) 553.

GAMING.

§ 1. Gambling contracts and transactions.

At common law a contract legitimate on its face cannot be declared void, as a wagering contract, on proof that only one of the parties meant it to be such.—A. G. Edwards Brokerage Co. v. Stevenson (Mo.) 617.

§ 2. Criminal responsibility.

Facts *held* not sufficient to support a conviction for card playing in a public place.—Green v. State (Tex. Cr. App.) 481.

GARNISHMENT.

See "Attachment."

§ 1. Proceedings to support or enforce.

A garnishee *held* entitled under the evidence to an allowance of attorney's fees on the rendition of judgment in his favor.—Fife v. Netherlands Fire Ins. Co. (Tex. Civ. App.) 160.

GIFTS.

§ 1. Inter vivos.

Where the suit was on notes which the plaintiff claimed had been given her by her deceased mother, *held* proper to allow her to testify that she had been claiming and holding them as her own since a time when her mother visited her.—Mason v. Willhite (Tenn. Ch. App.) 298; Same v. Cooper, Id.

In action on notes claimed by plaintiff to have been given her by her mother, evidence *held* sufficient to establish a gift.—Mason v. Willhite (Tenn. Ch. App.) 298; Same v. Cooper, Id.

GOOD FAITH.

Of party asking equitable relief, see "Specific Performance," § 2.

Of purchaser, see "Vendor and Purchaser," § 4.

GRAND JURY.

See "Indictment and Information."

Under the constitutional provision that a grand jury shall consist of 12 jurors, one convicted under an indictment found by 13 will be released on habeas corpus.—Ex parte Ogle (Tex. Cr. App.) 122.

GRANTS.

Of public lands, see "Public Lands."

GUARANTY.

See "Principal and Surety."

GUARDIAN AND WARD.

§ 1. Appointment, qualification, and tenure of guardian.

Where the pleadings in a case commenced in 1900 showed that a ward was 14 years old in 1880, when a guardian was appointed for him for the sole purpose of selling realty, it was error to hold that the guardianship had not been closed, though no record of such termination appeared.—Lynch v. Munson (Tex. Civ. App.) 140.

HABEAS CORPUS.

§ 1. Nature and grounds of remedy.

A person arrested for pursuing the occupation of a barber without a license, in violation of Rev. St. 1890, c. 78, may contest the constitutionality of the law by habeas corpus.—Ex parte Lucas (Mo.) 218.

§ 2. Jurisdiction, proceedings, and relief.

Where relator in habeas corpus proceedings for release on bail in his application relied only on the illegality of his restraint, and it was not framed so as to submit the question of excessiveness of bail, such question cannot be passed on on appeal from the order fixing bail.—Ex parte Bishop (Tex. Cr. App.) 308.

On appeal from an order fixing bail in habeas corpus proceedings for release on bail by one indicted for burglary, the appellate court has no authority to discharge relator under Code Cr. Proc. art. 194.—Ex parte Bishop (Tex. Cr. App.) 308.

In habeas corpus proceedings for release on bail, admission of improper evidence is not reversible error.—Ex parte Qualls (Tex. Cr. App.) 392.

HARMLESS ERROR.

See "Criminal Law," § 23.

In civil actions, see "Appeal and Error," § 17. In criminal prosecutions, see "Homicide," § 8.

HEALTH.

See "Food."

§ 1. Boards of health and sanitary officers.

The appointment of a physician as county health officer, in absence of regularly elected health officer, owing to threatened epidemic of dangerous disease, *held* to have been unauthorized.—Allen v. Dekalb County (Tenn. Ch. App.) 201.

Under Acts 1885, c. 95, § 5, a county health officer *held* not bound by amount of compensation allowed him by county court for taking charge of a smallpox patient and establishing a quarantine.—Allen v. Dekalb County (Tenn. Ch. App.) 201.

Where a physician agreed with his partner, who was county health officer, that in absence of the latter he would attend to the county business, such agreement would not prevent him from recovering compensation for services to a smallpox patient performed at request of board of health, in excess of amount allowed by county court under Acts 1885, c. 95, § 1.—Allen v. Dekalb County (Tenn. Ch. App.) 201.

Under Acts 1885, c. 95, §§ 1, 2, the board of health, in the absence of the county health officer, *held* to have had authority to bind the county for reasonable compensation of physician employed by them to take charge of a smallpox patient and prevent the spread of the

disease.—*Allen v. Dekalb County* (Tenn. Ch. App.) 291.

Where, in the absence of county health officer, board of health employed a physician to take charge of a smallpox patient and establish a quarantine, evidence *held* to show that \$500 was not unreasonable compensation for his services.—*Allen v. Dekalb County* (Tenn. Ch. App.) 291.

Where the county board of health, suspecting that a case of smallpox existed in the county, in the absence of the county health officer employed a physician to take charge of the patient and prevent the spread of the disease, that the compensation he was to receive was not agreed on *held* no defense to an action for reasonable compensation.—*Allen v. Dekalb County* (Tenn. Ch. App.) 291.

HEARING.

In probate proceedings, see "Wills," § 4.

HEARSAY.

In criminal prosecutions, see "Criminal Law," § 7.

HEIRS.

See "Descent and Distribution."

Right of adopted child under conveyance to bodily heirs, see "Adoption."

HIGHWAYS.

See "Municipal Corporations," §§ 9, 10; "Turnpikes and Toll Roads."

Accidents at railroad crossings, see "Railroads," § 3.

§ 1. Establishment, alteration, and discontinuance.

Facts *held* insufficient to show that a road was a public highway by prescription.—*Whitesides v. Earles* (Tenn. Ch. App.) 1038.

An arbitration establishing mutual rights of landowners to pass over each other's lands by a certain road thereon did not tend to show that such road was a public highway.—*Whitesides v. Earles* (Tenn. Ch. App.) 1038.

Where a jury of view appointed to open a road never reported, such road *held* not made a public highway by order of court.—*Whitesides v. Earles* (Tenn. Ch. App.) 1038.

HOMESTEAD.

§ 1. Nature, acquisition, and extent.

Under Const. art. 9, § 3, a homestead is not exempt from sale on execution to satisfy a note given as part of the price to a third person to satisfy a debt of the seller.—*Brown v. Ennis* (Ark.) 379.

A lot first occupied as a homestead after rendition of a judgment was subject to sale on an execution issued on such judgment after such occupation, but before expiration of the judgment lien.—*Burgauer v. Parker* (Ark.) 381.

Where plaintiff and defendant purchased two tracts of land jointly at different times, defendant was entitled to a homestead in his share of the tract first purchased, as against the amount due by him on account of payments made by plaintiff on the second purchase.—*Crenshaw v. Crenshaw* (Ky.) 366.

The intention of a householder and his wife to move onto a farm owned by them when they were able to build thereon was not sufficient to impress the farm with the character of a homestead.—*George v. Ryon* (Tex. Civ. App.) 138.

Under Const. art. 16, § 51, lots owned and farmed by one residing in the town *held* not capable of being regarded as a homestead.—*George v. Ryon* (Tex. Civ. App.) 138.

Where parties traded their home in town for a farm, intending to use it as a homestead, and never abandoned such intention, they may restrain a sale thereof under execution.—*Rutherford v. Cox* (Tex. Civ. App.) 527.

§ 2. Transfer or incumbrance.

An ante mortem conveyance by a husband of his homestead to defeat his wife of her dower right is void under Rev. St. 1899, § 3616.—*Newton v. Newton* (Mo.) 861.

In an action of trespass to try title, an instruction that if plaintiffs knew, before he became indebted to them, that defendant's conveyance of his homestead was fictitious, they could not recover, *held* properly given.—*Schneider v. Sanders* (Tex. Civ. App.) 727.

§ 3. Rights of surviving husband, wife, children, or heirs.

Where a widow sells a deceased husband's homestead and removes therefrom, the purchaser acquires only the widow's dower interest.—*Bryant v. Bennett* (Ky.) 1004.

Under Rev. St. 1880, § 5439, a widow has a vested estate in her husband's homestead to the value of \$1,500 from the time of his death.—*Wilson v. Johnson* (Mo.) 189.

A valuation of a widow's interest in the homestead of her deceased husband at the same sum as the appraised value of the land *held* not so unreasonable as to justify setting aside the judgment awarding her homestead and dower.—*Gore v. Riley* (Mo.) 837.

Under Rev. St. 1889, § 5440, the estimate of the value of a widow's interest in the homestead of her deceased husband should not be reduced because there are minor children who may occupy with her until their majority.—*Gore v. Riley* (Mo.) 837.

Under Rev. St. 1889, § 5439, the widow and children of a decedent are not each entitled to a certain or definite part of the homestead as tenants in common, but take interests therein jointly or as joint tenants.—*Gore v. Riley* (Mo.) 837.

The provision of Const. art. 16, § 52, that in a controversy between the heirs and the surviving husband or wife the homestead cannot be partitioned during the life of the survivor, has no application when a third party asserts rights in the homestead as a purchaser under a trust deed executed by the husband after his wife's death.—*Lee v. British & American Mortg. Co.* (Tex. Civ. App.) 134.

A surviving husband having power to create a valid lien on his interest in the homestead by a deed of trust, a purchaser under such deed will acquire the right to the use and possession thereof.—*Lee v. British & American Mortg. Co.* (Tex. Civ. App.) 134.

A surviving husband is not entitled, as against the surviving children, to absolute title to the homestead and other exempt property because of his having paid community debts from the proceeds of a policy issued during the marriage on the life of the wife in his favor.—*Martin v. McAllister* (Tex. Civ. App.) 522.

§ 4. Abandonment, waiver, or forfeiture.

The owner of land *held* not to lose his homestead right by a conveyance which was in fact a mortgage.—*Worley v. Hicks* (Mo.) 818.

Conceding that a deed given as security for a debt passed title, it was a defeasible one, and did not render the land subject to sale under execution; the land being the grantor's homestead.—*Worley v. Hicks* (Mo.) 818.

§ 5. Protection and enforcement of rights.

Where intervenors in an action of trespass to try title are entitled to judgment if defendant's debt to plaintiff is paid, a charge withdrawing such issue from the jury was properly refused.—*Schneider v. Sanders* (Tex. Civ. App.) 727.

HOMICIDE.

§ 1. Murder.

If, without any conspiracy, accused advised and counseled the killing of members of the legislature, and in pursuance of such advice and counsel, and induced thereby, the killing of deceased was done, the accused was guilty of murder; and the requirement that the jury should first believe there was a conspiracy to bring armed men to the capital for the purpose of doing an unlawful or criminal act, before they could convict because of such counsel and advice, is objectionable, as tending to confuse the jury, whether or not it is reversible error.—*Powers v. Commonwealth* (Ky.) 735.

Where one of several persons who have conspired to do some other unlawful act commits a murder, his co-conspirators are not criminally responsible as accessories before the fact, unless the murder was committed in furtherance of the conspiracy and was the necessary or probable result of its execution.—*Powers v. Commonwealth* (Ky.) 735.

It was proper to instruct the jury that they might convict if they believed the defendant on trial fired the shot, or if they believed that one of the other defendants fired the shot, and that he was acting with them, or any one of them, and did aid and abet such shooting.—*Howard v. Commonwealth* (Ky.) 756.

Where an officer, having knowledge of a past felony and of the one who committed it, arrests the offender without process, the killing of the officer by the prisoner while resisting arrest is murder in the first degree.—*State v. Evans* (Mo.) 500.

Where an officer arrested a person for a felony without process on a reasonable suspicion, the killing of the officer by the prisoner while attempting to escape is murder in the first degree, though no felony has been committed.—*State v. Evans* (Mo.) 590.

Rev. St. 1899, §§ 5784, 5788, do not limit the authority of policemen at common law to make arrests without process for crimes against the state; and if a police officer has reasonable cause to suspect that a person apprehended for a felony is guilty, and the prisoner kills the officer in his attempt to escape, such killing is murder.—*State v. Evans* (Mo.) 590.

A person arrested without process by policemen who are clothed in uniform cannot justify the killing of one of them on the ground that he had no notice of their official character.—*State v. Evans* (Mo.) 590.

A person, apprehended for a past felony on a fresh pursuit, cannot justify the killing of the officer making the arrest on the ground that he had no notice of the charge against him.—*State v. Evans* (Mo.) 590.

Where defendant, after shooting and wounding a brother of the deceased, shot and killed the deceased, it was error, on the trial for killing, to make an instruction depend on the guilt or intent in the difficulty in which the brother was wounded.—*Norris v. State* (Tex. Cr. App.) 493.

The fact that morphine and chloral, when administered in small doses, are not poisonous, and were only given for the purpose of robbery, held not to prevent the killing from constituting murder in the first degree.—*Rupe v. State* (Tex. Cr. App.) 929.

Under Pen. Code, arts. 647-649, 711, killing by poison by administering morphine and chloral, for the purpose of robbery, held to constitute murder in the first degree.—*Rupe v. State* (Tex. Cr. App.) 929.

§ 2. Manslaughter.

Charge on manslaughter considered, and held correct.—*Norris v. State* (Tex. Cr. App.) 493.

Where a challenge and acceptance to fight is without intent to kill, and death ensues, the offense is not greater than manslaughter; but, if killing was intended, it could be murder.—*Stringfellow v. State* (Tex. Cr. App.) 719.

§ 3. Assault with intent to kill.

Drunkenness not amounting to insanity is no defense in a prosecution for assault with intent to murder.—*Little v. State* (Tex. Cr. App.) 483.

Under Pen. Code, art. 41, instructions on defendant's state of mind produced by intoxication held properly refused in a prosecution for assault with intent to murder.—*Little v. State* (Tex. Cr. App.) 483.

§ 4. Excusable or justifiable homicide.

That previous threats of violence may justify defendant in killing deceased, he must have good reason to believe that deceased was about to do him great bodily harm.—*State v. Westlake* (Mo.) 243.

Where difficulty between defendant, deceased, and his brother ended in defendant's killing deceased, it was not error to refuse to instruct that, if it reasonably appeared to defendant that he was in danger of death or serious bodily harm from deceased "or his brother," he had the right to kill deceased.—*Norris v. State* (Tex. Cr. App.) 493.

If deceased was present during the difficulty between defendant and a brother of deceased, but was not participating therein, but, after defendant shot the brother in self-defense, deceased made an attack on defendant, threatening serious bodily harm, defendant had the right to kill deceased.—*Norris v. State* (Tex. Cr. App.) 493.

An instruction as to self-defense, which required an actual presentation of a pistol before defendant could act, held erroneous.—*Graham v. State* (Tex. Cr. App.) 714.

An instruction as to self-defense, which required an actual assault before defendant could act, held erroneous.—*Graham v. State* (Tex. Cr. App.) 714.

§ 5. Indictment and information.

An indictment is good, though a particular word or phrase may be ambiguous or obscure, if there is no doubt as to the charge intended.—*Powers v. Commonwealth* (Ky.) 735.

An indictment for murder which charges that one of the several defendants named therein, or some person acting with them whose name is unknown to the grand jury, fired the shot, and that the other defendants were present, aiding and abetting the shooting, but that which one fired the shot and which aided and abetted the shooting is unknown to the grand jury, is good.—*Howard v. Commonwealth* (Ky.) 756.

§ 6. Evidence.

On a prosecution for murder, where the defense was justifiable homicide, it was error for the court to exclude evidence of threats and former assaults made by deceased on the defendant.—*Bell v. State* (Ark.) 918.

The statement of deceased that his wound would kill him, made in connection with a declaration as to the circumstances of the shooting, does not show such a sense of impending death as to make his declaration admissible as a dying declaration.—*Barnes v. Commonwealth* (Ky.) 733.

Evidence *held* sufficient to sustain a conviction for murder in the second degree.—*State v. Holloway* (Mo.) 600.

Evidence *held* sufficient to support a conviction for murder in the second degree.—*State v. Haines* (Mo.) 621.

Evidence in a prosecution for murder considered, and *held* to sustain a conviction of murder in the second degree.—*State v. Robinson* (Tenn. Sup.) 65.

Under plea of self-defense, *held* error to exclude evidence that deceased knew of his own knowledge that deceased carried deadly weapons.—*Glenewinkel v. State* (Tex. Cr. App.) 123.

Under a plea of self-defense, *held* error to exclude evidence that deceased had the general reputation of habitually carrying deadly weapons.—*Glenewinkel v. State* (Tex. Cr. App.) 123.

Under a plea of self-defense based on threats and previous difficulties, *held* error to exclude evidence of a difficulty between defendant and deceased, in which the latter was the aggressor, though not a part of the *res gestæ*.—*Glenewinkel v. State* (Tex. Cr. App.) 123.

Under a plea of self-defense, *held* error to exclude defendant's offer to prove by himself the general bad reputation of deceased and that it was known to him, made to explain why he went to a saloon where the killing took place, and where a former difficulty occurred, to get a neighbor to go home with him as a protection against an anticipated assault.—*Glenewinkel v. State* (Tex. Cr. App.) 123.

In view of the evidence, *held*, that a conviction of murder in the second degree could not be reversed, though there was evidence which strongly tended to reduce the killing to manslaughter.—*Kennard v. State* (Tex. Cr. App.) 131.

Evidence *held* to justify a verdict of murder in the second degree.—*Spangler v. State* (Tex. Cr. App.) 314.

Where, on a prosecution for murder, it appeared that there had been a quarrel relative to certain land, and that the quarrel had been taken up by deceased and accused, evidence that the latter had stated that they would win the land by law or by bullets was admissible.—*De la Garza v. State* (Tex. Cr. App.) 484.

On trial for murder, the killing having been done with a pistol, the caliber of which did not appear, it was not error to admit evidence that accused possessed a 44-caliber pistol.—*De la Garza v. State* (Tex. Cr. App.) 484.

Where defendant shot and wounded a brother of deceased immediately before shooting and killing deceased, it was error to instruct that evidence of the wounding of the brother could only be considered to establish the *res gestæ* or defendant's intent.—*Norris v. State* (Tex. Cr. App.) 493.

Evidence showing why deceased's wife did not get married in defendant's house *held* admissible in a murder trial on the question of motive and ill will.—*Villereal v. State* (Tex. Cr. App.) 715.

§ 7. Trial.

Under an indictment for murder, accused is not entitled to an instruction as to manslaughter, where there is no evidence tending to reduce the crime from murder to manslaughter.—*Brown v. Commonwealth* (Ky.) 4.

Upon a trial for murder, the court should instruct the jury that the words "with malice" denote a wrongful act done intentionally without just cause, and that by the term "aforethought" is meant a predetermination to do the act, however sudden or recently formed.—*Jolly v. Commonwealth* (Ky.) 49.

Where the death penalty has been imposed, the court cannot say on appeal that the substantial rights of accused were not prejudiced by instructions omitting a material ground of defense.—*Jolly v. Commonwealth* (Ky.) 49.

Upon a trial for murder, it was not error to instruct the jury that they could acquit on the ground of self-defense only if they believed that defendant believed, and had reasonable grounds for believing, that he had no safe means of "averting" the danger except by shooting deceased.—*Barnes v. Commonwealth* (Ky.) 733.

Instruction as to the effect of conspiracy on the guilt of accused, charged with a murder a result of the conspiracy, though not the original purpose thereof, *held* erroneous.—*Powers v. Commonwealth* (Ky.) 735.

To an instruction directing the jury to find defendant guilty, if they believed deceased was killed pursuant to defendant's "advice, counsel, or encouragement," the words "and said killing was induced thereby," or their equivalent, should be added.—*Powers v. Commonwealth* (Ky.) 735.

An instruction that, if defendant drew a pistol without legal excuse, and deceased seized the pistol and was accidentally killed, defendant was guilty of manslaughter in the fourth degree, *held* not erroneous for not using the words "culpable negligence," as used in Rev. St. 1899, § 1834.—*State v. Haines* (Mo.) 621.

On trial for murder, where the defense was insanity, an instruction as to the effect of insanity on the rights of self-defense *held* improperly refused.—*State v. Wade* (Mo.) 800.

On a trial for murder, where defendant was convicted of murder in the second degree, it was not error to charge that "malice, in its legal sense, denotes a wrongful act done intentionally, without just cause or excuse."—*Spangler v. State* (Tex. Cr. App.) 314.

On a trial for murder, a charge that before defendant can be convicted of manslaughter the jury must find the facts constituting such crime beyond a reasonable doubt is not objectionable, as requiring defendant to establish the defense of manslaughter beyond a reasonable doubt before he could be acquitted of murder.—*Spangler v. State* (Tex. Cr. App.) 314.

On a trial for murder, a charge relating to manslaughter *held* not too restrictive.—*Spangler v. State* (Tex. Cr. App.) 314.

Where defendant admitted shooting and killing deceased, on his trial for murder, a charge as to murder in the second degree *held* not erroneous.—*Spangler v. State* (Tex. Cr. App.) 314.

Where the defendant in a murder trial shot the deceased twice in rapid succession, claiming self-defense, and there was no issue as to one shot being justifiable and the other not, it was not error to refuse a charge based on such hypothesis.—*Spangler v. State* (Tex. Cr. App.) 314.

A charge relating to self-defense *held* not too restrictive.—*Spangler v. State* (Tex. Cr. App.) 314.

A charge on self-defense on a murder trial *held* not erroneous, as failing to instruct that defendant was authorized to use such force as might reasonably appear to him necessary.—*Spangler v. State* (Tex. Cr. App.) 314.

On a trial for murder, failure to charge as to threats in connection with the charge as to self-defense *held* not error under the evidence.—*Spangler v. State* (Tex. Cr. App.) 314.

A failure to charge on manslaughter *held* reversible error.—*Runnells v. State* (Tex. Cr. App.) 479.

Evidence *held* to entitle defendant to a charge on manslaughter.—*Norris v. State* (Tex. Cr. App.) 493.

Where defendant shot and wounded a brother of deceased immediately before shooting and killing deceased, on trial for the killing, it was error to instruct that if the brother had made threats against defendant, and the two showed intent to carry out such threats, and defendant shot the brother in self-defense, he was not guilty; defendant not being on trial for shooting the brother.—*Norris v. State* (Tex. Cr. App.) 493.

Evidence in a prosecution for murder *held* to not present the issue of mutual combat, authorizing its submission to the jury.—*Stringfellow v. State* (Tex. Cr. App.) 719.

An instruction that defendant was not guilty, if the deceased died from the administration of chloral, *held* properly refused under the evidence.—*Rupe v. State* (Tex. Cr. App.) 929.

§ 8. Appeal and error.

Though accused was charged only as an accessory before the fact, the giving of an instruction authorizing the jury to find him guilty, "whether he was present at the shooting or wounding or not," was harmless error, as the jury could not have found him guilty as a principal; all the evidence showing that he was not present at the time of the shooting.—*Powers v. Commonwealth* (Ky.) 735.

An erroneous instruction as to self-defense *held* not reversible error under the evidence in a homicide case.—*State v. Holloway* (Mo.) 600.

An erroneous instruction on murder in the first degree will not be considered on appeal from a conviction for second degree murder.—*State v. Holloway* (Mo.) 600.

Where a defendant was convicted of murder in the second degree, any error in an instruction defining the word "deliberate" was harmless.—*State v. Haines* (Mo.) 621.

After admission of threats by brother of accused, accused not being present, *held* prejudicial error not to instruct that the statement was not evidence unless there was a conspiracy and the threats made in pursuance thereof.—*De la Garza v. State* (Tex. Cr. App.) 484.

HOUSEBREAKING.

See "Burglary."

HUSBAND AND WIFE.

See "Divorce"; "Dower"; "Marriage."

Acknowledgment by married women, see "Acknowledgment," § 1.

Admissions by husband, see "Evidence," § 6.

Adultery, see "Adultery."

Competency as witnesses, see "Witnesses," § 2.

Effect of discharge in bankruptcy on judgment for alimony, see "Bankruptcy," § 2.

Ratification of wife's act by husband, see "Principal and Agent," § 2.

Rights of survivor, see "Descent and Distribution," § 2; "Homestead," § 3.

§ 1. Mutual rights, duties, and liabilities.

Equity will enforce the wife's interest in property conveyed by the husband before his death to defeat her marital rights, though the legal title was not in him.—*Newton v. Newton* (Mo.) 881.

A conveyance by a husband during his last sickness and in contemplation of death, without consideration, to defraud the wife of her marital rights, gives ground for equitable interference.—*Newton v. Newton* (Mo.) 881.

§ 2. Wife's separate estate.

A conveyance in trust for the use of the grantor's wife *held* to create a separate equitable

estate in the wife, a deed of which without the husband's assent passed the fee.—*Cadernatori v. Gauger* (Mo.) 195.

Allegations that creditors, secured by a deed on community property and also separate property of the debtor's wife, permitted the community property to be squandered, *held* to charge laches on their part constituting cause for relief to parties claiming the separate property through a conveyance from the wife.—*Schneider v. Sellers* (Tex. Civ. App.) 541.

Where a married woman seeks to recover her separate estate conveyed because of her defective acknowledgment of the conveyance, she is not required to refund the consideration received as a condition of recovery.—*Silcock v. Baker* (Tex. Civ. App.) 939.

Where a married woman's deed is not acknowledged as required by statute, *held*, that grantee has neither title nor color of title affording protection under the three-year statute of limitations.—*Silcock v. Baker* (Tex. Civ. App.) 939.

Rev. St. arts. 2970, 2971, *held* not to authorize a judgment against a wife's separate estate in an action by an attorney employed by the husband to defend a suit affecting her separate estate.—*Parker v. Wood* (Tex. Civ. App.) 940.

A husband, by purchasing an outstanding title to the wife's property with community property, acquired no interest therein.—*Gebhart v. Gebhart* (Tex. Civ. App.) 964.

In an action for divorce, *held* proper to award land to the wife as her separate property.—*Gebhart v. Gebhart* (Tex. Civ. App.) 964.

§ 3. Actions.

A married woman might, without joining her husband, have maintained an action against a broker for deceit in the sale of real estate to her.—*Kice v. Porter* (Ky.) 266.

Where an action was brought against a married woman before the married woman's act took effect, but the issues were not completed until after that time, it was not error to render a personal judgment, in the absence of a plea that she was under the disability of coverture when debt was contracted.—*Bethel v. Dural* (Ky.) 690.

§ 4. Community property.

Where defendant claimed under an alleged sale by survivor in community to pay community debt, an instruction placing the burden on defendant to show the sale was in good faith *held* erroneous.—*Solomon v. Mowry* (Tex. Civ. App.) 335.

Land deeded to a husband after marriage is presumed to be community property.—*Schneider v. Sellers* (Tex. Civ. App.) 541.

ICE.

Liability of city for injuries from icy sidewalks, see "Municipal Corporations," § 10.

IMPAIRING OBLIGATION OF CONTRACT.

See "Constitutional Law," § 5.

IMPEACHMENT.

Of witness, see "Witnesses," § 4.

IMPLIED CONTRACTS.

See "Contribution"; "Covenants," § 1; "Money Paid."

IMPRISONMENT.

See "Bail."

Habeas corpus, see "Habeas Corpus."

IMPROVEMENTS.

On premises demised, see "Landlord and Tenant," § 2.

Public improvements, see "Municipal Corporations," §§ 5-7.

Right of grantee to improvements on cancellation of deed, see "Cancellation of Instruments," § 2.

INCOMPETENT PERSONS.

See "Insane Persons."

INCORPORATION.

See "Municipal Corporations," § 1.

INDEBTEDNESS.

Of fraudulent grantor, see "Fraudulent Conveyances," § 1.

INDEMNITY.

See "Principal and Surety."

INDEPENDENT CONTRACTORS.

See "Master and Servant," § 3.

INDIANS.

Exemptions of Indian bankrupts, see "Bankruptcy," § 2.

INDICTMENT AND INFORMATION.

See "Grand Jury."

For particular offenses, see "Buggery," § 1; "Forgery"; "Homicide," § 5; "Larceny," § 2; "Perjury," § 1.

—violation of local option law, see "Intoxicating Liquors," § 5.

§ 1. Filing and formal requisites of information or complaint.Proceedings on a substituted information, without a motion by the prosecuting attorney alleging the loss of the information and seeking permission to substitute the same, are irregular and invalid.—*Reed v. State* (Tex. Cr. App.) 825.**§ 2. Requisites and sufficiency of accusation.**Under Ky. St. § 1180, providing that a person convicted the second time of felony shall be confined not less than double the time of the first conviction, and, if convicted a third time of felony, shall be confined for life, to authorize the infliction of the increased penalty it must appear from the indictment that the offense charged was committed subsequent to the former conviction or convictions.—*Brown v. Commonwealth* (Ky.) 4.The complaint and information in a prosecution for false imprisonment held to be so variant as to vitiate the information.—*Hanson v. State* (Tex. Cr. App.) 120.An indictment for larceny held not objectionable for failure to sufficiently describe the stolen property.—*Jasper v. State* (Tex. Cr. App.) 392.

That an indictment charging the theft of hogs in its latter claim charges "with the intent

to appropriate it" does not invalidate the indictment.—*Funderbark v. State* (Tex. Cr. App.) 893.If the person assaulted is once correctly named in the complaint, a misstatement of his name subsequently is no ground for quashal.—*Catlett v. State* (Tex. Cr. App.) 485.**INDORSEMENT.**

Of bill of exchange or promissory note, see "Bills and Notes," § 2.

INFANTS.

See "Adoption"; "Guardian and Ward."

Action for wrongful death, see "Death," § 1.

§ 1. Property and conveyances.Where an infant sells land to another by fraudulently representing that he is of age, he is estopped, upon arriving at age, to disaffirm the deed; and one to whom he has conveyed the land is affected by that estoppel.—*Damron v. Commonwealth* (Ky.) 459.**INFERIOR COURTS.**

See "Courts," § 2.

INFORMATION.

Criminal accusation, see "Indictment and Information."

INHERITANCE.

See "Descent and Distribution."

INJUNCTION.

Enforcement of judgment, see "Judgment," § 3.

Erection of toll gate, see "Turnpikes and Toll Roads," § 2.

§ 1. Nature and grounds in general.As an action lies against a state charitable institution to recover damages from the pollution of a stream upon which plaintiff's land borders, and it must be presumed that the legislature would make provision for the payment of any judgment obtained, the existence of this remedy at law is a sufficient reason for denying an injunction restraining the nuisance.—*Herr v. Central Kentucky Lunatic Asylum* (Ky.) 283.Plaintiffs, who have long slept on their rights, will not be allowed to enjoin a nuisance, especially where the injury from granting the injunction would be out of proportion to that suffered by plaintiffs by the continuance of the nuisance.—*Herr v. Central Kentucky Lunatic Asylum* (Ky.) 283.Several suits to collect taxes against the property of several owners should not be enjoined at the joint suit of such owners on grounds which are available as defenses in such suits.—*McMickle v. Hardin* (Tex. Civ. App.) 322.**§ 2. Actions for injunctions.**A bill to prevent interference with a stock of goods, alleging only that one of the defendants "had greatly intermeddled with the affairs that involved said goods," was properly dismissed as to such defendant.—*Jones v. Stewart* (Tenn. Ch. App.) 108.**§ 3. Liabilities on bonds or undertakings.**

Where a bill to enjoin a suit at law on a note was dismissed, and the injunction dissolved, on demurrer, held that a judgment against

the complainant was properly entered on his injunction bond for the amount of the note, interest, and costs.—*Haynes v. Second Nat. Bank* (Tenn. Sup.) 775.

Where plaintiff applied for an injunction to restrain the collection of a larger amount than was due on a judgment against him, defendant *held* not entitled to a judgment against the sureties on the injunction bond for the amount due.—*Hamburger v. Kosminsky* (Tex. Civ. App.) 958.

IN PAIS.

Estoppel, see "Estoppel," § 1.

INSANE PERSONS.

Imbecility as defense to criminal prosecution, see "Criminal Law," § 1.

Insanity after conviction of crime, see "Criminal Law," § 18.

§ 1. Property and conveyances.

A power of attorney executed by an imbecile is not void, but voidable.—*Williams v. Sapieha* (Tex. Sup.) 115.

In the absence of proof that an imbecile has the money or property acquired with it, or that it has been expended for necessities, he is not required to return it before rescinding a power of attorney and a deed of land pursuant thereto.—*Williams v. Sapieha* (Tex. Sup.) 115.

INSOLVENCY.

See "Assignments for Benefit of Creditors"; "Bankruptcy."

Of corporation, see "Corporations," § 4.

Of fraudulent grantor, see "Fraudulent Conveyances," § 1.

INSTRUCTIONS.

In civil actions, see "Trial," §§ 5-7.

In criminal prosecutions, see "Criminal Law," § 15; "Homicide," § 7.

INSURANCE.

Penalty for failure to pay policies as denial of equal protection of law, see "Constitutional Law," § 7.

§ 1. Control and regulation in general.

Where policy holders mail their renewal premiums to New York, the postal and express authorities were the agents of the policy holders, and not of the insurance company.—*State v. Connecticut Mut. Life Ins. Co.* (Tenn. Sup.) 75.

Where a foreign insurance company ceased issuing new policies in the state before the passage of Acts 1897, c. 2, and Acts 1899, c. 432, it was not liable for the tax imposed by such acts on companies which continue to collect renewal premiums on policies already in force.—*State v. Connecticut Mut. Life Ins. Co.* (Tenn. Sup.) 75.

That a foreign insurance company continued to collect its renewal premiums by mail on the policies in force, after it had withdrawn from the state, *held* not to make it liable for the tax provided by Acts 1897, c. 2, § 5.—*State v. Connecticut Mut. Life Ins. Co.* (Tenn. Sup.) 75.

Acts 1896, c. 160, § 2, concerning the making of insurance contracts, *held* to have no application to a foreign insurance company which had withdrawn from the state, but continued to collect renewal premiums.—*State v. Connecticut Mut. Life Ins. Co.* (Tenn. Sup.) 75.

Under Rev. St. art. 3096, an insurance agent is not personally liable on the contracts of a foreign insurance company for which he is

acting; the company having complied with the laws of the state.—*Hudson v. Compere* (Tex. Sup.) 389.

§ 2. Insurance agents and brokers.

Authority to procure insurance *held* not to confer an implied authority to accept a cancellation of the insurance.—*Martin v. Palgline Ins. Co.* (Tenn. Sup.) 1024.

Where plaintiff requested a friend to secure insurance on certain property, which was done without plaintiff's knowledge, the act of the agent in securing the policy was ratified by plaintiff's bringing a suit thereon; and hence plaintiff was bound by all the provisions of the policy.—*Arnold v. St. Paul Fire & Marine Ins. Co.* (Tenn. Sup.) 1032.

Insured, procuring broker to obtain policy, *held* liable to the broker for the premium paid by him.—*Holmes v. Thomason* (Tex. Civ. App.) 504.

Where a broker, without being applied to, procured a policy on property of insured and paid premiums thereon, he cannot recover the same of the insured.—*Holmes v. Thomason* (Tex. Civ. App.) 504.

A delivery of a policy to the broker or agent appointed by the insured to procure it is a delivery to the latter.—*Holmes v. Thomason* (Tex. Civ. App.) 504.

§ 3. The contract in general.

A provision in the conditions annexed to a life insurance policy that, "except as herein provided," the policy was incontestable, construed to apply only to the conditions in which the provision occurred.—*Union Cent. Life Ins. Co. v. Fox* (Tenn. Sup.) 62.

Where a life policy issued in Texas provides that it shall be governed by the laws of another state, the statutes applicable are considered as part of the written contract.—*New York Life Ins. Co. v. Orlopp* (Tex. Civ. App.) 336.

Where a life policy provides that it shall be governed by the laws of a foreign state, the provisions of a statute applying thereto cannot be waived by the parties.—*New York Life Ins. Co. v. Orlopp* (Tex. Civ. App.) 336.

§ 4. Forfeiture of policy for breach of promissory warranty, covenant, or condition subsequent.

In an action on a policy, a recovery was precluded by the insured subsequently insuring the property without knowledge of the first policy, where he was not diligent in inquiring about the same.—*Arnold v. St. Paul Fire & Marine Ins. Co.* (Tenn. Sup.) 1032.

Legal transfers of insured property *held* to be a complete defense to an action on a policy which provided that it should be void on any change in the title to the property insured.—*Hartford Fire Ins. Co. v. Ransom* (Tex. Civ. App.) 144.

The renewal of a life policy, which provides that it shall be governed by the laws of New York, *held* under Laws N. Y. 1892, c. 690, § 92, not to lapse by the failure of insured to pay the renewal notes when no notice of the time of their maturity was given to insured.—*New York Life Ins. Co. v. Orlopp* (Tex. Civ. App.) 336.

The renewal contract of a lapsed life policy, which provides that it shall be construed by the laws of New York, *held* not to change the policy to a term policy, which would allow it to lapse under Laws N. Y. 1892, c. 690, § 92, without notice of the maturity of the renewal notes.—*New York Life Ins. Co. v. Orlopp* (Tex. Civ. App.) 336.

The furnishing by insured of invoices of goods placed in the insured's store *held* not a substantial compliance with condition of policy

requiring an inventory.—Fire Ass'n of Philadelphia v. Masterson (Tex. Civ. App.) 962.

The fact that it was not customary nor practicable for manager of insured grocery store to receive invoices of farm produce generally held no excuse for failure of insured to comply with condition of policy requiring an inventory.—Fire Ass'n of Philadelphia v. Masterson (Tex. Civ. App.) 962.

§ 5. Estoppel, waiver, or agreements affecting right to avoid or forfeit policy.

Under Rev. St. art. 3093, a soliciting agent of an insurance company, without authority to issue a policy, has not power to waive a warranty in an application, and the company is not bound by his knowledge of the falsity of the statements therein.—Hartford Fire Ins. Co. v. Walker (Tex. Sup.) 711.

A company held not to have waived the breach of a provision in a policy that it should be void on any transfer of the title to the property insured.—Hartford Fire Ins. Co. v. Ransom (Tex. Civ. App.) 144.

Forfeiture of fire policy by reason of breach of condition held to have been waived.—German-American Ins. Co. v. Evans (Tex. Civ. App.) 536.

§ 6. Extent of loss and liability of insurer.

Salvage goods carried with a new stock and sold off by the insured held to be chargeable with their proper proportion of the expenses of the business.—Palatine Ins. Co. v. Morton-Scott-Robertson Co. (Tenn. Sup.) 787.

A brick building held to have been a total loss, within Rev. St. art. 3089, making an insurance company liable for the full amount of the policy in case of a total loss.—American Cent. Ins. Co. v. Murphy (Tex. Civ. App.) 956.

§ 7. Adjustment of loss.

A compliance with a clause in a fire policy that the amount of loss shall be ascertained by appraisers in case of disagreement held to be a condition precedent to a right of action on the policy.—Palatine Ins. Co. v. Morton-Scott-Robertson Co. (Tenn. Sup.) 787.

A demand for appraisal of salvage goods alone held not authorized by a policy providing that the amount of loss should be ascertained by appraisers.—Palatine Ins. Co. v. Morton-Scott-Robertson Co. (Tenn. Sup.) 787.

A joint demand for an appraisal by several insurance companies held not within the terms of a policy providing for an appraisal of loss.—Palatine Ins. Co. v. Morton-Scott-Robertson Co. (Tenn. Sup.) 787.

The sale of a portion of the salvage goods by the insured held not to have justified one of several companies in its refusal to proceed with an appraisal of the loss.—Palatine Ins. Co. v. Morton-Scott-Robertson Co. (Tenn. Sup.) 787.

§ 8. Right to proceeds.

Insurance of a chattel, effected by a cestui que trust in her own name, does not inure to the benefit of the trustee, and the proceeds thereof may be subjected by the creditors of the cestui que trust.—Saunders v. Armstrong (Ky.) 700.

§ 9. Actions on policies.

In an action on a life insurance policy, the court may refuse a request to charge, where it has granted other requests embodying all the facts and points involved in the request refused.—Union Cent. Life Ins. Co. v. Fox (Tenn. Sup.) 62.

Where a defense is not pleaded, the trial court may properly ignore it in submitting the issues to the jury.—American Cent. Ins. Co. v. Murphy (Tex. Civ. App.) 956.

In an action on a fire policy, evidence held insufficient to warrant submission to the jury of question whether the insurer had waived any conditions of the policy.—Fire Ass'n of Philadelphia v. Masterson (Tex. Civ. App.) 962.

§ 10. Mutual benefit insurance.

Where defendant alleges that answers of insured to three specified questions in medical examination were false, he is not entitled to instruction authorizing verdict if there were any other misrepresentations.—Wolfe v. Supreme Lodge, Knights and Ladies of Honor (Mo.) 637.

Defendant, in action on benefit certificate, has the burden of proving answers on medical examination to be false.—Wolfe v. Supreme Lodge, Knights and Ladies of Honor (Mo.) 637.

An acceptance on the face of a benefit insurance certificate of "all the conditions therein named" did not carry a reference to matters on the back of the certificate and make them a part thereof.—Page v. Knights & Ladies of America (Tenn. Ch. App.) 1068.

INTENT.

Evidence as to intent, see "Evidence," § 4.
Fraudulent, see "Fraudulent Conveyances," § 1.

INTEREST.

See "Joint Adventures"; "Usury."
As part of judgment, see "Judgment," § 5.
Disqualification as witness, see "Witnesses," § 2.
Effect as to credibility of witness, see "Witnesses," § 4.
On award in condemnation proceedings, see "Eminent Domain," § 5.

INTERLOCUTORY JUDGMENT.

Appealability, see "Appeal and Error," § 1.
Review on appeal or writ of error, see "Appeal and Error," §§ 13-17.

INTERNAL REVENUE.

The United States internal revenue law of 1898 relative to the introduction of unstamped documents in evidence applies to federal courts only.—Watson v. Mirike (Tex. Civ. App.) 538.

INTERPLEADER.

§ 1. Proceedings and relief.

Where a bill of interpleader is filed, naming the various claimants of the fund in the plaintiff's hands, a claimant not made a party to the bill may become so by entering a plea asserting an interest in the fund.—Bolin v. St. Louis & S. W. Ry. Co. of Texas (Tex. Civ. App.) 444.

A bill of interpleader, which states that plaintiff is in possession of a fund, which he tenders in court, to which he has no claim, and which is claimed by two other parties, and that he is ready and willing to pay the fund to whomsoever the court may adjudge is entitled to it, is not demurrable.—Bolin v. St. Louis & S. W. Ry. Co. of Texas (Tex. Civ. App.) 444.

Where plaintiff in good faith and without collusion files a bill of interpleader, asking that the court determine the ownership of a fund which he does not own, and which is adversely claimed, he is entitled to his necessary costs and attorney's fees out of the fund when the same is distributed.—Bolin v. St. Louis & S. W. Ry. Co. of Texas (Tex. Civ. App.) 444.

INTERROGATORIES.

To witnesses, see "Depositions."

INTERSTATE COMMERCE.

Regulation, see "Commerce."

INTESTACY.

See "Descent and Distribution."

INTOXICATING LIQUORS.

Validity of statute prohibiting liquor dealer from keeping place open on Sunday as arbitrary exercise of police power, see "Constitutional Law," § 2.

§ 1. Local option.

In the absence of evidence to the contrary, it will be presumed that the result of local option election was publicly announced by one of the judges at the close of the polls, as required by the statute.—Puckett v. Snider (Ky.) 277.

The order for local option election should be directed to the sheriff of the county, whose duty it was to give notice thereof.—Puckett v. Snider (Ky.) 277.

The fact that the petition to the county judge under Ky. St. § 2554, for a local option election, did not name a date for the election, did not invalidate the election.—Puckett v. Snider (Ky.) 277.

The county judge had power to fix any day for local option election not earlier than 60 days after the application was lodged with him.—Puckett v. Snider (Ky.) 277.

The requirement of the statute that the unvoted ballots shall be destroyed is directory merely, and a failure to comply with it does not invalidate local option election.—Puckett v. Snider (Ky.) 277.

It was proper for the county judge to appoint special officers to hold local option election.—Puckett v. Snider (Ky.) 277.

As the statute provides for a contest of local option election, that remedy is exclusive, and an action does not lie to have the election and the certificate thereof adjudged void.—Puckett v. Snider (Ky.) 277.

Failure of the commissioners' court to publish the result of a county election abolishing prohibition *held* not to invalidate an order for a local option election in a precinct therein, which would warrant the reversal of a judgment convicting defendant of a violation of the local option law.—Lyon v. State (Tex. Cr. App.) 125.

The fact that an order of the commissioners' court declaring the result of an election on the question of local option did not recite the exceptions in regard to sales for medicinal and sacramental purposes *held* not to invalidate the order.—Truesdell v. State (Tex. Cr. App.) 935.

§ 2. Licenses and taxes.

Under Rev. St. arts. 5060c, 5060e, a license to sell liquors in a town where the streets are not named or buildings numbered is valid, though the place of sale is designated only as in such town; and the failure to designate the place more definitely is not a defense to an action on the bond of the licensee for violation of the conditions of the license and bond.—Green v. Southard (Tex. Sup.) 706.

§ 3. Offenses.

A local prohibitory liquor law, which showed on its face that it was intended to contain the entire law governing the subject, repealed by implication a previous law governing the same subject.—Rice v. Commonwealth (Ky.) 473.

The fact that an employé has no control of the building or the conduct of the business is no defense to a prosecution against him for

keeping open a saloon for traffic on Sunday, in violation of a statute authorizing a conviction of an employé as well as the proprietor.—Ramey v. State (Tex. Cr. App.) 128.

§ 4. Actions for penalties.

A fine may be recovered in a penal action, unless the statute provides that the proceeding shall be by indictment.—Harp v. Commonwealth (Ky.) 467.

As to the penalty for selling without a license and the proceeding for its recovery, all local prohibitory liquor laws have been superseded by Ky. St. §§ 2557, 2558, part of the general local option law.—Harp v. Commonwealth (Ky.) 467.

§ 5. Criminal prosecutions.

Evidence that a sale of liquor in a saloon on Sunday would have been made, but for the appearance of the county attorney, is admissible to show that the place was kept open for traffic.—Ramey v. State (Tex. Cr. App.) 128.

Testimony by a minor that the signature to a paper authorizing a liquor dealer to sell liquor to him looked like his mother's signature *held* not to render the instrument admissible in a prosecution for the sale of liquor to such minor.—Patton v. State (Tex. Cr. App.) 309.

A written instrument by a mother authorizing a liquor dealer to sell liquor to her minor son is not admissible in a prosecution for such a sale, unless it was in defendant's possession at the time of the sale.—Patton v. State (Tex. Cr. App.) 309.

Evidence offered by defendant in a prosecution for violating the local option law *held* properly excluded.—Taul v. State (Tex. Cr. App.) 394.

An indictment for violating the local option law *held* sufficient.—Douthitt v. State (Tex. Cr. App.) 404.

An instruction that whisky is an intoxicating liquor *held* proper.—Douthitt v. State (Tex. Cr. App.) 404.

On trial for violation of the local option law, evidence was admissible to show defendant's general system of transacting business.—Martin v. State (Tex. Cr. App.) 486.

On trial for violation of local option law, a United States revenue license, taken out by defendant and bearing date prior to the filing of complaint, *held* admissible against him.—Martin v. State (Tex. Cr. App.) 486.

A temporary injunction by the district court, prohibiting the publication of an order of the commissioners' court declaring the result of the election on the question of local option, *held* admissible to show an excuse for not making the publication.—Truesdell v. State (Tex. Cr. App.) 935.

Where a temporary injunction prohibiting the publication of an order of the commissioners' court declaring the result of an election on the question of local option was introduced as an excuse for not making the publication, it was not error to exclude the pleadings on which the injunction was obtained.—Truesdell v. State (Tex. Cr. App.) 935.

The fact that the judge who presided at defendant's trial for a violation of the local option law was a formal party to an application to contest the election on the question of local option *held* to constitute no objection to the introduction of an order of the commissioners' court declaring the result of the election.—Truesdell v. State (Tex. Cr. App.) 935.

ISSUES.

Presented for review on appeal, see "Appeal and Error," § 3.

JEOPARDY.

Former jeopardy bar to prosecution, see "Criminal Law," § 2.

JOINDER.

Of causes of action, see "Action," § 2.

JOINT ADVENTURES.

Where plaintiff and defendant purchased land jointly and immediately divided it, in an action for an accounting it was proper to allow each party interest on the payments made by him.—*Crenshaw v. Crenshaw* (Ky.) 366.

Where two tracts of land were purchased by plaintiff and defendant jointly at different times, it was error to give plaintiff a lien on defendant's share of both tracts for the entire balance found due plaintiff on account of his overpayment of his share of the purchase price of both tracts.—*Crenshaw v. Crenshaw* (Ky.) 366.

Where defendant sold plaintiff and his brother shares of stock under an agreement to pool shares and to divide all benefits, including any sales, the issuance of plaintiff's shares to his wife with defendant's knowledge, and the temporary pledge of shares by the brother, were not sales.—*Green v. Higham* (Mo.) 798.

An agreement by parties to form a pool of shares of certain stock owned by them, and to share equally all benefits accruing thereunder, was valid, without a declaration of trust or execution of a power of attorney to any one person.—*Green v. Higham* (Mo.) 798.

A contract to form a pool of certain shares of stock *held* not invalid, as not expressing time of duration.—*Green v. Higham* (Mo.) 798.

JOINT TENANCY.

See "Tenancy in Common."

JUDGES.

See "Courts"; "Justices of the Peace."

§ 1. Rights, powers, duties, and liabilities.

A circuit judge has no jurisdiction to make a final decree authorizing the winding up of a building and loan association in vacation.—*State ex rel. Ballew v. Woodson* (Mo.) 252.

A circuit judge in vacation has power to appoint and require bonds from receivers to take charge of and preserve the affairs of a building and loan association until a final judgment.—*State ex rel. Ballew v. Woodson* (Mo.) 252.

Rev. St. 1899, § 1398, does not give circuit judges, in dissolving a building and loan association, the same powers as given with regard to insurance companies by Rev. St. 1899, § 8026, but only gives the court the same jurisdiction.—*State ex rel. Ballew v. Woodson* (Mo.) 252.

Under Const. art. 6, § 1, the legislature has no power to authorize a circuit judge to make a final decree in vacation.—*State ex rel. Ballew v. Woodson* (Mo.) 252.

§ 2. Disqualification to act.

The fact that the judge who presided at defendant's trial for violation of the local option law was a formal party to an application to contest the validity of the election under which the prosecution was maintained *held* not to disqualify him from sitting in the case.—*Truesdell v. State* (Tex. Cr. App.) 935.

JUDGMENT.

Against married woman, see "Husband and Wife," § 3.

Decisions of courts in general, see "Courts," § 1.

Effect as curing defects in pleadings, see "Pleading," § 5.

— of discharge in bankruptcy, see "Bankruptcy," § 2.

Enforcement by creditors' suit, see "Creditors' Suit."

In criminal prosecutions, see "Criminal Law," § 18.

In particular civil actions or proceedings, see "Divorce," § 3; "Trespass to Try Title," § 2.

— action for rent, see "Landlord and Tenant," § 3.

— against sureties on injunction bond, see "Injunction," § 3.

— election contest, see "Elections," § 2.

— foreclosure, see "Mortgages," § 6.

— on appeal or writ of error, see "Appeal and Error," § 18.

Review, see "Appeal and Error."

Tax judgments, see "Taxation," § 5.

§ 1. On trial of issues.

Where action is brought to recover proceeds of note collected, a judgment for conversion is erroneous.—*Osborne v. Boswell* (Tenn. Ch. App.) 96.

A purchaser at execution sale of the interest of a partner in firm property *held* not prevented from recovery for failure to prove the extent of his interest or the value of the goods converted between the sale and trial; the trustee in bankruptcy of the debtor partner having intervened.—*Jones v. Meyer Bros. Drug Co.* (Tex. Civ. App.) 553.

§ 2. Opening or vacating.

Where plaintiff filed an application to have a judgment set aside, the service of which was accepted by the defendant and an agreement indorsed thereon that the matter might be presented by motion, *held*, that plaintiff's delay in filing the application after learning of the judgment was waived by the defendant's indorsement on the application.—*McCord-Collins Commerce Co. v. Stern* (Tex. Civ. App.) 341.

Where an application to have a previous judgment set aside, which was in the form of a motion for a new trial, was not filed until seven months after the rendering of the judgment, *held* error for the court to sustain a demurrer thereto on the ground of delay in filing the same.—*McCord-Collins Commerce Co. v. Stern* (Tex. Civ. App.) 341.

A petition *held* to state sufficient ground for vacating judgments in partition.—*Schneider v. Sellers* (Tex. Civ. App.) 541.

§ 3. Equitable relief.

A demurrer was properly sustained to a petition for a new trial of an equitable action, where nothing was complained of except errors which might have been taken advantage of upon appeal.—*Todd v. Jackson* (Ky.) 1.

Where issue was as to whether return of process was false, in that there had been no service on plaintiff, and the evidence established such fact, *held* error to allow the sheriff to testify that he gave a copy of the writ to plaintiff's husband for her.—*Smoot v. Judd* (Mo.) 854.

Where there was no service of process on defendant, and she had no knowledge of the pendency of the action, a sheriff's deed, given in pursuance of a sale on execution on a default judgment in the action, will be set aside in a suit in equity.—*Smoot v. Judd* (Mo.) 854.

Where the evidence in a suit to set aside a judgment on a note for fraud in tampering with papers filed in the original suit does not sup-

port the allegations, the bill is properly dismissed.—*Grizzle v. Adams* (Tenn. Ch. App.) 95.

A bill to enjoin a judgment for fraud *held* not demurrable, as seeking to overthrow the whole judgment while admitting that the judgment creditors were entitled to different relief.—*McTeer v. Briscoe* (Tenn. Ch. App.) 564.

Where a bill to enjoin a judgment of the supreme court, characterizing itself as "a bill in the nature of a bill of review," showed on its face that it was a bill attacking a decree for fraud, it was not demurrable as a bill to review a decree of the supreme court.—*McTeer v. Briscoe* (Tenn. Ch. App.) 564.

Where judgment on a bond was rendered forthwith for the penalty of the bond over the obligors' objection, the latter were not precluded from complaining of the fraudulent insertion of four times the penalty of the bond in the decree.—*McTeer v. Briscoe* (Tenn. Ch. App.) 564.

The fact that parties against whom the supreme court had rendered a decree could move in that court to have it corrected would not interfere with equity jurisdiction to enjoin such decree for fraud.—*McTeer v. Briscoe* (Tenn. Ch. App.) 564.

In a suit to enjoin a judgment for the fraudulent insertion of four times the amount agreed on, the contention that there was no fraud in the judgment creditors presenting their claims to the court was idle.—*McTeer v. Briscoe* (Tenn. Ch. App.) 564.

A bill to enjoin a judgment *held* to make out a case of fraud.—*McTeer v. Briscoe* (Tenn. Ch. App.) 564.

In an application for an injunction to restrain the collection of a larger amount than was due on a judgment, it was not necessary to deposit the amount due in court in order to maintain the action.—*Hamburger v. Kosminsky* (Tex. Civ. App.) 958.

§ 4. Collateral attack.

Under Const. 1869, art. 12, §§ 20, 21, and Galveston City Charter 1871, tit. 6, art. 14, and Galveston Rev. Ord. 1871, c. 39, art. 1, § 14, a judgment of the Galveston district court foreclosing a tax lien on land is subject to collateral attack.—*Cordray v. Neuhaus* (Tex. Civ. App.) 415.

An attack, in an action to recover land, on judgments affecting plaintiff's title, *held* not collateral, but direct.—*Schneider v. Sellers* (Tex. Civ. App.) 541.

A petition to restrain the collection of a larger sum than was due on a judgment *held* not demurrable as an attack on the validity of the judgment.—*Hamburger v. Kosminsky* (Tex. Civ. App.) 958.

§ 5. Construction and operation in general.

The records in a cause, including the pleadings, are admissible in evidence to aid the court in construing the judgment, if ambiguous.—*Texas Savings-Loan Ass'n v. Banker* (Tex. Civ. App.) 724.

Defendants *held* not entitled under the evidence to interest on the costs of an action in which judgment was rendered in their favor.—*Hamburger v. Kosminsky* (Tex. Civ. App.) 958.

§ 6. Merger and bar of causes of action and defenses.

A judgment of the circuit court adverse to the plaintiff, on an appeal from a justice court of a suit for the possession of certain real estate, *held* not a bar to a subsequent suit in equity by plaintiff to recover the same property.—*Robnett v. Howard* (Tenn. Ch. App.) 1082.

§ 7. Conclusiveness of adjudication.

Where plaintiff sought to intervene in a partition suit, on ground that plaintiff in partition had not acquired her title to the lands, and she was not allowed to intervene, determination *held* not binding on her in suit in equity to set aside deed of her interest to plaintiff in partition.—*Smoot v. Judd* (Mo.) 864.

A decree for the sale of lands conveyed in trust to the use of one for life, then to his children, in a proceeding to which the one child in esse of the life tenant was a party, would bind all children subsequently coming into being.—*Ridley v. Halliday* (Tenn. Sup.) 1025.

A judgment in a former suit involving rights under separate chattel mortgages, and a contract between the mortgagees and mortgagor, *held* to be a bar to a subsequent action by one of the mortgagees against the other for a conversion of the property before the rendition of such judgment.—*Moore v. Wood* (Tenn. Ch. App.) 1068.

Where judgment of justice is appealed, but papers are not returned by justice, or lost in justice court, or lost after transmission, the judgment *held* not res adjudicata as to issues involved.—*Childs v. Dennis* (Tenn. Ch. App.) 1092.

A judgment in favor of grantee for rents of the land, the grantor being in possession, *held* not res adjudicata as to grantor's right to a credit for the rents in suit to establish deed as mortgage.—*Childs v. Dennis* (Tenn. Ch. App.) 1092.

§ 8. Foreign judgments.

Recitals of appearances in judgments are conclusive only in courts of domestic jurisdiction.—*League v. Scott* (Tex. Civ. App.) 521.

Judgments of federal courts are not domestic judgments, in the sense that it cannot be shown on collateral attack that the court failed to acquire jurisdiction over defendant's person; and the fact that he was a resident of the state does not change the rule.—*League v. Scott* (Tex. Civ. App.) 521.

§ 9. Payment, satisfaction, merger, and discharge.

Where defendants attached plaintiff's property, which was sold, and the proceeds deposited in court, plaintiffs were entitled to a credit on the judgment for the full amount received for the property.—*Hamburger v. Kosminsky* (Tex. Civ. App.) 958.

§ 10. Actions on judgments.

In a suit on judgments recovered in another state by an assignee thereof, the transfer of such judgments must be proved to render them admissible in evidence.—*Baggs v. Hale* (Tex. Civ. App.) 525.

JUDICIAL NOTICE.

In civil actions, see "Evidence," § 1.

JUDICIAL SALES.

Of property of decedent, see "Executors and Administrators," § 5.

On execution, see "Execution," § 8.

JURISDICTION.

See "Equity," § 1.

Accounting by public administrator, see "Executors and Administrators," § 7.

Amount in controversy, see "Appeal and Error," § 1.

Appellate jurisdiction, see "Criminal Law," §§ 19-23.

County courts, see "Courts," § 2.

Effect of appearance, see "Appearance."

Justices' courts in civil cases, see "Justices of the Peace," § 2.

Particular court, see "Courts."

Pleas to jurisdiction, see "Abatement and Revival," § 1.

JURY.

See "Grand Jury."

Custody and conduct, see "Criminal Law," §§ 12-16.

Impeaching verdict, see "Criminal Law," § 17.

Instructions in civil actions, see "Trial," §§ 5-7.

— in criminal prosecutions, see "Criminal Law," § 15.

Questions for jury in criminal prosecutions, see "Criminal Law," § 14.

Taking case or question from jury at trial, see "Trial," § 4.

§ 1. Right to trial by jury.

A peremptory instruction for defendant, where there was no evidence of a right of recovery on the part of plaintiff, does not deprive plaintiff of his constitutional right of a trial by jury.—*Morris' Adm'r v. Louisville & N. R. Co.* (Ky.) 41.

Defendant was entitled to a jury trial of the issue whether he had undertaken, in consideration of the transfer of property to him, to pay a debt due by plaintiff to another.—*Kerr v. Hough* (Ky.) 262.

§ 2. Qualifications of jurors and exemptions.

Evidence that one of the jurors had been convicted of robbing the mail was insufficient ground for reversing a conviction of perjury, in the absence of a showing that the former crime entailed a sentence of infamy.—*Goad v. State* (Tenn. Sup.) 79.

§ 3. Summoning, attendance, discharge, and compensation.

Where the regular panels were out considering other cases, the court properly ordered talesmen to fill out the panel in connection with the regular jurymen present to try a criminal case.—*Little v. State* (Tex. Cr. App.) 483.

§ 4. Competency of jurors, challenges, and objections.

If the trial judge is informed by credible evidence that a juror is not qualified to try the case, it is proper for him to strike the juror's name from the list.—*Barnes v. Commonwealth* (Ky.) 733.

Challenging a juror for cause is insufficient, unless the ground of the challenge is distinctly specified.—*State v. Evans* (Mo.) 590.

Acceptance of a juror, who has testified that he was prejudiced against such cases in general, but knew nothing about that particular case, was not reversible error.—*Ruschenberg v. Southern Electric R. Co.* (Mo.) 626.

Jurors who had formed an opinion as to the guilt of accused based on statements and rumors, and who stated they could try the case on its merits, were not incompetent.—*State v. Robinson* (Tenn. Sup.) 65.

Ignorance of a juror's incompetency would not excuse the omission to object to such juror before verdict.—*Goad v. State* (Tenn. Sup.) 79.

An objection to a juror in a perjury trial that he had been convicted of an infamous crime, not made until after verdict, was too late.—*Goad v. State* (Tenn. Sup.) 79.

Jurors who state on their voir dire that they have no prejudice against one indicted for violating the local option law held not disqualified by reason of having contributed for the employment of counsel in a local option election contest.—*Taul v. State* (Tex. Cr. App.) 394.

Venireman held not disqualified by reason of having formed an opinion.—*Tellis v. State* (Tex. Cr. App.) 717.

A juror, in a prosecution for murder, whose wife was the first cousin of decedent's wife, who had died leaving sons who were private prosecutors in the case, was disqualified, and a new trial should have been granted for such reason.—*Stringfellow v. State* (Tex. Cr. App.) 719.

Under Acts 1899, p. 214, an action against two railroads held in effect two separate causes of action against different defendants, entitling each to three peremptory challenges in the selection of the jury.—*Texas & P. Ry. Co. v. Stell* (Tex. Civ. App.) 980.

JUSTICES OF THE PEACE.

§ 1. Rights, duties, and liabilities.

There being no statute requiring a justice of the peace to make "return" to any court of violations of the Sunday law within his view or knowledge, his failure to make such return does not render him liable to a prosecution, under Pen. Code, art. 269, for official misconduct.—*Green v. State* (Tex. Cr. App.) 482.

§ 2. Civil jurisdiction and authority.

The entry of a motion before a justice to transfer a case to some other justice does not divest him of jurisdiction, and a writ of prohibition does not lie to restrain him from proceeding with the trial, though he may have committed an error in overruling the motion.—*Schoberg v. Manson* (Ky.) 999.

Complaint in action before a justice held not to show a fictitious credit in order to give the court jurisdiction.—*Ball v. Hines* (Tex. Civ. App.) 332.

§ 3. Procedure in civil cases.

Plaintiff, after judgment rendered before a justice, can remit any part of the amount recovered.—*Ball v. Hines* (Tex. Civ. App.) 332.

§ 4. Review of proceedings.

On statements by the parties in a case appealed from a justice, evidence of the value of a horse held sufficient to make out a prima facie case against a railroad company for wrongfully killing such horse.—*Utley v. Louisville & N. R. Co.* (Tenn. Sup.) 84.

The introduction of certain evidence in a case against a railroad company for killing a horse held not to vary the rule that statements made by the parties at the circuit court's request, in a case appealed from a justice's court, should be treated as pleadings.—*Utley v. Louisville & N. R. Co.* (Tenn. Sup.) 84.

Where plaintiff, on recovery before a justice, remits a part of the judgment, on trial de novo in county court he can demand the whole of his claim.—*Ball v. Hines* (Tex. Civ. App.) 332.

Where one appealed from a justice's judgment for less than his claim without notice of bond, dismissal of such appeal was error, since the case was not within *Sayles' Civ. St. art. 1670*.—*Clifford v. Kohr* (Tex. Civ. App.) 424.

The condition of a bond on appeal from a justice, that if the judgment of the county court should be against the appellant she should "perform its judgment," was the same in legal effect as that prescribed in *Rev. St. art. 1670*.—*Coman v. Lincoln* (Tex. Civ. App.) 443.

Where the bond on appeal from a justice was more onerous than required by law, the bond was not vitiated by such condition.—*Coman v. Lincoln* (Tex. Civ. App.) 443.

JUSTIFICATION.

Of homicide, see "Homicide," § 4.

LACHES.

Effect in equity, see "Equity," § 2.
In foreclosure of mortgage, see "Mortgages," § 6.
In suing to set aside fraudulent conveyance, see "Fraudulent Conveyances," § 2.

LANDLORD AND TENANT.

Mining leases, see "Mines and Minerals," § 1.
Validity of lease as affected by public policy, see "Contracts," § 1.

§ 1. Terms for years.

Under Sayles' Civ. St. art. 3250, a sublease of land by a tenant is void, if made without the landlord's consent.—*Gartrell v. State* (Tex. Cr. App.) 487.

§ 2. Premises, and enjoyment and use thereof.

Where a tenant sues for an eviction, and an injury to his goods resulting from dirt is alleged as an element of damages, but there is evidence that such injury might have resulted from other causes, a judgment denying damages will not be reversed.—*De Donato v. Morrison* (Mo.) 641.

A tenant cannot recover for injuries received from dust resulting from tearing down a building adjoining that owned by the landlord.—*De Donato v. Morrison* (Mo.) 641.

Where in a lease the landlord contracted to keep the roof in repair, the fact that when the lease was made the roof was defective did not relieve him from liability for damages to the tenant from such defect.—*Lovejoy v. Townsend* (Tex. Civ. App.) 331.

§ 3. Rent and advances.

Where the landlord waived his lien by accepting personal security, a conviction of defendant under Acts 1897, c. 114, for selling the crop, will be reversed.—*State v. Hoskins* (Tenn. Sup.) 781.

Where an application for a writ of distress alleges rent due as a cause therefor, and the evidence shows that only a part thereof is due, the tenant is not entitled to damages for the distraint of the whole crop, but only to the damages sustained for the distraint of an unnecessary amount, caused by the false allegation.—*Watson v. Boswell* (Tex. Civ. App.) 407.

The value of time lost and money expended in prosecuting an action of replevin to obtain possession of property wrongfully distressed is an element of damages in an action therefor.—*Watson v. Boswell* (Tex. Civ. App.) 407.

The failure to establish all the grounds alleged by a landlord in his application for a distress warrant will not render him liable in damages to the tenant, when he establishes one of such grounds.—*Watson v. Boswell* (Tex. Civ. App.) 407.

Evidence of loss of time by a tenant and his family as the result of an illegal distress is admissible on the question of exemplary damages.—*Watson v. Boswell* (Tex. Civ. App.) 407.

An instruction on the issue of damages for an illegal distraint *held* erroneous, as allowing a recovery of damages, even if some of the grounds alleged in fact exist.—*Watson v. Boswell* (Tex. Civ. App.) 407.

Clause in a lease exempting landlord from any damage incident to a suit for distraint *held* valid.—*Watson v. Mirike* (Tex. Civ. App.) 538.

A verdict in a landlord's suit for rent and wages which failed to specify the amount recovered for each was not sufficient to support a judgment foreclosing the landlord's lien.—*Miller v. Newbauer* (Tex. Civ. App.) 974.

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A verdict which failed to show that property sought to be subject to a landlord's lien was so situated as to be subject thereto would not support a judgment foreclosing the lien thereon.—*Miller v. Newbauer* (Tex. Civ. App.) 974.

LANDS.

See "Public Lands."

LARCENY.

See "Robbery."

§ 1. Offenses, and responsibility therefor.

Where defendant was indicted for stealing property of different persons, located at different places, no part of which was worth more than \$30, he cannot be convicted of grand larceny.—*State v. Maggard* (Mo.) 184.

§ 2. Prosecution and punishment.

An indictment for larceny of the property of a firm, named as such, is sufficient, without naming specifically the members of the firm.—*Porter v. Commonwealth* (Ky.) 16.

Where there was no evidence that the stolen property had a market value, an instruction that its value was its actual worth in the open market was properly modified by striking out the words "in the open market."—*State v. Maggard* (Mo.) 184.

The failure to submit the issue of circumstantial evidence in a prosecution for cattle theft *held* under the evidence to be erroneous.—*York v. State* (Tex. Cr. App.) 128.

Where an indictment for cattle theft alleges that A. was holding the property for G., who was the real owner, and the evidence established such ownership and possession, it is error to instruct that defendant cannot be convicted unless G. was the owner or had the actual care and control of the stolen cattle.—*York v. State* (Tex. Cr. App.) 128.

An instruction on the question of ownership in a prosecution for theft of a cow *held* erroneous, as calling attention to a particular part of the testimony, and authorizing the jury to regard, as proving ownership, the brand on a cow in question.—*Garrett v. State* (Tex. Cr. App.) 129.

A charge that the jury should acquit, if they believed that defendant had in her possession money which she picked up, and did not take it from the person of the prosecuting witness, *held* not objectionable.—*Jasper v. State* (Tex. Cr. App.) 392.

Under an information for theft, describing the property as "lawful money of the United States," proof of a theft of silver certificates or national bank notes was a variance.—*Perry v. State* (Tex. Cr. App.) 400.

Where the only testimony as to the market value of stolen property was that of an expert, who stated that it was \$22 to \$24, an instruction authorizing a conviction on a value above the market value, if such value existed, was erroneous.—*McBroom v. State* (Tex. Cr. App.) 490.

That an indictment for cattle theft alleges that the cattle were the property of an unknown owner does not relieve the state from the necessity of proving that they were cattle belonging to such an owner.—*Dawson v. State* (Tex. Cr. App.) 489.

Where an indictment for cattle theft alleges the animals to have been stolen from an unknown owner, testimony that cattle had been lost by certain persons was inadmissible.—*Dawson v. State* (Tex. Cr. App.) 489.

Where, on a prosecution for theft of cattle of an unknown owner, there is no evidence that

any unknown owner possessed any cattle in that part of the country, or that the animals in the defendant's possession belonged to any unknown owner, the conviction cannot be sustained.—*Dawson v. State* (Tex. Cr. App.) 490.

LAW OF THE CASE.

Decision on appeal, see "Appeal and Error," §§ 13-17.

LEASES.

See "Landlord and Tenant."

LEGACIES.

See "Wills."

LEVY.

Of execution, see "Execution," § 1.

LIBEL AND SLANDER.

§ 1. Words and acts actionable, and liability therefor.

Words charging that "the negroes who were said to have the smallpox had no breaking out or eruption" until plaintiff, the attending physician, "applied a salve to their faces and caused it to break out," do not charge improper treatment, unprofessional conduct, or want of integrity, and are therefore not actionable per se.—*Manire v. Hubbard* (Ky.) 466.

Words charging one in a business or profession with ignorance or want of skill in a particular transaction are not ordinarily actionable per se.—*Manire v. Hubbard* (Ky.) 466.

A publication that there are and have been no cases of smallpox in a certain town, as published by plaintiff, a physician, is not actionable per se.—*Manire v. Hubbard* (Ky.) 466.

§ 2. Privileged communications, and malice therein.

An allegation, though false, by a defendant in a cross complaint in a divorce proceeding, that her husband had been cohabiting with the plaintiff, was an absolutely privileged statement, for which libel will not lie.—*Jones v. Brownlee* (Mo.) 796.

§ 3. Actions.

The venue of an action to recover damages for a libel published in a newspaper is in any county in which the newspaper was circulated, and summons may be served in a county other than that in which the action is brought.—*Cincinnati Times-Star Co. v. France* (Ky.) 18.

Where the words complained of are not actionable per se, there can be no recovery, in the absence of an averment of special damage.—*Manire v. Hubbard* (Ky.) 466.

A city school board had no right to engage plaintiff to lobby against a measure affecting his tenure of office and the existence of the board.—*Stark v. Publishers: George Knapp & Co.* (Mo.) 669.

Evidence of plaintiff's previous good character is not admissible in chief to prove that he is not guilty of the matters charged in a libel, but is admissible on the question of damages.—*Stark v. Publishers: George Knapp & Co.* (Mo.) 669.

Where the defamatory matter complained of in a libel suit is in general terms, the particular facts relied on by defendant as warranting the charge must be set forth specifically in his plea of justification.—*Stark v. Publishers: George Knapp & Co.* (Mo.) 669.

Defamatory matter, complained of in a libel suit, held sufficiently specific to advise plaintiff of the particular matter he would be called on

to meet.—*Stark v. Publishers: George Knapp & Co.* (Mo.) 669.

Where the defendant in libel averred that she made the libelous allegation in a pleading in divorce on reasonable grounds, a failure to prove the averments of the answer will not deprive her of the absolute privileged character of the allegation.—*Jones v. Brownlee* (Mo.) 796.

LICENSES.

For sale of intoxicating liquors, see "Intoxicating Liquors," § 2.

Injuries to licensees, see "Railroads," §§ 2-4.

§ 1. For occupations and privileges.

In an action under Rev. St. 1889, §§ 6905, 6907, against a manufacturer for failure to file statutory statement, held, that the fact that defendant's property had changed hands before the 1st of June, 1896, was no defense.—*State ex rel. Nunnelee v. Horton Land & Lumber Co.* (Mo.) 869.

In an action under Rev. St. 1889, §§ 6905, 6907, against a manufacturer for failure to file the statement required by sections 6821, 6897, held proper to admit evidence tending to prove the value of defendant's raw material, finished products, and machinery on hand on any date between the first Monday in March and the first Monday in June, 1896.—*State ex rel. Nunnelee v. Horton Land & Lumber Co.* (Mo.) 869.

In an action under Rev. St. 1889, §§ 6905, 6907, against a manufacturer for failure to file the statement required by sections 6821, 6897, held proper to overrule objections that the petition did not state a cause of action.—*State ex rel. Nunnelee v. Horton Land & Lumber Co.* (Mo.) 869.

In an action under Rev. St. 1889, §§ 6905, 6907, against a manufacturer for failure to file the statement required by sections 6821, 6897, held, that defendant's bond was sufficient evidence to prove that a license was delivered to it.—*State ex rel. Nunnelee v. Horton Land & Lumber Co.* (Mo.) 869.

In an action under Rev. St. 1889, §§ 6905, 6907, held proper to refuse defendant's declaration that it was not liable if its property had been sold under an execution prior to June 1, 1896; no such issue being pleaded.—*State ex rel. Nunnelee v. Horton Land & Lumber Co.* (Mo.) 869.

LIENS.

See "Attorney and Client," § 1; "Livery Stable Keepers."

Employers, see "Master and Servant," § 2.

Landlord's lien for rent, see "Landlord and Tenant," § 3.

Mortgage, see "Mortgages," § 2.

Of farm laborer on crop, see "Agriculture."

Purchase-money lien, see "Joint Ventures."

Subrogation to rights of lienors, see "Subrogation."

Vendor's lien on lands sold, see "Vendor and Purchaser," § 5.

LIFE ESTATES.

See "Dower"; "Remainders."

Creation by will, see "Wills," § 5.

A decree for the sale of lands conveyed in trust to the use of one for life, then to his children, rendered before any such children were in esse, but preserving the rights of such children in the proceeds of the sale, would be binding on all such children, in absence of fraud.—*Ridley v. Halliday* (Tenn. Sup.) 1025.

Since a petition for the sale of lands deeded in trust to one for life, remainder to his chil-

dren, filed by the trustee and life tenant before birth of the latter's children, was not within Shannon's Code, tit. 2, c. 3, section 5086 of that chapter had no application thereto.—*Ridley v. Halliday* (Tenn. Sup.) 1026.

Where a decree of sale of property deeded in trust to the use of one for life, then to his children, was rendered before birth of any such children, it was immaterial, as to its binding force, whether the bill was brought by or against the life tenant.—*Ridley v. Halliday* (Tenn. Sup.) 1026.

LIMITATION OF ACTIONS.

See "Adverse Possession"; "Ejectment," § 8; "Reformation of Instruments," § 2.

Action for accounting by agent, see "Principal and Agent," § 1.

Foreclosure, see "Mortgages," § 6.

Suits to set aside fraudulent conveyances; see "Fraudulent Conveyances," § 2.

Time for taking appeal, see "Appeal and Error," § 5.

§ 1. Statutes of limitation.

A written order for goods, containing a promise to pay therefor, is a contract of sale, and hence the four-year statute of limitations applies thereto.—*Voelcker v. McKay* (Tex. Civ. App.) 424.

An instrument held insufficient to convey title to lands, and to be only an executory contract to convey land, against which the 10-year statute of limitations would run.—*Laguereanne v. Farrar* (Tex. Civ. App.) 953.

§ 2. Computation of period of limitation.

An action was not barred, though an amended petition to perfect the cause of action stated in the original petition was not filed until limitations had run.—*Turner v. Mitchell* (Ky.) 468.

In determining whether the right to an execution on a judgment is barred by 15 years' limitation, the time of defendant's absence from the state since the last execution was issued is to be deducted.—*Brittain v. Lankford* (Ky.) 1000.

Where a minor sold property in 1886, and attained majority in 1891, his right of action to recover the land in 1897 was barred under Gen. St. 1895, c. 191, § 4.—*Ogle v. Hignet* (Mo.) 596.

Where limitations have commenced to run against an entire debt payable in installments, because of default, the contract may be reinstated and the running of the statute stopped by agreement of the parties.—*San Antonio Real-Estate, Building & Loan Ass'n v. Stewart* (Tex. Sup.) 386.

Where several notes, maturing monthly, are secured by a mortgage providing that, on default in the payment of three notes, all should become due, on such default limitations commence to run against the entire debt.—*San Antonio Real-Estate, Building & Loan Ass'n v. Stewart* (Tex. Sup.) 386.

Where an amendment to a petition, alleging certain facts as ground for recovery on express contract, was filed after limitations expired, and alleged the same facts as ground for recovery for negligent failure to perform a duty imposed by implication of law, *held*, that the amendment was improper and the action was barred.—*Phoenix Lumber Co. v. Houston Water Co.* (Tex. Sup.) 707.

The immediate use of a lake and a tract of land by the public as a public park, after the owner had declared it should belong to the public, *held* an acceptance of the dedication.—*Gilleen v. City of Frost* (Tex. Civ. App.) 345.

Where the debtor left Texas before the debt had been due four years, the running of the statute of limitations was suspended during his absence.—*O'Neal v. Clymer* (Tex. Civ. App.) 545.

Where a debtor conveys his land to his wife in trust for himself, the statute of limitations does not run in her favor against the claims of his creditors.—*O'Neal v. Clymer* (Tex. Civ. App.) 545.

Suit on a note executed September 23, 1890, payable three years thereafter, not brought until November 3, 1897, *held* barred by the four-year statute of limitation.—*Schneider v. Sanders* (Tex. Civ. App.) 727.

The statute of limitations will run against the beneficiary's demand, founded on a completed declaration of an express executed trust, when the acts of the trustee are equivalent to the repudiation of the trust, and the beneficiary has knowledge thereof.—*Laguereanne v. Farrar* (Tex. Civ. App.) 953.

§ 3. Acknowledgment, new promise, and part payment.

Where defendant claimed title to a park and lake, to which a city asserted title by dedication, an attempt by defendant to rent the property of the city *held* a sufficient recognition of the city's title to prevent the running of the statute of limitations prior to that time.—*Gilleen v. City of Frost* (Tex. Civ. App.) 345.

LIMITATION OF LIABILITY.

Of carrier, see "Carriers," § 1.

LIQUIDATED DAMAGES.

See "Damages," § 2.

LIQUOR SELLING.

See "Intoxicating Liquors."

LIVERY STABLE KEEPERS.

The lien, under Rev. St. art. 3319, of a liveryman on a horse boarded by him, is inferior to the lien of a duly-registered prior mortgage, when the horse is left at the stable without the knowledge or consent of the mortgagee.—*Blackford v. Ryan* (Tex. Civ. App.) 161.

LIVE STOCK.

Carriage of, see "Carriers," § 2.

LOAN ASSOCIATIONS.

See "Building and Loan Associations."

LOCAL LAWS.

See "Statutes," § 2.

LOCAL OPTION.

Traffic in intoxicating liquors, see "Intoxicating Liquors," § 1.

LUNATICS.

See "Insane Persons."

MACHINERY.

Liability of employer for defects, see "Master and Servant," § 4.

MAINTENANCE.

See "Champertry and Maintenance."

MALICIOUS PROSECUTION.

§ 1. Actions.

Evidence *held* to justify the direction of a verdict in defendant's favor in an action for malicious prosecution.—Clark v. Thompson (Mo.) 194.

Where the facts, if true, showed probable cause, the question of probable cause was properly submitted to the jury.—Clark v. Thompson (Mo.) 194.

Where there was no evidence that a criminal prosecution was commenced for the purpose of collecting a debt, an instruction that, if defendant instituted the action to collect a debt, such action of itself constituted "probable cause," was properly refused.—Clark v. Thompson (Mo.) 194.

MANDAMUS.

§ 1. Subjects and purposes of relief.

St. Louis City Ordinance 19,984, empowering the board of public improvements to contract with a certain person for the erection on the streets of receptacles for litter, not being based on any specifications, mandamus would not lie to compel the board to make the contract.—State ex rel. Belt v. City of St. Louis (Mo.) 653.

The county treasurer being merely a ministerial officer, mandamus will lie to compel him to pay a properly audited warrant.—State ex rel. Wheeler v. Adams (Mo.) 894.

§ 2. Jurisdiction, proceedings, and relief.

Defendant, by failing to deny plaintiff's allegation that the county had for many years maintained a swamp-land fund, *held* estopped from insisting that there was no such fund known to the law.—State ex rel. Wheeler v. Adams (Mo.) 894.

Defendant's failure to deny plaintiff's allegation that there were funds available to pay plaintiff's warrant when presented *held* to estop defendant from claiming that there were then no funds in the treasury available for its payment.—State ex rel. Wheeler v. Adams (Mo.) 894.

MANDATE.

See "Mandamus."

To lower court or decision on appeal or writ of error, see "Appeal and Error," § 18.

MANSLAUGHTER.

See "Homicide," § 2.

MANUFACTURES.

See "Licenses," § 1.

MARRIAGE.

See "Divorce"; "Husband and Wife."

In action by a father against a clerk for illegal issuance of a marriage license to his minor daughter, plaintiff *held* estopped, by statement made to daughter, from saying she did not have his consent.—Evans v. Johnson (Tex. Civ. App.) 143.

In an action by a father against a clerk for the illegal issuance of a marriage license to his minor daughter, a charge *held* erroneous as relieving the clerk from his duty to ascertain if

he could legally issue the license, under Rev. St. 1895, art. 2957.—Evans v. Johnson (Tex. Civ. App.) 143.

MARRIED WOMEN.

See "Husband and Wife."

MASTER AND SERVANT.

Lien of farm laborer on crop, see "Agriculture."

Release from liability for personal injuries, see "Release," § 2.

§ 1. The relation.

Where plaintiff's minor son was injured by a fire while employed in defendant's store, in an action for loss of services, *held* proper to refuse to submit the issue as to whether the building was a factory requiring fire escapes, under city ordinances.—Hernischel v. Texas Drug Co. (Tex. Civ. App.) 419.

§ 2. Services and compensation.

The allegation of some specific default *held* necessary to admit proof under a defense to an action for services that the work was unsatisfactory.—Mudgett v. Texas Tobacco Growing & Mfg. Co. (Tex. Civ. App.) 149.

Instruction in an action for wages *held* improper, as ignoring evidence of waiver of ground for discharge in the case.—Mudgett v. Texas Tobacco Growing & Mfg. Co. (Tex. Civ. App.) 149.

Instruction *held* improper, there being no evidence supporting the proposition charged.—Mudgett v. Texas Tobacco Growing & Mfg. Co. (Tex. Civ. App.) 149.

Instruction *held* improper, as practically charging that an employer could discharge an employe before the expiration of his term without cause.—Mudgett v. Texas Tobacco Growing & Mfg. Co. (Tex. Civ. App.) 149.

Under Sayles' Civ. St. art. 3339a, one hired for a year, wages payable monthly, was not required to fix a separate lien for the wages due each month.—Mudgett v. Texas Tobacco Growing & Mfg. Co. (Tex. Civ. App.) 149.

Under Sayles' Civ. St. art. 3339a, one hired to raise a tobacco crop had no lien for "expenses" incurred in raising the same.—Mudgett v. Texas Tobacco Growing & Mfg. Co. (Tex. Civ. App.) 149.

§ 3. Master's liability for injuries to servant.

It was the duty of the foreman, when leaving plaintiff in charge of a grinding machine, to warn him of the danger and to instruct him how to unclog it, especially as the foreman had, a short time before, had his finger injured in running his hand into the spout.—Standard Oil Co. v. Eiler (Ky.) 8.

A section foreman, whose duty it was to control the brakes on a hand car, was the superior of the men on the car and not their fellow servant, and therefore the master is liable for the death of one of them through his negligence.—Illinois Cent. R. Co. v. Josey's Adm'x (Ky.) 703.

In an action for injuries received by overexertion in attempting to lift a truck wheel out of a drainage hole in the floor of defendant's cotton mill, *held*, that the hole was a patent and obvious defect, and that it was not necessary for defendant to caution plaintiff in regard to same.—Ferguson v. Phoenix Cotton Mills (Tenn. Sup.) 53.

The conductor of a freight train, who also assists in switching cars at stations, is not a fellow servant of a station agent.—Louisville & N. R. Co. v. Jackson (Tenn. Sup.) 771.

Sayles' Civ. St. art. 4560f, does not render a railroad company liable for an injury received by a section man, injured while engaged in unloading a car by the negligence and incompetence of a fellow servant.—Lawrence v. Texas Cent. Ry. Co. (Tex. Civ. App.) 342.

Where plaintiff's minor son was injured by a fire while in defendant's employ, in an action for loss of services, *held* that no liability on the theory of discovered peril was presented.—Hernischel v. Texas Drug Co. (Tex. Civ. App.) 419.

§ 4. — Tools, machinery, appliances, and places for work.

In an action by a servant, evidence *held* to show the master negligent in not properly guarding machinery, as required by Act Gen. Assem. April 20, 1891.—Lore v. American Mfg. Co. (Mo.) 678.

In an action by a servant for injuries, an instruction *held* properly refused as imposing a less degree of care on the master than is required by Act Gen. Assem. April 20, 1891.—Lore v. American Mfg. Co. (Mo.) 678.

The maintenance of a railroad bridge having one overhead beam lower than the other beams, and so low that it may strike employes standing on top of cars, *held* negligence.—Gulf, C. & S. F. Ry. Co. v. Knox (Tex. Civ. App.) 969.

Evidence *held* to show an injury to one employed on a freight train to have been caused by the negligence of the company.—Missouri, K. & T. Ry. Co. of Texas v. Miller (Tex. Civ. App.) 978.

§ 5. — Risks assumed by servant.

Where a servant slipped on the slippery floor of a factory and was injured by her hand passing through an insufficient guard about the gearing of the machinery, a contention that she had assumed the risk of slipping and that it was the proximate cause of the injury *held* without merit.—Lore v. American Mfg. Co. (Mo.) 678.

Where a servant was injured by her hand being caught in cogwheels insufficiently guarded, plaintiff was not chargeable with the action of employes, before she had been employed, which had rendered the guards ineffective.—Lore v. American Mfg. Co. (Mo.) 678.

A servant *held* not to have assumed the risk arising from the dangerous condition of appliances.—Pauck v. St. Louis Dressed-Beef & Provision Co. (Mo.) 806.

In an action for injuries received by overexertion in attempting to lift a truck wheel out of a drainage hole in the floor of defendant's cotton mill, *held*, that it was not incumbent on defendant to prove the plaintiff's knowledge of the hole.—Ferguson v. Phoenix Cotton Mills (Tenn. Sup.) 53.

Plaintiff *held* not entitled to recover for injuries received by straining and overexerting himself in attempting to lift a truck wheel out of a drainage hole in the floor of defendant's cotton mill.—Ferguson v. Phoenix Cotton Mills (Tenn. Sup.) 53.

In an action for injuries received by overexertion in attempting to lift a truck wheel out of a drainage hole in the floor of defendant's cotton mill, an instruction that, if the plaintiff could have seen or known of the existence of the hole by the exercise of ordinary care and prudence, the defendant would not be liable, was proper.—Ferguson v. Phoenix Cotton Mills (Tenn. Sup.) 53.

The rule that a servant cannot recover for injuries received, if he had equal facilities with the master for ascertaining the dangers of the employment, is not applicable to an injury re-

ceived through an incompetent fellow servant.—Lawrence v. Texas Cent. Ry. Co. (Tex. Civ. App.) 342.

A servant, injured through the incompetency of a fellow servant, *held* not precluded from recovering by the fact that he could have known of such incompetency by ordinary care.—Lawrence v. Texas Cent. Ry. Co. (Tex. Civ. App.) 342.

An instruction that, if a section hand was injured by his foreman's negligence, he could recover from the railroad, was error, where such hand knew of the danger in time to have escaped.—Ft. Worth & D. O. Ry. Co. v. Gilstrap (Tex. Civ. App.) 351.

A servant, injured while voluntarily assisting a fellow servant in the performance of the latter's duty at his request, *held* not entitled to recover from the employer for such injuries.—Werner v. Trautwein (Tex. Civ. App.) 447.

§ 6. — Contributory negligence of servant.

Negligence of deceased in not supporting himself by holding to a lever on a hand car *held* not to preclude a recovery for his death, caused by the negligence of the foreman.—Illinois Cent. R. Co. v. Josey's Adm'r (Ky.) 703.

In an action by a servant against the master for injuries, evidence *held* not to show plaintiff guilty of contributory negligence.—Lore v. American Mfg. Co. (Mo.) 678.

Evidence *held* not to justify the court in holding as a matter of law that plaintiff, injured by defective appliances, was guilty of contributory negligence.—Pauck v. St. Louis Dressed-Beef & Provision Co. (Mo.) 806.

Facts *held* to show that a section hand on a railroad, who was injured by continuing to work on the track when train was coming, was guilty of contributory negligence as a matter of law.—Sharp v. Missouri Pac. Ry. Co. (Mo.) 829.

Facts *held* to show that an engineer was not guilty of such reckless and wanton disregard of human life as to make his company liable to a person injured, notwithstanding his contributory negligence.—Sharp v. Missouri Pac. Ry. Co. (Mo.) 829.

§ 7. — Actions.

Where plaintiff, who was 17 years of age and unskilled in the use of machinery, had just been assigned to the duty of putting corn into the hopper of a grinding machine, the question whether plaintiff was guilty of contributory negligence in putting his hand in a spout at the bottom of the machine for the purpose of unclogging it was for the jury.—Standard Oil Co. v. Eiler (Ky.) 8.

In an action for injuries founded on Act Gen. Assem. April 20, 1891, *held* sufficient, if complaint states facts bringing the case within the statute, without pleading it.—Lore v. American Mfg. Co. (Mo.) 678.

Where, in an action by an employe for injuries received in a cotton mill, there was no assignment that the evidence did not support the verdict, the court will not consider a contention that plaintiff, because of the poor light at the place, and because of his stooping posture, necessitated by the place, could not have avoided the alleged defect.—Ferguson v. Phoenix Cotton Mills (Tenn. Sup.) 53.

Facts *held* sufficient to support a verdict against a railroad company on the ground that a station agent was negligent in leaving a "pinch bar" lying between the rails of a side track.—Louisville & N. B. Co. v. Jackson (Tenn. Sup.) 771.

An instruction that a section hand could recover from a railroad, if he was injured by his foreman's negligence, *held* not supported by the

pleading.—*Ft. Worth & D. C. Ry. Co. v. Gilstrap* (Tex. Civ. App.) 351.

In an action for loss of services of plaintiff's minor son from injuries received while in defendant's employ, *held* proper to direct a verdict for defendant.—*Hernischel v. Texas Drug Co.* (Tex. Civ. App.) 419.

A printed book of rules, warning a brakeman of the danger in standing erect while passing under a certain bridge, *held* insufficient as a matter of law to show that a brakeman assumed such risk.—*Gulf, C. & S. F. Ry. Co. v. Knox* (Tex. Civ. App.) 969.

In an action for injuries to an employé occurring from a failure to inspect the freight cars of the employer, evidence that the employer had formerly had two inspectors at the place of the injury, but had none at the time of the accident, *held* competent.—*Missouri, K. & T. Ry. Co. of Texas v. Miller* (Tex. Civ. App.) 978.

§ 8. Liabilities for injuries to third persons.

Where the servants of independent contractors engaged in repairing a building used an ash lift belonging to the owners of the building for the purpose of removing dirt from the basement, the owners are not liable for an injury to a servant of the contractors resulting from a defect in the lift.—*Bush v. Grant* (Ky.) 363.

Where plaintiff's minor son was injured while complying with the directions of the driver in the employ of defendant, *held*, in the absence of proof that the driver had any authority over plaintiff's employes, that it was error to charge that the defendant was liable for his acts.—*Williams v. Gobble* (Tenn. Sup.) 51.

MATERIALITY.

Of evidence, see "Criminal Law," §§ 4-10.
— in civil actions, see "Evidence," § 4.

MEASURE OF DAMAGES.

See "Damages," § 2.

MEETINGS.

Of municipal council, see "Municipal Corporations," § 2.
School district meetings, see "Schools and School Districts," § 1.

MEMORANDA.

Required by statute of frauds, see "Frauds, Statute of," § 3.

MINES AND MINERALS.

§ 1. Title, conveyances, and contracts.

Where a lessee was entitled by a mining lease to houses erected by him on the leased land, subject to the option of the lessors to purchase, the lessors having failed to exercise that option, the lessees, having subsequently acquired an interest in the land, are entitled in a partition to that part of the land on which the houses are situated.—*Brinkmeyer v. Rankin* (Ky.) 1007.

MINORS.

See "Infants."

MISREPRESENTATION.

See "Fraud."

MONEY PAID.

Where a city was compelled to pay for hydrants which it ordered for the county for the

court-house square, it may recover of the county the amount paid.—*City of Stanford v. Lincoln County* (Ky.) 463.

MONEY RECEIVED.

Recovery of tax paid, see "Taxation," § 3.

MONOPOLIES.

§ 1. Trusts and other combinations in restraint of trade.

An agreement not to sell beer to any one except defendant within a certain territory *held* not to come within Rev. St. 1895, art. 5313, defining trusts.—*Vandeweghe v. American Brewing Co.* (Tex. Civ. App.) 526.

MORTGAGES.

Effect of discharge of surety on mortgage securing his liability, see "Principal and Surety," § 4.

Parol evidence, see "Evidence," § 9.
Personal property, see "Chattel Mortgages."

§ 1. Requisites and validity.

In a proceeding in equity to have a warranty deed absolute on its face declared a mortgage, evidence *held* sufficient to support a finding that the deed was in fact a mortgage.—*Chance v. Jennings* (Mo.) 177.

A party who refuses to recognize a valid agreement that an instrument conveying an absolute title should be treated as a mortgage is not entitled to be relieved of the payment of costs of a suit to enforce the agreement.—*Spicer v. Johnson* (Tenn. Ch. App.) 1041.

A decree confirming a partition sale and vesting title in one who advanced the purchase money for a bidder who could not comply with his bid *held* to be a mortgage.—*Spicer v. Johnson* (Tenn. Ch. App.) 1041.

In proceedings to foreclose a mortgage, *held*, that the description of the land was sufficiently definite to warrant a foreclosure.—*Glenn v. Seeley* (Tex. Civ. App.) 959.

§ 2. Construction and operation.

Where a mortgagor incumbered real estate to which he did not have any title, but subsequently became the mortgagee of the property by a mortgage from the owner, *held*, that the satisfaction of the second mortgage without notice of the existence of the first defeated whatsoever title inured to the first mortgagor under Sand. & H. Dig. § 699.—*Turman v. Sanford* (Ark.) 167.

Where a mortgagor incumbered real estate to which he did not have any title, but subsequently became the mortgagee of the property by a mortgage from the owner, whatever interest the first mortgagor received by the second mortgage did not inure to a purchaser at the sheriff's sale on the foreclosure of the same, under Sand. & H. Dig. § 699.—*Turman v. Sanford* (Ark.) 167.

A recital in a junior mortgage of the existence of a prior mortgage *held* not to estop the junior mortgagee to contest the validity of the prior mortgage.—*Allen West Commission Co. v. Brown* (Ark.) 913.

Where defendant owed plaintiff \$4,600, and made a trust deed stating that he owed plaintiff "about \$1,500, which I wish paid in full," *held* that the deed intended the payment of only \$1,500.—*Hightower v. Wray* (Tenn. Sup.) 88.

Pasch. Dig. art. 4985, was superseded by the fourth, fifth, and thirteenth sections of Act Feb. 5, 1940, so that the record of a mortgage made after 1840 and not recorded within 90 days is constructive notice to purchasers after

the date of record.—*Turner v. Cochran* (Tex. Sup.) 922.

Where a mortgage provided that in case of default in the payment of interest the mortgage debt should thereafter bear interest at 10 per cent., and the mortgaged premises were destroyed by fire, which rendered the mortgagor insolvent, the mortgagee *held* entitled to 10 per cent. from the time of default.—*Pan Handle Nat. Bank v. Security Co.* (Tex. Civ. App.) 731.

Where a mortgage to secure future advances recited that it secured a note for a certain amount owing by the mortgagor, but no such note was given, and subsequently one for the amount actually due on account was executed, the mortgagee has a lien for the debt remaining unpaid, intended to be secured by the mortgage.—*Gleason v. Seeley* (Tex. Civ. App.) 960.

§ 3. Assignment of mortgage or debt.

Where money was paid by defendant to garnishee in part payment of a cash installment for purchase of a mortgage, on defendant's rescission of the purchase, the money *held* not subject to garnishment by creditors of defendant.—*Vaughan v. Garner* (Tenn. Sup.) 777; *Black v. Same, Id.*

§ 4. Transfer of property mortgaged or of equity of redemption.

One who has simply bought land subject to a trust deed, without assuming payment of the note secured thereby, is not entitled to question the ownership of the note by the plaintiff in a suit to foreclose the deed.—*Board of Trustees of Westminster College v. Pierson* (Mo.) 811.

One who accepts a warranty deed reciting that it is made subject to a deed of trust executed on the same date takes the land subject to the trust deed, though he is in possession under a prior unrecorded land contract.—*Board of Trustees of Westminster College v. Pierson* (Mo.) 811.

Where mortgaged property was sold by the sole devisee of the mortgagor, subject to the mortgage, the contention that the purchaser was not liable for any deficiency because his vendor was not so liable could not be sustained.—*Fant v. Wright* (Tex. Civ. App.) 514.

§ 5. Payment or performance of condition, release, and satisfaction.

Where a mortgagee indorsed his mortgage "Canceled," to enable the mortgagor to obtain money by a new mortgage for the purpose of discharging the existing mortgage, the mortgagor failing to obtain the money, the cancellation, which was never recorded, did not take effect.—*Boli's Adm'r v. Citizens' Bank* (Ky.) 271.

As between first and second mortgagees, a release of the first mortgage without consideration *held* not effective; the second mortgagee having advanced nothing on the faith thereof.—*Sells v. Tootle* (Mo.) 579.

Evidence *held* not to show release of mortgage.—*Sells v. Tootle* (Mo.) 579.

§ 6. Foreclosure by action.

The chancellor properly refused to enforce a mortgage after the lapse of 40 years; the claim being a stale one, and no adequate excuse being given for the delay in bringing suit.—*McArthur v. Preston* (Ky.) 365.

The purchaser of mortgaged property at decretal sale executed bond for the excess of price over the mortgage debt, and that bond was transferred by the mortgagor to S. in consideration of his release of an attachment lien upon other property. The sale was set aside, and the property was resold, bringing more than the mortgage debt, but less than it had formerly brought. *Held*, that S. is entitled to the excess.—*Ryan v. Sugg* (Ky.) 702.

Where an execution purchaser of land was not a party to a suit to foreclose a mortgage thereon, the purchaser at the foreclosure sale cannot recover in trespass to try title against those claiming under the execution purchaser.—*Davis v. Lanier* (Tex. Sup.) 886.

A judgment sustaining defendant's plea of limitations in an action on notes, with foreclosure of a trust deed, does not deprive plaintiff of a right to foreclose under the power of sale.—*Lee v. British & American Mortg. Co.* (Tex. Civ. App.) 134.

An allegation, in a petition to foreclose a mortgage which had been assumed by defendant, that by a contract between the sole devisee of the mortgagor and defendant the latter had assumed payment of the mortgage was sufficient averment of the assumption on a general demurrer.—*Fant v. Wright* (Tex. Civ. App.) 514.

An instruction that the purchaser of land was not bound by his contract, if through fraud or mistake a stipulation was made in the contract which required him to pay more taxes than he had agreed, unless he had waived such fraud, *held* not objectionable on the ground that fraud could not be waived unless the deed was accepted.—*Fant v. Wright* (Tex. Civ. App.) 514.

Where a purchaser of property was informed of the existence of certain unpaid taxes against it, an instruction that if the purchaser, with full knowledge that there were unpaid taxes, nevertheless intended to accept the deed, he was bound by the contract, *held* not objectionable as inconsistent with the facts.—*Fant v. Wright* (Tex. Civ. App.) 514.

MOTIONS.

Arrest of judgment in criminal prosecutions, see "Criminal Law," § 17.

Continuance in civil actions, see "Continuance."

New trial in civil actions, see "New Trial," § 3.

— in criminal prosecutions, see "Criminal Law," § 17.

MUNICIPAL CORPORATIONS.

See "Counties"; "Schools and School Districts," § 1.

Mandamus, see "Mandamus," § 1.

Street railroads, see "Street Railroads."

Subjects and titles of statutes, see "Statutes," § 3.

§ 1. Creation, alteration, existence, and dissolution.

Under *Sayles' Civ. St. art. 386*, a town which had made an inadequate attempt to become incorporated as a city, and had acted and been recognized by the state as such, became a city with full power to enforce the collection of taxes.—*McMickle v. Hardin* (Tex. Civ. App.) 322.

§ 2. Proceedings of council or other governing body.

Ky. St. § 2773, part of charter of cities of the first class, requiring the proceedings of the two boards of the common council to be published in a newspaper, is directory merely, and the failure to publish the proceedings does not invalidate an ordinance.—*Reed v. City of Louisville* (Ky.) 11.

At once, upon the adoption of the general charter of cities of the fifth class, the chairman of the board of trustees of a town assigned to that class became the mayor, and could not thereafter be counted as a member of the council in estimating a quorum.—*Bybee v. Smith* (Ky.) 15.

Under charter of cities of the fifth class, providing that a majority of the council, consisting of six members, shall constitute a quorum, and that the mayor shall preside at all meetings of the council, the mayor and three members of the council do not constitute a quorum.—*Bybee v. Smith* (Ky.) 15.

A resolution permitting abutting owners to improve a public street at their own expense, if it had been passed with the formality required in the enactment of an ordinance, would have been binding as an ordinance.—*Gleason v. Barnett* (Ky.) 20; *City of Louisville v. Gleason*, Id.

St. Louis City Ordinance 17,693, § 6, held not void because conflicting with Rev. Ord. 1892, § 1275, and not repealing same.—*Ruschenberg v. Southern Electric R. Co.* (Mo.) 626.

St. Louis City Ordinance 19,984 held objectionable as not expressing the object in the title.—*State ex rel. Belt v. City of St. Louis* (Mo.) 658.

§ 3. Property.

The state only can question the authority of a city to acquire and hold real estate.—*Hafner v. City of St. Louis* (Mo.) 632.

Under Rev. St. 1845, c. 34, § 1, a city may, when necessary, acquire land outside its limits for wharf purposes.—*Hafner v. City of St. Louis* (Mo.) 632.

§ 4. Contracts in general.

Where a part of the contract price of the original construction of a street was intended to cover future repairs, the contractor was entitled to recover of the city that part of the price to be paid out of the appropriation for street repairs; no more specific appropriation being necessary.—*City of Louisville v. Gosnell* (Ky.) 476.

§ 5. Public improvements.

In an action against a city to recover damages for injury to property in making a street improvement, the criterion of recovery is the diminution in value of plaintiff's property by reason of the acts complained of.—*City of Louisville v. Harbin* (Ky.) 1011.

The dedication of land for a street does not give the city the right to so construct the street as to materially damage the property of the dedicator or his vendees.—*City of Louisville v. Harbin* (Ky.) 1011.

In an action against a city to recover damages for injury to property in changing the grade of a street, the criterion of recovery is the diminution in value of plaintiff's property by reason of the acts complained of.—*City of Louisville v. Bohlson* (Ky.) 1014.

A claim for extra work performed in erecting a city hall held unenforceable for want of a duly-executed contract in conformity with defendant's charter.—*Watterson v. City of Nashville* (Tenn. Sup.) 782.

§ 6. — Preliminary proceedings and ordinances or resolutions.

In determining whether a majority in value of real-property owners petitioned for a municipal improvement, a spur track of a railroad on one of the streets was properly excluded.—*Ahern v. Board of Improvement Dist. No. 3 of Texarkana* (Ark.) 575.

In determining whether a majority in value of real-property owners petitioned for a municipal improvement, church property should be included.—*Ahern v. Board of Improvement Dist. No. 3 of Texarkana* (Ark.) 575.

In determining whether a majority in value of real-property owners petitioned for a municipal improvement, extraneous proof of the value of church property is admissible.—*Ahern v. Board of Improvement Dist. No. 3 of Texarkana* (Ark.) 575.

In determining whether a majority in value of real-property owners petitioned for a municipal improvement, improvements on the property subsequent to the last county assessment and previous to filing the petition should be included.—*Ahern v. Board of Improvement Dist. No. 3 of Texarkana* (Ark.) 575.

In determining whether a majority in value of real-property owners petitioned for a municipal improvement, it was proper to include mortgaged property signed for by the mortgagor, though the mortgage had been foreclosed.—*Ahern v. Board of Improvement Dist. No. 3 of Texarkana* (Ark.) 575.

In determining whether a majority in value of real-property owners petitioned for a municipal improvement, the underground right of way of a water company, and that of telegraph and electric light companies, was properly excluded.—*Ahern v. Board of Improvement Dist. No. 3 of Texarkana* (Ark.) 575.

It was proper to include property signed for by a purchaser, though the deed was not delivered, in determining whether a majority in value of real-property owners petitioned for a municipal improvement.—*Ahern v. Board of Improvement Dist. No. 3 of Texarkana* (Ark.) 575.

It was proper to include property signed for by the seller, in determining whether a majority in value of real-property owners petitioned for a municipal improvement.—*Ahern v. Board of Improvement Dist. No. 3 of Texarkana* (Ark.) 575.

Only one-half of property signed for by one tenant in common should be included in determining whether a majority in value of real-property owners petitioned for a municipal improvement.—*Ahern v. Board of Improvement Dist. No. 3 of Texarkana* (Ark.) 575.

Property of an estate signed for by the widow was improperly included, in determining whether a majority in value of real-property owners petitioned for a municipal improvement.—*Ahern v. Board of Improvement Dist. No. 3 of Texarkana* (Ark.) 575.

Property signed for by an executor was improperly included, in determining whether a majority in value of real-property owners petitioned for a municipal improvement.—*Ahern v. Board of Improvement Dist. No. 3 of Texarkana* (Ark.) 575.

Public property was properly excluded, in determining whether a majority in value of real-property owners petitioned for a municipal improvement.—*Ahern v. Board of Improvement Dist. No. 3 of Texarkana* (Ark.) 575.

Where more than a majority in value of real-property owners petitioned for a municipal improvement, a decree foreclosing assessment liens will be affirmed, though property had been improperly included and excluded.—*Ahern v. Board of Improvement Dist. No. 3 of Texarkana* (Ark.) 575.

St. Louis City Charter, art. 6, § 28, did not permit the assembly to pass an ordinance requiring the board to make a contract for public work, where the cost therefor was borne by the contractor and required no specific appropriation; but such section was governed by sections 17 and 27, limiting the assembly's power.—*State ex rel. Belt v. City of St. Louis* (Mo.) 658.

Under St. Louis City Charter, art. 6, § 27, prohibiting the general assembly from contracting for public improvements, City Ordinance 19,984, directing the board of public improvements to contract for the erection on the street of receptacles for litter, was invalid, not being on any recommendation by the board.—*State ex rel. Belt v. City of St. Louis* (Mo.) 658.

§ 7. — Assessments for benefits, and special taxes.

Objections to irregularities in the proceedings of the board of benefit improvements and the city council, not made within 20 days, cannot be set up in a suit to enforce tax liens for the improvement.—*Ahern v. Board of Improvement Dist. No. 3 of Texarkana (Ark.)* 575.

Under Const. art. 19, § 27, an assessment for local improvements in proportion to the benefits is not prohibited.—*Ahern v. Board of Improvement Dist. No. 3 of Texarkana (Ark.)* 575.

Under Const. art. 9, § 3, and article 19, § 27, a homestead is not exempt from the lien for assessments for local improvements.—*Ahern v. Board of Improvement Dist. No. 3 of Texarkana (Ark.)* 575.

Under a city charter providing that the general council may, upon a petition of a majority of the property owners on a public way, grant them permission to improve said public way under the supervision of the engineer, a petition, signed by an agent for property owners, which was granted by the council, protected the property owners in the construction made thereunder, so as to exempt them from further taxation for that purpose.—*Gleason v. Barnett (Ky.)* 20; *City of Louisville v. Gleason, Id.*

Though a city charter required an "ordinance" for the construction of a street, yet, as the council by resolution accepted the proposition of the lot owners and permitted them to incur the expense of the work, the city cannot thereafter charge the property owners with any part of the cost of reconstructing the street, upon the idea that the construction is an original one.—*Gleason v. Barnett (Ky.)* 20; *City of Louisville v. Gleason, Id.*

Ky. St. § 3378 (part of charter of cities of the third class), requiring a specific description of property assessed, is directory merely, and a failure to comply therewith does not render the assessment void.—*Board of Councilmen of Frankfort v. Farmers' Bank (Ky.)* 458.

In assessing property for the cost of the original construction of a street, the council of a city of the first class has no power, in determining the depth to be assessed, to cross another principal street and lay the burden on property fronting on that street.—*Fidelity Trust & Safety-Vault Co. v. Voris' Ex'rs (Ky.)* 474.

§ 8. Police power and regulations.

Under Ind. T. Ann. St. §§ 522-534, an ordinance prohibiting the erection of wooden buildings more than 10 feet square *held* ultra vires.—*In re English (Ind. T.)* 992.

§ 9. Use and regulation of public places, property, and works.

St. Louis City Ordinance 19,984, requiring the board of public improvements to erect on the streets receptacles for litter, and giving the contractor the exclusive privilege of posting advertisements on such receptacles, was invalid, as subjecting the streets to a purely private use.—*State ex rel. Belt v. City of St. Louis (Mo.)* 658.

§ 10. Torts.

In action for injuries from defective sidewalk, plaintiff, alleging that the planks and supports of the sidewalk were rotten, worn out, out of place, and warped, was not bound to prove all the defects as alleged.—*Stern v. Bensieck (Mo.)* 594.

In an action for injuries to an infant, it was error to charge that the infant was bound to exercise such reasonable care as a boy of his age was individually capable of exercising; but the degree required was that which, under like circumstances, would reasonably be expected of

one of his years and capacity.—*Stern v. Bensieck (Mo.)* 594.

Instructions as to a city's liability for damages caused by the breaking of a defective sewer during an unusual rainfall approved.—*Brash v. City of St. Louis (Mo.)* 808.

In an action against a city for injuries received by falling on an icy sidewalk, where the evidence did not show that there was any other ice or snow in the city, it was error to charge on the theory that the city would be liable only in case the snow or ice was suffered to be piled up so as to create a veritable obstruction.—*Reedy v. St. Louis Brewing Ass'n (Mo.)* 859.

In an action against a city for injuries received by falling on an icy sidewalk, an instruction *held* erroneous, as leaving too much inference to be drawn from the common knowledge which the jurors derived from their everyday experience.—*Reedy v. St. Louis Brewing Ass'n (Mo.)* 859.

Smooth and slippery ice, covering a sidewalk for a space of 15 feet, is a dangerous obstacle, which the city is bound to remove within a reasonable time after notice, where there is no other ice or snow on the streets.—*Reedy v. St. Louis Brewing Ass'n (Mo.)* 859.

In an action against a city and an abutting property owner for injuries received by falling on an icy sidewalk, the abutting owner was not liable for failing to keep the gutters in good repair, whereby the water from a water pipe on the building flowed onto the sidewalk.—*Reedy v. St. Louis Brewing Ass'n (Mo.)* 859.

Under the plea of not guilty in an action against a city for personal injuries, it may show that it never accepted the part of the street where the accident occurred.—*Nellums v. City of Nashville (Tenn. Sup.)* 88.

Instructions *held* a sufficient presentation of the law on an issue as to whether a city had accepted a portion of a street where an accident occurred.—*Nellums v. City of Nashville (Tenn. Sup.)* 88.

Where evidence was undisputed that plaintiff was driving recklessly at a high speed, and turned out of the safe track, whereby his wagon was overturned by striking embankment on side of street, error in charging that the city is not required to keep its street reasonably safe through its entire width *held* not ground for reversal.—*Oliver v. City of Nashville (Tenn. Sup.)* 89.

Municipal corporation *held* not liable for the value of property destroyed by fire through city's negligent failure to furnish water.—*Butterworth v. City of Henrietta (Tex. Civ. App.)* 975.

§ 11. Fiscal management, public debt, securities, and taxation.

Under Ky. St. § 2996, part of charter of cities of the first class, a tax bill authenticated by the assessor by his signature is prima facie proof that all steps have been taken to make it binding.—*Reed v. City of Louisville (Ky.)* 11.

A contract by a city with a water company, entered into prior to the adoption of the constitution, created an "indebtedness," within the meaning of Const. § 157, authorizing certain cities to exceed the tax rate prescribed therein when necessary to enable them "to pay the interest on, and provide a sinking fund for the extinction of, indebtedness contracted before the adoption of this constitution."—*Mayfield Woolen Mills v. City of Mayfield (Ky.)* 43.

The courts cannot inquire as to the necessity of a tax levy made by a municipal council within the limits prescribed by the constitution.—*Mayfield Woolen Mills v. City of Mayfield (Ky.)* 43.

A tax levy within the constitutional limit for the payment of current expenses is not void be-

cause the intention is to pay it to parties with whom the city has a void contract for lighting the city.—*Mayfield Wooden Mills v. City of Mayfield* (Ky.) 43.

The authority given a city to levy a tax to pay interest on, and provide a sinking fund for the extinction of, an indebtedness, authorizes the levy of a tax to pay installments of such indebtedness, which, by the contract creating it, fall due from year to year.—*Mayfield Wooden Mills v. City of Mayfield* (Ky.) 43.

A tax collector's bond, though not good as a statutory bond to the extent that it binds the collector to perform duties required only by ordinance, *held* good as a common-law bond as to such duties, and sufficient to bind the sureties for street assessments collected by the principal pursuant to an ordinance.—*Delker v. City of Owensboro* (Ky.) 362.

Street assessments are "taxes," within Ky. St. § 3412, making it the duty of the tax collector of a city of the third class to collect "all taxes" levied by the city, and the sureties on his bond are liable for such assessments.—*Delker v. City of Owensboro* (Ky.) 362.

§ 12. Actions.

To invalidate a contract by a city on the ground that it creates an indebtedness in excess of the income and revenue provided for the year, in violation of Const. § 157, the facts showing that such is the effect of the contract must be alleged.—*City of Louisville v. Gosnell* (Ky.) 476.

MURDER.

See "Homicide," § 1.

MUTUAL INSURANCE.

See "Insurance," § 10.

NAMES.

Of partnership, see "Partnership," § 2.

NATIONAL BANKS.

See "Banks and Banking," § 2.

NEGLIGENCE.

By particular classes of parties, see "Carriers," §§ 1, 4; "Municipal Corporations," § 10; "Street Railroads," § 1.

—employers, see "Master and Servant," §§ 3-7.

—railroad companies, see "Railroads," §§ 2-4.

—telegraph or telephone companies, see "Telegraphs and Telephones," § 1.

Causing death, see "Death," § 1.

Measure of damages, see "Damages," § 3.

Of passenger, see "Carriers," §§ 3-5.

Of servant, see "Master and Servant," § 6.

§ 1. Acts or omissions constituting negligence.

An instruction defining negligence *held* not error.—*Anderson v. Union Terminal R. Co.* (Mo.) 874.

§ 2. Proximate cause of injury.

An instruction that, if defendant used ordinary care to prevent a certain injury, and such injury was caused by the act of God, the jury should find for the defendant, *held* error.—*Texas & N. O. R. Co. v. Anderson* (Tex. Civ. App.) 424.

Evidence *held* to show mine owners' negligence not to be the proximate cause of injuries to one employed in the mine.—*Roe v. Thomason* (Tex. Civ. App.) 523.

§ 3. Contributory negligence.

The injured servant *held* guilty of contributory negligence in standing upon the heavily loaded lift for the purpose of removing an obstruction caused by negligent loading.—*Bush v. Grant* (Ky.) 363.

§ 4. Actions.

The proof of contributory negligence must be clear to authorize a peremptory instruction for defendant on that ground.—*Standard Oil Co. v. Eiler* (Ky.) 8.

Where the facts show unmistakably that the injury complained of resulted from an act of plaintiff which in law was negligence, a peremptory instruction for defendant is proper.—*Bush v. Grant* (Ky.) 363.

Where plaintiff's minor son was injured by stepping on a defective platform over a horse power operated by defendants in connection with their thrasher, *held*, that it was not error to admit plaintiff's evidence as to the condition of the platform the day before the injury.—*Williams v. Gobble* (Tenn. Sup.) 51.

In a suit for the overflow of land caused by the obstruction of a ditch, evidence that on the removal of the obstruction the water receded *held* admissible.—*Texas & N. O. R. Co. v. Anderson* (Tex. Civ. App.) 424.

In a suit for the overflow of land caused by the obstruction of a ditch, evidence that on the removal of the obstruction the water receded was not inadmissible as proof of prior negligence by subsequent repairs.—*Texas & N. O. R. Co. v. Anderson* (Tex. Civ. App.) 424.

An instruction on contributory negligence, applicable to other special charges, but given in connection with a charge relating to "proximate cause," was not thereby rendered erroneous.—*Sherman, S. & S. Ry. Co. v. Eaves* (Tex. Civ. App.) 550.

An instruction on contributory negligence *held* to correctly state the law.—*Sherman, S. & S. Ry. Co. v. Eaves* (Tex. Civ. App.) 550.

NEGOTIABLE INSTRUMENTS.

See "Bills and Notes"; "Bonds," § 1.

NEWLY-DISCOVERED EVIDENCE.

Ground for new trial in civil actions, see "New Trial," § 2.

NEWSPAPERS.

Publication of ordinances, see "Municipal Corporations," § 2.

NEW TRIAL.

In criminal prosecutions, see "Criminal Law," § 17.

Necessity of motion for purpose of review, see "Appeal and Error," § 3.

Opening or vacating judgment, see "Judgment," § 2.

Remand by appellate court for new trial, see "Appeal and Error," § 18.

§ 1. Nature and scope of remedy.

Where one of two joint defendants was not liable in an action for tort, and there was a verdict for plaintiff, it was not error to set aside the verdict as to the defendant not liable and permit it to stand against the other.—*Nashville St. Ry. v. Gore* (Tenn. Sup.) 777.

§ 2. Grounds.

The court properly refused a new trial asked upon the ground of newly-discovered evidence which was merely cumulative.—*Thomas' Adm'r v. Louisville & N. R. Co.* (Ky.) 43.

A party who made no effort to obtain delay on account of testimony introduced cannot, after verdict against him, apply for a new trial on the ground of surprise.—*Nellums v. City of Nashville* (Tenn. Sup.) 88.

That a building association has no right to sue, because it has not paid its franchise tax, cannot be made the ground for a new trial unless the objection is raised before motion for new trial.—*Frazier v. Waco Bldg. Ass'n* (Tex. Civ. App.) 132.

The refusal of a new trial for evidence newly discovered by defendant, consisting of statements of such party's own witness contrary to the latter's testimony on the trial, was not an abuse of judicial discretion.—*Phifer v. Mansur & Tebbetts Implement Co.* (Tex. Civ. App.) 968.

The refusal of a new trial for newly-discovered evidence, which consisted of statements of plaintiff's agent not shown to have been authorized nor to have been part of the res gestæ of the transaction in controversy, was proper.—*Phifer v. Mansur & Tebbetts Implement Co.* (Tex. Civ. App.) 968.

§ 3. Proceedings to procure new trial. Formal technical objection to hearing of plaintiff's motion for new trial *held* waived.—*Oliver v. City of Nashville* (Tenn. Sup.) 89.

The action of the court in stating that verdict against a carrier for the ejection of a passenger is excessive, and in allowing a remittitur, *held* not erroneous.—*Houston, E. & W. T. Ry. Co. v. Jackson* (Tex. Civ. App.) 440.

That an agent's statements were made on the "occasion" of a certain transaction *held* insufficient to show that they were res gestæ of such transaction.—*Phifer v. Mansur & Tebbetts Implement Co.* (Tex. Civ. App.) 968.

NEXT OF KIN.

See "Descent and Distribution."

NONRESIDENCE.

Effect on limitation, see "Limitation of Actions," § 2.

NONSUIT.

Before trial, see "Dismissal and Nonsuit."

NOTES.

Promissory notes, see "Bills and Notes."

NOTICE.

See "Elections," § 1.

Nonpayment or protest of bill or note, see "Bills and Notes," § 3.

Of mortgage, see "Mortgages," § 2.

To take depositions, see "Depositions."

NUISANCE.

Conviction for maintaining nuisance as bar to subsequent prosecution, see "Criminal Law," § 2.

Forfeiture of right to enjoin by laches, see "Injunction," § 1.

OBLIGATION OF CONTRACT.

Laws impairing, see "Constitutional Law," § 5.

OBSTRUCTING JUSTICE.

Murder in resisting officer, see "Homicide," § 1.

Under Sayles' Civ. St. art. 4869, *held* not necessary, in a criminal prosecution for resisting

an officer who was attempting to seize property under a voidable writ of sequestration, that the description of the property in the writ and the affidavit should correspond.—*Witherspoon v. State* (Tex. Cr. App.) 393.

A writ of sequestration, voidable as not stating the value and location of the property sought to be taken, will not justify a defendant, on a criminal prosecution therefor, in preventing a seizure of property under the writ, though the writ might be quashed in a civil suit.—*Witherspoon v. State* (Tex. Cr. App.) 398.

On a criminal prosecution for preventing an officer from seizing property under a writ of sequestration, where it was alleged as a defense that the writ was void in not conforming to the affidavit on which it was issued, evidence of the bond and affidavit for sequestration was properly rejected.—*Witherspoon v. State* (Tex. Cr. App.) 396.

In a criminal prosecution for resisting an officer who was attempting to seize property under a voidable writ of sequestration, *held*, that the writ was properly received in evidence on behalf of the state.—*Witherspoon v. State* (Tex. Cr. App.) 396.

In a criminal prosecution for preventing an officer from making a seizure of property under a writ of sequestration, *held* not error to refuse an instruction that, if the jury believed that the officer was attempting to execute an illegal and invalid writ, they should acquit.—*Witherspoon v. State* (Tex. Cr. App.) 393.

OBSTRUCTIONS.

Of process, see "Obstructing Justice."

OFFER.

Of proof, see "Trial," § 2.

OFFICERS.

Creditors' suit to reach officer's salary, see "Creditors' Suit."

Judicial notice of state officers, see "Evidence," § 1.

Mandamus, see "Mandamus," § 1.

Particular classes of officers, see "Clerks of Courts"; "Judges"; "Justices of the Peace"; "Receivers."

— collectors of taxes, see "Taxation," § 4.

— health officers, see "Health," § 1.

— school officers, see "Schools and School Districts," § 1.

Resisting officer, see "Obstructing Justice."

Validity of assignment of future salary, see "Assignments," § 1.

§ 1. Appointment, qualification, and tenure.

When two persons are present at the seat of government, each claiming to be governor de jure, and each assuming to perform the duties of the office, the one who is governor de jure is also governor de facto.—*Powers v. Commonwealth* (Ky.) 735.

Rev. St. 1899, § 5035, prescribing the method of selecting members of the board of examiners for barbers, is authorized by Const. art. 14, § 9.—*Ex parte Lucas* (Mo.) 218.

The payment of an order given by school directors regularly elected and exercising the functions of their office cannot be defeated on the ground that certain members are not eligible or have forfeited their office.—*State v. Hart* (Tenn. Sup.) 780.

§ 2. Rights, powers, duties, and liabilities.

It will be conclusively presumed that an officer who was discharging the duties of an office and receiving its emoluments had tak

the oath of office, when necessary for the protection of the public.—Commonwealth v. Pate (Ky.) 1009.

OPENING.

Judgment, see "Judgment," § 2.

OPINION EVIDENCE.

In civil actions, see "Evidence," § 10.
In criminal prosecutions, see "Criminal Law," § 9.

OPINIONS.

Of courts, see "Courts," § 1.

ORDERS.

Review of appealable orders, see "Appeal and Error."

ORDINANCES.

Municipal ordinances, see "Municipal Corporations," §§ 2, 6, 8.

PARDON.

The production of a valid pardon of the offense whereof defendant is accused puts an end to the proceedings, no plea of pardon being necessary.—Powers v. Commonwealth (Ky.) 735.

PARENT AND CHILD.

See "Adoption"; "Guardian and Ward."
Action for wrongful death, see "Death," § 1.

PAROL EVIDENCE.

In civil actions, see "Evidence," § 9.

PARTIES.

See "Trespass to Try Title," § 2.
Action to recover taxes paid, see "Taxation," § 3.
Admissions as evidence, see "Evidence," § 6.
Collateral attack on judgment, see "Judgment," § 4.
Domicile or residence as affecting venue, see "Venue," § 1.
Entitled to allege error, see "Appeal and Error," § 14.
In actions by or against particular classes of parties, see "Executors and Administrators," § 6; "Husband and Wife," § 3; "Partnership," § 4.
Interpleading, see "Interpleader."
Intervention by trustee in bankruptcy, see "Bankruptcy," § 1.
Joint interests, see "Joint Ventures."
On appeal or writ of error, see "Appeal and Error," §§ 2, 4.
Persons concluded by judgment, see "Judgment," § 7.
—entitled to raise constitutional questions, see "Constitutional Law," § 1.
Suits to set aside fraudulent conveyances, see "Fraudulent Conveyances," § 2.

§ 1. Defects, objections, and amendment.

A defect of parties is waived unless the objection is made by a special demurrer or other pleading.—Rittenhouse v. Clark (Ky.) 83.

PARTITION.

§ 1. Actions for partition.

Ejectment is not a condition precedent to a suit for partition by persons claiming an inter-

est in land as heirs of a common ancestor.—Lee v. Lee (Mo.) 630.

In partition, a decree in a former partition *held* not a basis on which to predicate a claim of homestead.—Lee v. Lee (Mo.) 630.

Will construed, and *held* that, when the youngest of a devisee's children came of age, the mother and the children were tenants in common, so as to authorize partition.—Doerner v. Doerner (Mo.) 801.

Pleadings in action for partition *held* to put in issue the collection of rents and profits by one of the defendants, so as to authorize an accounting thereof.—Doerner v. Doerner (Mo.) 802.

Tenants in common, collecting all the rents and profits, *held* liable to account to the other tenants for their proportionate shares.—Doerner v. Doerner (Mo.) 802.

Exclusion of certain lands by commissioners appointed to partition lands *held* erroneous.—Gass v. Waterhouse (Tenn. Ch. App.) 450.

Modification by the trial court of a decree previously made, so as to conform to the rights of the parties, *held* proper.—Gass v. Waterhouse (Tenn. Ch. App.) 450.

A deed partitioning land held in common is valid as to the land included therein, though it may not include all of the tract held in common.—Robnett v. Howard (Tenn. Ch. App.) 1082.

A tenant in common *held*, under a partition of the property, to be entitled to the possession of a portion thereof which is subject to a life estate, on the removal of the life tenant.—Robnett v. Howard (Tenn. Ch. App.) 1082.

A vendee in common, entitled to the possession of a certain part of the property under a partition between the owners in common, *held* entitled to recover rent thereon from a co-owner retaining possession.—Robnett v. Howard (Tenn. Ch. App.) 1082.

PARTNERSHIP.

See "Joint Ventures."

§ 1. The relation.

A partnership *held* to exist, though the contract did not provide for the sharing of the losses.—Torbert v. Jeffrey (Mo.) 823.

Agreement by plaintiff with a third person, whereby such person was to cut logs belonging to plaintiff and raft them to market in consideration of one-half the proceeds, *held* not to constitute such person a partner or joint owner.—Gore v. Benedict (Tenn. Ch. App.) 1054.

Facts *held* not to constitute such representation of partnership by plaintiff as to estop him from questioning a sale by the alleged partner.—Gore v. Benedict (Tenn. Ch. App.) 1054.

Estoppel cannot be invoked against a private corporation in favor of a bank seeking to hold it liable for holding a third party out as partner.—Murray Ginning-System Co. v. Exchange Nat. Bank (Tex. Civ. App.) 508.

A contract *held* not to create a partnership, but an agency.—Murray Ginning-System Co. v. Exchange Nat. Bank (Tex. Civ. App.) 508.

§ 2. The firm, its name, powers, and property.

Facts *held* not inconsistent with a finding that all the business of a banking partnership was done in the firm name of the "Bank of L."—Masterson v. Mansfield (Tex. Civ. App.) 505.

§ 3. Mutual rights, duties, and liabilities of partners.

A partner who furnishes labor as his part of the capital cannot be required to contribute to

the payment of any part of the loss of the other partner's capital.—*Meadows v. Mocquot* (Ky.) 28.

§ 4. Rights and liabilities as to third persons.

Where plaintiff allowed his partner to receive assistance from a third party, who took an active part in the business, on plaintiff bringing trover to recover cattle sold by such third party, the question of partnership or agency was for the jury.—*Gentry v. Singleton* (Ind. T.) 990.

A partnership cannot be sued by its firm name, but the individual partners should be named as defendants.—*Fox v. Blue-Grass Grocery Co.* (Ky.) 265.

Where one member of a firm, engaged in banking under one name and in the real-estate business under another, borrowed money in the name of the real-estate firm, it is not liable, unless under such partnership such power is implied.—*Masterson v. Mansfield* (Tex. Civ. App.) 505.

In an action on notes for borrowed money, made by one partner in the name of a firm in the real-estate business, evidence held sufficient to sustain a finding that he had no implied power to bind the firm.—*Masterson v. Mansfield* (Tex. Civ. App.) 505.

Under Rev. St. art. 1485, receiver held properly appointed, after verdict in an action to subject the interest of partner in firm property to his debts; he being insolvent and in possession of the property.—*Jones v. Meyer Bros. Drug Co.* (Tex. Civ. App.) 553.

§ 5. Dissolution, settlement, and accounting.

Where the pleadings disclosed that there was a partnership between the parties, and each claimed an indebtedness by the other, there should have been a reference for a statement of the accounts.—*Bush v. Stamper* (Ky.) 267.

Equity is not deprived of jurisdiction of a suit between partners to wind up a partnership business by the fact that a part of the firm property is stored in another state.—*Torbert v. Jeffrey* (Mo.) 823.

PASSENGERS.

See "Carriers," §§ 3-5.

PAYMENT.

See "Compromise and Settlement"; "Mortgages," § 5.

Compensation of board of examiners for barbers, see "States," § 1.

Price of land sold, see "Vendor and Purchaser," § 3.

Recovery for money paid, see "Money Paid."

Subrogation on payment, see "Subrogation."

Taxes, see "Taxation," § 3.

§ 1. Application.

Payment held properly applied on a general account, and not on a note, in the absence of an express agreement that it should be applied on the note.—*Reed v. Corry* (Tex. Civ. App.) 157.

§ 2. Pleading, evidence, trial, and review.

Where evidence was conflicting as to whether it had been agreed that payments by defendant should be applied on his note or on a general account, held error to instruct that the moneys received by plaintiff became his property.—*Reed v. Corry* (Tex. Civ. App.) 157.

PENALTIES.

Violations of liquor laws, see "Intoxicating Liquors," § 4.

PERJURY.

§ 1. Prosecution and punishment.

Evidence held not to sustain a conviction of perjury.—*Goad v. State* (Tenn. Sup.) 79.

Indictment for perjury held not bad, as not alleging the materiality of the false testimony.—*Tellis v. State* (Tex. Cr. App.) 717.

PERSONAL INJURIES.

See "Negligence"; "Street Railroads," § 1.

Excessive damages, see "Damages," § 4.

Measure of damages, see "Damages," § 3.

Release from liability, see "Release," § 2.

To employé, see "Master and Servant," §§ 3-7.

To licensee, see "Railroads," §§ 2-4.

To passenger, see "Carriers," § 4.

To person on or near railroad tracks, see "Railroads," §§ 2-4.

To traveler on highway, see "Municipal Corporations," § 10.

— crossing railroad, see "Railroads," § 3.

To trespasser, see "Railroads," §§ 2-4.

PHYSICIANS AND SURGEONS.

Expert testimony, see "Evidence," § 10.

Physicians as health officers, see "Health," § 1.

PLEA.

In civil actions, see "Pleading," § 2.

PLEADING.

Allegations as to particular facts, see "Estoppel," § 1; "Pardon."

— statute of frauds, see "Frauds, Statute of," § 5.

Amendment after reversal, see "Appeal and Error," § 18.

Applicability of instructions to pleadings, see "Trial," § 6.

Conformity of judgment to pleadings, see "Judgment," § 1.

Costs on amendment of pleading, see "Costs," § 1.

In actions by or against particular classes of parties, see "Carriers," §§ 2-5; "Corporations," § 3; "Municipal Corporations," §§ 10, 12; "Railroads," §§ 2-4.

— tax collector, see "Taxation," § 4.

In particular actions or proceedings, see "Equity," § 3; "Injunction," § 2; "Libel and Slander," § 3; "Partition," § 1; "Trespass to Try Title," § 2.

— actions for personal injuries, see "Railroads," §§ 2-4.

— actions for wrongful attachment, see "Attachment," § 4.

— actions on notes, see "Bills and Notes," § 4.

— condemnation proceedings, see "Eminent Domain," §§ 3, 4.

— foreclosure, see "Mortgages," § 6.

— indictment or criminal information or complaint, see "Indictment and Information."

— suit for dower, see "Dower," § 2.

— suit to enjoin a judgment, see "Judgment," § 3.

§ 1. Form and allegations in general.

A declaration alleging that it was the duty of a railroad company to have all of its cars needing ice placed at a certain derrick, without alleging how such duty arose, held to merely state a conclusion of law and hence insufficient.—*Baker v. Louisville & N. Terminal Co.* (Tenn. Sup.) 1029.

§ 2. Plea or answer, cross complaint, and affidavit of defense.

Sustaining a demurrer to defendant's answer held erroneous under the evidence.—*Case v. Ingle* (Ind. T.) 994.

Where a petition against two railroads alleges a partnership or joint liability, the plea of one of them, a nonresident, to the jurisdiction, is properly overruled, where it fails to charge fraud in the allegations.—*Texas & P. Ry. Co. v. Stell* (Tex. Civ. App.) 980.

§ 3. Amended and supplemental pleadings and replader.

Under Mansf. Dig. § 5080 (Ind. T. Ann. St. 1890, § 3285) it was not error for the court to allow plaintiff to amend his petition by merely changing the name of the action from "forcible entry and detainer" to "ejectment"; the issues remaining the same and no delay being occasioned.—*Rutherford v. McDonald* (Ind. T.) 989.

Where it had been held upon appeal that defendant's counterclaim stated a cause of action, but that it should be reformed, it was error to sustain a demurrer to the counterclaim as amended after remand.—*Brashears v. Letcher County Court* (Ky.) 285.

An amended answer and counterclaim, which was filed in vacation without leave of court, should have been stricken from the files.—*Brashears v. Letcher County Court* (Ky.) 285.

§ 4. Issues, proof, and variance.

The answer in an action for breach of a contract held not to dispense with proof of the contract alleged in the bill.—*Nichols v. Cecil* (Tenn. Sup.) 768.

§ 5. Defects and objections, waiver, and aid by verdict or judgment.

Where defendant filed its answer and went to trial after its motion to make the petition more definite and certain was overruled, it waived such objection.—*State ex rel. Mahan v. Merchants' Bank* (Mo.) 676.

Unless the second or other count in a declaration expressly refers to the first, no defect therein will be aided by the preceding count.—*Baker v. Louisville & N. Terminal Co.* (Tenn. Sup.) 1029.

Objection that a judgment introduced in evidence was rendered in the county court, instead of the district court, as alleged in the pleading, first raised after verdict, is untenable.—*Jones v. Meyer Bros. Drug Co.* (Tex. Civ. App.) 553.

Objection to a petition of intervention by a trustee in bankruptcy, that it failed to allege that the bankrupt had been adjudged a bankrupt, is obviated by an answer containing such allegation, though a demurrer to the paragraph of answer containing the allegation is sustained.—*Jones v. Meyer Bros. Drug Co.* (Tex. Civ. App.) 553.

PLEDGES.

Liability of pledged property to attachment, see "Attachment," § 1.

POISONS.

Murder by poison, see "Homicide," § 1.

POLICE POWER.

See "Constitutional Law," § 2; "Food."

Of municipality, see "Municipal Corporations," § 8.

POLICY.

Of insurance, see "Insurance."

POSSESSION.

See "Adverse Possession."

Retention by grantor in fraudulent conveyance, see "Fraudulent Conveyances," § 1.

POWERS.

Of attorney, see "Principal and Agent."
Power of attorney by imbecile, see "Insane Persons," § 1.

PRACTICE.

In equity, see "Equity."

In justices' courts, see "Justices of the Peace," § 3.

In particular actions or proceedings, see "Ejectment"; "Habeas Corpus," § 2; "Interpleader"; "Mandamus," § 2; "Replevin"; "Trespass to Try Title," § 2.

—condemnation proceedings, see "Eminent Domain," § 3.

Particular proceedings in actions, see "Abatement and Revival"; "Appeal and Error"; "Appearance"; "Continuance"; "Costs"; "Damages," § 5; "Depositions"; "Dismissal and Nonsuit"; "Divorce," § 2; "Evidence"; "Execution"; "Judgment"; "Jury"; "Limitation of Actions"; "Parties"; "Pleading"; "Process"; "Trial"; "Venue."

—remedies in or incident to actions, see "Attachment"; "Garnishment"; "Injunction"; "Receivers."

Procedure in criminal prosecutions, see "Bail," § 1; "Criminal Law"; "Intoxicating Liquors," § 5.

—of particular courts, see "Courts."

—on review, see "Justices of the Peace," § 4; "New Trial."

PREFERENCES.

In fraudulent conveyance, see "Fraudulent Conveyances," § 1.

PREJUDICE.

Ground for reversal in civil actions, see "Appeal and Error," § 17.

PREMIUMS.

For insurance, see "Insurance," § 4.

PRESCRIPTION.

See "Easements," § 1; "Highways," § 1.

Acquisition of rights, see "Adverse Possession," § 1.

Establishment of highways, see "Highways," § 1.

PRESENTMENT.

Of claims against estate assigned for creditors, see "Assignments for Benefit of Creditors," § 3.

PRESUMPTIONS.

In civil actions, see "Evidence," § 2.

In criminal prosecutions, see "Criminal Law," § 5.

On appeal or error, see "Appeal and Error," § 15.

PRINCIPAL AND AGENT.

See "Attorney and Client"; "Brokers."

Admissions by agent, see "Evidence," § 6.

Agency of partner for firm, see "Partnership," § 4.

—or partnership, see "Partnership," § 1.

Insurance agents, see "Insurance," §§ 1, 2.

Liability of insurance agent on contracts of foreign insurance company, see "Insurance," § 1.

Power of insurance agent to waive warranty, see "Insurance," § 5.

Service of process on agent, see "Process," § 1.

§ 1. Mutual rights, duties, and liabilities.

Where defendant's testimony in a suit to recover the proceeds of a note showed a collection more than six years before suit, limitations applied.—*Osborne v. Boswell* (Tenn. Ch. App.) 98.

A power of attorney "to buy and sell land, and to transact all business necessary in transaction of my affairs," held to empower the attorney to convey land already owned by the principal.—*Texas Loan Agency v. Miller* (Tex. Sup.) 477.

§ 2. Rights and liabilities as to third persons.

In the absence of special authority to bind the principal, the contract of sale of a drummer does not become completed until the order is accepted by his principal.—*John Matthews Apparatus Co. v. Rens* (Ky.) 9.

A husband, having ratified the act of his wife in signing his name to a note, is bound thereby.—*Hewling v. Wilshire* (Ky.) 264.

Defendants are liable for the act of their agent in refusing to permit plaintiffs to carry out a contract which they had made with him, the act being within the apparent authority of the agent.—*Blood v. Harring* (Ky.) 273.

Evidence held not sufficient to show that an agent had authority to consummate an exchange of his principal's land.—*Cockrell v. McIntyre* (Mo.) 648.

PRINCIPAL AND SURETY.

See "Bail."

Liabilities of sureties on bond of tax collector, see "Municipal Corporations," § 11; "Taxation," § 4.

—on bonds in legal proceedings, see "Injunction," § 3.

§ 1. Creation and existence of relation.

Where a surety signed a convict bond on a condition precedent to his liability, and the payee, on accepting the bond, knew of such condition, which never was fulfilled, the surety was not liable on the bond.—*Gatling v. San Augustine County* (Tex. Civ. App.) 432.

§ 2. Nature and extent of liability of surety.

Indorsers of a note held estopped to question its validity.—*Klein v. German Nat. Bank* (Ark.) 572.

§ 3. Discharge of surety.

Payment one day before due was not such an alteration of a building contract as to release sureties on the contractor's bond.—*Maree v. Ingle* (Ark.) 369.

Where under a building contract it was optional with the proprietor to make payments before mechanics' claims were paid, such payment did not release the sureties on the contractor's bond.—*Maree v. Ingle* (Ark.) 369.

Under Rev. St. arts. 3811, 3812, a verbal request by a surety that the creditor bring action against the principal debtor will not release the surety from liability.—*Leazar v. Menefee* (Tex. Civ. App.) 438.

§ 4. Remedies of creditors.

The fact that a surety has been discharged from liability by limitations specially applicable to sureties is not a bar to the enforcement of a mortgage executed by the surety to secure the debt.—*Craddock v. Lee* (Ky.) 22.

Where personal property was delivered by the principal obligor in a note to defendants, the principal devisees of a surety therein, to protect the estate from loss, and the estate of the surety proves insolvent, the principal, in an ac-

tion for the benefit of the creditor, can recover the value of the property delivered to defendants.—*Kerr v. Hough* (Ky.) 262.

The assignee of a payee on a note held entitled to collect a balance due thereon from certain sureties.—*Dixon v. Sims* (Tenn. Ch. App.) 1062.

PRIORITIES.

Of mortgages, see "Mortgages," § 2.

PRIVILEGE.

Of witness as to testimony, see "Witnesses," § 3.

PRIVILEGED COMMUNICATIONS.

Defamatory communications, see "Libel and Slander," § 2.

Disclosure by witness, see "Witnesses," § 2.

PRIVITY.

Admissions by privies, see "Evidence," § 6.

PRIZE FIGHTING.

See "Bail," § 1.

PROBATE.

Of will, see "Wills," § 4.

PROCESS.

See "Corporations," § 3.

Effect of appearance, see "Appearance."

Murder of officer making arrest without process, see "Homicide," § 1.

Particular forms of writs or other process, see "Execution"; "Injunction"; "Mandamus"; "Replevin."

Resistance or obstruction, see "Obstructing Justice."

§ 1. Service.

A vendor of newspapers, who buys his copies from the publisher for the purpose of reselling them, is not an agent of the publisher for the purpose of service of process.—*Cincinnati Times-Star Co. v. France* (Ky.) 18.

A return of service indorsed on the process by the officer may not be contradicted by parol on a petition to supersede execution.—*Home Ins. Co. v. Webb* (Tenn. Sup.) 79.

§ 2. Defects, objections, and amendment.

Where defendant, a foreign corporation, moved to quash the service of process upon the ground that the person on whom the process was served was not its agent, it was error to require defendant to disclose an agent upon whom service of summons might be had, and, upon its failure to do so, to render judgment by default.—*Cincinnati Times-Star Co. v. France* (Ky.) 18.

PROHIBITION.

Of traffic in intoxicating liquors, see "Intoxicating Liquors."

PROMISSORY NOTES.

See "Bills and Notes."

PROOF.

Of service of process, see "Process," § 1.

PROPERTY.

See "Animals"; "Mines and Minerals."
Adverse possession, see "Adverse Possession."
Constitutional guaranties of rights of property, see "Constitutional Law," § 4.
Dedication to public use, see "Dedication."
Power of city to hold, see "Municipal Corporations," § 3.
Taking for public use, see "Eminent Domain."

PROSTITUTION.

See "Disorderly House."

PROTEST.

Of bill or note, see "Bills and Notes," § 3.

PROVINCE OF COURT AND JURY.

In criminal prosecutions, see "Criminal Law," § 14.

PROXIMATE CAUSE.

Direct or remote consequences of injury, see "Damages," § 1.
Of injury, see "Negligence," § 2.

PUBLIC DEBT.

See "Counties," § 2; "Municipal Corporations," § 11; "States," § 1.

PUBLIC IMPROVEMENTS.

By municipalities, see "Municipal Corporations," §§ 5-7.

PUBLIC LANDS.

§ 1. Survey and disposal of lands of United States.

Rev. St. 1899, § 8199, providing that payments into the county treasury on account of swamp land shall become a part of the school fund, *held* not to prevent the county from maintaining a fund known as the "swamp-land fund."—State ex rel. Wheeler v. Adams (Mo.) 894.

Rev. St. 1899, §§ 8213, 8215, *held* not to prohibit the county court from compromising a suit by relator for damages occasioned by the unlawful rescission of a contract to sell swamp lands to relator.—State ex rel. Wheeler v. Adams (Mo.) 894.

Under Rev. St. 1899, § 8199, the county *held* not prevented from issuing warrants in refunding relator's payments on a contract to purchase swamp land, on the ground that money so paid had become a part of the school fund.—State ex rel. Wheeler v. Adams (Mo.) 894.

Where it did not appear that relator was unable to carry out his contract for the purchase of swamp land, or that he consented to a rescission of his contract, the county court *held* to have no authority, under Rev. St. 1899, §§ 8213, 8215, to rescind the contract or to forfeit relator's payments.—State ex rel. Wheeler v. Adams (Mo.) 894.

Where relator sued the county for unlawfully rescinding his contract for the purchase of swamp lands, warrants issued by the county court in settlement of the suit *held* valid.—State ex rel. Wheeler v. Adams (Mo.) 894.

§ 2. Disposal of lands of the states.

An entry and grant of lands, made subsequent to a general entry, but prior to the grant on such entry, gives a superior title.—Gass v. Waterhouse (Tenn. Ch. App.) 450.

Where a bounty warrant recited that the ancestor of the heirs entitled to the land described therein was killed at the Alamo, the burden of proof is on those disputing it to show the contrary.—Malone v. Dick (Tex. Sup.) 112.

Evidence *held* not sufficient to show that plaintiffs were heirs of the person named in the bounty warrant as entitled to certain lands.—Malone v. Dick (Tex. Sup.) 112.

An applicant for the purchase of school land does not lose his right thereto by mistakenly and in good faith settling on adjacent land, believing it to be the tract he applied for.—Hall v. White (Tex. Sup.) 385.

Where there was no objection on the part of the state to a sale of school land to defendant because she was a married woman, a subsequent lessee from the state cannot question her right to purchase on that ground.—Anderson v. Neighbors (Tex. Civ. App.) 145.

An approval of a reappraisal of all school lands "which appeared on the market" *held* not to constitute a reappraisal of a tract which had previously been awarded to plaintiff.—Bowerman v. Pope (Tex. Civ. App.) 330.

Where plaintiff claimed land under a certificate of purchase on a certain date, and defendant, an adverse claimant, contended that the date was a forgery, it was error to direct a verdict for defendant.—Bowerman v. Pope (Tex. Civ. App.) 330.

Where school land had been appraised at \$2 per acre, an application to purchase it at \$1.50 *held* to confer no right on the applicant to an award.—Bowerman v. Pope (Tex. Civ. App.) 330.

Where school land was appraised at \$2 per acre, the fact that it appeared on the books of the land office without appraisement, and that land so listed was understood to be on sale at \$1.50 per acre, *held* not to validate an application to purchase it at that price.—Bowerman v. Pope (Tex. Civ. App.) 330.

Where the bill of exceptions in an action for title and possession of public lands failed to set out a certain land commissioner's certificate, which was the ground for the objection to certain evidence, the question of admissibility of such evidence was not before the court on appeal.—Clark v. McKnight (Tex. Civ. App.) 349.

Under Rev. St. art. 4218s, a refusal to admit evidence of improvements made on certain public lands before and after the same were forfeited to the state, in the absence of a showing that such improvements were in the character of personality, *held* proper.—Clark v. McKnight (Tex. Civ. App.) 349.

Under Rev. St. arts. 4218f, 4218s, the court *held* to have properly directed a verdict for a purchaser, suing for title and possession of certain public lands.—Clark v. McKnight (Tex. Civ. App.) 349.

Under Sayles' Civ. St. art. 4218k, where an original purchaser sold his claim to a minor, he did not thereby subject the land to resale, though the sale to the minor was void.—O'Keefe v. McPherson (Tex. Civ. App.) 534.

Under Sayles' Civ. St. art. 4218i, land forfeited for nonoccupancy would not be subject to sale till listed with the county clerk.—O'Keefe v. McPherson (Tex. Civ. App.) 534.

Under Sayles' Civ. St. arts. 4218j-4218l, lands sold by the purchaser from the state to a minor, and not thereafter lived on by the vendor, were not forfeited for nonoccupancy, in absence of the land commissioner's indorsement of "Lands forfeited" on the obligation therefor.—O'Keefe v. McPherson (Tex. Civ. App.) 534.

PUBLIC SCHOOLS.

See "Schools and School Districts," § 1.

PUBLIC USE.

Dedication of property, see "Dedication."
Taking property for public use, see "Eminent Domain."

PUNISHMENT.

See "Criminal Law," § 24; "Pardon"; "Usury," § 2.
Carrying concealed weapons, see "Weapons,"
Fines, see "Fines."

QUASHING.

Attachment, see "Attachment," § 3.

QUESTIONS FOR JURY.

In criminal prosecutions, see "Criminal Law," § 14.

QUIETING TITLE.

§ 1. Proceedings and relief.

Plaintiff *held* entitled to a judgment for possession of disputed lands and to a decree quieting title.—Carter v. Norton (Tenn. Ch. App.) 561.

RAILROADS.

See "Street Railroads."

As employers, see "Master and Servant."
Carriage of goods and passengers, see "Carriers."

Condemnation of property, see "Eminent Domain."

County bonds for railroad aid, see "Counties," § 2.

§ 1. Sales, leases, traffic contracts, and consolidation.

Under Const. § 203, the purchaser of the tangible property of a railroad corporation is not charged with duty of the vendor to maintain a fence on each side of its right of way; the purchaser having no notice thereof.—Bailey v. Southern Ry. Co. (Ky.) 31.

§ 2. Operation.

In an action against a railroad company to recover damages for the death of a man stealing a ride on a freight car, *held*, that a peremptory instruction for defendant was proper, as the jury could not infer that he was ejected from the train, and that unnecessary force was used in putting him off.—Morris' Adm'r v. Louisville & N. R. Co. (Ky.) 41.

A railroad company, maintaining tracks in a city street and required to maintain the street in repair, *held* liable for an injury resulting from the negligence of its lessee.—Anderson v. Union Terminal R. Co. (Mo.) 874.

Under the pleadings and evidence in an action against a railroad for injuries resulting from the defective condition of a street which it was bound to repair, *held* not error to refuse to sustain a demurrer to the evidence on the ground that the defendant was not liable for the acts of the lessee.—Anderson v. Union Terminal R. Co. (Mo.) 874.

In action for injuries to child on railroad turntable, evidence *held* to sustain a verdict for defendant.—Stacker v. Louisville & N. R. Co. (Tenn. Sup.) 766.

Presence of ice and snow on a car *held* an obvious danger, which the licensee, a servant of an ice company climbing on the car to fill the same with ice, assumed.—Baker v. Louisville & N. Terminal Co. (Tenn. Sup.) 1029.

Snow and ice on the roof of a car is not such a defect as to make the owner liable, under the rule that the owner of premises, inviting others

onto them, is bound to keep them in a reasonably safe condition.—Baker v. Louisville & N. Terminal Co. (Tenn. Sup.) 1029.

That a car was placed by a railroad company on an inclined track to be iced *held* not to show a defective condition of the company's premises, so as to render it liable to an employe of an ice company injured by slipping from the car.—Baker v. Louisville & N. Terminal Co. (Tenn. Sup.) 1029.

A charge that plaintiff could not recover for the destruction of hay stored in his barn near defendant's right of way, if he placed it there with knowledge that combustible material had been allowed to accumulate on the track, *held* erroneous.—Rutherford v. Texas & P. Ry. Co. (Tex. Civ. App.) 422.

§ 3. — Accidents at crossings.

Instructions which made the negligence of defendant's engineer in unnecessarily blowing a whistle, so as to frighten plaintiff's horse, depend solely on whether circumstances in his knowledge admonished him that injury would probably result, *held* erroneous.—Inabnett v. St. Louis, I. M. & S. Ry. Co. (Ark.) 570.

An instruction, in an action for injuries resulting from plaintiff's horse becoming frightened at a crossing, that defendant's employes "were not bound to take notice of the mere presence of the plaintiff and his horse in close proximity to the railway," *held* misleading.—Inabnett v. St. Louis, I. M. & S. Ry. Co. (Ark.) 570.

An instruction, in an action for injuries resulting from plaintiff's horse becoming frightened at a railroad crossing, *held* abstract, as not predicated on the facts in evidence.—Inabnett v. St. Louis, I. M. & S. Ry. Co. (Ark.) 570.

It is immaterial that engine bell was not rung at a crossing, where traveler injured heard the whistle and saw the headlight.—Hutchinson v. Missouri Pac. Ry. Co. (Mo.) 635.

Whether a person at a railroad crossing was negligent *held* a question for the jury, where the train was running at 35 miles an hour; an ordinance providing it should not exceed 6.—Hutchinson v. Missouri Pac. Ry. Co. (Mo.) 635.

Where plaintiff, riding in a buggy driven by another, was injured in attempting to avoid collision with a switch engine at a crossing, the evidence in an action against the railroad company *held* sufficient to sustain a finding that neither plaintiff nor the driver was guilty of contributory negligence.—Houston & T. C. R. Co. v. Byrd (Tex. Civ. App.) 147.

In an action for injuries at a street crossing, contributory negligence in not stopping the horse after seeing the engine, not alleged in defendant's answer, was not in issue.—Houston & T. C. R. Co. v. Byrd (Tex. Civ. App.) 147.

Where plaintiff was injured in attempting to avoid collision with a switch engine approaching a crossing without warning, it was *held* that the negligence of defendant's employes was the proximate cause of the injury.—Houston & T. C. R. Co. v. Byrd (Tex. Civ. App.) 147.

Whether or not plaintiff acted prudently or imprudently in attempting to avoid injury at a crossing from a switch engine negligently operated *held* not to affect her right to recover.—Houston & T. C. R. Co. v. Byrd (Tex. Civ. App.) 147.

Evidence in action for injuries at crossing *held* to show that the injury was due solely to defendant's neglect to blow the whistle or ring the bell.—Sherman, S. & S. Ry. Co. v. Eaves (Tex. Civ. App.) 550.

§ 4. — Injuries to persons on or near tracks.

As the engineer, if he was on the lookout, must have seen plaintiff and his companions, the question as to whether he did see them in time to slacken the speed of the train, so as to save plaintiff, was for the jury.—*Becker v. Louisville & N. R. Co. (Ky.) 997.*

If the engineer saw plaintiff in time to have so slackened the speed of the train as to enable plaintiff to reach the end of a bridge in safety, he was guilty of negligence in failing to do so, though plaintiff was only a trespasser.—*Becker v. Louisville & N. R. Co. (Ky.) 997.*

Plaintiff, a boy 12 or 14 years of age, was not guilty of contributory negligence in remaining on a railroad bridge, after he saw a train approaching, to rescue a girl about the same age who had fallen between the ties.—*Becker v. Louisville & N. R. Co. (Ky.) 997.*

Evidence in a personal injury suit against railroad company *held* not to show defendant's servants guilty of a reckless and wanton disregard of human life.—*Tanner v. Missouri Pac. Ry. Co. (Mo.) 826.*

Evidence in an action against a railroad company for injuries received while standing on a depot platform *held* to show that plaintiff was guilty of contributory negligence as a matter of law.—*Tanner v. Missouri Pac. Ry. Co. (Mo.) 826.*

Where a railroad negligently allows a pile of cinders to remain by the side of its tracks, and a boy 9 years old stumbles over it and falls under a train without negligence on his part, the negligence of the company is the proximate cause of the accident.—*Anderson v. Union Terminal R. Co. (Mo.) 874.*

A petition in an action against a railroad company for injuries occurring on its tracks in a city street *held* sufficient to authorize a recovery at common law for defendant's negligence.—*Anderson v. Union Terminal R. Co. (Mo.) 874.*

It is error, in an action against a railroad for injuries received in an accident on its tracks in a city street, to permit ordinances regulating the manner of operating such lines therein to be given in evidence, without showing that they were accepted by the company.—*Anderson v. Union Terminal R. Co. (Mo.) 874.*

The submission of the issue of contributory negligence to the jury *held* not error under the evidence, in the case of a boy 9 years old who was injured on railroad tracks in a city street.—*Anderson v. Union Terminal R. Co. (Mo.) 874.*

Where the defendant in an action against a railroad company for an injury received on its tracks asks instructions submitting the question whether the plaintiff's age and capacity was sufficient to require him to do certain acts, it is not error to refuse instructions that the failure to perform such acts will prevent a recovery.—*Anderson v. Union Terminal R. Co. (Mo.) 874.*

Refusal to instruct that a verdict should be rendered for defendants, if the defect causing the injury could have been easily seen by a boy of plaintiff's age, *held* not erroneous, under the evidence, in an action against a railroad company for an accident on its tracks.—*Anderson v. Union Terminal R. Co. (Mo.) 874.*

An instruction in an action against a railroad for an injury received on its tracks is not erroneous, as authorizing a recovery if defendant's negligence was the cause of the injury, though "proximate cause" is the more accurate term.—*Anderson v. Union Terminal R. Co. (Mo.) 874.*

Where railroad cars are being moved over premises which the public is allowed to fre-

quent, it is the company's duty to use reasonable care to see that its tracks are clear before moving trains thereon.—*Fleming v. Louisville & N. R. Co. (Tenn. Sup.) 58.*

RAPE.

§ 1. Prosecution and punishment.

Evidence *held* not to sustain a prosecution for rape.—*State v. Huff (Mo.) 900, 1104.*

Evidence *held* not sufficient to sustain a conviction for assault with intent to rape.—*Wood v. State (Tex. Cr. App.) 308.*

RATIFICATION.

Of act of agent, see "Principal and Agent," § 2.

REAL ACTIONS.

See "Ejectment"; "Forcible Entry and Detainer," § 1; "Trespass to Try Title."

RECEIVERS.

In action against partners, see "Partnership," § 4.

§ 1. Appointment, qualification, and tenure.

Receivers of a building and loan association appointed in vacation can only take charge of and preserve the property, but cannot administer its assets.—*State ex rel. Ballev v. Woodson (Mo.) 252.*

§ 2. Actions.

Where property is taken in replevin from a receiver appointed by another court, leave of court to maintain the action not having been obtained, judgment of dismissal and for the value of the property taken should be rendered.—*Jones v. Moore (Tenn. Sup.) 81; Tucker v. Same, Id.*

Where, pending an appeal from a judgment in attachment, a stranger to the attachment filed a bill in equity to restrain the receiver, appointed by the court in the attachment, from selling the goods, it was error for the court to dismiss the bill for want of equity, as the stranger could not apply to the supreme court in regard to the receiver's acts.—*Jones v. Stewart (Tenn. Ch. App.) 106.*

A bill asking that a receiver be restrained from further interference with the property replevied was a proper remedy; the bill having been filed in the same court appointing the receiver, and having specified the cause wherein he was appointed.—*Jones v. Stewart (Tenn. Ch. App.) 106.*

§ 3. Accounting and compensation.

The costs of a receivership *held* included in the adjudication of costs against complainant and payable by him under an agreement between the parties.—*Hetterman v. Young (Tenn. Ch. App.) 1085.*

RECOGNIZANCES.

On appeal, see "Criminal Law," § 21.

RECORDS.

Failure to record conveyance as evidence of fraud, see "Fraudulent Conveyances," § 1. Transcript on appeal or writ of error, see "Appeal and Error," §§ 6-9; "Criminal Law," § 22.

REDEMPTION.

From tax sales, see "Taxation," § 6.

REFERENCE.

See "Arbitration and Award."

To state accounts of partners, see "Partnership," § 5.

REFORMATION OF INSTRUMENTS.**§ 1. Right of action and defenses.**

In ejectment, *held*, that land was omitted from defendant's deed by mistake and that he was entitled to its correction.—Epperson v. Epperson (Mo.) 853.

§ 2. Proceedings and relief.

Limitations *held* no bar to correction of a deed to include land sued for in ejectment.—Epperson v. Epperson (Mo.) 853.

The evidence must be clear and satisfactory in order to justify the reformation of a deed for mistake.—Sawyer v. Sawyer (Tenn. Sup.) 1022.

REHEARING.

See "New Trial."

REINCORPORATION.

See "Corporations," § 5.

RELEASE.

See "Compromise and Settlement"; "Dower," § 1; "Mortgages," § 5.

§ 1. Requisites and validity.

The discontinuance of lawsuits brought to harass attorneys of an infant, who had obtained a judgment against a railroad company, and to delay the collection thereof, *held* no consideration for a release of the judgment for less than the amount due thereon.—Winter v. Kansas City Cable Ry. Co. (Mo.) 606.

The facts attending a curator's release of an infant's judgment for less than the amount thereof *held* to show no consideration for the release of the balance due thereon.—Winter v. Kansas City Cable Ry. Co. (Mo.) 606.

§ 2. Construction and operation.

Where a servant releases his master from liability for injuries received in part consideration of being retained in the same capacity, and accepts a less remunerative position, *held* not entitled to withdraw from such employment and sue for such injury.—Missouri, K. & T. Ry. Co. of Texas v. Chumlea (Tex. Civ. App.) 524.

RELEVANCY.

Of evidence in civil actions, see "Evidence," § 4.
— in criminal prosecutions, see "Criminal Law," § 6.

REMAINDERS.

See "Life Estates."

Creation by deed, see "Deeds," § 2.

A sum paid by mistake to a life tenant as a sum due for rents on the trust property cannot be recovered from the rents due the remaindermen which accrue after the death of the life tenant.—Armistead v. Armistead (Tenn. Ch. App.) 1071.

REMAND.

Of cause on appeal or writ of error, see "Appeal and Error," § 18.

REMOVAL OF CAUSES.

Change of venue or place of trial, see "Venue," § 2.

RENT.

See "Landlord and Tenant," § 3.

REPAIRS.

Of premises demised, see "Landlord and Tenant," § 2.

REPEAL.

Of statute, see "Intoxicating Liquors," § 3; "Statutes," § 5; "Usury," § 1.

REPLEVIN.**§ 1. Liabilities on bonds and undertakings.**

Under Shannon's Code, § 4837, judgment could not be rendered on a replevin bond on which no writ had ever issued.—McGeer v. Briscoe (Tenn. Ch. App.) 564.

REQUESTS.

For instructions in criminal prosecutions, see "Criminal Law," § 16.
— to jury in civil actions, see "Trial," § 7.

RESCISSION.

Cancellation of written instrument, see "Cancellation of Instruments."
Of contract, see "Contracts," § 2.
— for sale of goods, see "Sales," § 2.
— for sale of land, see "Vendor and Purchaser," § 2.

RESERVATIONS.

For grantor in fraudulent conveyance, see "Fraudulent Conveyances," § 1.

RES GESTÆ.

In civil actions, see "Evidence," § 4.
In criminal prosecutions, see "Criminal Law," § 6.

RES JUDICATA.

See "Courts," § 1; "Judgment," § 7.

RESTRAINT OF TRADE.

Trusts and other combinations, see "Monopolies," § 1.

RESULTING TRUSTS.

See "Trusts," § 1.

RETURN.

Of execution, see "Execution," § 4.
Of process in general, see "Process," § 1.

REVENUE.

See "Internal Revenue"; "Taxation."

REVIEW.

See "Appeal and Error"; "Certiorari"; "Criminal Law," §§ 19-23; "Justices of the Peace," § 4.

REVISION.

Of statute, see "Statutes," § 4.

REVIVAL.

Of statute, see "Statutes," § 5.

REVOCATION.

Appointment of administrator, see "Executors and Administrators," § 1.

RIGHT OF WAY.

See "Easements."

RISKS.

Assumed by employé, see "Master and Servant," § 5.
— licensee, see "Railroads," §§ 2-4.

ROADS.

See "Highways"; "Turnpikes and Toll Roads." Streets in cities, see "Municipal Corporations," §§ 9, 10.

ROBBERY.

Instructions as to credibility of accused, see "Criminal Law," § 15.
Murder in commission of robbery, see "Homicide," § 1.

An unlawful and felonious assault, with intent to deprive the person assaulted of his property, made without any honest claim to the property, and the unlawful taking of property from him by force and violence and against his will, constitutes the crime of robbery in the first degree.—State v. Adair (Mo.) 187.

SALES.

See "Joint Adventures"; "Vendor and Purchaser."
Of bill of exchange or promissory note, see "Bills and Notes," § 2.
Of intoxicating liquors, see "Intoxicating Liquors."
Of property of decedent under order of court, see "Executors and Administrators," § 5.
Of railroads, see "Railroads," § 1.
On execution, see "Execution," § 3.
Sale of state lands, see "Public Lands," § 1½.
Tax sales, see "Taxation," § 5.

§ 1. Requisites and validity of contract.

Where plaintiff's salesman, who had no authority to vary the terms of a printed order blank, took an order containing written conditions changing such terms, no contract is made until the order is accepted by plaintiff, and the order may be withdrawn before such acceptance.—Whitaker v. Zeihme (Tex. Civ. App.) 499.

Where defendant gave plaintiff an order for goods on a printed blank, inserting written conditions changing the printed terms, plaintiff could not ignore the writing and accept the order according to the printed terms.—Whitaker v. Zeihme (Tex. Civ. App.) 499.

Where conditions were written into a printed order given by defendant to plaintiff, in the absence of evidence as to when the writing was inserted, there is no presumption that the contract was signed as printed and afterwards changed by plaintiff.—Whitaker v. Zeihme (Tex. Civ. App.) 499.

§ 2. Modification or rescission of contract.

Purchasers of machinery held not entitled to a rescission of the contract.—Miller-Stone Mach. Co. v. Balfour (Tex. Civ. App.) 972.

§ 3. Performance of contract.

Where plaintiff substantially performed a contract to deliver tanks for oil at defendant's mill, defendant was not justified in refusing to deliver oil, on the ground that the tanks

were not furnished in time.—Palestine Cotton-Seed Oil Co. v. Corsicana Cotton-Oil Co. (Tex. Civ. App.) 433.

Where, under a contract to sell and deliver cotton-seed oil, there was a substantial compliance with the terms of the contract by plaintiff, but a literal compliance was prevented by defendant's acts, defendant was not justified in refusing to perform.—Palestine Cotton-Seed Oil Co. v. Corsicana Cotton-Oil Co. (Tex. Civ. App.) 433.

§ 4. Warranties.

A contract to ship oranges not later than a specified date held a warranty as to time, and defendant's claim for damages was not waived by accepting, without protest, fruit shipped at a later date.—Redlands Orange-Growers' Ass'n v. Gorman (Mo.) 820.

§ 5. Remedies of seller.

Where plaintiff sought to recover the price of whisky barrels alleged sold in July, 1891, and the evidence showed a contract by plaintiff to furnish barrels during the season of 1891, and that defendant continued to make whisky during the month of July, 1891, there was not a material variance.—Jackson-Vanarsdall Distilling Co. v. Moore (Ky.) 368.

Where a buyer repudiated a sale, the seller could not recover the contract price while the goods were held by a carrier for freight and storage.—Keppert v. Aultman, Miller & Co. (Tex. Civ. App.) 410.

On an issue as to whether a price quoted in a letter of plaintiff to defendant referred to a secondhand or a new machine, a prior letter in which plaintiff quoted new machines at a higher price held admissible to show defendant's knowledge of the price of a new machine.—Dorsey Printing Co. v. Gainesville Cotton-Seed Oil Mill & Gin Co. (Tex. Civ. App.) 556.

§ 6. Remedies of buyer.

The court properly instructed that if defendants were entitled to damage on a counterclaim for less than the amount of the notes sued on it should be credited thereon, and that if it equaled the notes to find for the defendants, and if greater than the sum of the notes to find for defendants the excess.—Bean v. Taylor (Ky.) 31.

Where plaintiff purchased structural iron, which was a part of defendant's building, evidence of the value of that character of iron by those acquainted with it was admissible to determine the damages.—Warren v. A. B. Mayer Mfg. Co. (Mo.) 644.

Where plaintiff purchased structural iron, a part of defendant's building, and after he had taken down some of it defendant refused further delivery and retook what plaintiff had removed, defendant was chargeable with plaintiff's expenses in taking down the iron.—Warren v. A. B. Mayer Mfg. Co. (Mo.) 644.

Where plaintiff purchased structural iron to use in a building he was going to erect, in an action for refusal to deliver, defendant was not chargeable with the amount expended by plaintiff in grading his lot to receive the iron.—Warren v. A. B. Mayer Mfg. Co. (Mo.) 644.

In an action for refusal to deliver certain structural iron bought, which was a part of defendant's building, the fact that plaintiff wished to use it in another building would not enhance its value beyond the market price of such iron.—Warren v. A. B. Mayer Mfg. Co. (Mo.) 644.

In an action for refusal to deliver certain structural iron, to be taken out of defendant's building, if there was no market value for such iron, evidence of its value was admissible from those experienced in dealing with property of such character.—Warren v. A. B. Mayer Mfg. Co. (Mo.) 644.

A finding in an action for breach of a contract for the delivery of grain by the delivery of an inferior quality *held* not sufficient to show a continuing warranty which would authorize a recovery for a defect in quality discovered after acceptance.—*Nichols v. Cecil* (Tenn. Sup.) 768.

Where, under a contract to deliver oil in buyer's tanks at defendant's mill, the tanks were delivered before the time limited by the contract expired, but defendant claimed there was not time to fill them within such limit, evidence of the length of time it would take defendant to fill a tank was properly excluded.—*Palestine Cotton-Seed Oil Co. v. Corsicana Cotton-Oil Co.* (Tex. Civ. App.) 433.

Where defendant refused to perform its contract to deliver cotton-seed oil, the measure of damages was the difference between the contract price and the market price at the time of its refusal.—*Palestine Cotton-Seed Oil Co. v. Corsicana Cotton-Oil Co.* (Tex. Civ. App.) 433.

Where findings of court and jury as to the value of property are at variance, a judgment based thereon must be set aside.—*Miller-Stone Mach. Co. v. Balfour* (Tex. Civ. App.) 972.

Where, in a suit for rescission of a contract for machinery, the petition claimed damages for freight, drayage, and damage for putting the machinery in place, an exception to such items was properly overruled.—*Miller-Stone Mach. Co. v. Balfour* (Tex. Civ. App.) 972.

Where rescission of the contract by the purchaser of machinery was refused, *held*, that he could not recover drayage and the cost of putting the machinery in place as damages.—*Miller-Stone Mach. Co. v. Balfour* (Tex. Civ. App.) 972.

SATISFACTION.

See "Compromise and Settlement"; "Release."
Of judgment, see "Judgment," § 9.
Of mortgage, see "Mortgages," § 5.

SCHOOLS AND SCHOOL DISTRICTS.

Elections of school directors, see "Elections," § 1.

School lands, see "Public Lands," § 14.

§ 1. Public schools.

A contract with a school teacher, made by two members of the board, authorized at a meeting held without notice and in which the third member refused to participate, is not binding on the district.—*School Dist. No. 49, Faulkner County, v. Adams* (Ark.) 798.

In October, 1898, H. was elected trustee to succeed C., whose term was to expire July 1, 1899, and H. immediately entered upon his duties. H. died in March, 1899, and the county superintendent appointed J. to fill the vacancy. *Held*, that J. became de facto trustee until July 1, 1899, and then de jure trustee for the term for which H. was elected.—*Mattingly v. Vancleave* (Ky.) 257; *Hawkins v. Davis*, *Id.*

By the act of March 17, 1898, changing the time of election of school trustees from June to October in each year, the terms of all trustees in office July 1, 1898, were extended one year.—*Mattingly v. Vancleave* (Ky.) 257; *Hawkins v. Davis*, *Id.*

The county superintendent, by declaring a vacancy in the office of school trustee when none in fact existed, did not create a vacancy, and an appointment to fill the supposed vacancy was void.—*Mattingly v. Vancleave* (Ky.) 257; *Hawkins v. Davis*, *Id.*

Though such an appointee may have been a de facto officer by reason of his recognition by the county superintendent, yet he ceased to be so when notified by the county superintendent

that he was no longer considered trustee, and his acts thereafter, though on the same day he received such notice, were void.—*Mattingly v. Vancleave* (Ky.) 257; *Hawkins v. Davis*, *Id.*

Shannon's Ann. Code, § 1427, authorizing the payment of costs of a suit commenced in good faith by a school director out of the money of the school district in case of his defeat, does not authorize the payment of costs in suit to determine the right of the plaintiff as school director to hold office.—*State v. Banks* (Tenn. Sup.) 778.

Where the election of school directors is illegal, an order given by the old directors before the expiration of their term of office is binding.—*State v. Hart* (Tenn. Sup.) 780.

The inclusion of a city with contiguous territory within a school district created by the legislature is not prohibited by Const. art. 11, § 10.—*State v. Brownson* (Tex. Sup.) 114.

SEALS.

Under Rev. St. 1899, § 2090, equity will inquire into the consideration of a curator's release under seal of an infant's judgment for less than the amount thereof.—*Winter v. Kansas City Cable Ry. Co.* (Mo.) 606.

Where a curator unnecessarily attached his seal to a release of an infant's judgment for less than the amount due thereon, the seal did not conclusively import a consideration for the discharge of the entire debt.—*Winter v. Kansas City Cable Ry. Co.* (Mo.) 606.

SECONDARY EVIDENCE.

In civil actions, see "Evidence," § 5.

SEDUCTION.

§ 1. Criminal responsibility.

On a prosecution for seduction, the testimony of the prosecutrix as to the promise of marriage may be corroborated by circumstantial evidence.—*Creighton v. State* (Tex. Cr. App.) 492.

Evidence on prosecution for seduction under promise of marriage *held* to sustain a conviction.—*Creighton v. State* (Tex. Cr. App.) 492.

SEPARATE ESTATE.

Of married women, see "Husband and Wife," § 2.

SEQUESTRATION.

Resisting service, see "Obstructing Justice."

SERVICE.

Of process, see "Process," § 1.

SERVICES.

See "Master and Servant," § 2.

SERVITUDES.

See "Easements."

SETTLEMENT.

See "Compromise and Settlement"; "Release."
By executor or administrator, see "Executors and Administrators," § 7.

SEWERS.

Defects or obstructions, see "Municipal Corporations," § 10.

SHERIFFS AND CONSTABLES.

Appeal by sheriff in action against county for money illegally collected, see "Appeal and Error," § 2.
 Sheriff as tax collector, see "Taxation," § 4.
 — deed, see "Execution," § 3.

SLANDER.

See "Libel and Slander."

SLAVES.

Under Rev. St. 1899, § 2920, *held*, that it was no objection to the legitimacy of children born of slaves that the parents, being slaves, had no authority to contract, and hence could not exercise "good faith."—*Lee v. Lee* (Mo.) 630.

SPECIAL LAWS.

See "Statutes," § 2.

SPECIFIC PERFORMANCE.

§ 1. Contracts enforceable.

Description of land in a memorandum of a contract for the sale of land *held* sufficiently definite to entitle vendee to specific performance.—*Smith v. Wilson* (Mo.) 597.

Under Rev. St. 1899, § 3418, a contract for the sale of real estate may be enforced by specific performance, though unilateral or signed only by the party to be charged.—*Smith v. Wilson* (Mo.) 597.

Where an alley had been fenced and not used since 1876, its existence constituted no ground for refusing to perform a contract to purchase the lot.—*Scannell v. American Soda-Fountain Co.* (Mo.) 889.

Where plaintiff showed a title by adverse possession for 52 years, the fact that the record title showed a conveyance of the property by the French government in 1869, and a devise of it by a subsequent grantee in 1878, did not justify defendant in refusing to perform a contract to purchase it.—*Scannell v. American Soda-Fountain Co.* (Mo.) 889.

An agreement that plaintiff should accept a lease of property in the usual form *held* not so indefinite as to be unenforceable.—*Scannell v. American Soda-Fountain Co.* (Mo.) 889.

§ 2. Good faith and diligence.

The contention that plaintiff was not entitled to a specific performance of a contract to exchange real property, because time was of the essence of the contract, *held* not sustainable by the evidence.—*Scannell v. American Soda-Fountain Co.* (Mo.) 889.

A letter stating that plaintiff should not be required to give a guaranty of title, because defendant's title was also defective, *held* not to estop plaintiff from demanding specific performance of a contract to exchange property.—*Scannell v. American Soda-Fountain Co.* (Mo.) 889.

SPIRITUOUS LIQUORS.

See "Intoxicating Liquors."

STATEMENT.

By witness inconsistent with testimony, see "Witnesses," § 4.
 Of case or facts for purpose of review, see "Appeal and Error," § 8.

STATES.

Courts, see "Courts."

Public lands, see "Public Lands," § 1½.

§ 1. Fiscal management, public debt, and securities.

Rev. St. 1899, § 5037, providing that compensation of members of the board of examiners for barbers shall be paid out of the treasury of the board, is not repugnant to Const. art. 4, § 43, prohibiting payment of state funds except on particular appropriations.—*Ex parte Lucas* (Mo.) 218.

STATUTES.

Judicial notice of laws of other states, see "Evidence," § 1.

Laws impairing obligation of contracts, see "Constitutional Law," § 5.

Presumptions as to laws of foreign states, see "Evidence," § 2.

Provisions relating to particular subjects, see "Bankruptcy," § 1; "Descent and Distribution"; "Elections," § 1; "Eminent Domain"; "Fines"; "Food"; "Homestead"; "Insurance," § 1; "Intoxicating Liquors"; "Limitation of Actions," § 1; "Master and Servant," § 1; "Monopolies," § 1; "Usury," § 1.
 — revenue laws, see "Internal Revenue."
 — statute of frauds, see "Frauds, Statute of."

§ 1. Enactment, requisites, and validity in general.

Under Const. art. 7, § 3, as amended, it was proper for the legislature to pass Gen. Laws 1899, p. 151, creating an independent school district without the notice required by Const. art. 3, § 57.—*State v. Brownson* (Tex. Sup.) 114.

§ 2. General and special or local laws.

A local act, passed prior to the present constitution, regulating the practice in a court not of continuous session, ceased to be operative after the expiration of six years from the adoption of the constitution.—*Morgan v. Wickliffe* (Ky.) 13.

Rev. St. 1899, c. 78, is not unconstitutional, as special legislation, because the regulation of barbers extends only to cities of 50,000 inhabitants.—*Ex parte Lucas* (Mo.) 218.

Gen. Laws 1897, p. 205, c. 143, disorganizing a certain county on the ground of public necessity, attaching it to another county, and providing for the payment of its debts by taxes levied by the latter county, *held* not a local law within the prohibition of Const. art. 3, §§ 56, 57.—*Clarke v. Reeves County* (Tex. Civ. App.) 981.

§ 3. Subjects and titles of acts.

Acts 1897, c. 114, providing that a landlord or furnisher shall have a lien on crops, *held* not in violation of Const. art. 2, § 17, prohibiting a bill from embracing more than one subject.—*State v. Hoskins* (Tenn. Sup.) 781.

Act April 22, 1899, limiting the time in which suits may be brought against municipal corporations for the recovery of the state privilege tax on litigation, *held* not unconstitutional as embracing subjects not included in its title.—*State v. Town of McMinnville* (Tenn. Sup.) 785.

§ 4. Amendment, revision, and codification.

Under the act authorizing the revision of the laws, and Rev. St. p. 1106, § 19, Rev. St. § 3093, should be construed as a continuation of Act 1879, entitled "An act to define who are agents of insurance companies," etc., and as referring only to the duties and liabilities therein specified.—*Hartford Fire Ins. Co. v. Walker* (Tex. Sup.) 711.

§ 5. Repeal, suspension, expiration, and revival.

Under Ky. St. § 484, when a law which repealed another law is repealed, the previous law is not thereby revived.—*Rice v. Commonwealth* (Ky.) 473.

§ 6. Construction and operation.

The construction placed upon a statute by the legislative and executive branches of the

government for many years will be adopted by the courts.—*Auditor of Public Accounts v. Cain* (Ky.) 1016.

Under Const. art. 4, § 38, the words "90 days after the approval of this act" in Rev. St. 1899, c. 78, construed to mean 90 days after this act takes effect, and time to take out license under the act did not expire until 90 days after the act took effect.—*Ex parte Lucas* (Mo.) 218.

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Corporate stock, see "Corporations," § 2.

STREET RAILROADS.

See "Railroads"; "Taxation."

Expert testimony as to operation, see "Evidence," § 10.

§ 1. Regulation and operation.

Under Rev. Ord. St. Louis 1892, subs. 9, 10, a street-car company whose franchise provides that its cars may be run at a speed greater than eight miles an hour is entitled to so run them.—*Ruschenberg v. Southern Electric R. Co. (Mo.) 626.*

Instruction as to contributory negligence in personal damage suit against street-car company held proper.—*Ruschenberg v. Southern Electric R. Co. (Mo.) 626.*

STREETS.

See "Highways"; "Municipal Corporations," §§ 9, 10.

SUBLETTING.

See "Landlord and Tenant," § 1.

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See "Witnesses," § 1.

SUBROGATION.

Purchasers who paid notes secured by a lien on the land superior to theirs, believing it necessary, held subrogated to the rights of their payee.—*Schneider v. Sellers (Tex. Civ. App.) 541.*

SUIT.

See "Action."

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See "Process."

SUNDAY.

Act prohibiting liquor dealer from keeping place open on Sunday as arbitrary exercise of police power, see "Constitutional Law," § 2.
Sale of liquor on Sunday, see "Intoxicating Liquors," § 8.

SUPREME COURTS.

See "Courts," § 8.

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See "Principal and Surety."

SURPRISE.

Ground for new trial, see "New Trial," § 2.

TAXATION.

See "Counties," § 2; "Licenses," § 1; "Municipal Corporations," § 11.

Assessments for municipal improvements, see "Municipal Corporations," § 7.

Judicial notice of tax rate, see "Evidence," § 1.
Occupation tax as interference with interstate commerce, see "Commerce," § 1.

Of foreign insurance companies, see "Insurance," § 1.

§ 1. Liability of persons and property.

The owners of shares of stock in a national bank may be compelled to list them for taxation.—*Commonwealth v. Jackson* (Ky.) 700.

Under Act Gen. Assem. 1897, §§ 1-3, a street railroad whose line lies partly in two cities, and partly without the limits of any city, is liable to taxation.—*State ex rel. Gottlieb v. Metropolitan St. Ry. Co.* (Mo.) 608.

Evidence of a debt belonging to a foreign corporation held taxable in this state, under *Sayles' Civ. St. art. 5067*.—*Jesse French Piano & Organ Co. v. City of Dallas* (Tex. Civ. App.) 942.

§ 2. Levy and assessment.

Under Act Gen. Assem. 1897, §§ 1-3, and 2 Rev. St. 1889, c. 133, art. 8, it was proper to assess the whole property of a street railroad in the manner prescribed for the assessment of the distributable property of other railroads.—*State ex rel. Gottlieb v. Metropolitan St. Ry. Co.* (Mo.) 608.

Under Act Gen. Assem. 1897, §§ 1-3, it was proper to levy the school taxes on a street railroad at the rate levied on other property in each school district.—*State ex rel. Gottlieb v. Metropolitan St. Ry. Co.* (Mo.) 608.

In an action on a tax bill against a bank, a claim that defendant should have appealed from the action of the county board of appeals is without merit.—*State ex rel. Mahan v. Merchants' Bank* (Mo.) 676.

Under Acts 1891, p. 195, and Rev. St. 1889, § 7540, assessment of bank shares must be made to the stockholders, instead of the bank.—*State ex rel. Mahan v. Merchants' Bank* (Mo.) 676.

§ 3. Payment and refunding or recovery of tax paid.

One of a number of taxpayers from whom money has been illegally collected as taxes may sue for all to recover the money thus illegally collected.—*Whaley v. Commonwealth* (Ky.) 35; *Ratliff v. Same, Id.*; *Same v. Nicholas County, Id.*

In an action by taxpayer to recover for all taxpayers illegal tax collected, it was proper to

direct the master commissioner to ascertain the names of all persons in the county who had paid any part of the illegal tax, and the amounts paid.—*Whaley v. Commonwealth* (Ky.) 35; *Ratliff v. Same, Id.*; *Same v. Nicholas County, Id.*

Under Rev. St. arts. 5157, 5159, 5210, 5211, held, that an action could not be maintained against a county for the recovery of state taxes paid on an alleged illegal valuation of the property.—*Texas Land & Cattle Co. v. Hemphill County* (Tex. Civ. App.) 338.

In an action against a county and the tax collector to recover taxes paid on an alleged illegal valuation of the property, it was error for the court to grant a recovery for the county taxes paid, since such action was a collateral attack on the judgment of the commissioners' court fixing the value of the land.—*Texas Land & Cattle Co. v. Hemphill County* (Tex. Civ. App.) 338.

§ 4. Collection and enforcement against persons or personal property.

The sureties in a sheriff's "official" bond are liable for the county levy collected by him, where no county levy bond has been executed; and the fact that such a bond has been executed is matter of defense.—*Whaley v. Commonwealth* (Ky.) 35; *Ratliff v. Same, Id.*; *Same v. Nicholas County, Id.*

The sureties in a sheriff's bond are not liable for the void part of a county levy collected by the sheriff.—*Whaley v. Commonwealth* (Ky.) 35; *Ratliff v. Same, Id.*; *Same v. Nicholas County, Id.*

The sheriff was not chargeable with interest on the void part of the levy collected by him until there had been a settlement, and the amount due by him had been properly ascertained.—*Whaley v. Commonwealth* (Ky.) 35; *Ratliff v. Same, Id.*; *Same v. Nicholas County, Id.*

In an action against the "Merchants' Bank of Jefferson City, Missouri," on a tax bill against the "Merchants' Bank," the bill was properly admitted in evidence.—*State ex rel. Mahan v. Merchants' Bank* (Mo.) 676.

In an action on a tax bill against a bank, it was error to exclude evidence that the taxes for that year had been paid before commencement of the suit.—*State ex rel. Mahan v. Merchants' Bank* (Mo.) 676.

Where, in an action on a tax bill against a bank, it appeared that the assessment should have been made against the stockholders, the prima facie case made by the bill was overcome.—*State ex rel. Mahan v. Merchants' Bank* (Mo.) 676.

In an action on a tax bill against a bank, it was error to exclude evidence that it was stock which was assessed.—*State ex rel. Mahan v. Merchants' Bank* (Mo.) 676.

In an action against a tax collector to recover taxes paid on an alleged illegal valuation, it was not error for the court to sustain a demurrer to the complaint, where the proceedings were regular on their face and the tax rolls were in due form and had issued from the proper authority.—*Texas Land & Cattle Co. v. Hemphill County* (Tex. Civ. App.) 338.

§ 5. Sale of land for nonpayment of tax.

Where the affidavit of publication of notice of proceedings under the overdue tax act does not show that publication has been made as required by *Mansf. Dig. § 4356*, a sale of land thereunder is invalid.—*West v. State* (Ark.) 918.

Under Ky. St. § 2098, part of charter of cities of the first class, providing that uncollected tax bills against any persons "not under the disability of infancy, coverture, or unsound mind"

shall be deemed a debt from such person, it is error to render a personal judgment against a married woman for taxes.—*Reed v. City of Louisville (Ky.)* 11.

A personal judgment against a married woman for taxes prayed for in the petition is not a mere clerical misprision.—*Reed v. City of Louisville (Ky.)* 11.

Sale under judgment of Galveston district court foreclosing tax lien held void for irregularity.—*Cordray v. Neuhaus (Tex. Civ. App.)* 415.

Where defendants filed answers in a suit for taxes against unknown owners, and judgment was entered against unknown owners, an appeal by defendants will not be dismissed on the ground that they were not parties to the judgment.—*Watkins v. State (Tex. Civ. App.)* 532.

Under Sayles' Civ. St. art. 5232c, the introduction of the list prepared by the county tax collector of land sold to the state for taxes, without proof of the validity of the assessments, held not sufficient to support a judgment for the taxes.—*Watkins v. State (Tex. Civ. App.)* 532.

That suits for taxes were brought against unknown owners held not prejudicial to defendants, where they appeared and filed answers.—*Watkins v. State (Tex. Civ. App.)* 532.

§ 6. Redemption from tax sale.

Sand. & H. Dig. §§ 4596, 6615, authorizing a minor to redeem land from a tax sale at any time within two years after attaining his majority, held not limited by section 4641, as amended by Act March 7, 1895, to a redemption before the state has disposed of the land.—*Moore v. Irby (Ark.)* 371.

TELEGRAPHS AND TELEPHONES.

Condemnation of property, see "Eminent Domain," § 1.

§ 1. Regulation and operation.

Where, in an action for failure to deliver a telegram announcing the death of plaintiff's daughter, the facts showed negligence in the delivery, and that the plaintiff would have been at his daughter's funeral but for the delay, a judgment of \$750 in favor of plaintiff will be sustained.—*Western Union Tel. Co. v. Rice (Tex. Civ. App.)* 327.

Evidence in an action against a telegraph company for failure to deliver a message held sufficient to raise the issue of the defendant's negligence.—*Western Union Tel. Co. v. Ragland (Tex. Civ. App.)* 421.

A stipulation in a telegram that the company shall not be liable for mistake or delay, unless the message is repeated, does not relieve the company from a mistake occurring for want of reasonable care in repeating a message, not ordered to be repeated back, at a relay station in its transmission.—*Western Union Tel. Co. v. Ragland (Tex. Civ. App.)* 421.

Loss of time held an element of damages for a failure to deliver a death message.—*Western Union Tel. Co. v. Ragland (Tex. Civ. App.)* 421.

Sickness caused by exposure by being compelled to walk a certain distance, as a result of negligence in failing to deliver a death message, held not an element of damages for such failure.—*Western Union Tel. Co. v. Ragland (Tex. Civ. App.)* 421.

Residence in a state allowing damages against a telegraph company for mental suffering caused by the failure to deliver a message held not to authorize a recovery of such damages for failure to deliver a message in a state not allowing such damages.—*Thomas v. Western Union Tel. Co. (Tex. Civ. App.)* 501.

The law of the place where the injury occurred is controlling as to damages for mental anguish for nondelivery of a telegram.—*Thomas v. Western Union Tel. Co. (Tex. Civ. App.)* 501.

Where the failure to deliver a telegram in a state whose laws do not allow damages for mental anguish causes such anguish to a citizen of Texas, the fact that such suffering continues after his return to the latter state does not authorize a recovery therefor.—*Thomas v. Western Union Tel. Co. (Tex. Civ. App.)* 501.

In an action for failure to promptly deliver a telegraph message, evidence held to present a reasonable excuse for the recipient's delay in acting on it after receipt.—*Western Union Tel. Co. v. Bryson (Tex. Civ. App.)* 548.

In an action for failure to deliver a telegraph message promptly, held not error to have refused an instruction to find for defendant if by a reasonable expenditure of money plaintiff could have prevented the injury, where the delay occasioned involved more than the expenditure of money.—*Western Union Tel. Co. v. Bryson (Tex. Civ. App.)* 548.

In an action for failure to deliver a telegraph message, the defendants were precluded from objecting to the submission to the jury of a question, where they had admitted in a requested instruction, which had been refused and made part of the record, that the question was for the jury.—*Western Union Tel. Co. v. Bryson (Tex. Civ. App.)* 548.

In an action for failure to deliver a telegraph message promptly, held not error to have allowed the jury to determine the question of defendant's office hours, where no regular office hours were shown to have been fixed.—*Western Union Tel. Co. v. Bryson (Tex. Civ. App.)* 548.

A party cannot recover damages from a telegraph company for mental suffering caused by his anger towards the company over the non-delivery of a death message.—*Western Union Tel. Co. v. Bell (Tex. Civ. App.)* 942.

TENANCY IN COMMON.

§ 1. Creation and existence.

The purchasers of land by title bond which was signed by only a part of the owners became tenants in common with the other owners.—*Pope v. Brassfield (Ky.)* 5.

§ 2. Mutual rights, duties, and liabilities of co-tenants.

Though two of six tenants in common held the land adversely to the others, some of whom were under no disability, the statute did not run against such of the others as were under the disability of coverture.—*Pope v. Brassfield (Ky.)* 5.

A purchase at a tax sale made by a tenant in common inures to the benefit of all, though the purchaser had agreed with a stranger that the bid should be in part for his benefit.—*Field v. Farmers' & Drovers' Bank (Ky.)* 258.

Purchase of tax title to land by one tenant in common held to have been made for all.—*Gass v. Waterhouse (Tenn. Ch. App.)* 450.

Purchase by one tenant in common of an outstanding title to land partly in conflict with the grant to be partitioned held to have been made for the benefit of all only as to the conflicting part.—*Gass v. Waterhouse (Tenn. Ch. App.)* 450.

TESTAMENTARY CAPACITY.

See "Wills," § 1.

THEFT.

See "Larceny."

THREATS.

Justification for homicide, see "Homicide," § 4.

TIME.

For taking appeal or suing out writ of error, see "Appeal and Error," § 5.

Of taking effect of statute, see "Statutes," § 6.

TITLE.

Change of title as avoiding insurance policy, see "Insurance," § 4.

Color of title, see "Adverse Possession."

Matters affecting title, see "Adverse Possession," § 1; "Dedication," § 2.

Of ordinances, see "Municipal Corporations," § 2.

Removal of cloud, see "Quieting Title."

Retention of apparent title by grantor, see "Fraudulent Conveyances," § 1.

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TOLLS.

Toll roads, see "Turnpikes and Toll Roads."

TORTS.

See "Municipal Corporations," § 10.

Employés, see "Master and Servant," § 8.

Measure of damages, see "Damages," § 3.

Particular torts, see "Forcible Entry and Detainer," § 1; "Fraud"; "Libel and Slander"; "Malicious Prosecution"; "Negligence."

— causing death, see "Death," § 1.

TOWNS.

See "Counties"; "Municipal Corporations"; "Schools and School Districts," § 1.

TRANSCRIPTS.

Of record for purpose of review, see "Appeal and Error," §§ 6-9; "Criminal Law," § 22.

TRESPASS.

Ejection of trespasser, see "Carriers," § 5.

Injuries to trespassers, see "Railroads," §§ 2-4.

TRESPASS TO TRY TITLE.

See "Ejectment."

§ 1. Right of action and defenses.

Parties claiming title as against a judgment debtor under a sheriff's deed are not required to connect him with the sovereignty of the soil in order to recover judgment against him in an action of trespass to try title.—*Frasier v. Waco Bldg. Ass'n* (Tex. Civ. App.) 132.

The right of plaintiff, having a superior title, to recover in trespass to try title, is not defeated by the fact that a deed in his chain of title was not acknowledged until after suit was brought.—*Walker v. Downs* (Tex. Civ. App.) 725.

The right of plaintiff, having a superior title, to recover in trespass to try title, *held* not defeated by the fact that a deed in his chain of title referred to another deed to describe the property, and gave an erroneous page of the record in which it was to be found.—*Walker v. Downs* (Tex. Civ. App.) 725.

§ 2. Proceedings.

The description of the land given in a petition in trespass to try title contained an additional description, but did not tend to vary the

description stated in the instruments of title relied on. *Held*, that there was no variance.—*Frasier v. Waco Bldg. Ass'n* (Tex. Civ. App.) 132.

The abstract of title filed by plaintiff in trespass to try title stated that he relied on "a copy of an execution," while the instrument read in evidence was a copy of an alias execution. *Held*, that there was no variance.—*Frasier v. Waco Bldg. Ass'n* (Tex. Civ. App.) 132.

A judgment *held* erroneous, as including persons not interested in the subject of the litigation.—*Gillean v. City of Frost* (Tex. Civ. App.) 345.

Where the owner of a lake deeded the use of its waters to a railway company for railway purposes and then dedicated it to a city as a park, the railway company *held* not a necessary party to an action by the city against a subsequent grantee to try title to the park.—*Gillean v. City of Frost* (Tex. Civ. App.) 345.

An issue not raised by the pleadings nor submitted to the jury below *held* not reviewable on appeal.—*Schneider v. Sellers* (Tex. Civ. App.) 541.

Where, in trespass to try title, a deed was not embraced in the abstract of title filed in the case, but the record of the deed was not discovered until a short time before it was offered in evidence, its admission was proper.—*Taffinder v. Merrill* (Tex. Civ. App.) 938.

A question as to the minority of plaintiff's remote grantor should not be made an issue in trespass to try title, when it can bring no advantage.—*Gillum v. Fuqua* (Tex. Civ. App.) 938.

Under Rev. St. arts. 1236, 5250, and Id. tit. 30, c. 22, a petition in an action of trespass to try title against unknown heirs of a certain person must allege complainant's title and the claim of defendants, if known.—*Cates v. Alston's Heirs* (Tex. Civ. App.) 979.

TRIAL.

See "Continuance"; "New Trial"; "Witnesses."

Criminal prosecutions, see "Arson"; "Criminal Law," §§ 11-16; "Homicide," § 7; "Larceny," § 2; "Obstructing Justice."

— prosecution for violation of local option law, see "Intoxicating Liquors," § 5.

Entry of judgment after trial of issues, see "Judgment," § 1.

Particular civil actions or proceedings, see "Ejectment," § 3; "Malicious Prosecution," § 1; "Negligence," § 4.

— action against carriers, see "Carriers," § 2.

— action against telegraph company, see "Telegraphs and Telephones," § 1.

— action by broker for compensation, see "Brokers," § 1.

— action by partner, see "Partnership," § 4.

— action for ejection of passenger, see "Carriers," § 5.

— action for personal injuries, see "Carriers," § 4; "Master and Servant," § 7; "Municipal Corporations," § 10; "Railroads," §§ 2-4.

— action for services, see "Master and Servant," § 2.

— action on insurance policies, see "Insurance," §§ 9, 10.

— condemnation proceedings, see "Eminent Domain," § 3.

— foreclosure suits, see "Mortgages," § 6.

— probate proceedings, see "Wills," § 4.

— proceeding to establish a drain, see "Drains," § 1.

— trespass to try title to real property, see "Trespass to Try Title."

— trial of right to property levied on, see "Execution," § 2.

Place of trial, see "Venue," § 2.
 Right to trial by jury, see "Jury," § 1.
 Summoning and impaneling jury, see "Jury," § 3.

§ 1. Course and conduct of trial in general.

Where the burden of proof was upon one of two defendants, and as to the other the burden was on plaintiff, the order of argument to the jury was in the sound discretion of the court.—*Simons v. Pearson* (Ky.) 259.

§ 2. Reception of evidence.

Where only certain parts of an affidavit of a witness were contradictory to his testimony on the stand, it was not necessary to offer the whole of the affidavit in evidence for the purpose of impeachment.—*St. Louis, I. M. & S. Ry. Co. v. Faist* (Ark.) 374.

Book used by physician in testifying *held* admitted to the jury.—*Wolfe v. Supreme Lodge, Knights and Ladies of Honor* (Mo.) 637.

A general objection that evidence admitted is incompetent and immaterial saves no question for review.—*Stark v. Publishers: George Knapp & Co.* (Mo.) 669.

When admissible evidence is intermingled with that which is inadmissible, it is not error to exclude the whole.—*Cole v. Horton* (Tex. Civ. App.) 503.

On the question whether A. was the real purchaser of property, or whether B. was the purchaser, and it was taken in A.'s name to protect it from B.'s creditors, statements by B. concerning the purpose of an attempted purchase by him, though made when A. was not present, *held* admissible.—*Jones v. Meyer Bros. Drug Co.* (Tex. Civ. App.) 553.

In trespass to try title, it was not error to admit evidence not objected to when given, and which did not affect any issue in the case.—*Schneider v. Sanders* (Tex. Civ. App.) 727.

§ 3. Arguments and conduct of counsel.

In an action for libel, it was error to interrupt counsel for defendant as he was commenting in his argument upon the probable effect of the libelous publication upon the character of a man of the calling of plaintiff, who was engaged in conducting lottery schemes.—*Cincinnati Times-Star Co. v. France* (Ky.) 18.

A statement by counsel in his argument *held* reversible error.—*Missouri, K. & T. Ry. Co. of Texas v. Huggins* (Tex. Civ. App.) 976.

Expressions of opinion by the counsel in his argument reflecting upon the honesty of the adverse party, and which have no support in the evidence, may constitute reversible error.—*Missouri, K. & T. Ry. Co. of Texas v. Huggins* (Tex. Civ. App.) 976.

§ 4. Taking case or question from jury.

Where the facts are undisputed, and the reasonable inference to be drawn therefrom clear, it is proper to give a peremptory instruction.—*Morris' Adm'r v. Louisville & N. R. Co.* (Ky.) 41.

§ 5. Instructions to jury.

In condemnation proceedings, refusal to give instructions directly in conflict with others asked and given for the same party was not error.—*St. Louis, K. & N. W. R. Co. v. Knapp, Stout & Co. Company* (Mo.) 300.

Instructions as to the degree of care to be used by one having knowledge of defects in a sidewalk *held* not contradictory.—*Phelps v. City of Salisbury* (Mo.) 582.

A declaration of law is correctly refused which assumes that the two persons named are one and the same person, when the evidence shows that they are different persons.—*Worley v. Hicks* (Mo.) 818.

Where an instruction given at plaintiff's request lacks a necessary element, such error is cured by an instruction, as given at defendant's request, which supplies such element.—*Anderson v. Union Terminal R. Co.* (Mo.) 874.

In an action by a parent to recover for the death of her 12 year old son, an erroneous instruction as to the measure of damages *held* not to have been remedied by a further instruction.—*San Antonio Traction Co. v. White* (Tex. Sup.) 706.

Where the attention of the court is called to an erroneous instruction by a requested instruction, it is error for the court to fail to correct such error by a proper instruction.—*Watson v. Boswell* (Tex. Civ. App.) 407.

An instruction *held* not erroneous as tending to confuse the jury and as a comment on the weight of the evidence.—*Fant v. Wright* (Tex. Civ. App.) 514.

In an action of trespass to try title, an instruction that, if defendant's debt to plaintiffs was paid at the time of the deed to plaintiff, they could not recover, *held* not misleading.—*Schneider v. Sanders* (Tex. Civ. App.) 727.

§ 6. — Applicability to pleadings and evidence.

An instruction in an action for personal injuries *held* erroneous, as authorizing jury to consider plaintiff's age, of which there was no evidence.—*Phelps v. City of Salisbury* (Mo.) 582.

The refusal of an instruction predicated on a theory of recovery which is not included in the issues is not error.—*De Donato v. Morrison* (Mo.) 641.

In an action under Rev. St. 1889, §§ 6905, 6907, against a manufacturer for failure to file the statement required by sections 6821, 6897, *held* proper to refuse defendant's declaration that under the law and the evidence the finding must be for defendant.—*State ex rel. Nunnellee v. Horton Land & Lumber* (Mo.) 869.

An instruction as to the effect of the insertion of a stipulation in a contract for the purchase of land through a mutual mistake or fraud *held* not erroneous on the ground that the evidence did not warrant the submission of the issue.—*Fant v. Wright* (Tex. Civ. App.) 514.

Where defendant filed an answer alleging he was induced to sign a contract through fraud or mistake, an instruction as to the effect of such fraud, if the jury should find it existed, *held* not erroneous on the ground that the issue was not raised by the pleadings.—*Fant v. Wright* (Tex. Civ. App.) 514.

An instruction that, if defendant notified an authorized agent of plaintiff that he was satisfied with a machine purchased of plaintiff before the latter revoked the offer to sell, the verdict should be for defendant, *held* erroneous as not warranted by the evidence.—*Dorsey Printing Co. v. Gainesville Cotton-Seed Oil-Mill & Gin Co.* (Tex. Civ. App.) 556.

An instruction in an action for the price of a typewriter *held* erroneous, as failing to submit the issue whether the machine received by defendant was the one referred to in plaintiff's letter quoting a certain price.—*Dorsey Printing Co. v. Gainesville Cotton-Seed Oil-Mill & Gin Co.* (Tex. Civ. App.) 556.

§ 7. — Requests or prayers.

An instruction substantially included in an instruction given *held* properly refused.—*De Donato v. Morrison* (Mo.) 641.

When a requested charge is fully covered by the charge given, its refusal affords no ground for reversal.—*Brash v. City of St. Louis* (Mo.) 808.

The refusal of requested instructions is not error, where the subjects to which they re-

late are fully covered by instructions given.—*Anderson v. Union Terminal R. Co. (Mo.)* 874.

Refusal of an instruction is immaterial, where the court correctly charged on the feature of the case to which the instruction related.—*Stacker v. Louisville & N. R. Co. (Tenn. Sup.)* 766.

Instruction in personal damage suit against railroad *held* properly refused, because substantially contained in those given.—*Galveston, H. & S. A. Ry. Co. v. Morris (Tex. Sup.)* 709.

It was not error to refuse special instructions which were substantially given in the main charge and other requested charges.—*Houston & T. C. R. Co. v. Byrd (Tex. Civ. App.)* 147.

Where there was no error in an instruction as given, and no other instruction requested, an objection cannot be urged on appeal that the court should have instructed further in regard to the proposition stated.—*Lindsey v. White (Tex. Civ. App.)* 438.

Where instructions in an action for injuries received in a railroad-crossing accident limits plaintiff's right to recover to the causes of negligence alleged in the petition, the failure to give a further charge thereon is not error, in the absence of a request therefor.—*St. Louis S. W. Ry. Co. of Texas v. Laws (Tex. Civ. App.)* 498.

Where a court in its general charge had properly submitted an issue to the jury, *held*, that a special charge on the same issue was properly refused.—*Farlin & Orendorf Co. v. Coffey (Tex. Civ. App.)* 512.

A requested instruction, the subject-matter of which was substantially embodied in the charge of the court, was properly refused.—*Fant v. Wright (Tex. Civ. App.)* 514.

§ 3. Verdict.

A verdict is not void for uncertainty if its meaning can be understood from the record.—*Buckeye Engine Co. v. Buckwalter (Ky.)* 263.

§ 9. Trial by court.

Under Rev. St. 1890, §§ 721, 722, the submission of a single issue to the jury in an action of ejectment, without submitting all the issues in the case, *held* not erroneous.—*Cockrell v. McIntyre (Mo.)* 648.

A finding of the trial court to the effect that plaintiff's possession was taken and maintained under a certain title *held* to constitute a finding of fact, though it was copied among the conclusions of law.—*Robertson v. Kirby (Tex. Civ. App.)* 967.

TRUSTS.

Combinations to monopolize trade, see "Monopolies," § 1.

Conveyances in trust for creditors, see "Assignments for Benefit of Creditors."

Creation by will, see "Wills," § 5.

Effect of trust on limitation, see "Limitation of Actions," § 2.

Right to proceeds of insurance on trust property, see "Insurance," § 8.

Secret trusts, see "Fraudulent Conveyances," § 1.

Trust deeds, see "Chattel Mortgages"; "Mortgages."

§ 1. Creation, existence, and validity.

Evidence in an action to establish a trust in land under an alleged contract *held* insufficient to authorize a decree for complainant.—*Goodman v. Crowley (Mo.)* 850.

Equity has no power to complete a gift, on death of the alleged giver, by making the conveyance necessary to accomplish it.—*Goodman v. Crowley (Mo.)* 850.

Where a trustee sells the trust real property under a power, and purchases other property in his own name with the proceeds, the beneficiaries have a resulting trust therein.—*Bozarth v. Watts (Tenn. Ch. App.)* 108.

A deed by a father, creating a trust in favor of his minor children to continue during their pendency on him, will be presumed to be terminated after the expiration of 30 years.—*Bozarth v. Watts (Tenn. Ch. App.)* 108.

A deed to a railway company of the right to use the waters of a lake which the owner subsequently dedicated to a city *held* not to declare a trust in the railway company in favor of the city.—*Gilleen v. City of Frost (Tex. Civ. App.)* 345.

§ 2. Construction and operation.

Where land is conveyed in trust for the benefit of W., and to be disposed of as W. may direct, and she quitclaims to a city, the legal title acquired by the trustees conveying it to her inures to the city.—*Hafner v. City of St. Louis (Mo.)* 632.

A deed from a father to his minor children construed to convey the fee to the children, subject to the control of the father as trustee until the children cease to be dependent on him.—*Bozarth v. Watts (Tenn. Ch. App.)* 108.

An instrument executed by a grantee to his grantor *held* not to have been a completed declaration of an express trust, against which the statute of limitations would not run.—*Laguerrenne v. Farrar (Tex. Civ. App.)* 953.

§ 3. Establishment and enforcement of trust.

Suit to establish a resulting trust in the lands of a decedent, commenced more than 10 years after his death, is barred by limitation.—*Lucas v. Malone (Tenn. Sup.)* 82.

TURNPIKES AND TOLL ROADS.

Charter of turnpike company as contract within constitutional inhibition against impairment of obligation, see "Constitutional Law," § 5.

§ 1. Establishment, construction, and maintenance.

Charter of a turnpike company (Act Jan. 4, 1830, § 7) *held* not void for indefiniteness or uncertainty, as to a provision prohibiting a new road so near as to injure its turnpike, which is a matter of proof.—*Nashville, M. & S. Turnpike Co. v. Davidson County (Tenn. Sup.)* 68.

§ 2. Regulation and use for travel.

Where a turnpike-road company proposes, in violation of its charter, to erect a toll gate within one mile of a town, one who lives on the road within a mile of the town *held* entitled to an injunction restraining the erection of the gate.—*President, etc., of Louisville & T. Turnpike-Road Co. v. Anderson (Ky.)* 13.

Acts 1847-48, c. 200, amending the charter of a turnpike company chartered under Act 1835-36, as amended by Acts 1837-38, c. 217, construed, and *held*, that the company, in relocating its toll gates under the act, had the right to place a gate on an arm of its toll road.—*State v. Lebanon & N. Turnpike Co. (Tenn. Ch. App.)* 1006.

UNDUE INFLUENCE.

Procuring making of will, see "Wills," § 3.

UNITED STATES.

Courts, see "Courts," § 4.

USURY.

See "Building and Loan Associations."

§ 1. Usurious contracts and transactions.

Evidence *held* insufficient to sustain defendant's plea of usury.—*Carter v. Wallace* (Ind. T.) 988.

The chancellor will purge a claim of usury shown by the proof, though not pleaded.—*Morgan v. Wickliffe* (Ky.) 13.

Where R. sold land to S., and B. executed his notes to R. for the purchase price, S. executing his notes to B., bearing 8 per cent. interest, and thereafter the notes sued on were executed by S. to B. for the interest calculated at 8 per cent., the interest in excess of 6 per cent. was usurious.—*Stokeley v. Buckler* (Ky.) 460.

The fact that the note sued on was executed for money borrowed to pay a debt owing a building association which embraced usury does not entitle defendant to plead the usury in the original transaction, though plaintiff was the president of the association.—*Ratliffe v. Buckler* (Ky.) 472.

Where plaintiff agreed to extend the time of payment of the debt sued on in consideration of usurious interest, defendant, having repudiated the agreement to pay usury, cannot insist upon the extension.—*Morgan v. Wickliffe* (Ky.) 1017.

Shannon's Code, §§ 6732, 6733, making it usury to charge more than 6 per cent. per annum, *held* not repealed by the interest law of 1869.—*State v. Fleming* (Tenn. Sup.) 72.

When there is doubt as to whether a transaction apparently fair on its face is free from usury, the question whether it is usurious is for the jury.—*Peightal v. Cotton States Bldg. Co.* (Tex. Civ. App.) 428.

Evidence *held* insufficient to warrant an injunction as to the effect of usury.—*Cole v. Horton* (Tex. Civ. App.) 503.

§ 2. Criminal responsibility.

Under Shannon's Code, §§ 6732, 6733, receiving usury in a sum less than \$10 is subject to fine of \$10.—*State v. Fleming* (Tenn. Sup.) 72.

VACATION.

Of attachment, see "Attachment," § 3.

Of judgment, see "Judgment," § 2.

Sale on execution, see "Execution," § 3.

VALUE.

Limits of jurisdiction, see "Appeal and Error," § 1.

VENDOR AND PURCHASER.

See "Sales."

Assignability of contract for sale of land, see "Assignments," § 1.

Purchasers at sale on execution, see "Execution," § 3.

Requirements of statute of frauds, see "Frauds, Statute of," § 2.

Specific performance of contract, see "Specific Performance."

§ 1. Construction and operation of contract.

Where a purchaser assigned to the vendors as collateral for the price of land certain certificates issued to him by an investment company, the default by the purchaser in the payment of the monthly installments required by the rules of the company precipitated the maturity of his obligation for the purchase money

under the terms of the contract.—*Baker v. Smith* (Ky.) 1014

§ 2. Modification or rescission of contract.

Where a vendor of land showed a perfect title by adverse possession since 1861, the fact that her written title was defective *held* not sufficient to annul the contract.—*Fant v. Wright* (Tex. Civ. App.) 514.

A peremptory instruction that a purchaser of land was entitled to repudiate his contract because, unknown to him, a suit was pending for trespass at the time the contract was entered into, *held* properly refused under the evidence.—*Fant v. Wright* (Tex. Civ. App.) 514.

Where purchaser of property objected to the title on other grounds than insufficiency in the signature of the deed, and after several months' negotiation repudiated the contract on such grounds without objecting that the deed was not signed by all of the parties interested, the latter objection was waived.—*Fant v. Wright* (Tex. Civ. App.) 514.

§ 3. Performance of contract.

Where land was described in a deed as containing "120 acres, more or less," when in fact it contained only 98 acres, the purchaser is not entitled to damages on account of the deficit; both parties understanding that the sale was in gross.—*La Rue v. Reid* (Ky.) 360.

The failure of the vendors to promptly take advantage of the first default in payment of purchase price did not preclude them from subsequently relying upon such omission.—*Baker v. Smith* (Ky.) 1014.

§ 4. Rights and liabilities of parties.

Persons to whom an equitable interest in land was assigned by a writing reciting that the transfer was in consideration of services to be performed by them could not demand the property without a performance of the stipulated services, and a purchaser from them stands in their shoes; the paper being sufficient to put him on inquiry as to the services to be rendered and as to whether they had been performed.—*Shuttleworth v. Kentucky Coal, Iron & Development Co.* (Ky.) 1013.

Where land is sold under a trust deed given to secure a note, the burden is on those claiming under the purchaser at such sale to show, in an action to recover the land from the assignees of the grantee in a prior unrecorded warranty deed, that the grantee in the trust deed had no notice of the senior unrecorded deed.—*Turner v. Cochran* (Tex. Sup.) 923.

Purchasers *held* not affected by fraud in the procurement of judgments on which their title depends, if it only appears from evidence dehors the record, and they had no notice thereof.—*Schneider v. Sellers* (Tex. Civ. App.) 541.

§ 5. Remedies of vendor.

In an action by a nonresident to enforce a vendor's lien, where defendant has not been disturbed on his covenant of warranty, he should be allowed, as a set-off for its breach, only the cost of obtaining a patent to the land from the state.—*Little v. Bishop* (Ky.) 464.

In an action by a nonresident or insolvent vendor to enforce a lien for purchase money, the purchaser may rely upon a breach of a covenant of warranty, though there has been no eviction.—*Little v. Bishop* (Ky.) 464.

Evidence in an action to recover deferred payments on real estate *held* not to entitle the defendant to a deduction by reason of failure of title.—*West Missouri Land Co. v. Kansas City S. B. Ry. Co.* (Mo.) 847.

In an action for the purchase price of land, objections to a decree in plaintiff's favor that it did not order a delivery of the deed or vest

title in defendants were technical.—*Collier v. Primm* (Tenn. Ch. App.) 1088.

The refusal to instruct that plaintiff, in an action to foreclose a vendor's lien, cannot recover if deceased left other property, and owed other debts, and had not been dead four years, *held* not erroneous.—*Cole v. Horton* (Tex. Civ. App.) 503.

VENUE.

Action for libel, see "Libel and Slander," § 3.

§ 1. Domicile or residence of parties.

A plea to the jurisdiction, claiming that defendants were entitled to be sued in the county of their residence, which was other than that in which suit was brought, *held* properly overruled.—*Schneider v. Sellers* (Tex. Civ. App.) 541.

§ 2. Change of venue or place of trial.

A statute authorizing "any party to a civil action to obtain a change of venue" did not authorize each individual defendant to obtain such change.—*Klein v. German Nat. Bank* (Ark.) 572.

Under a statute providing that on a change of venue all the papers in the case should be transmitted to the court to which the venue was changed, three defendants had no right to change of venue where a fourth refused to join in the application.—*Klein v. German Nat. Bank* (Ark.) 572.

VERDICT.

In civil actions, see "Trial," § 8.

Review on appeal or writ of error, see "Appeal and Error," § 15.

VESTED RIGHTS.

Protection, see "Constitutional Law," § 4.

VICE PRINCIPALS.

See "Master and Servant," §§ 3-7.

VILLAGES.

See "Municipal Corporations."

WAGES.

See "Master and Servant," § 2.

WAIVER.

See "Appearance"; "Estoppel"; "Insurance," § 5; "Pleading," § 5.

Defect of parties, see "Parties," § 1.

Exceptions to depositions, see "Depositions."

Exemption of homestead, see "Homestead," § 4.

Grounds of abatement, see "Abatement and Revival," § 1.

Objection to delay in opening judgment, see "Judgments," § 2.

Of objection to motion for new trial, see "New Trial," § 3.

— to particular acts or proceedings, see "Criminal Law," §§ 12-16.

WARDS.

See "Guardian and Ward."

WARRANTY.

On sale of goods, see "Sales," §§ 4, 6.

WAYS.

Private rights of way, see "Easements."
Public ways, see "Highways"; "Municipal Corporations," §§ 9, 10.

WEAPONS.

A conviction of unlawfully carrying a pistol *held* justified by the evidence.—*State v. Robinson* (Tenn. Sup.) 60.

A sentence of \$50 fine and 6 months' imprisonment *held*, on the facts of the case, to be excessive, on a conviction for unlawfully carrying a pistol.—*State v. Robinson* (Tenn. Sup.) 60.

Evidence in a prosecution for unlawfully carrying a pistol *held* sufficient to support a conviction.—*Little v. State* (Tex. Cr. App.) 310.

Evidence that defendant drove very fast, and was drunk and boisterous, *held* admissible in a prosecution for unlawfully carrying arms.—*Little v. State* (Tex. Cr. App.) 310.

WIDOWS.

Dower, see "Dower."

Rights under statutes of descent and distribution, see "Descent and Distribution," § 2.

WILLS.

See "Descent and Distribution"; "Executors and Administrators."

Contract to provide for another by will as affected by statute of frauds, see "Frauds, Statute of," § 1.

Declarations as evidence in will contest, see "Evidence," § 7.

Expert testimony as to mental capacity, see "Evidence," § 10.

Right to partition under will, see "Partition," § 1.

§ 1. Testamentary capacity.

The court, having told the jury what was testamentary capacity, properly refused to tell them what was not such capacity.—*Dean v. Phillips* (Ky.) 10.

Evidence *held* insufficient to show mental incapacity of testator.—*Riggin v. Board of Trustees of Westminster College* (Mo.) 803.

§ 2. Contracts to devise or bequeath.

A cause of action does not accrue upon a contract to make provision for another by will until the death of the obligor.—*Story v. Story* (Ky.) 270.

Where plaintiff, an adopted son, claims the testator's estate under an agreement that it should all be left to him, he must present evidence so strong, cogent, and convincing as to exclude every doubt that testator made the contract.—*Steele v. Steele* (Mo.) 815.

§ 3. Requisites and validity.

Instructions as to mental capacity of testator and as to undue influence approved.—*Dean v. Phillips* (Ky.) 10.

§ 4. Probate, establishment, and annulment.

Upon a contest of the will of D., it was error to instruct the jury that they could not find the paper to be the will of D. unless it was signed or acknowledged by D. in the presence of the attesting witnesses, and was wholly composed, written, and signed by him, without the aid in any way of any other person.—*Dean v. Phillips* (Ky.) 10.

Where instructions in a will contest defining undue influence and mental capacity were substantially such as have been approved by the court, and the evidence shows clearly tes-

tamentary capacity and no undue influence, a verdict for the will will not be set aside.—*Cox v. Field* (Ky.) 261.

On the probate of a will which had been lost and was being established by parol, evidence of one witness that she had heard of two wills being executed after the execution of the first, but that she had never seen them, was insufficient to present the issue of a later will.—*Lindsey v. White* (Tex. Civ. App.) 438.

§ 5. Construction.

Where testator and his brother had been partners in the jewelry business, and testator contemplated that it would be continued by his widow and his brother as partners, the expression in his will of the desire that his friend J. "be retained in the employ of the firm" did not create a precatory trust.—*Jewell v. Barnes' Adm'r* (Ky.) 360.

Under a will which took effect after the enactment of Rev. St. 1845, c. 32, §§ 2, 5, 6, and section 47 of the chapter on "Wills," *held*, that the devisee took a fee simple, in the absence of express words showing an intent to give him only a life estate.—*Yocum v. Siler* (Mo.) 208.

Where devise is made to a class, the estate in remainder vests in the persons in esse at the time the will takes effect, and will open to let in after-born persons.—*Doerner v. Doerner* (Mo.) 801.

The words "legal heirs" in a devise *held* equivalent to children or their descendants.—*Waller v. Martin* (Tenn. Sup.) 73.

Where a will bequeathed certain property to a woman for life, and at her death to go to her legal heirs, the estate did not vest in her and her heirs, so as to convert her life estate into a fee.—*Waller v. Martin* (Tenn. Sup.) 73.

Where the power of disposition of a life estate given to the devisee thereof was restricted, it did not vest a fee in the devisee.—*Waller v. Martin* (Tenn. Sup.) 73.

§ 6. Rights and liabilities of devisees and legatees.

An agreed judgment in an action by an executor to settle his testator's estate, by which each of the legatees accepted a certain sum in full of his legacy, "and in full of all demands" against testator's estate, did not include a remote contingent interest in the residue of the estate.—*Greig v. Dickson* (Ky.) 356.

WITNESSES.

See "Depositions"; "Evidence."

Absence as ground for continuance of criminal prosecution, see "Criminal Law," § 11.

Experts, see "Evidence," § 10.

Instructions as to credibility, see "Criminal Law," § 15.

Opinions, see "Evidence," § 10.

Perjury, see "Perjury."

Testimony of accomplices, see "Criminal Law," §§ 4-10.

§ 1. Attendance, production of documents, and compensation.

A return of service signed by a special deputy in his own name is invalid.—*State v. Huff* (Mo.) 900, 1104.

A subpoena is inadmissible where its return shows service in a county not in the state; the process being void if served outside the state.—*State v. Huff* (Mo.) 900, 1104.

Return on writ to attach witness for contempt *held* not to show any real effort on the part of the state to obtain the witness mentioned in the attachment.—*State v. Huff* (Mo.) 900, 1104.

§ 2. Competency.

Plaintiff was a competent witness as to a transaction had with an agent of defendants,

though one of the defendants was dead at the time of the trial; the agent having testified as to the transaction.—*Blood v. Herring* (Ky.) 273.

The claim of each of several persons under a contract to provide for them by will is separate, and each may testify for the others as to the transaction with the obligor.—*Story v. Story* (Ky.) 279.

Where an attorney represented both parties to a controversy, his information obtained from them in the joint presence was not privileged, in a subsequent controversy between them.—*Taylor v. Boulstone* (Ky.) 354.

Where plaintiff sought to recover upon the ground that H., one of several sureties in the note sued on, had first taken an assignment of the note to himself and then assigned one-half the note to plaintiff, H. being dead, plaintiff was not a competent witness for himself as to the transaction.—*Turner v. Mitchell* (Ky.) 468.

Where the husband unites with the wife in an action brought in her right, he is not a competent witness for plaintiffs as to a transaction with a person since deceased.—*Dunn v. Duncan* (Ky.) 1011.

Under Rev. St. 1889, § 8922, a married man is a competent witness to prove his own agency to act for his wife.—*Smith v. Wilson* (Mo.) 597.

Where witness testified that he had not seen defendant for five years, and that defendant lived in Topeka, Kan., while witness lived in Independence, Mo., *held* he was not competent to testify as to defendant's reputation as a peaceable, law-abiding citizen.—*State v. Haines* (Mo.) 621.

Under Rev. St. 1889, § 8918, the widow of a deceased grantor is not a competent witness against the genuineness of an alleged deed from herself and husband.—*Davis v. Wood* (Mo.) 695.

Testimony of attorney for plaintiff relative to communications made to him by his client *held* incompetent.—*Smoot v. Judd* (Mo.) 854.

Where a married woman sued to set aside a sheriff's deed on the ground that return of process showing service on her was false, and defendants took issue and endeavored to show delivery of process to the husband for her, the husband *held* not a competent witness.—*Smoot v. Judd* (Mo.) 854.

Where, in suit by married woman to set aside a sheriff's deed on ground that there had been no service of process on her, the issue is whether the sheriff made her husband agent to deliver process to her, the husband was competent to prove the agency.—*Smoot v. Judd* (Mo.) 854.

Rev. St. 1889, § 4656, *held* not to preclude a widow from testifying to admissions by her husband in a suit to recover an adopted child's share in his estate.—*Lynn v. Hockaday* (Mo.) 885.

A widow, having elected to take dower in open court, *held* not precluded by interest from testifying to an adoption by her husband of one claiming a child's share in his estate.—*Lynn v. Hockaday* (Mo.) 885.

When the suit was on a note which plaintiff claimed as a gift from her deceased mother, *held* not competent for plaintiff to testify as to statements made to her by her mother.—*Mason v. Willhite* (Tenn. Ch. App.) 296; *Same v. Cooper*, *Id.*

Under Sayles' Civ. St. art. 2302, testimony as to the making of a contract with decedent *held* inadmissible in a suit brought by the heirs.—*Pennybacker v. Hazlewood* (Tex. Civ. App.) 153.

§ 3. Examination.

Upon a trial for murder, defendant, testifying for himself, was privileged from answering questions asked him on cross-examination as

to another murder with which he was charged.—Howard v. Commonwealth (Ky.) 756.

On trial for an aggravated assault on a certain woman, it was error to allow the state, while cross-examining defendant, to prove that a certain person told him that the woman was of bad character, and that he believed it.—Reed v. State (Tex. Cr. App.) 925.

§ 4. Credibility, impeachment, contradiction, and corroboration.

Where, on the cross-examination of a witness, his attention was called to an affidavit made by him, and he was cross-examined thereon, and the court refused to have the affidavit go to the jury, it was not incumbent on the cross-examiner to again offer the affidavit on opening his case.—St. Louis, I. M. & S. Ry. Co. v. Faist (Ark.) 374.

Where, on the cross-examination of a witness, he was interrogated as to statements in an affidavit by him, but no motion was made that such affidavit go to the jury until after the subsequent cross-examination of another witness, *held* not error to deny the motion.—St. Louis, I. M. & S. Ry. Co. v. Faist (Ark.) 374.

Where, on cross-examination, a witness' attention was called to an affidavit made by him containing contradictory statements, and he acknowledged his signature, but testified that he did not make such contradictory statements, *held* error not to allow the affidavit to go to the jury.—St. Louis, I. M. & S. Ry. Co. v. Faist (Ark.) 374.

Where it is sought to impeach a witness by showing contradictory statements in an affidavit made by him, it is for the trial court to determine whether there is any evidence of a contradictory nature, and, if there be, the question is then for the jury.—St. Louis, I. M. & S. Ry. Co. v. Faist (Ark.) 374.

The improper refusal of the trial court to allow statements contained in an affidavit made by a witness to go to the jury *held* not to be disregarded because the cross-examiner did not offer the testimony of the one making the affidavit.—St. Louis, I. M. & S. Ry. Co. v. Faist (Ark.) 374.

Statements made in an affidavit by a witness *held* so at variance with his testimony on the stand as to have entitled the party seeking to impeach him to have had the affidavit go to the jury.—St. Louis, I. M. & S. Ry. Co. v. Faist (Ark.) 374.

Refusal of the court, on the examination of a witness, to allow his affidavit to go to the jury for impeachment, *held* erroneous.—St. Louis, I. M. & S. Ry. Co. v. Faist (Ark.) 374.

Upon the cross-examination of a witness with a view to his impeachment by contradiction, he should be permitted to explain the supposed contradictory statements which he made.—Powers v. Commonwealth (Ky.) 735.

Declarations of an accomplice who had testified for the prosecution *held* not to authorize the inference that he had been bribed.—Powers v. Commonwealth (Ky.) 735.

The testimony of a witness for defendant on cross-examination as to an alteration had by him with one of the witnesses for the commonwealth on a train was admissible to show the feelings of the witness.—Howard v. Commonwealth (Ky.) 756.

It was prejudicial error to permit the commonwealth to prove that the principal witness for accused had been indicted for perjury on account of his testimony on a former trial of the case.—Johnson v. Commonwealth (Ky.) 1005.

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It is not error to instruct in a criminal case that, if the jury concludes that a witness has testified falsely to a material fact, his entire testimony may be disregarded.—State v. Adair (Mo.) 187.

The defendant *held* to have made plaintiff's witness his own by cross-examination, which would prevent his subsequent contradiction of the witness.—Anderson v. Union Terminal R. Co. (Mo.) 874.

The refusal to admit evidence that the prosecuting witness in a prosecution for a violation of the local option law was in a similar line of business with defendant, and had entered into a conspiracy to break him up, *held* error.—Lyon v. State (Tex. Cr. App.) 125.

Where, on a second trial for murder, the state had changed its theory as to the motive of defendant, evidence of testimony given at the first trial, which does not tend to impeach any witness, or contradict or explain any evidence offered at the second trial, was inadmissible.—Spangler v. State (Tex. Cr. App.) 314.

No predicate was necessary for the introduction of evidence that, during the searching of defendant's room for stolen property, his roommate said that he did not know that defendant possessed a diamond, and defendant's reply that it was one he had owned for some time.—McBroom v. State (Tex. Cr. App.) 481.

In a prosecution for murder, *held* error to exclude stenographer's notes on a former trial for the purpose of contradicting witnesses.—Stringfellow v. State (Tex. Cr. App.) 719.

On trial for an aggravated assault, it was error to allow the prosecution to prove that a witness for defendant was in a wine room drinking with a woman when a certain murder occurred; the time and place of the two crimes being different.—Reed v. State (Tex. Cr. App.) 925.

Where defendant's accomplice admitted hiding himself on the second day after the murder, the exclusion of the evidence that it was the first day thereafter *held* not prejudicial to defendant.—Rupe v. State (Tex. Cr. App.) 929.

Evidence is admissible to show that at a former trial a witness did not mention a fact to which he now testifies.—Pennybacker v. Hazlewood (Tex. Civ. App.) 153.

Where the defendant testifies that he paid a certain sum to W. for the plaintiff as a part consideration of the note sued on, an answer filed by plaintiff, in an action by W. against him, *held* admissible as tending to corroborate defendant.—Watson v. Boswell (Tex. Civ. App.) 407.

WORK AND LABOR.

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